Discussion Points

Presented by the Business and Industry Advisory Committee (BIAC) to the OECD Working Party No. 3 on Cooperation and Enforcement

Regarding Re-Examination of the 1995 Recommendation Regarding Comity*

June 7, 2006

1. BIAC appreciates the opportunity to provide Working Party No. 3 with the perspective of the business community on the important issue of comity, with particular regard to the desirability to re-evaluate the 1995 Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade.1

2. As noted by the former Director-General for Competition Alexander Schaub, “[t]he existing 1995 Recommendation establishes the basic tools for cooperation: notification of cases, co-ordination of action, consultation and conciliation.”2

I. Introduction

3. Review and reassessment of OECD’s Recommendation is particularly timely, as more countries enact competition laws and as commerce continues to move across borders, there is a greater prospect of conflicting or at least diverse enforcement decisions. There is also greater likelihood of entities facing different discovery, production and remedial orders. All of this may give rise to increased transaction costs, as well as increased costs to the enforcement authorities, which may impair efficiency, effectiveness and ultimately affect consumer welfare.3

4. The OECD has significant experience in working with comity principles, has developed previous recommendations in this area (1986 and 1995) and has committed to ongoing

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3 As noted by Konrad von Finckenstein, former Canadian Commissioner of Competition and former Chair of the ICN Steering Group, “Cooperation is the essential precursor to convergence and to the development of bilateral trust. These developments, in turn, create momentum for deeper cooperation. The result is a virtuous cycle of ever increasing and deeper bilateral cooperation.” Konrad von Finckenstein, International Antitrust Cooperation: Bilateralism or Multilateralism?, Address Before the American Bar Association Section of Antitrust Law and the Canadian Bar Association National Competition Law Section (May 31, 2001).
engagement on these issues. There is greater likelihood of meaningful progress through the OECD given its (i) experience, and the experience of its members, with the development of competition law and policy, and (ii) limited number of members. Working Party No. 3 in particular, has experience and success with developing guidelines/templates, for example the merger framework, which subsequently formed the basis for work at the International Competition Network (ICN) and the information exchange project.

5. In summary, as more specifically herein discussed, BIAC submits that the OECD Competition Committee could consider the following initiatives. BIAC is prepared to support the Committee in these undertakings and any other aspects of comity review the Committee might deem appropriate.

a. Review of existing 1995 Recommendation to consider modification, including the identification of countries’ respective interests in a re-examination, the circumstances calling for and the timeliness of modification, and the institutional responsibility for implementation of comity undertakings.

b. Report and roundtable concerning adoption and implementation of existing Recommendation by member countries and more newly established antitrust regimes.

c. Report and review of cases in which comity principles have been applied with the objective of further developing best practices or guiding principles.

d. Consideration of whether distinct comity principles should apply where intellectual property rights are implicated.

e. Evaluation of relationship between principles of comity and of legal issues relating to jurisdiction.

f. Evaluation of the pros and cons of soft deference in process and other mechanisms for cooperation.

II. The Importance of Traditional Comity Principles

6. Traditional comity has long been recognized as an appropriate and useful methodology for avoiding—or resolving—conflicts between different jurisdictions resulting from disparate approaches to law, including competition law.\(^4\)

7. A speech by former European Commissioner Karel Van Miert provided a broad overview of the significance of comity:

Remedies adopted by an antitrust agency in order to ensure competition within its jurisdiction may seem legitimate, but may sometime adversely affect the interests of another country. They may also directly conflict with the remedies adopted in the same case by another authority.

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\(^4\) Comity is “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.” *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).
To overcome these difficulties, we need to take into consideration each others’ concerns and, to the fullest extent possible, devise remedies compatible with one another’s and coherent throughout the relevant market. Failing to do so gives private parties the opportunity to pit antitrust enforcers against each other. We risk also treating companies in an inefficient manner or making them suffer fragmentary and incoherent solutions imposed upon them by antitrust authorities ignoring each other….

Comity is not...a mere “aspiration”: it is a rule which governs our international relations.  

8. Comity may take two forms: positive comity and traditional comity. Traditional comity is defined as a country’s consideration of how it may prevent its laws and law enforcement activities from harming another country’s important interests. In other words, traditional comity means that “one country should take other countries’ interests into account in its antitrust policy.” It is traditional comity that is addressed in BIAC’s present recommendation for re-evaluation and possible redrafting of the 1995 Recommendation.

9. The Antitrust Enforcement Guidelines for International Operations of the U.S. antitrust enforcement agencies, adopted in 1995, apply a balancing test, describing traditional comity in section 3.2 as follows:

In enforcing the antitrust laws, the Agencies consider international comity. Comity itself reflects the broad concept of respect among co-equal sovereign nations and plays a role in determining “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation. Thus, in determining whether to assert jurisdiction to investigate or bring an action, or to seek particular remedies in a given case, each Agency takes into account whether significant interests of any foreign sovereign would be affected.

10. Comity principles do not require any nation to forego its sovereign interests. As noted in the OECD Recommendation of the Council on Merger Review, “countries are sovereign with

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6 Traditional comity is sometimes referred to as “negative” comity.


respect to the application of their own laws to mergers,”¹⁰ a statement which is also endorsed by the ICN in its Recommended Practices for Merger Notification Procedures.¹¹

11. The same principle applies to any application of a nation’s antitrust laws, including dominant firm conduct. BIAC recognizes that the standards for finding anticompetitive dominant firm conduct vary widely amongst jurisdictions. Comity principles do not mandate that a country should abandon the principles underpinning its competition regime; rather, in order to promote certainty and foster development of pro-competitive business activities, jurisdictions with disparate standards may, under certain circumstances which may, on further study, be appropriate for inclusion in a revised Recommendation, elect to work cooperatively to fashion a remedy.

12. The problems that may be associated with inconsistent remedies with regard to dominant firm behaviours may be illustrated by the following example. Jurisdiction A may only find rebates anticompetitive and violative of law if they are below average variable cost. Jurisdiction B may utilize average total cost as the appropriate standard. Jurisdiction C may condemn any incremental loyalty rebates. While both the firm and the complainant may have the greatest contacts with Jurisdiction A, a competitor may be able to press his complaint in one of the other jurisdictions, which may also provide for broader and more stringent remedies, despite only de minimis connections between the allegedly anticompetitive conduct and the country in question.¹²

13. Situations may occur where the most restrictive standards and regimes may de facto prevail regardless of the actions taken – or not taken – by other jurisdictions. For example, consider a dominant firm engaged in multi-packaged bundled discounts. The laws of Jurisdiction A may provide that such bundling is per se illegal and that such activities may be enjoined and a severe financial penalty imposed, while Jurisdiction B may impose a more limited remedy and Jurisdiction C may find the practice pro-competitive and legal. Assuming here that the nexus to Jurisdiction A is the weakest, the net effect may nevertheless be to chill the dominant firm from what may be pro-competitive above cost multi-product discounting.

III. The 1995 OECD Recommendation and the Current State of International Comity Agreements

14. The OECD has been at the forefront of encouraging cooperation between governments in the form of comity, and, in 1995 drafted the Recommendation of the Council concerning Cooperation between Member Countries on Anticompetitive Practices affecting International Trade. The OECD Recommendation has “enjoyed a great amount of success as a tool for soft

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¹¹ Available at http://www.internationalcompetitionnetwork.org/mnprecpractices.pdf, at I.A. Comment 1 (“Jurisdictions are sovereign with respect to the application of their own laws to mergers.”).

¹² It was recently announced that the International Competition Network will be examining questions related to anticompetitive unilateral conduct of market dominant firms, both domestically and internationally, through its Unilateral Conduct Working Group. This examination will include, in its second phase, discussion of shared experiences with an exchange of views on the proper means to deal with certain individual practices. The outcome may be useful in the comity context.
bilateral cooperation, evolving from defensive agreements, to weak cooperation, to active cooperation and positive comity.”\textsuperscript{13}

15. In fact, in its \textit{amicus} brief to the U.S. Supreme Court in the \textit{Empagran}\textsuperscript{14} case (discussed below at paragraph 46), the government of Japan noted that:

Japan and the United States are members of the [OECD]. The 1995 Recommendation of the OECD Council recognizes the need for Member countries to ‘use moderation and self-restraint in the interest of cooperation in the field of anticompetitive practices.’\textsuperscript{15}

16. The \textit{Recommendation} proposes that a country should notify other countries when its enforcement proceedings may “affect important interests” of another country in order to “take account of such views” as the affected country may wish to express, while retaining its independent decision-making authority. The country being consulted is to “give full and sympathetic consideration to the views expressed by the requesting country.”\textsuperscript{16}

17. It is true that, in recent years, comity principles have played an increasing role in mitigating the potential for application of multiple antitrust laws to the same conduct. The OECD \textit{Recommendation} has served as a general guideline towards endorsing broad principles of both traditional and positive comity, and provides impetus and a principled basis for bilateral cooperation agreements.

18. Additionally, many countries now have bilateral cooperation agreements reflecting principles both of traditional comity and, in many instances, positive comity principles. The European Union has dedicated co-operation agreements in competition matters with the United States, Canada and Japan, regarding coordination of enforcement activities as well as provisions on both positive and traditional comity, based upon the 1995 \textit{Recommendation}. Further, the EC has established an agreement as to consultation, transparency and the exchange of views on competition matters with Korea, and agreed to a “structured dialogue” with China on these matters.\textsuperscript{17} The United States\textsuperscript{18} and Canada\textsuperscript{19} also have a number of such agreements.

19. These agreements, as well as the OECD \textit{Recommendation}, have been a positive step in promoting comity in the antitrust realm. However, given the various issues described above,


\textsuperscript{15} Brief of the Government of Japan as \textit{Amicus Curiae} in Support of Petitioners, 2003 U.S. Briefs 724 at 11.

\textsuperscript{16} \textit{Recommendation} at paras. I.A.1 and I.B.4.b.

\textsuperscript{17} See, Bilateral relations in \textit{EU Competition Policy}, available at http://europa.eu.int/comm/competition/international/bilateral/.

\textsuperscript{18} For example, the United States has such agreements with Australia, Brazil, Canada, the European Union, Germany, Israel, Japan and Mexico, and appears to be moving towards additional agreements.

\textsuperscript{19} Canada has agreements with the European Union, Japan, Mexico and the United States. \textit{Available at} http://www.competitionbureau.gc.ca/internet/index.cfm?ItemID=115&lg=e. There are also agency-to-agency agreements between Canada and Australia, Chile, New Zealand and the United Kingdom, limited to competition law issues.
and the attendant difficulties therein, the time is ripe for the OECD to review the Recommendation, and consider whether revision is warranted. Since, as noted, the Recommendation may serve as the basis or structural underpinnings of bilateral agreements, the OECD may wish to consider whether more detailed language would provide a more structured framework for applications of comity principles.

IV. Based Upon Developments in Global Commerce and Antitrust Regulation, Re-evaluation of the 1995 Recommendation is Warranted

20. The 1995 Recommendation expressly acknowledges that the Competition Committee should, from time to time, “examine periodically the progress made in the implementation of the [1995] Recommendation.” To date, no such formal examination has taken place. For the reasons discussed below, BIAC believes that the goals of the 1995 Recommendation would be well-served were Working Party No. 3 to undertake an examination of the Recommendation at this time.

21. It is indisputable that the past ten years have seen a rapid acceleration in the globalization of commerce, and a concomitant emphasis on the globalization of competition law. Indeed, since the release of the Recommendation over ten years ago, there has been a proliferation of competition law regimes. At present, over one hundred countries have enacted competition statutes. And, over seventy countries currently require pre-merger notification. As noted in a recent Canadian court opinion, “the content of comity must be adjusted in light of a changing world order.”

22. In light of the increasingly globalised nature of commerce and competition law, BIAC urges that the existing Recommendation be examined at this time, in order to provide further clarification of guiding principles, along with specificity as needed, that would serve to promote competition.

23. The increasing number of countries actively engaging in a regime of antitrust regulation, not only in the merger context, but in investigating anti-competitive dominant firm and cartel behaviour renders the significance of applying comity principles to avoid inconsistent or multiplicative results even more important. While the United States, the European Union and Canada have long been active in enforcing antitrust law, and have had some concomitant

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20 Recommendation at III(1).


22 As one commentator noted, “Competition law, particularly the enforcement of competition law, has responded [to increasing globalization of commerce] through increased review by multiple jurisdiction authorities, as well as the institution of competition policies in states formerly without such control mechanisms.” See, Smitherman, supra note 13 at 777-78.


24 Even commentators skeptical about comity acknowledge that clarification of comity principles is desirable, in that before “comity is exalted as a modus operandi, we should know: deference to whom, for what, and at what cost.” Eleanor Fox, Extraterritoriality in the Age of Globalization; Conflict and Comity in the Age of Empagran, 1-04 ANTITRUST REP. 1 (2005).
opportunities to explore the application of comity principles, emerging antitrust agencies, particularly in “small-market” and “emerging” countries, are beginning to take a more active role.²⁵ And, there are other jurisdictions with existing antitrust regimes that have recently begun to increase their enforcement activities, particularly in the realm of dominant firm conduct.

24. For example, in recent years, the Japan Fair Trade Commission has undertaken investigations of both Microsoft and Intel K.K. (the Japanese arm of U.S.-based Intel). The JFTC has stated in its “Grand Design for Competition Policy” that it intends to undertake “stronger enforcement against Antimonopoly Act (“AMA”) infringements.”²⁶ The Korean Fair Trade Commission has undertaken investigations of several entities, including Microsoft, Qualcomm and Intel under its antimonopoly laws. Similarly, the Competition Commission of India recently found Mahyco-Monsanto guilty of charging “monopolistic and exorbitant rates” for its BT cotton products.²⁷

25. It is also expected that China will enact a new and more stringent antimonopoly law after nearly ten years of drafting, perhaps by the end of 2006. The new antimonopoly law is intended to overcome limitations of the current regime in terms of enforcement, and has been described by Chinese officials as intended in part to combat “intellectual-property abuses.”²⁸

26. It is, therefore, apparent that in response to the increasing presence of global commerce throughout the world, antitrust enforcement is burgeoning, and along with it, the possibility of inconsistent adjudications and remedies has also increased exponentially.

V. Problems Associated With Divergence and Lack of Defined Comity Standards Also Provide the Impetus for Re-examination of the Recommendation

27. Even with an increasing convergence of competition law principles across jurisdictions,²⁹ the possibility of multiple enforcement actions may lead to uncertainty and effects that may chill otherwise efficient economic activity, to the detriment not only of businesses, but, ultimately, to global economic development and consumer welfare.

²⁵ Indeed, it has been suggested that “[e]xperienced competition authorities in the United States, Canada, Australia, Europe, and elsewhere should negotiate [antitrust] cooperation agreements with enforcers in some emerging market countries . . . .” Daniel K. Tarullo, Norms and Institutions in Global Competition Policy, 94 AM. J. INT’L L. 478, 500-501 (2000).


²⁹ We note, for example, the recent Article 82 Discussion Paper proffered by the European Commission, as a significant step towards harmonization of antimonopoly law. Available at http://ec.europa.eu/comm/competition/antitrust/others/discpaper2005.pdf.
A. Forum Shopping

28. Divergence and lack of comity between nations may lead to any number of problematic effects. For example, complainants may engage in forum shopping. That is, complainants unsatisfied or skeptical of achieving success and stringent penalties in a given forum may seek out the most restrictive jurisdiction, regardless of the extent of nexus between parties and conduct in that jurisdiction. The result may be that behaviour subject to relatively minor penalties in a given jurisdiction may be heavily penalized elsewhere. Businesses and potentially consumer welfare would bear the risk of inconsistent or even inappropriate substantive rulings based on the whims of the putative complainant.

B. Conflicting or Inconsistent Remedies/Economic Inefficiency

29. In both the hypotheticals presented above, the real danger is that of conflicting or inconsistent remedies. This may also be seen in the context of merger investigations. One recent glaring example was the disparity in results between the EU and U.S. competition authorities concerning the recent proposed merger between General Electric Co. and Honeywell International Inc. U.S. antitrust authorities approved the proposed $42B deal with only a minor divestiture required. Conversely, the European Commission conducted its own independent investigation of this proposed merger of U.S. firms, and rejected the transaction. Former U.S. Deputy Assistant Attorney General William Kolasky noted that this divergent result “demonstrated how easily the goals of antitrust can become confused and frustrated and how large the consequences are when that happens.”30 Similarly, there have been inconsistencies involving dominant firm investigations of Microsoft between the U.S., the EC and various other regulatory agencies, such as the Korea Fair Trade Commission.31 While the U.S. imposed remedies on Microsoft in connection with its investigation of its marketing practice, other jurisdictions imposed more stringent, and inconsistent, remedies. Conversely, Canadian authorities “recognized that a global remedy was preferable to a patchwork quilt approach” and “thought it prudent to await the outcome of the case in the United States.” In commenting on her decision in that case, the Canadian Commissioner of Competition noted that “I believe we should act with moderation and constraint when proposed enforcement action conflicts with another state’s action, when there is a significantly greater nexus with that jurisdiction and our concerns will be dealt with.”32 BIAC takes no position on which remedies were appropriate, only pointing out the disparity.

30. It is worth noting that beyond the direct—and not insubstantial—effects of the disparate remedies in the cases described above, there is an inherent resulting uncertainty. Other entities may be reluctant to engage in potentially pro-competitive behaviours for fear of running squarely into the discordant situation encountered in these exemplars. Appropriate application of comity principles would lessen this degree of uncertainty.


31 It has been noted that “Microsoft may be a more compelling case for restraint than GE/Honeywell, because it is about on-going regulation of a single firm’s conduct. The Microsoft situation focuses the world on the problem of pile-on conduct remedies that could in theory so cabin a firm as to deprive it of its competitive virtues that inure to the benefit of world consumers.” Fox, supra note 24.

31. Comity considerations have, however, led to some more consistent results in the merger investigation context. For example, William Blumenthal, General Counsel of the U.S. Federal Trade Commission, noted in a recent speech that the EC and U.S. FTC had, post-GE, conducted a number of merger investigations in common with consistent results (e.g., GE/Amersham, P&G/Gillette, Sony/BMG joint venture, Sanofi/Aventis, GE/Instrumentarium).  

32. Similarly, R. Hewitt Pate, then-Assistant Attorney General for the Department of Justice Antitrust Division cited the Department’s “recent unpleasant experience in the Oracle case, in which a U.S. district court judge ruled against the Division, and in which the EC shortly thereafter closed its own investigation without taking separate action, is a useful example” of the proper application of comity principles.  

33. The danger in failing to apply comity principles was well-summarized by Mr. Pate:  

The alternative—an international system of seriatim review of controversial matters by different authorities that enables opponents of a transaction to skip across the globe until they get an answer that they like—is unacceptable. By that of course I do not mean to suggest that what happens in the United States is legally relevant to a European Commission decision, or vice-versa….But, when a jurisdiction is trying to determine what action to take, it surely must count for something under basic principles of comity that a competent system with a clear nexus to a matter has already made a full effort to address it and has already come to a result. A global antitrust system in which each agency simply lines up to take its whack at the piñata is not a model that is going to serve us, or the market, very well.  

34. In a recent speech, Canadian Bureau of Competition Commissioner Sheridan Scott noted that “[t]here have been a number of mergers where the Bureau has declined to seek our own remedies because, after a thorough, independent and cooperative review, we concluded that Canadian interests were adequately addressed by another jurisdiction’s actions.”  

35. Faced with such a multiplicity of jurisdictions, the uncertainty engendered by the risk of such inconsistencies as described above impedes business planning and will inevitably result in diminished investments and reduced innovation by diminishing the anticipated competitive rewards, as well as higher transaction costs from legal fees and expenses that will translate into higher consumer prices.  

36. Further, divergent standards untempered by considerations of comity are likely to lead to costs for governments in the form of misallocated legal and administrative resources duplicating the


35 Id.  

36 Scott, “C” is for Competition, supra note 32
efforts of other enforcement agencies who may be better positioned or have a superior connection to the matter at hand.

37. And, the diminished investment potential, merger activities and other pro-competitive activities foregone by businesses as a result of the uncertainty described above will ultimately redound to the detriment of the global economy as a whole.  

38. Thus, a number of antitrust enforcers have identified comity principles as a tool for the mitigation of inconsistencies and the enhancement of convergence.

C. Excessive Costs of Multiple Review and Investigations Could Be Mitigated by Application of Comity Principles

39. The unilateral pursuit of distinct and disparate remedies leads to an inefficient use of scarce legal and administrative resources by enforcement agencies. This not only results in a duplication of work, but may lead to less efficient remedies which may be difficult to enforce. The Committee examined the cost of multinational merger review in the landmark Wood/Whish Report and concluded that costs in time and capital would be served by application of comity principles. Other studies, notably under the aegis of the International Bar Association, have also addressed this issue.

40. Realization of friction was a moving force behind the OECD’s adoption of principles applicable to multinational merger review as well as the ICN’s effective work on merger notification and procedure.

41. Further, the imposition of divergent remedies in cases affecting the important interest of one or more states can create friction among trading partners and increased political tension that may reduce support for global trade, convergence in competition laws and policy and cooperative bilateral relations.

42. The out-of-pocket cost of compliance with multinational review is the tip of the iceberg. Expenses related to both legal and other professional review of multiple and diverse information requests and demands related to both substance and possible privilege issues are a major share of the cost. Application of comity principles could alleviate this burden, and, indeed, assist

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37 Former U.S. FTC Chairman Tim Muris has noted that “[t]he ruling of the most restrictive jurisdiction with respect to a proposed merger ultimately will prevail [and] disagreements among regulators may lead businesses to restrict their merger activity to [those] that will be acceptable to all jurisdictions.” Mr. Muris went on to recommend a cooperative approach, effectively encompassing comity principles. Timothy Muris, Merger Enforcement in a World of Multiple Arbiters”, Address Before the Brookings Institute Roundtable on Trade and Investment Policy (Dec. 21, 2001), available at http://www.ftc.gov/speeches/muris/brookings.pdf.


39 As noted by Konrad von Finckenstein, former Canadian Commissioner of Competition and former Chair of the ICN Steering Group, “Cooperation is the essential precursor to convergence and to the development of bilateral trust. These developments, in turn, create momentum for deeper cooperation. The result is a virtuous cycle of ever increasing and deeper bilateral cooperation.” See, Konrad von Finckenstein, International Antitrust Cooperation: Bilateralism or Multilateralism?, Address Before the American Bar Association Section of Antitrust Law and the Canadian Bar Association National Competition Law Section (May 31, 2001), available at http://www.apeccp.org.tw/doc/Canada/Policy/1a.htm.
enforcement agencies with timely and efficient collection of materials necessary to conduct an appropriate level of investigation.

**D. The Significance of Comity with regard to Intellectual Property Rights**

43. It is axiomatic that application of intellectual property rights drives much of the world’s business in today’s economy. Therefore, the real possibility of inconsistent and multiple rulings and remedies involving complaints alleging a dominant firm’s refusal to license intellectual property may result in an increased likelihood that pro-competitive innovation may be chilled.

44. For example, the standards for compulsory licensing of intellectual property appear to be more stringent in the EU than in some other jurisdictions, including the U.S., given the position taken by the European Court of Justice in *IMS Health* that even a competitor seeking to compete in the same market as a dominant firm may be entitled to compulsory licensing if it seeks to introduce a “new” product. In fact, the recent Article 82 Discussion Paper also utilizes similar language. And, it may be that the practical focus of the new Chinese antimonopoly law will be in this same area of refusals to deal intellectual property rights, and may impose an onerous standard for dominant firms. Conversely, other jurisdictions, including the United States, have narrower standards for finding an anticompetitive refusal to deal by a dominant firm. Thus, the same actions with regards to licensing of IPR by a dominant firm may have radically different consequences depending on jurisdiction.

45. Although we take no position in this paper on the differing approaches to compulsory licensing of intellectual property rights, application of comity principles as to cooperation in coordinating investigations and perhaps in fashioning remedies may serve to provide increased certainty for companies involved in dynamic innovation markets, spur innovation and technological growth, and, ultimately, serve to benefit competition and consumers.

**VI. Recent Developments in Extraterritorial Jurisdiction Involving Comity Principles**

46. The U.S. Supreme Court recently invoked comity principles in finding that the Foreign Trade Antitrust Improvements Act excluded extraterritorial conduct from the reach of U.S. antitrust laws where foreign plaintiffs suffered independent harm not directly related to U.S. commerce. In *Empagran* the Court, relying in large part on *amicus* briefs submitted by a number of foreign governments, declined to create any rule allowing a case-by-case consideration of comity principles, but rather, excluded all independent foreign injury cases from the jurisdiction of U.S. federal courts based on a general application of comity principles. As a result, the

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40. *Case C-418/01, IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG (Judgment of the Court (Fifth Chamber) of 29 April 2004), available generally at* [http://www.curia.eu.int/en/content/juris/index.htm](http://www.curia.eu.int/en/content/juris/index.htm).

41. See, e.g., Discussion Paper, *supra* note 29 at para. 239, utilizing similar language to *IMS Health*.


Empagran decision avoids unnecessary interference with the regulatory regimes of other nations.\textsuperscript{44}

47. The precise contours and parameters of extraterritorial jurisdiction in other countries remain somewhat amorphous in the wake of Empagran. It is undeniable that “the expansion of extraterritorial enforcement has been at the cost of comity.”\textsuperscript{45} The uncertainty of the possibility of extraterritorial jurisdiction, particularly in less developed antitrust regimes, adds uncertainty to business decision-making, and bears further consideration.\textsuperscript{46}

VII. Possible Initiatives for Consideration in Re-evaluating the 1995 Recommendation

A. Presumptive Deferral

48. The OECD could examine whether, and under what circumstances, presumptive deferral of a remedy is appropriate. Presumptive deferral has been suggested in cases where one country has a “greater interest” in the conduct or transaction at issue than another.\textsuperscript{47} However, it has also been suggested by some that “[t]raditional comity, through application of principles of communication, cooperation and coordination…is… producing appropriate results” and that presumptive deferral is inappropriate.\textsuperscript{48}

49. In the context of considering those situations where presumptive deferral may be appropriate, there are a number of key issues that might be appropriate subjects of review. For example, the OECD may wish to define with some specificity what constitutes a “greater interest” for purposes of presumptive deferral. Further, it may be desirable to consider whether there are special facts or circumstances that would obviate such a presumption, and define those circumstances, \textit{i.e.} considering where despite a lesser connection than another country, a country still has important policy considerations that would overcome the presumption.

\textsuperscript{44} The Court noted the significance of assuring that “the potentially conflicting laws of different nations work together in harmony…in today’s highly interdependent commercial world.” \textit{Id.} at 164-65.

\textsuperscript{45} Smitherman, \textit{ supra} note 13 at 855.

\textsuperscript{46} See, e.g., “Asian Development Outlook 2005: Competition policy in the context of regional and global integration”, \textit{available at} \url{http://www.adb.org/Documents/Books/ADO2005/part030500.asp}. This article suggests that both India and Korea’s competition laws have extraterritorial effect, and that both have applied this extraterritorial reach in the past, noting that Korea “took the unprecedented step [in 2002] of applying Korean antitrust law extraterritorially….” (in Korea’s case, with regard to, \textit{inter alia}, the same vitamins cartel at issue in \textit{Empagran}.)

\textsuperscript{47} See, e.g., \textit{Comments of the Section of Antitrust Law and the Section of International Law of the American Bar Association in Response to the Antitrust Modernization Commission’s Request for Comments Regarding the Role of Comity in International Competition Law Enforcement} (Apr. 2006), \textit{available at} \url{http://www.abanet.org/antitrust/at-comments/2006/04-06/AMC-comity.pdf}.

\textsuperscript{48} Sheridan Scott, \textit{Canadian Perspectives on the Role of Comity in Competition Law Enforcement in a Globalized World: To Defer or not to Defer? Is That the Question?}, Address Before the American Bar Association’s Section of Antitrust Law 2006 Spring Meeting (Mar. 29, 2006), \textit{available at} \url{http://www.competitionbureau.gc.ca/PDFs/canadianperspective-e_e.pdf}; \textit{but see}, R. Hewitt Pate, \textit{ supra} note 34 at 10-11 (comity principles should come into play “[w]hen a competent authority in a jurisdiction with which the parties have a particularly strong connection rules in a case, especially in situations where the relevant market conditions in other jurisdictions are similar to those that prevail in the jurisdiction that has acted on the deal, the global antitrust community should be willing to take “No”—or “Yes” for that matter—for an answer.”)
50. There are a number of other issues regarding presumptive deferral that might merit consideration as well, including the factors that would enter into determination of the lead jurisdiction, as well as the degree of presumptive deferral where the conduct or effects vary in some way. It may be useful to study both merger investigations and dominant firm matters.

51. In no instance should presumptive deferral be construed as conclusive deferral. The deferring country would closely monitor developments in a providing country and be able to move into a lead position at any juncture to preserve its own national interests.

B. Inconsistent Remedies

52. The OECD may also wish to undertake review of situations where presumptive deferral is not deemed appropriate, but some level of comity may be applied in such situations to avoid inconsistent remedies.

53. One topic for consideration is to define those situations where antitrust regulators might work cooperatively in fashioning remedies so as not to create inconsistent obligations, or mutually exclusive remedial orders. For example, the Canadian Competition Bureau has participated in joint discussions with the U.S. FTC (and the merging parties) to ensure consistent and complementary remedies in the merger review context.49 Indeed, in the General Electric/Instrumentarium merger, the United States and European Commission avoided drafting remedial decrees that would provide inconsistent obligations, and Canada eventually adopted these remedies. More recently, in Boston Scientific/Guidant the Competition Bureau determined that the consent order Boston Scientific signed with the U.S. FTC and commitments made to the European Commission adequately resolved competition concerns in Canada. A review of comity principles may provide definitional guidance as to those situations where such pre-remedy cooperation is warranted.

54. The OECD may also seek to provide guidance as to those situations in which governments would agree to consult prior to issuing any remedies inconsistent with those previously undertaken by another jurisdiction investigating the same transaction or conduct. One focus may be on ways to structure such recommendations to avoid the problems associated with forum shopping.

55. Beyond intergovernmental cooperation, the OECD may consider whether it would be appropriate to provide a mechanism whereby companies could, if subject to divergent or incompatible remedies, request consultation between the governments in question, in order to preserve their ability to compete in today’s global economy.

C. Intellectual Property Rights

56. In a general sense, given the significance of intellectual property rights and the specific issues related to a lack of consistent enforcement attendant upon IPR, the OECD may wish to consider comity in the context of IPR and dynamic high-tech markets as a separate issue, with relation to those topics discussed above.

49 See, Scott, Canadian Perspectives, supra note 48, discussing cooperative efforts involving the Bayer/Aventis merger.
D. Jurisdictional Issues

57. In light of the U.S. Supreme Court’s Empagran decision, it may also be useful to assess the implications of the application of comity principles to extra-territorial jurisdiction from a global standpoint, and determine whether guidance on this issue would be useful as a component of the Recommendations.