



## REPORTS

# Positive Comity 1999

### Introduction

This report on positive comity was adopted by the Competition Committee in 1999. It examines how to make international markets more efficient through “positive comity” in competition law enforcement.

### Overview

This Report is intended both to contribute to the public discussion of positive comity and to provide a framework, based on applicable OECD Recommendations, for use by OECD Members and other countries that may wish to consider the adoption or amplification of positive comity policies or procedures.

Part I discusses the policy context and historical background of positive comity, the relationship between positive and negative comity, the relationship between positive comity and other forms of co-operation, the development and use of positive comity, and positive comity’s potential contribution to improved competition enforcement and to the avoidance of jurisdictional disputes. Part II is intended as a “user-friendly” summary of the Report.

### Related Topics

Recommendation of the Council concerning co-operation between member countries on anticompetitive practices affecting international trade (1995)

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## CLP REPORT ON POSITIVE COMITY

*The attached CLP report on Positive Comity was adopted by the Committee on Competition Law and Policy at its last session (6-7 May 1999).*

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## **REPORT OF THE OECD COMMITTEE ON COMPETITION LAW AND POLICY**

### **-- MAKING INTERNATIONAL MARKETS MORE EFFICIENT THROUGH "POSITIVE COMITY" IN COMPETITION LAW ENFORCEMENT --**

#### **Introduction**

1. One result of the internationalisation of markets is that countries' economic interests are increasingly subject to harm from anticompetitive conduct occurring abroad. Even if there were no jurisdictional limits on the powers of each country's national competition authorities, efficiency considerations would provide a powerful reason for those authorities to co-operate with each other in investigating and seeking to remedy anticompetitive conduct with transborder effects

2. The jurisdictional limits on unilateral enforcement greatly increase the need for co-operation. As a result of these limits, individual competition authorities may find it impossible to remedy anticompetitive foreign conduct that is seriously harming their economies. There can also be situations in which no competition authority in any injured country is able on its own to halt or otherwise remedy such conduct.

3. Thus, while the Competition Law and Policy Committee (CLP) has always encouraged co-operation among Member countries' competition authorities, the need for such co-operation is now greater than ever. As one competition official has noted: "In an interdependent world, the objectives of competition agencies will never be met without some form of co-operation between them."<sup>1</sup>

4. Since 1991 there has at times been considerable discussion of "positive comity" as a form of co-operation that might be able to improve the effectiveness and efficiency of competition law enforcement in international cases. Much of this discussion has treated positive comity as if it were a new concept that was first articulated in the 1991 co-operation agreement between the European Communities and the United States ("the 1991 EC/US Agreement" or "the 1991 Agreement"). In fact, however, the term "positive comity" appears to have been coined during the negotiation of that agreement, but by 1991 the underlying concept was decades old. Indeed, the concept had long before been incorporated into various bilateral treaties and into Part I.B.5 of a series of OECD Recommendations on co-operation, although the term "positive comity" was not used in those documents. The term was used – but not defined -- in the 1998 OECD Recommendation on co-operation in curbing hard core cartels, which urges Member countries to seek ways in which their "co-operation might be improved by positive comity principles applicable to requests that another country remedy anticompetitive conduct that adversely affects both countries."

5. Thus, the positive comity provision in the 1991 EC/US Agreement reflected a policy that has been applicable to all OECD Member countries since 1973. Paraphrasing Part I.B.5 of the OECD Recommendations on co-operation, that policy is that a country should give full and sympathetic consideration to another country's request that it open or expand a law enforcement proceeding in competition cases in order to remedy conduct in its territory that is substantially and adversely affecting another country's interests. In addition, the requested country is urged to take whatever remedial action it deems appropriate on a voluntary basis and in consideration of its own legitimate interests.

6. "Positive comity" has never been formally defined, but the term is usually used by competition officials to refer to the form of co-operation that is described above and encouraged by Part I.B.5 of the OECD Recommendation on co-operation. This Report uses the term "positive comity" to refer to the same concept. The Report is not intended to define the term formally or to limit any country's ability to (a)

formulate policies that condition or otherwise limit the circumstances in which it will give full and sympathetic consideration to positive comity requests, or (b) otherwise define its own positive comity policies.

7. This Report is intended both to contribute to the public discussion of positive comity and to provide a framework, based on applicable OECD Recommendations, for use by OECD Members and other countries that may wish to consider the adoption or amplification of positive comity policies or procedures. The Report has two parts. Part I discusses the policy context and historical background of positive comity, the relationship between positive and negative comity, the relationship between positive comity and other forms of co-operation, the development and use of positive comity, and positive comity's potential contribution to improved competition enforcement and to the avoidance of jurisdictional disputes. Part II is intended as a "user-friendly" summary of the Report.

8. A number of general notes are in order.

- Because past analysis of positive comity has on occasion been obscured by inconsistent use of the relevant terms, both parts of this Report are careful to distinguish between positive comity and other co-operative practices. For example, the OECD Recommendation on co-operation distinguishes between a request that another country open or expand an enforcement action and a request for assistance in the requesting country's enforcement action. The former, contained in Part I.B.5 of the Recommendation, is described in this Report as a positive comity request, whereas the latter, contained in Part I.A.3, is described as a request for investigatory assistance. The Committee emphasises that these distinctions between positive comity and other forms of assistance do not reflect value judgements. They are made in order to encourage more consistent usage and thus more meaningful discussion; statements that a particular form of co-operation does not constitute positive comity are not intended to suggest that it is not valuable or is any less valuable than positive comity.
- In order to avoid limiting the concept of positive comity, two minor limitations contained in the OECD Recommendation are not included in this Report's description of positive comity. Although the Recommendation refers to anticompetitive conduct by "an enterprise," this Report does not include that limitation; Member countries may decide for themselves whether they want to adopt this or any other limitation in formulating their own policies. (Member countries are also free, of course, to adopt expansive forms of positive comity, such as that contained in the 1998 Supplement to the 1991 EC/US co-operation agreement). And although the OECD Recommendation is directed to Member countries and refers to requests by a "country," this Report does not distinguish between requests by a country and requests by its competition authority.

## **I. Analysis of Positive Comity's Policy and Historical Context, Fundamental Elements, Development and Use, and Potential Benefits**

### **A. *The Limits of Unilateral Enforcement in Transborder Cases***

9. It is evident that anticompetitive conduct in one country may harm the interests of other countries. In this respect, EC Commissioner Karel Van Miert has noted that the Community:

needs to ensure both (i) that anticompetitive practices outside the EC do not destroy companies and competitiveness in the EC or exploit EC consumers, and (ii) that anticompetitive practices in third markets do not prevent EC companies having access to those markets . . . . The Commission will not hesitate to use its powers where necessary to preserve undistorted competition inside the EC and market access outside where genuine cases are brought to its attention.<sup>2</sup>

10. At the same time, the jurisdictional limits on unilateral competition law enforcement restrict the ability of any single competition authority to halt such anticompetitive conduct on its own. These jurisdictional limits circumscribe a country's ability to assert jurisdiction over foreign conduct that affects the important interests of its citizens, to investigate such conduct within the territory of other countries, and to challenge and issue orders against such conduct in proceedings against persons located in other countries.

11. Differences in countries' positions concerning these limits have sometimes led to serious jurisdictional disputes. This history is widely known and thoroughly covered in texts on international antitrust practice and other publications,<sup>3</sup> and it should also be emphasised that there has been relatively little conflict in recent years. Nonetheless, it may be useful to note here the three areas in which the main disputes have occurred:

- Much of the early conflict related to United States cases asserting "extraterritorial" jurisdiction over foreign conduct by foreign firms that adversely affected its consumers. As the economy has become more global, more countries have adopted some such "effects doctrine" to protect their consumers, but differences remain among some countries.
- The US asserts that it has jurisdiction over foreign conduct that adversely affects its exporters even if its consumers are not injured. No recent US cases have relied on this claim as the sole basis for an assertion of jurisdiction,<sup>4</sup> but Japan and some other countries have expressed concern over the claim. Commissioner Van Miert has explained that eliminating the jurisdictional "imbalance" resulting from this claim was one of the main reasons the EC negotiated the positive comity provisions in the EC/US Supplement.<sup>5</sup>
- In addition to disagreements over whether an investigating country has jurisdiction over the conduct or the perpetrators, the post-war period has seen important disagreements relating to attempts to collect evidence located abroad. Such disagreements, which can and do arise even in cases where jurisdiction over the conduct is uncontested, led some countries to enact "blocking" statutes.<sup>6</sup>

12. As this Committee has consistently recognised, co-operation among countries can improve the overall effectiveness of competition enforcement and also reduce jurisdictional disputes. Indeed, these twin goals -- enforcement effectiveness and conflict avoidance -- are inseparably intertwined, because resentment over jurisdictional disputes can be an important obstacle to the kind of co-operation that can help avoid such disputes while improving enforcement effectiveness. For example, one enforcement official has observed that although actual jurisdictional conflicts may have been rare, jurisdictional differences between the United Kingdom and the United States have significantly limited the co-operation between their competition authorities.<sup>7</sup>

13. The goal, and the difficulty, are clear: to find co-operative mechanisms that are effective enough in eliminating anticompetitive conduct to reduce pressure for the kinds of unilateral action that in turn undercut co-operation.

## ***B. Co-operative Solutions to the Limits of Unilateral Enforcement***

14. The limits of unilateral enforcement can in principle be reduced by co-operation, and in fact co-operation among competition authorities has increased law enforcement effectiveness and decreased jurisdictional disputes. There are two main ways a country in which anticompetitive conduct may be occurring (a "requested country") can assist a country that perceives itself as being harmed (a "requesting

country”). The requested country may (a) provide investigatory assistance to the requesting country; or (b) open or expand an enforcement proceeding taking into account the requesting country’s interests. As discussed below, the OECD has long advocated both of these forms of co-operation.

15. To a considerable extent, these two forms of co-operation address different situations. When the requesting country has uncontested jurisdiction over the conduct, either kind of co-operation is possible, though investigatory assistance may be preferable and is certainly more common. When it disputes the requesting country’s jurisdiction over the conduct, however, the requested country can be expected to refuse on principle to provide investigatory assistance, but it may be willing to conduct an investigation of its own. Thus, an enforcement proceeding by the requested country is in some cases the only form of bilateral co-operation with potential to both improve enforcement and avoid disputes.

16. In addition to urging co-operation by countries that are asked for assistance, the OECD has encouraged countries that are conducting law enforcement activities to consider how they might conduct them so as to avoid or minimise harm to the other countries. This principle was originally referred to simply as “comity,” a term that is sometimes used to refer to a legal doctrine but in this context refers to a principle of voluntary abstention. This principle complements the equally long-standing OECD principle of voluntary co-operation -- the concept that a requested country should consider initiating proceedings to halt anticompetitive conduct within its borders that is having harmful extraterritorial effects. After 1991, when this principle of co-operation among competition authorities was widely labelled “positive comity,” its complementary principle of abstention became known as “negative” comity.

17. Perhaps because OECD Recommendations have all expressed the positive comity principle in the middle of a section entitled “Consultation and Co-ordination,”<sup>8</sup> this principle is not well known or understood. It is sometimes said, for example, that the positive comity provision in the 1991 EC/US Agreement was the first or the strongest, but positive comity has been encouraged since the 1973 OECD Recommendation in terms that are if anything stronger than those in the 1991 Agreement.<sup>9</sup>

### C. *The Nature of Positive Comity*

18. In the context of OECD Recommendations on co-operation, the concept of comity describes a voluntary policy calling for a country to give full and sympathetic consideration to other countries’ important interests while it is making decisions concerning the enforcement of its own competition laws. The principle is inherently voluntary, and does not imply that another country’s interests will be given any particular weight, merely that they will be considered. As set forth in the 1995 Recommendation concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade [(C)95(130)], negative comity involves a country’s consideration of how it may prevent its law enforcement actions from harming another country’s important interests.<sup>10</sup> In the same context, positive comity involves a county’s consideration of another country’s request that it open or expand a law enforcement proceeding in order to remedy conduct that is substantially and adversely affecting another country’s interests.<sup>11</sup>

#### *Definitional Issues*

19. Although this usage of the term “positive comity” is widely accepted,<sup>12</sup> analysis of positive comity has been obscured by occasional use of the term to refer not to sympathetic consideration of another country’s request for remedial action, but to any form of “positive” (that is, active or beneficial) co-operation.<sup>13</sup> This latter usage blurs the distinction between the two principal forms of enforcement co-operation -- providing investigatory assistance and conducting enforcement proceedings -- leading to a

variety of incorrect or misleading statements. For example, it has been claimed that the WTO Agreement contains positive comity provisions, but the cited provisions provide for investigatory assistance and have nothing to do with positive comity as that term is used generally and in this Report.<sup>14</sup> By merging forms of co-operation that are historically, analytically, and functionally distinct, this terminology eliminates the complementarity between negative and positive comity and obscures the relationship between positive comity and the avoidance of conflicts over extraterritoriality.

20. Use of the term “informal positive comity” can also reflect or result in confusion.<sup>15</sup> This term may be applicable to informal processes for making and considering positive comity requests, but it is inaccurate and confusing when used to refer to forms of co-operation in which there is no explicit or implicit request for remedial action. For example, assume that Country A regards its consumers as being injured by conduct in Country B. If Country A has requested law enforcement action and agreed to defer action if Country B grants its request, Country B’s consideration of the request would be positive comity and Country A’s inaction would be part of a positive comity arrangement. But assume that Country A has made no request. Rather, since Country B is publicly pursuing the alleged conduct, Country A has taken no action. In this situation -- where no request has been made -- it is inaccurate and misleading to refer to Country A’s inaction as “informal” (or any other form of) positive comity.<sup>16</sup> If Country A’s inaction constitutes an exercise of prosecutorial discretion based on its own interests, the inaction does not involve any form of comity. If its inaction is based in part on its desire not to conduct an investigation to which Country B might object, the inaction is a form of negative comity.

21. The term “informal positive comity” is also sometimes applied to situations in which there are “informal” statements to the effect that another country may want to “look into” the activities of certain practices or firms. Whether deemed suggestions, warnings, or “tips,” statements informing a country about allegedly illegal conduct in its territory are not positive comity because they are not requests for enforcement action.<sup>17</sup>

#### *The Relationship Between Positive Comity and Investigatory Assistance*

22. Although positive comity and investigatory assistance refer to different forms of enforcement co-operation and are governed by different sections of the 1995 Recommendation, some co-operative actions do not fall neatly or permanently within one category or another. In the real world, co-operation may sometimes fall initially into one category and later change categories on the basis of newly discovered facts or other considerations; there will also be times when the co-operation does not fit neatly within any one category.<sup>18</sup> An effective and efficient investigation process may often go beyond an “either/or” model and require a wider range of co-operative activities, with both countries engaging in investigatory activities at some point or points.

23. For example, early in an investigation the available information may suggest to two countries that both should conduct investigations. After these two (co-ordinated) investigations have begun to discover facts, it may appear that the conduct is principally occurring in and affecting one country, and the countries may agree that this country should take the lead. This allocation is literally positive comity if it results from a request, but it could also be (or be seen as) a step in the co-ordination process. After this allocation, the requested country may at some point ask the requesting country for investigatory assistance. (As discussed below, positive comity will often reduce but does not eliminate the importance of sharing confidential and other investigatory information.) Later, the investigation may produce evidence that leads the countries to agree that the requesting country should reopen or reactivate its investigation. Finally, when the investigation is complete, the usual expectation would be for the requested country to act alone in remedying the conduct, but in some cases the countries may agree that both of them should impose some sort of remedy.

24. Thus, in considering the nature of positive comity in relation to investigatory assistance, it is useful to treat “co-ordination” as a flexible term referring to both formal co-ordination of two active investigations and informal co-ordination of two country’s approaches to any given matter.<sup>19</sup> Under this approach, positive comity and investigatory assistance may be seen as distinct but potentially overlapping forms of co-ordination.

#### *Other Forms of Co-operation*

25. One other example -- the case of Australia and New Zealand -- further illustrates the importance of not becoming trapped by labels. By any measure, Australia and New Zealand have a very close relationship in the area of competition policy. Where that relationship is closest -- with respect to abuses of dominance -- Australia and New Zealand use neither positive comity nor investigatory assistance to deal with conduct in one country that harms the other country. Essentially, these countries have extended their bans on abuse of market power to include each other’s territory. Moreover, enforcement authorities and even courts can operate in each other’s territory.<sup>20</sup> This process -- a sort of mutual granting of extraterritorial jurisdiction -- goes far beyond what is possible in most other countries, and it serves as a reminder that positive comity and investigatory assistance are not the only possible forms of law enforcement co-operation.

#### **D. *The Development of Positive Comity Principles***

26. As discussed in more detail below, positive comity provisions have been set forth in non-binding OECD Recommendations on co-operation since 1973, although the term “positive comity” has not been used in these Recommendations. Positive comity provisions have also been included in binding and non-binding bilateral co-operation agreements between some OECD Member countries. Binding co-operation agreements containing positive comity provisions may commit countries to sympathetic consideration of each other’s comity requests, but the countries remain free to make their law enforcement decisions as they choose.

#### *Pre-OECD Activities*

27. This century has seen many attempts to deal co-operatively with cartels and other anticompetitive conduct with international effects. As reviewed by this Committee at the outset of the process that led to the 1967 OECD Recommendation, international work began during 1927 in the Preparatory Committee of the World Economic Conference, established under the auspices of the League of Nations. That Committee concluded that international rules concerning cartels were impracticable, given differences in national cartel policies, but it encouraged co-operative supervision.<sup>21</sup> The 1948 Havana Charter contained a provision saying that each country was to “take all possible measures, in accordance with its constitution or system of law and economic organisation, to ensure that private and public commercial enterprises do not engage in” prohibited practices.<sup>22</sup> This was not positive comity, because it did not relate to the consideration of requests for action in particular situations, but it may have been the earliest multilateral call for competition enforcement.

28. Like the Havana Charter, most other work done by international organisations during this period came to nothing,<sup>23</sup> but actual positive comity provisions were included in a number of contemporaneous bilateral treaties. For example, Article XVIII of the 1954 Friendship, Commerce, and Navigation Treaty between Germany and the United States provides as follows:

The two Parties agree that business practices which restrict competition, limit access to markets, or foster monopolistic control, and which are engaged in or made more effective by one or more private or public commercial enterprises or by combination, agreement or other arrangement among such enterprises, may have harmful effects upon commerce between their respective territories. Accordingly, each Government agrees upon the request of the other Government to consult with respect to any such practices and to take such measures, not precluded by its legislation, as it deems appropriate with a view to eliminating such harmful effect.<sup>24</sup>

29. This provision is quite far-reaching, and similar provisions apparently exist in treaties between the US and Denmark, France, Greece, Italy, and Japan.<sup>25</sup> However, in 1968 a German competition official described the provision as having had little practical effect. He added that there had been no cases determining whether the treaty would permit the Cartel Office to challenge a German export cartel on the ground that it “violates the trade in goods and commercial services accepted by the Federal Republic of Germany in international treaties.”<sup>26</sup> It does not appear that either Germany or any other party to these treaties ever challenged export cartels on these grounds or otherwise made significant use of these early positive comity agreements. Moreover, although the treaty establishing the Benelux Economic Union provided for a form of positive comity,<sup>27</sup> that provision too has apparently received little if any use.

30. On the global front, a 1960 resolution by a GATT group of experts contained the first recommendation in a broad multilateral instrument of what would today be called positive comity. The resolution recommended that each country “should accord sympathetic consideration to requested consultations,” and “if it agrees that such harmful effects are present, it should take such measures as it deems appropriate to eliminate these effects.”<sup>28</sup> Apparently, this resolution was invoked for the first time in the recent Kodak/Fuji matter.

#### *The 1967 OECD Recommendation*

31. The first draft of what was to become the 1967 Recommendation began by noting that Members’ “laws and provisions, for various reasons, can often not be effectively applied to restrictive business practices in international trade.” The draft called for notification and consultation regarding investigations of enterprises situated in another country, co-ordination when more than one Member country was investigating the same conduct, sharing information “which their laws and interests permit them to disclose,” and legislative or other action to authorise further co-operation and information sharing.<sup>29</sup> The draft was approved in principle, but the consultation requirement and the call for legislation authorising further information sharing were both deleted for reasons that are now unclear.<sup>30</sup> The next draft added positive comity language:

If a Member country informs another Member country of a private restrictive business practice harmful to the former’s interests and engaged in by enterprises situated in the latter’s territory, the latter Member country should consider the matter carefully, consulting with the former Member country where deemed appropriate, and, where consistent with the latter’s interest, deal with the restrictive business practices by such methods as are available to it.<sup>31</sup>

32. The final text of the Recommendation dropped the positive comity provision, substituting new language stating that early notification would permit the requesting country to “take account of . . . such remedial action as the other Member may find it feasible to take under its own laws to deal with the restrictive practice.”<sup>32</sup> The 1967 Recommendation thus contained a small step in the direction of negative comity (calling for notice but not providing the requested country a right of consultation) and a small nod in the direction of positive comity. A late addition to the Recommendation’s preamble recognised “that the

unilateral application of national legislation, in cases where business operations in other countries are involved, raises questions as to the respective spheres of sovereignty of the countries concerned.”<sup>33</sup>

#### *The 1973 and 1979 Recommendations*

33. The OECD’s first positive comity provision appeared in the 1973 Recommendation concerning a Consultation and Conciliation Procedure on Restrictive Business Practices Affecting International Trade [C(73)99(Final)]. The 1967 and 1973 Recommendations were then combined in the 1979 Recommendation concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade [C(79)154(Final)]. The 1979 Recommendation strengthened the negative comity provision and carried forward the strong positive comity provision of the 1973 Recommendation.<sup>34</sup> The latter provision begins by reciting that a requesting country “may request consultation” with a requested country, which “should give full consideration to such views and factual materials as may be provided.” It goes on to provide that:

[A]ny [requested country] which agrees that enterprises situated on its territory are engaged in restrictive business practices harmful to the interests of the requesting country should attempt to ensure that these enterprises take remedial action, or should itself take whatever remedial action it considers appropriate, including actions under its legislation on restrictive business practices or administrative measures, on a voluntary basis and considering its legitimate interests.<sup>35</sup>

#### *The 1986 and 1995 Recommendations*

34. The positive comity provision has not changed since the 1979 Recommendation. The 1986 Recommendation concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade [C(86)44(Final)] added an appended set of “Guiding Principles,” one of which stated that “[t]he notified Member country should, where appropriate, consider taking remedial action under its own legislation in response to a notification.”<sup>36</sup>

35. The 1995 Recommendation concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade [(C)95(130)] made no substantive changes to the Recommendation itself, and none of the changes to the annex related to positive comity. Contrary to statements made by various commentators, there do not appear to be other articulations of positive comity by multinational institutions.<sup>37</sup>

### ***E. Recent and Recently Proposed Positive Comity Agreements***

#### *The 1991 EC/US Agreement*

36. The term positive comity is not used in the 1991 EC/US Agreement, but the concept is contained in Article V, which provides that “[i]f a Party believes that anticompetitive activities carried out on the territory of the other Party are adversely affecting its important interests,” the former may request the latter “to initiate appropriate enforcement activities.” The requested country is required to “consider” the matter and to inform the requesting party of its decision and concerning any resulting investigation. The use of this process does not preclude the requesting party from taking its own enforcement action.

37. Despite statements to the contrary by many commentators,<sup>38</sup> there was nothing substantively new about the concept of positive comity in the 1991 EC/US Agreement. That agreement was, however, the

first modern bilateral agreement – and the first agreement related exclusively to competition law – to include positive comity. Moreover, in 1991 there was a high level of interest in competition law’s relationship to “market access” issues, and there was also a perception that the agreement reflected a real commitment on the part of two key competition authorities to achieve a new level of co-operation.<sup>39</sup> For these reasons, and with assistance of its new descriptive label, the 1991 Agreement’s positive comity article attracted a great deal of attention.

#### *The 1995 Canada/US Agreement*

38. The positive comity article of the 1995 Canada/US co-operation agreement is virtually identical to that in the 1991 EC/US Agreement. The former does add that the requested country must “carefully” consider the request to initiate enforcement proceedings. A “Backgrounder” issued when the agreement was announced explains that “[b]y encouraging enforcement by the Party on whose territory the conduct actually takes places, positive comity potentially increases the effectiveness of enforcement action while minimising friction arising from ‘extraterritorial’ enforcement.”

#### *The EC’s 1996 Suggested WTO Competition Rules*

39. A variant of positive comity was incorporated into the EC’s original proposals for binding competition rules in the WTO. In seeking authority from the Council to propose that the WTO develop such rules, the EC suggested a regime in which countries would be required to enact legislation containing collectively determined “minimum” rules and to enforce those rules in accordance with commonly determined and enforced binding “positive comity” rules.<sup>40</sup> Under that proposal, a country receiving a request would have been obliged to:

- Investigate and report within a fixed time whether it would take enforcement action; and
- Justify a decision to decline the request in a reasoned decision that is substantiated by the record and subject to review on various grounds including manifest error of appraisal of the facts and misuse of powers. Lack of resources would apparently not have been a legitimate ground for declining a positive comity request.<sup>41</sup>

The EC recently revised its proposal.<sup>42</sup> In light of the lack of experience in implementing positive comity as a principle of voluntary action, the EC concluded that it would no longer propose binding “positive comity” rules.

#### *The 1998 EC/US Supplement*

40. The 1998 EC/US Supplement contains much that is new and important. Essentially, it sets forth principles for implementing the 1991 Agreement in dealing with particular kinds of cases. The Supplement is not applicable to mergers, but the broader, more general positive comity provisions of the 1991 Agreement remain in effect and would in theory permit a positive comity request in a merger case.<sup>43</sup>

41. Article III of the Supplement provides that either party may request the other “to investigate and, if warranted, to remedy anticompetitive conduct,” and Article IV(1) provides that the parties “may agree” that the requesting country will defer or suspend activities during the pendency of the requested country’s enforcement activities. These provisions apply to all alleged competition law violations other than mergers, but the core of the Supplement -- Article IV(2)’s presumption of deferral or suspension in certain

cases -- is narrower. The presumption applies only if the alleged violations (1) harm the requesting country's exporters but not its consumers, or (2) "occur principally in and are directed principally towards" the requested country's territory. In other words, the presumption of deferral or suspension does not apply to export cartels or to cases in which the conduct at issue does not satisfy the requirement that it occur principally in and be directed principally at the requested country.<sup>44</sup>

42. With respect to the two categories of cases that are covered by the presumption, two additional conditions must be met before the presumption actually applies to a particular case. First, it must appear that the requested country can and likely will conduct a full investigation and, as appropriate, impose an adequate remedy. Second, the requested country must agree that it will devote adequate resources, use best efforts to pursue all reasonably available information and to complete the investigation within six months (or such other time as agreed to by the parties), and keep the requesting country informed about the progress of the investigation. The requesting country may defer or suspend its enforcement activities even if all of these conditions are not met.

43. The Supplement also recognises that even where all the conditions for deferral or suspension are met, "it may be appropriate to pursue separate enforcement activities where anticompetitive activities affecting both territories justify the imposition of penalties within both jurisdictions." It is noteworthy that even though both parties may want to impose remedies in, for example, hard core cartel cases, positive comity could still be useful as a means to allocate investigatory responsibility. In such a situation, the parties might agree that the requested party would proceed with the investigation and that if sufficient evidence of a violation is found the requesting country would reactivate enforcement proceedings in order to impose its own remedy.

44. The presumption mechanism in the EC/US Supplement is a major substantive advance. The competition authorities of many OECD Members lack the experience and mutual trust and confidence necessary to expand positive comity in this manner. Nevertheless, the presumption mechanism is important because it expresses a long-standing, well respected, but "fuzzy" principle in operational terms. This step can both contribute to an operational system and provide momentum that may permit positive comity to be tried as a means of improving the effectiveness of competition enforcement and avoiding jurisdictional disputes. In this latter respect, the importance of the Supplement transcends its substantive provisions by underscoring the 1991 Agreement's message that the parties intend to realise the potential of positive comity and other forms of co-operation.<sup>45</sup>

#### *The proposed 1999 Canada/EC Agreement*

45. Canada and the EC have negotiated a co-operation agreement that is expected to be signed later in 1999. The positive comity provisions of this agreement are very similar to those in the Canada/US agreement and the EC/US Agreement.

#### ***F. Examples of Positive Comity and Other Forms of Enforcement Co-ordination***

46. There is little evidence concerning the use of the positive comity provision in the OECD Recommendation, and until very recently, the positive comity provision of the 1991 EC/US Agreement had never been formally invoked. Until 1995, the lack of formal invocation of the 1991 Agreement's provision apparently reflected caution by the parties in light of the legal challenge to the Agreement. But in any event, the 1991 Agreement's positive comity provision "may have been a source of inspiration in daily co-operation," and this co-operation may have been so good that "it is not normally necessary to activate formally the (positive or negative) comity procedures."<sup>46</sup> The OECD's positive comity provisions and other encouragement of co-operation may have had similar benefits.

47. A recent example illustrates the point that one must not infer from the rarity of its formal invocation that positive comity has not produced beneficial results. The case involved A.C. Nielsen, a large US firm that the US was investigating to determine whether it was extending its market power into new markets by offering better terms where it had market power to those firms that agreed to use its services in markets where it faced competition. The contracting practices occurred mostly outside the US, but they may have been adversely affecting US exports by Nielsen's competitors. Since most of the conduct occurred in Europe and had a direct impact on European consumers, however, it was decided that the EC should take the lead, and the US closed its investigation after Nielsen entered into formal undertakings with the EC.<sup>47</sup> It seems clear that a sensible result was achieved here, though there was no need for a positive comity request. The availability of positive comity (and other forms of co-operation) may itself have beneficial effects in such cases.

48. The only actual invocation of the positive comity provision has been a request by the US that the EC investigate activities involving the computerised reservation system established by Amadeus, a firm whose main shareholders are three European airlines. The issue in that case is whether the airlines were acting anticompetitively to prevent US-based computer reservations systems from competing in several European countries. The EC's investigation is ongoing.<sup>48</sup>

49. There have been some other cases with positive comity aspects that have become public. For example, after US trade officials complained that US soda ash producers faced barriers to access in Japan, the Japan Fair Trade Commission conducted an investigation and concluded that illegal concerted action by Japanese producers was restricting imports into Japan. The effectiveness of the resulting cease and desist order has been questioned by US producers, but the case nonetheless may be seen as a significant instance of positive comity.

### ***G. The Limits of Positive Comity***

50. There may be two kinds of limitations on the usefulness of positive comity. First, since the concept relates to possible enforcement action by the requested country, it applies only to conduct that is illegal in that country. Second, with respect to such conduct, there are several limitations on positive comity's potential. These limitations relate to (1) bans on competition agencies' sharing of investigatory information, (2) the requesting country's need for confidence that the requested country's competition agency has the legal tools, resources, and independence necessary to remedy illegal conduct that it finds, and (3) the need for the requested country to agree to investigate.

#### *Illegality in the Requested Country*

51. Since a positive comity request seeks the initiation or expansion of enforcement proceedings by the requested country, this form of co-operation is inherently inapplicable to conduct that does not violate the requested country's laws. The principal category of anticompetitive conduct thus excluded from the reach of positive comity is the export cartel, which is often not illegal in its home country. As noted above, a German competition law enforcement official noted in 1968 the possibility that Germany's 1954 treaty with the US would permit the Cartel Office to challenge a domestic export cartel, but it appears that neither Germany nor other countries followed up on this possibility.

*Ban on Sharing Investigatory Information*

52. When a requested country accepts a positive comity request, the competition authority with the best access to the most facts will conduct the investigation. Thus, except when the requesting country does not suspend or defer its own investigation, positive comity should often have the benefit of reducing the need of competition authorities to share confidential and other information. Even in these circumstances, however, positive comity does not eliminate the difficulties that result from laws that ban the sharing of investigatory information with foreign competition agencies. These bans -- “Probably the most important obstacles” to co-operation<sup>49</sup> -- may have the effect of preventing the competition agency of the requested country from obtaining needed information from the requesting country or some other country. It is ironic indeed that with a few exceptions, Country A’s competition agency would not be authorised to share investigatory information with Country B’s agency even when Country B is conducting an investigation requested by Country A.

*Confidence among Competition Authorities*

53. One country might in some circumstances request another to investigate a matter despite concerns about the latter’s ability to remedy the situation. However, unless the requesting country has continuing confidence in the requested country’s legal tools, commitment, and independence, it is unlikely to defer or suspend its own proceeding during any proceeding by the requested country. Absent deferral or suspension, some of the potential benefits of positive comity will not be fully realised.

*Voluntary Nature of Positive Comity*

54. The voluntary nature of positive comity is in some respects a limitation, but it also an advantage. For example, the EC Communication to Council seeking approval of the EC/US Supplement discusses the voluntary nature of positive comity as a benefit. The Communication says that its voluntary nature assures that there is “no risk that a [requested country] would be obliged to investigate a case where it was not in its interests to do so.”<sup>50</sup> Thus, this limitation at least benefits requested countries, ensuring that they do not lose control of their own enforcement agendas. Despite positive comity’s voluntary nature, however, there is concern in some quarters that pressure to agree to requests would make it more difficult for competition authorities to adhere to their own agendas.

55. Of course, the voluntary nature of positive comity is a limitation in the sense that a requested country cannot be compelled to investigate and remedy conduct that it either believes is not occurring or regards as beneficial, benign, or unimportant.<sup>51</sup> Even if one considers this a disadvantage, it may not be an important one. It is “a fact of life that countries tend not to take any action against any [anticompetitive] conduct that merely affects other countries,”<sup>52</sup> but positive comity is inapplicable to such conduct because it would not violate the requested country’s law. For conduct that is illegal in the requested country, as stated in the EC Communication, “very often it will be in the requested country’s interest to bring an end to anticompetitive behaviour occurring on its territory and it may be extremely beneficial to have such behaviour brought to its attention.”<sup>53</sup>

56. While it is difficult to assess the importance of positive comity’s voluntary nature as a limitation, it seems clear that some have exaggerated its importance. In commenting on the EC/US Supplement, the International Chamber of Commerce opined that the freedom of the requesting country not to defer or suspend its investigation is a real weakness and means that “[t]here is no real pressure for a party to use the positive comity procedure instead of, rather than addition to, exercising its jurisdiction extraterritorially.”<sup>54</sup> This assertion misreads the Supplement’s text, which makes it clear that the reinstatement of deferred or

suspended investigations “should be an exception.”<sup>55</sup> In addition, the claim misconceives the nature of long-term voluntary co-operation among countries, overlooking the fact that the reciprocal nature of such agreements tends to make them self-enforcing. The absence of a contractual obligation does not mean an absence of “pressure” when there is mutual trust and mutual recognition of the importance of co-operation.<sup>56</sup>

#### *Past Failure to Invoke Positive Comity*

57. Another issue that must be considered in assessing the potential of positive comity is the significance of Member countries’ past failure to use it extensively. In competition policy terms, has positive comity failed a market test? Examining the “market,” it is clear that there have been many changes since the concept of positive comity was first introduced. Product and service markets have become more global, and competition regimes are now more prevalent, more powerful, and more oriented to international competition issues. It is impossible to say with confidence that positive comity will succeed now, but these economic and legal changes mean that one cannot now predict failure based on past lack of use.

#### **H. Assessment of Positive Comity’s Potential Benefits**

58. The nature, extent, and likelihood of benefits from positive comity are uncertain at this point. Positive comity’s potential benefits and inherent limitations are identifiable, however. Based on these factors and other relevant experience, this Report identifies the areas in which positive comity has the greatest potential and one area in which it has almost no potential. In the remaining areas, the Report notes factors that are likely to determine what benefits are achieved and draws some general and preliminary conclusions.

59. Some observers have been pessimistic about positive comity’s potential,<sup>57</sup> though they have not provided in-depth explanations for their position. At this point, perhaps the most that can be said is that the voluntary use of positive comity in specific cases presents no apparent risks and has clear potential benefits in a limited number of situations. Positive comity’s “interaction with the threat of what is commonly called ‘extraterritorial’ application of competition law is obvious: the more successful the positive comity clause, the less one needs to apply ‘extraterritoriality’ of one’s own competition rules.”<sup>58</sup> “From the European Community’s point of view,”

[i]t is clearly preferable . . . that the United States avail itself of the principle of positive comity when considering anticompetitive behaviour taking place within the European Community rather than seeking to apply US competition laws. Through positive comity the Commission can retain control, where it wishes, of enforcement procedures addressing such behaviour.<sup>59</sup>

60. Positive comity’s potential appears to be greatest in cases where anticompetitive action in the requested country injures the requesting country’s exporters but not its consumers.<sup>60</sup> With respect to these “export restraint cases” -- what trade officials would call “market access cases” -- US Assistant Attorney General Joel Klein has pointed to several benefits of positive comity:

First, competition authorities tend to have a stake in taking such complaints seriously, even if they do involve foreign access, because they also harm consumers in the country where the conduct is occurring. Second, such a process makes it much more likely that the evidence required to decide such cases properly can be obtained, since [the authority in the country where the conduct is occurring handles the case]. Finally, the positive comity approach should increase

the credibility of competition laws and competition authorities, since it can address at least some market access issues through a systematic competition law-based approach.<sup>61</sup>

Whether under the general language of the OECD Recommendation or under bilateral co-operation agreements such as the presumptive deferral provision of the EC/US Supplement, it seems clear that positive comity's greatest potential involves cases in which the primary or exclusive injury is to the requesting country's exporters.

61. At the other extreme, it is clear that positive comity has little potential utility in export cartel cases. As noted above, positive comity cannot be used unless the conduct at issue is illegal in the requested country, and this is generally not the case with export cartels.

62. Positive comity's potential is more uncertain in other areas. For example, the EC/US Supplement's presumption of deferral or suspension applies in cases where the conduct is occurring principally in and aimed principally towards the requested country. In such cases, positive comity could help avoid disputes over investigatory activities, and it could improve competition enforcement by encouraging the handling of a case by the agency with the superior enforcement tools.<sup>62</sup> Together with other, complementary co-operative activities, it could help ensure that firms do not pit competition authorities against each other, and that remedies are coherent and compatible with others' concerns.<sup>63</sup> Stated differently, it could help avoid inefficient, duplicative investigations and fragmentary remedies, thus benefiting enforcement while also reducing unnecessary costs on the targets and other information sources in competition investigations. The ICC has supported positive comity on the ground that it "minimises inefficiencies from duplicative enforcement and maximises predictability and consistency."<sup>64</sup> Others have made similar comments.<sup>65</sup>

63. On the other hand, there is considerable uncertainty about how large and important this category will turn out to be. The main cause of uncertainty is the requirement that the conduct be aimed principally towards the requested country. If firms in Country X fix prices on a product, for example, it is unclear whether their conduct would be said to be aimed principally at Country X unless for some reason the geographic market for the product is Country X. But if Country X is a separate market, one would not expect the conduct to harm consumers in any other country. In addition to such issues relating to market definition, it is noteworthy that the phrase "aimed principally towards" reads somewhat like a "purpose" test, though it seems unlikely that purpose will prove to be the sole or even the main criterion. Some sort of "effects" test may evolve, perhaps one that looks to the volume of purchases in the requesting and requested countries.

64. In hard core cartel cases, positive comity appears to have some potential in cases where a requesting country acknowledges that it does not have or may lack jurisdiction. Co-operative positive comity (where the requesting country does not defer or suspend its investigation) could be beneficial as part of a co-ordinated challenge in which, for example, a requested country takes the initial lead with the understanding that roles may shift and that there may well be multiple challenges. In hard core cartel cases where a requesting country has jurisdiction, however, allocative positive comity (where there is deferral or suspension) appears to have little potential because requesting countries are likely to want to add their own fines or other remedies to any relief that a requested country may obtain.

65. In merger cases, the mandatory and differing time frames make allocative positive comity likely to be rare, but again, in some circumstances co-operative positive comity could play a part in efficiently co-ordinating the activities of interested countries.

66. Finally, it is important to note that in those areas in which positive comity has some potential benefits, an important determinant of its impact may be the level of competition agencies' commitment to

the overall co-operation system. A positive comity request could occasionally have the benefit of bringing information to the attention of requested countries' competition authorities. Achieving the more significant potential benefits of positive comity will require substantial work, however. Except as part of a long-range reciprocal arrangement, competition authorities should not and cannot be expected to take resources away from cases that benefit their own economies in order to bring cases with more substantial world-wide benefit but less benefit to their own economies. The ultimate impact of positive comity will therefore depend in substantial part on whether competition authorities are willing and able to create a co-operative culture in which agencies can justify bringing some cases for the primary benefit of others on the basis of the benefits they expect to receive from cases brought by others.

67. In this sense, the EC/US Supplement's importance goes beyond its specific terms by underscoring a commitment to co-operation that the parties have emphasised in many ways.<sup>66</sup> Two examples illustrate this point:

- The European Commission has described the Agreement as “a commitment on the part of the United States and the European Union to co-operate with respect to antitrust enforcement rather than seeking to apply their antitrust laws extraterritorially.”<sup>67</sup> This is not a literal parsing of the Agreement, but rather an expression of a co-operative spirit without which precise agreement provisions would be meaningless and with which one can achieve levels of co-operation that could never be precisely articulated in an agreement;
- Mr. Klein has emphasised that positive comity “respects the sovereignty principle of participating countries since it recognises that the country whose market is most directly affected has the principal responsibility for enforcement.”<sup>68</sup> Again, one cannot find the underscored language in the text of the Agreement, but when voluntary co-operation is involved, text is less important than trust.

In sum, positive comity has significant potential benefits in a limited number of situations – principally export restraint cases – and has smaller potential benefits in a wider range of cases. It is no panacea, but at the same time it does not appear that there are any risks involved in placing new emphasis on a form of voluntary co-operation that the OECD has recommended for twenty-five years.

## II. Summary of Positive Comity Concepts and Potential Benefits

*This Summary is intended as a practical, “user-friendly” guide to the concepts and the analysis set forth in Part I. It consists of general propositions (in normal type) and explanatory materials (italicised).*

*As noted in Part I, “positive comity” has never been formally defined, but competition officials usually use the term to refer to the form of co-operation that is encouraged by Part I.B.5 of the OECD Recommendation on co-operation. Given the lack of any formal definition and the need for more consistent usage to promote clarity in discussions of this and other forms of co-operation, this Report uses the term in this sense. This Report is not intended to define positive comity formally or to limit any country's ability to (a) formulate policies that condition or otherwise limit the circumstances in which it will give full and sympathetic consideration to positive comity requests, or (b) otherwise define its own positive comity policies. Two other important concepts -- negative comity and investigatory assistance -- are also used to refer to voluntary principles contained in the OECD Recommendation on co-operation.*

## A. The Nature of Positive Comity and Related Concepts

### I. Positive Comity

Paraphrasing Part I.B.5 of the OECD Recommendation, **positive comity** may be described as **the principle that a country should (1) give full and sympathetic consideration to another country's request that it open or expand a law enforcement proceeding in order 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 and in considering its legitimate interests.**

- *Positive comity describes a form of law enforcement co-operation -- one that has been urged on OECD Member countries by a series of Recommendations on co-operation that date back to 1973. It is a principle of voluntary co-operation in competition law enforcement concerning requests from one country that another country begin or expand enforcement-related activities in order to remedy allegedly illegal anticompetitive conduct. **Positive comity is not a general term for co-operation that involves “positive” (affirmative) steps by the requested country or has “positive” (beneficial) results.***
- *Positive comity is a concept of voluntary action. OECD Recommendations are not binding, and countries may choose not to provide the recommended “full and sympathetic consideration.” Moreover, a country's choice to provide positive comity's full and sympathetic consideration to another country's request does not in any way detract from its freedom to make its law enforcement decisions as it chooses. Some OECD Member countries have included positive comity principles in co-operation agreements. When such agreements are binding, they may commit countries to consideration of each other's requests, but the countries remain free to make their law enforcement decisions as they choose.*
- *Positive comity relates to the consideration by one country (“the requested country”) of a request for enforcement action by another country (“the requesting country”). Positive comity is not involved when a request is not made on behalf of a country or when a country makes a suggestion or “tip” rather than a request. Although the OECD Recommendation is directed to Member countries and refers to requests by a “country,” this Report does not distinguish between requests made by a country and those made by its competition authority.*
- *Positive comity relates to competition law enforcement activities. When positive comity is described as a request to open or expand a “law enforcement proceeding,” the term “proceeding” is used to refer to all enforcement-related activities, not merely to requests for action of any particular type or any particular level of formality. The phrase “expand enforcement-related activities” includes investigating additional parties or issues and taking other steps in a proceeding to remedy harm to the requesting country's interests.*
- *A country's request for enforcement action constitutes positive comity regardless of what entities or persons are alleged to be engaging in the illegal conduct. The OECD Recommendation refers to illegal conduct by enterprises, but Member countries may decide for themselves whether to adopt this or other limitations.*

2. Negative Comity, Investigatory Assistance, and Related Concepts

(a) Paraphrasing Part I.B.5 of the OECD Recommendation, **negative comity** may be described as **the principle that a country should (i) notify other countries when its enforcement proceedings may have an effect on their important interests, and (ii) give full and sympathetic consideration to possible ways of fulfilling its enforcement needs without harming those interests.**

- *Both positive and negative comity relate to the impact of a country's law enforcement on another country or countries. The difference between them may be described as follows:*
  - *positive comity involves conducting a proceeding in order to assist another country;*
  - *negative comity involves conducting all proceedings with a view to avoiding harm to other countries.*

(b) Paraphrasing Part I.A.3 of the OECD Recommendation, **investigatory assistance** may be described as **co-operation with another country's law enforcement proceeding. Such assistance may include gathering information on behalf of the requesting country, sharing information with the requesting country, and discussing relevant facts and legal theories.**

- *Positive comity and investigatory assistance are the two basic means by which the OECD Recommendation contemplates that a country in which anticompetitive conduct may be occurring can co-operate with a country that perceives itself as being harmed by that conduct. The difference between these two forms of co-operation may be described as follows:*
  - *positive comity involves a requested country's enforcement proceeding;*
  - *investigatory assistance involves a requesting country's enforcement proceeding.*
- *Based on the above distinction, a country's consideration of a request for information to be used in the requesting country's legal proceeding constitutes investigatory assistance, not positive comity, whether or not the requested country would or does initiate a law enforcement proceeding in order to gather the information.*

(c) Paraphrasing Part I.A.2 of the OECD Recommendation, co-ordinated investigation may be described as **co-operation between two or more countries in proceedings against the same or related alleged conduct by providing each other investigatory assistance to increase each other's ability to pursue the conduct.**

- *Positive comity, investigatory assistance, and co-ordinated investigation may all be described as forms of enforcement co-operation. Enforcement proceedings may involve more than one form of enforcement co-operation, either sequentially or simultaneously. For example, positive comity can be a form of co-ordinated investigation, and requests for investigatory assistance may be made in positive comity investigations and in co-ordinated investigations.*

### 3. *Making and Considering Positive Comity Requests*

*The Recommendation does not suggest procedures for making or considering positive comity requests. Some OECD Member countries have included procedural provisions in their co-operation agreements; otherwise, Member countries are free to take any approach they desire. The Committee notes that it may be possible to reduce the likelihood of misunderstandings between the requesting and requested countries by identifying and following specified procedures or guidelines. For example, a guideline concerning the content of requests might provide that positive comity requests should (a) specify the nature of the request by describing the conduct at issue, its impact on the requesting country, and the desired remedy; (b) provide the factual basis for the allegations, including a description of any investigation and an offer of any evidentiary material it is authorised to provide; and (c) state the requesting country's intention with respect to future investigation of the conduct at issue.*

(a) **Prerequisites for a request.** The only requirement for a positive comity request under the OECD Recommendation is that a country believe that the conduct at issue is likely to be illegal under the requested country's laws and is substantially and adversely affecting the requesting country's interests.

- *The requesting country's belief that the alleged conduct, if proved, is likely to violate the other country's law need not be based upon a detailed analysis of that law.*
- *The requesting country's determination that alleged conduct is having a substantial and adverse effect on its interests is made in its sole discretion.*
- *Positive comity requests may be made and granted whether or not the conduct at issue violates the requesting country's laws or is subject to its jurisdiction.*
- *OECD Member countries may make positive comity requests pursuant to the OECD Recommendation and/or pursuant to an applicable co-operation agreement.*

(b) **Criteria for considering a request.** The Recommendation provides that the requested country should give a positive comity request full and sympathetic consideration and that if it concludes that conduct by enterprises on its territory is having a substantial and adverse impact on the requesting country, it should seek a remedy it considers appropriate on a voluntary basis and considering its own legitimate interests.

- *There is no precise standard for deciding whether to take remedial action. Since any remedial action is voluntary and may take into account the requested country's legitimate interests, it is clear the requested country is in any event free to deny the request. The phrase "full and sympathetic consideration" necessarily implies that a request should not be automatically rejected merely because of considerations that would exist in all or virtually all such requests. For example, a request should not automatically be rejected merely because the target firms are domestic, or because the necessary resources could provide more short-term benefit for the requested country's economy if spent on another case. The cost/benefit analysis is that of the requested country, but it should take into account the interests of the requesting country and the long-term benefits of more effective competition enforcement.*

- *Elimination of any economic benefits to particular economic actors in the requested country that result from illegal conduct in its territory should be considered a benefit, not a cost, to granting a positive comity request.*
- *The likely cost to the requested country of diverting law enforcement resources from pursuing other illegal conduct is relevant to whether a request should be granted. This cost should be weighed against future savings in enforcement costs, other benefits from the reciprocal nature of positive comity, and the benefits of more effective competition law enforcement. When resource constraints would otherwise require declining a request, a requested country may consider the possibility of granting the request in part or may inquire whether the requesting country is willing to contribute financial or staff resources.*

(c) **Implications of denying a request.** Denial of a positive comity request does not waive any objections a requested country may have to an investigation by the requesting country. (1995 Rec. I.A.5.a.)

(d) **The positive comity process.** The positive comity process is not intended to be a formal one, in which there is no interaction between the countries while a request is being considered; by definition, the process is co-operative.

- *Co-operative solutions may be encouraged by opportunities for continuing dialogue after a positive comity request is made and even after a request is denied.*

#### 4. *Legal Considerations*

(a) **Applicable law.** The requested country's law governs whether a requesting country's allegations are sufficient to open an enforcement proceeding and also governs any proceeding.

- *A requesting country may express preferences on matters as to which the requested country has discretion -- such as what firms or individuals should be targeted or sued, and what remedies to seek -- but the proceeding is controlled by the requested country and its laws.*

(b) **Requirement of proof of substantial market effects.** The fact that a requested country's law requires proof of substantial market effects is likely to affect the costs of a requested enforcement proceeding, but is not a legal obstacle to granting a request since the issue at that point is whether the alleged conduct if proved would violate the requested country's law.

- *In principle and in practice, positive comity cases are unlikely to involve conduct with de minimis effects that could be found illegal only through use of a per se rule.*

(c) **Differences in countries' laws.** Differences between two countries' laws, such as differences in investigatory or remedial powers or in the nature of their proceedings (administrative, civil, or criminal) are likely to affect their analysis of whether to make or grant positive comity requests, but not to affect the availability of positive comity as a legal matter.

- *A positive comity request may be made and granted even if two countries take quite different approaches to the conduct at issue, so long as the requested country can provide a remedy.*

## B. Assessment of Positive Comity

*The OECD Recommendation does not refer to categories of positive comity, but it is useful to identify several categories in order to assess the likely benefits of positive comity. The categories do not reflect fundamental principles of positive comity, and the Report is not intended to endorse the defined categories or to advise against the use of other categories.*

- **A case-specific positive comity arrangement** is the understanding between a requesting and a requested country concerning a matter the requested country agrees to investigate.
- **Allocative positive comity** is a case-specific positive comity arrangement under which the requesting country undertakes to defer or suspend action during the pendency of the requested country's proceeding.
- **Co-operative positive comity** is any case-specific positive comity arrangement that does not constitute allocative positive comity.
- *Like other terms or conditions relating to case-specific positive arrangements, whether an arrangement should be allocative is determined by the requesting and requested countries. The 1998 Supplement to the 1991 EC/US co-operation agreement contains a presumption that positive comity will be allocative in certain situations.*

### 1. Positive Comity and its Alternatives

(a) **The options.** A country that receives credible complaints about alleged competition law violations in another country normally has three general options:

- *Suggest that the complainant contact the other country.*
- *Conduct its own competition enforcement proceeding, unless the alleged conduct would not violate its own competition laws or is clearly outside its jurisdiction.*
- *Make a positive comity request, after reviewing the complaint's allegations to determine whether they warrant investigation.*

(b) **Considerations governing choice among options.** A country's choice among these options is likely to be governed by the following considerations:

- *Suggesting that a complainant contact another country is inexpensive and often provides minimal assistance. It could in principle be the optimum response if the country receiving the complaint has substantial confidence in the other country's ability and willingness to take appropriate action. In reality, a country will often consider this option inadequate if it believes that the alleged conduct is substantially and adversely affecting its interests.*
- *Conducting a competition law investigation permits a country to use its chosen substantive, procedural, and remedial approaches, and despite the costs, countries often prefer protecting*

*their interests through their own proceedings. Jurisdictional problems, however, sometimes make such unilateral action controversial, impractical, or impossible.*

- *Making a positive comity request requires acceptance that any proceeding will be controlled by the requested country and governed by its law, but a positive comity investigation would provide the most thorough consideration of the facts and deter anticompetitive conduct through co-operation and avoidance of jurisdictional conflicts.*

## 2. **Potential Benefits of Positive Comity**

- (a) **Improved effectiveness.** By invoking a requested country's laws, positive comity can provide a remedy for illegal conduct that the requesting country cannot remedy itself due to jurisdictional problems.
- *Positive comity provides a means of remedying illegal conduct:*
    - *over which the requesting country either lacks jurisdiction or, under the negative comity principle, should not assert jurisdiction without considering alternatives;*
    - *when the requesting country has jurisdiction but cannot prove the conduct's illegality because it is unable to conduct a thorough investigation; and*
    - *when the requesting country has jurisdiction and could prove the conduct's illegality but cannot impose an effective remedy.*
- (b) **Improved efficiency.** Since positive comity results in an investigation by the country in the best position to gather the necessary facts, it can improve efficiency by reducing investigation costs, the risk of error, and the risk of inconsistent orders.
- *Potential efficiency benefits are greatest when positive comity reduces the number of proceedings to one, but the benefits may be significant in any event. Costs and risks are likely to be lower if the requested country conducts an investigation and brings the first case, even if the requesting country eventually decides to bring a case in order to vindicate its interests.*
- (c) **Reducing the need for sharing confidential and other information.** Since the proceeding is handled by the competition authority with the best access to the most facts, there is likely to be less need for sharing confidential and other information, unless the requesting country does not defer or suspend its own action.
- (d) **Avoidance of jurisdictional conflict.** Since positive comity invokes a requested country's own laws, it provides a means of avoiding jurisdictional conflicts.
- *Positive comity provides a means of avoiding conflicts between countries:*
    - *when the requested country believes the requesting country has no jurisdiction; and*
    - *when the requesting country has jurisdiction over the conduct but its investigation or remedy would face jurisdictional problems.*
- (e) **Avoiding harm to the requested country's interests.** Since decisions whether to grant positive comity requests are voluntary, there is no risk that a requested country must investigate a case where it is not in its interests to do so. The voluntary nature of positive comity also provides assurance that requested countries' competition authorities will not lose control of their

enforcement agendas. Also, voluntary co-operation systems tend to be self-policing, meaning that countries have an incentive not to make unreasonable requests so that they will not receive unreasonable requests.

- (f) **Protecting other legitimate interests of the requested country.** By investigating the alleged illegal conduct itself, a requested country controls the investigation, assures application of its chosen competition policy, and is generally in a position to protect its legitimate interests.

### 3. *Limits of Positive Comity*

- (a) **Law of the requested country.** Positive comity is available only with respect to conduct that is illegal in the requested country.

- (b) **Bans on sharing investigatory information.** If a requested country needs access to information located abroad – in either the requesting country or some other country – it is unlikely to get significant investigatory assistance in obtaining even non-confidential information because of statutory bans on sharing any non public investigatory information.

- (c) **Need for experience, confidence, and trust.** Although OECD Member countries have long agreed to Recommendations urging co-operative positive comity, many Member countries lack experience with this process. It is unclear to what extent experience with other forms of enforcement co-operation has created the kind of confidence and trust needed for co-operative positive comity. It is unlikely that many countries have the confidence and trust needed for allocative positive comity arrangements.

- *Case-specific positive comity arrangements require mutual confidence and trust concerning each other's willingness and ability to safeguard confidential information, operate free from political or other outside influence, afford national treatment, conduct effective proceedings in a timely manner, secure effective relief, and engage in appropriate consultations.*

- *Particularly great confidence and trust are needed for allocative positive comity, in which the requesting country agrees to defer or suspend action during the pendency of the requested country's proceeding, because the requesting country foregoes its best opportunity to remedy the conduct on its own and relies on the requested country to protect its interests.*

- (d) **Voluntary nature of comity.** A requested country cannot be compelled to co-operate contrary to its perceived interests, even if co-operation would provide the best or only remedy. Despite its voluntary nature, some OECD countries are concerned that positive comity requests might limit their control over their enforcement agendas.

### 4. *Positive Comity's Potential in Particular Categories of Cases*

- (a) **Export restraint ("market access") cases.** Positive comity seems most likely to be useful in export restraint cases -- *i.e.*, cases in which conduct in one country harms another country's exporters but not its consumers. The 1998 Supplement to the 1991 EC/US co-operation agreement contains a presumption of allocative positive comity in such cases.

- *Export restraint cases are likely to present the most serious jurisdictional problems for a requesting country. The country in which the conduct is occurring will often dispute another*

*country's jurisdiction and refuse to assist its investigation. Therefore, positive comity will often be the only available form of enforcement co-operation in such cases.*

- *Export restraint cases are likely to be relatively attractive to a requested country, since ending export restraints benefits its consumers.*
- (b) **Acts conducted in and directed at the requested country.** Positive comity may have considerable potential when the conduct at issue is principally conducted in and directed towards the requested country. The EC/US Supplement presumes allocative positive comity in such cases. The scope of this category is currently unclear, however.
- (c) **Hard core cartel cases.** Allocative positive comity has limited potential in hard core cartel cases because injured countries are likely to want to impose their own remedies. Positive comity has greater potential when the injured country lacks jurisdiction to act on its own, and co-operative positive comity could be beneficial as part of a co-ordinated challenge in which, for example, a requested country takes the lead initially with the understanding that roles may shift and that there may be multiple challenges.
- (d) **Export cartel cases.** Positive comity is unlikely to be available in most export cartel cases because such cartels are seldom illegal in their home countries.
- (e) **Merger cases.** The mandatory and differing time frames applicable to many mergers makes allocative positive comity likely to be rare, but in some cases co-operative positive comity could play a role in efficiently allocating the resources of interested countries.
- (f) **Other anticompetitive conduct.** In general, allocative positive comity has limited potential in other cases, because countries whose interests are being harmed will often have the incentive and ability to conduct their own investigations and obtain their own remedy. However, co-operative positive comity could be useful in such cases. A positive comity request may alert a competition authority to the existence of anticompetitive conduct of which it was unaware, or to the anticompetitive nature of conduct it knew of but misjudged. Moreover, co-operative positive comity could be useful in allocating resources in co-ordinated investigations.

## NOTES

1. Hank Spier, *The Interaction between Trade and Competition Policy; the Perspective of the Australian Competition & Consumer Commission*, Seminar on International Trade Policies, Taipei, 2 May 1997, at 6.
2. Karel Van Miert, *Analysis and Guidelines on Competitive Policy*, Address at Royal Institute of Int'l Affairs, London (May 11, 1993), cited in Joseph P. Griffin, *EC and U.S. Extraterritoriality: Activism and Co-operation*, Fordham 1993.
3. See, e.g., Dieter Lange and Gary Born, *The Extraterritorial Application of National Laws*, ICC (1987)
4. Claude Rakovsky, *The Commission's co-operation with third countries in the field of competition*, FTW Conference, 18/9/97, Brussels, at 8 ("In practice the impact of this controversial approach has been rather limited. I have no knowledge of any recent case based on this sole ground while one or two cases have been partly based on it.")
5. Karel Van Miert, Fordham Conference 1997 ("As the Community has never formally claimed territorial jurisdiction as extensive as that which is claimed by the US, this situation was viewed as an imbalance in our bilateral relations and an obstacle to any further deepening of those relations. For this reason we have decided to negotiate a strengthening of the positive comity instrument.")
6. See, e.g., *Competition Law Enforcement: International Co-operation in the Collection of Information*, OECD, 1984, at paras. 98-114.
7. Margaret Bloom, *International Co-operation between Competition Authorities*, Speech to the Law Society's Solicitors' European Group Annual Conference, Bristol, 13 June 1997, at 5.
8. The Recommendation's structure is confusing in that investigatory assistance is described in Part A (Notification, Exchange of Information, and Co-ordination of Action), while positive comity is covered in Part B (Consultation and Conciliation). In describing the 1986 Recommendation in a background document for a Joint Roundtable of the CLP and the Trade Committee, Professor Ernst-Ulrich Petersmann at one point stated that information sharing (i.e., investigatory assistance) was a form of "co-operation," whereas positive comity was a form of "dispute settlement." Competition Elements in International Instruments [COM/DAF/CLP/TD(94)35], para. 55. Later in the report, however, Professor Petersmann apparently recognises positive comity as a form of enforcement co-operation, though his description of information sharing as a form of positive comity (para. 140) exemplifies another area of confusion, which is discussed in n.12 and the accompanying text.
9. *Id.* at para. 142 (suggesting that the positive comity obligations of the 1991 Agreement be incorporated into the 1986 Recommendation). Part B(4) of the Recommendation says that the requested country "should" attempt to remedy any harm, whereas Article V of the 1991 Agreement says only that the requested country should "consider" the request, but this may not reflect any substantive difference.
10. Specifically, sections I.A.1 and I.B.4 of the Recommendation provide that a country should notify other countries of enforcement proceedings that may affect their important interests and should give full and sympathetic consideration to possible ways of fulfilling its enforcement needs without harming those interests.
11. Section I.B.5 of the Recommendation provides that a country should give full and sympathetic consideration to another country's request that it open or expand a law enforcement proceeding in order to remedy conduct in its territory that is substantially and adversely affecting another country's interests, and should take whatever remedial action it deems appropriate on a voluntary basis and considering its own legitimate interests.

12. *E.g.*, Alexander Schaub, *International Co-operation in antitrust matters: making the point in the wake of the Boeing/MDD matter*, EC Competition Policy Newsletter, February 1998, (stating that “[t]o overcome these difficulties antitrust enforcers need to take into consideration each others concerns,” describing “the realm of traditional comity” as conducting one’s enforcement “to avoid creating a harmful effect to the market of the partner,” and discussing positive comity as the initiation of enforcement proceedings); Paul Crampton and Milos Barutciski, *Trade Distorting Private Restraints: A Practical Agenda for Future Action*, Pacific Economic Co-operation Council Conference on Trade and Competition Policy, May 13-14, 1997, at 30-31; Allan Fels, *Trade and Competition in the Asia Pacific Region*, Economic Society of Australia, 24th Conference of Economists, Adelaide, 28 September 1995, at 7-8.
  
13. For example, Donald I. Baker, A. Neil Campbell, Michael J. Reynolds, and J. William Rowley, *Harmonisation of International Competition Law Enforcement*, Global Forum on Competition and Trade Policy, (1995), at 7 describe positive comity as “affirmative acts of assistance” and say that it “is not a buffer against jurisdictional conflict.” Properly defined, positive comity is in some situations the only potential “buffer” against jurisdictional conflict. *See also* Fox, *Competition Law and the Next Agenda for the WTO*, New Dimensions of Market Access in a Globalising World Economy, at 171 (“undertakings to (sympathetically) consider giving active assistance . . . are now known as positive comity.”); Hachigian, *International Antitrust Enforcement*, Antitrust Magazine, 22, 24 (Fall 1997)(“‘Positive comity’ refers to active, ‘positive’ actions that one country may take at the request of another.”)
  
14. Although the influential Report of the Group of Experts, *Competition Policy in the New Trade Order: Strengthening International Co-operation and Rules* (EC July 1995) uses the term “positive comity” in the generally accepted sense, the accompanying Reflection Paper by Professor Ernst-Ulrich Petersmann uses it to include investigatory assistance – co-operation with another country’s investigation. The paper states that the WTO Agreement contains “positive comity” provisions (*e.g.*, p. 55), but the cited provisions (Article IX of GATS and Article 40 of TRIPS) relate to investigatory assistance, not to positive comity. A statement by Claus Dieter Ehlermann that positive comity was incorporated into the Final Act of Uruguay Round also reflects this imprecise usage. Ehlermann, *The Role of Competition Policy in a Global Economy*, New Dimensions of Market Access in a Globalising World Economy, OECD, June 30-July, 1994, at 122. It has also been incorrectly claimed that NAFTA contains positive comity guidelines. Edward M. Graham and J. David Richardson, *Competition Policies for the Global Economy* (1997), at 50.
  
15. Two other usage issues are less important. Commentators have sometimes used the term positive comity to describe the EC/US Supplement’s complete implementation process, including the principles governing deferral or suspension. This usage confuses the concept of positive comity with a particular set of implementing procedures, and as useful as those procedures are they should not be incorporated into positive comity’s definition. Moreover, it is sometimes said that positive comity relates to a country’s ability to request enforcement proceedings, but strictly speaking it refers to the principle that such requests should be given full and sympathetic consideration by the requested country.
  
16. Moreover, even though Country B may be able to anticipate with reasonable accuracy when Country A is likely to want it to open or expand an investigation, doing so without discussion and at least an implicit request would not be positive comity; except perhaps for minor adjustments in an ongoing investigation, such unilateral action by Country B would not constitute co-operation but rather unilateral action that could interfere with Country A’s plans for dealing with the situation.
  
17. In addition, a request not made on behalf of a country (or its competition authority) would not invoke positive comity.
  
18. *Cf.* Competition Policy and Trade, OECD Instruments of Co-operation, OECD 1987, at 7 (referring to “a wide range of co-operation, not falling neatly into one or the other category.”)
  
19. Allard D. Ham, *International Co-operation in the Anti-Trust Field and in Particular the Agreement between the United States of America and the Commission of the European Communities*, 30 Common

- Market L. Rev. 571, 589, notes that “co-ordination” includes different sorts of activities in different situations.
20. Spier, *supra* n.1, at 8. *See also* Graeme Thomson, *Australia and New Zealand*, printed in Edward M. Graham and J. David Richardson, *Global Competition Policy* (1997) at 400.
  21. Committee on Restrictive Business Practices, Report on the Problems Relating to the Control of Restrictive Business Practices Affecting International Trade, 12th January 1965, E.41450, at 3.
  22. *Id.* at 6.
  23. In 1949 the Council of Europe prepared a draft convention on the control of cartels. *Id.* at 9. By resolution dated 13th September 1951, the Economic and Social Council of the United Nations asked the Ad Hoc Committee on Restrictive Business Practices to report on how to prevent anticompetitive international agreements. The Committee’s proposal largely followed the Havana Charter. *Id.* at 7.
  24. Kurt E. Markert, *Recent Developments in International Antitrust Co-operation*, 18 Antitrust Bull. 355, 359 n.11 (1968).
  25. Competition Law Enforcement, *supra* n.6, at para. 149.
  26. Markert, *supra* n.24, at n.11.
  27. According to a 1984 CLP Report, “Under Article 11 of the implementing protocol to the Treaty, each of the members of the Union . . . may request another member to take a decision in antitrust matters in cases where such co-ordination is considered necessary by the requesting member.” Competition Law Enforcement, *supra* n.6, at para. 154.
  28. Committee on Restrictive Business Practices, *supra* n.21, at 10.
  29. Working Party No. 3, Comments on TFD/RBP/WP3/15, 6th April 1966, TFD/RBP/WP3/17, at 2-4.
  30. Fourth Meeting of the Working Party, 2nd May 1966, TFD/RBP/WP3/18 (16th June 1966).
  31. *Id.* (emphasis added).
  32. Draft Recommendation of the Council Concerning Co-operation Between Member Countries of the OECD on Restrictive Business Practices Affecting International Trade, 22nd August 1966, TFD/RBP/WP3/20.
  33. Recommendation Concerning a Consultation and Conciliation Procedure on Restrictive Business Practices Affecting International Trade, 3rd July 1973 [C(73)99(Final)]. Switzerland abstained.
  34. The new negative comity provision stated that (1) a notified country could call for a consultation if it considered a notified investigation to affect its important interests, and (2) the notifying country should give full and sympathetic consideration to the requesting country’s views, including any suggestions as to alternative means of achieving the objectives of the investigation. Draft Recommendation on Co-operation Between Member Countries on Restrictive Business Practices Affecting International Trade, 13th July 1979, C(79)154.
  35. Recommendation on Co-operation Between Member Countries on Restrictive Business Practices Affecting International Trade, 5th October 1979, C(79)154(Final).
  36. Proposed Revision of the 1979 Council Recommendation, 20th December 1985.

37. The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, 5 Dec 1980, Section E(4), provides only that “States should seek appropriate remedial or preventive measures to prevent and/or control the use of restrictive business practices within their competence . . . that . . . adversely affect international trade . . . .” Section C (i)1 provides that “Appropriate action should be taken in a mutually reinforcing manner . . . .” Contrary to statements by a number of commentators, neither the WTO Agreement nor NAFTA contains positive provisions or guidelines. See n.14, *supra*.
38. E.g., Americo Beviglia Zampetti and Pierre Sauve, *New Dimensions of Market Access: An Overview*, in *New Dimensions of Market Access in a Globalising World Economy*, 30 June - 1 July 1994, at 21 (“An interesting new feature, dubbed ‘positive comity,’ . . . goes beyond the conciliation and co-operation approach provided in the 1986 OECD Recommendation.”); Hans-Jurgen Vosgerau, *Trade Policy and Competition Policy in Europe, Complementarities and Contradictions*, Sonderforschungsbereich 178 “Internationalisierung der Wirtschaft” (January 1993) at 63 (1991 Agreement provides some possibilities “that a party may be induced (not forced!) to initiate measures against anticompetitive behaviour in its territory at the request of the other party.”)
39. The US Department of Justice press release quoted then-Assistant Attorney General Rill as describing the 1991 Agreement as “an important step toward minimising disputes over the extraterritorial application of the antitrust laws.” The EC release described the 1991 Agreement as “historic” but stressed the prospect of co-ordinated investigations generally rather than positive comity.
40. Sir Leon Brittan and Karel Van Miert, *Towards an International Framework of Competition Laws*, June 1996.
41. *Id.* at Annex Section (c).
42. The recent nature of the EC’s change of position is exemplified by the fact that in February 1998 Mr. Schaub commented that the Experts Group’s “recommendation for a fully fledged international instrument, including adequate enforcement structures, a core of common principles and a positive comity provision remains valid.” Schaub, *supra* n.12, at 4.
43. In practice, however, the limits on the EC’s discretion in merger review and the statutory timetables that the EC and the US face would make it very difficult for them to use positive comity in merger cases.
44. *Commission communication to the Council concerning the Agreement between the European Communities and the Government of the United States on the application of positive comity principles in the enforcement of their competition*, 18 June 1997, at 4.
45. See text accompanying n.57 and n.66-68.
46. Rakovsky, *supra* n.4, at 7.
47. Joel Klein, *Anticipating the Millennium: International Antitrust Enforcement at the End of the Twentieth Century*, Fordham Corporate Law Institute, 24th Annual Conference on International Law and Policy, New York, NY, October 16, 1997, at 14. See also US Department of Justice Press Release dated December 3, 1996.
48. Schaub, *supra* n.12, at 3.
49. Markert, *supra* n.24, at n.13 (“Unfortunately, most national laws still impose restrictions as to the disclosure of information to other governments. There is need to consider whether these restrictions could be removed or at least substantially loosened so as to permit the exchange of information on a confidential and reciprocal basis.” *Id.* at 369.

50. *Communication to Council, supra* n.44, at 4.
51. Fox, *Toward World Antitrust and Market Access*, 91 *American Journal of International Law* 1, n.1 (1997), states that positive comity “assumes that countries will recognise and want to pursue a common interest in enforcing antitrust law,” and she says that the doctrine is very likely to solve problems when the parties are in a co-operative mode. She observes (at 18), however, that “many times nations consider their interests to be adverse, either because of national industrial policies (i.e., sanctions for cartels), differences in what is considered anticompetitive (IBM), or differences on the facts (Hartford).”
52. Fels, *supra* n.12, at 6. *See also* James R. Atwood, *Positive Comity - Is It A Positive Step?*, 1992 *Fordham Corp. L. Inst.* 79, 87 (1993)(“not realistic to expect one government to prosecute its citizens solely for the benefit of another”).
53. *Communication to Council, supra* n.44, at 4.
54. *ICC Comments on EU-US Positive Comity Agreement*, *ICC Business World*, at 2.
55. Rakovsky, *supra* n.4, at 8.
56. *See* text accompanying n.46 and n.66-68; Joel Davidow, *Recent Developments in the Extraterritorial Application of U.S. Antitrust Law*, September 1997 at 8 (“Since the U.S. has successfully urged countries like Japan to strengthen their enforcement powers and promise positive comity, U.S. officials would appear unreasonable if they acted unilaterally before giving the host country’s officials a chance to remedy the problem.”)
57. *E.g.*, Atwood, *supra* n.52; Ham, *supra* n.19; Fox, *supra* n.51.
58. Ehlermann, *supra* n.14, at 121 (“It is indeed the ‘positive comity’ clause which is the most innovative element of the Agreement.”) *See also* Ulrich Immenga, *Basic Principles for an International Antitrust Code*, *Competition Policies for an Integrated World Economy*, Oslo, June 1996, at 4 (positive comity “an important step.”) One commentator who criticised a number of aspects of the 1991 Agreement expressed approval of the prospect that the requesting country might act “at the request of the party who would otherwise have needed to resort to the extraterritorial application of its own competition law provisions.” Paul Torremans, *Extraterritorial Application of E.C. and U.S. Competition Law*, 21 *European L. Rev.* 280 (1996).
59. *Communication to Council, supra* n.45, at 3.
60. Ham, *supra* n.19, seems incorrect in stating (at 595) that the US reassertion of its traditional position on jurisdiction in export restraint cases reduces the potential value of the 1991 Agreement in such cases. He reasons that if US interests are involved, it would not need to make a positive comity request, but US officials have urged positive comity precisely as a means to protect those interests efficiently and without creating jurisdictional disputes.
61. Klein, *supra* n.47, at 15. *See also* ABA Section of Antitrust Law, *Comments on the Draft Agreement between the Government of the United States and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws*, at 4. *See* Klein, *A Note of Caution with Respect to a WTO Agenda on Competition Policy*, *The Royal Institute of International Affairs* (London, Nov 18, 1996) at 6: “In the Department’s view, the most effective way to redress private restraints barring access to foreign markets is to empower competition authorities and to insulate them as much as possible from short-term protectionist pressures.”
62. Klein, *supra* n.47 at 15.
63. Schaub, *supra* n.12, at 1.

64. ICC, Competition and Trade in the Global Arena, Draft Report by the International Chamber of Commerce, February 1998 at 77.
65. *E.g.*, ABA, *supra* n.61, at 7.
66. *See* text accompanying n.46 and n.58.
67. *Communication to the Council*, *supra* n.44, at 5.
68. Klein, *supra* n.61, at 6.