

COMMENTS OF THE SECTION OF ANTITRUST LAW,
AMERICAN BAR ASSOCIATION, ON THE DRAFT
AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES
OF
AMERICA AND THE EUROPEAN COMMUNITIES ON THE APPLICATION
OF POSITIVE COMITY PRINCIPLES IN THE ENFORCEMENT OF
THEIR COMPETITION LAWS¹

The views expressed herein are presented on behalf of
the Section of Antitrust Law. They have not been
approved by the House of Delegates or the Board of
Governors of the American Bar Association and,
accordingly, should not be construed as representing
the position of the Association. The Section welcomes
the opportunity to comment 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 ("agreement"). The agreement offers
the potential to create significant benefits for
competition law enforcement, policy and practice.
Without limiting the powers of the respective
governments to enter into agreements of this nature, we
agree that the solicitation of public comment is a
useful tool in shaping the most effective public
policy.

General Comments

The Section encourages the use of comity principles

¹Blanket Authority for these comments expires July 1, 1997.

in competition law matters because they can lead to more effective and more efficient enforcement. The use of comity principles is particularly appropriate for coordinating the prosecution of conduct in which two jurisdictions have an interest but for which one jurisdiction has superior enforcement tools (e.g., access to documents and witnesses). Furthermore, when reliance on positive comity principles is accompanied by deferral or suspension of enforcement activity by the Affected Party, the likelihood of unnecessary duplicative enforcement activity and inconsistent enforcement outcomes is minimized. Finally, the employment of positive comity principles may advance harmonization and convergence of competition law enforcement while ensuring that steps are taken against anticompetitive practices wherever they may occur, including anticompetitive practices directed at an Affected Party's exporters.

For these reasons, the Section supports the Government of the United States and the European Communities in their endeavor to strengthen reliance on comity principles in competition law matters. The proposed agreement advances the concept of positive comity in a number of ways. Perhaps most importantly, through its reiteration of the principles expounded in the 1991 Agreement between the Government of the United

States of America and the European Communities Regarding the Application of Their Competition Laws, the current agreement signals the continued commitment of the parties to the use of positive comity principles. Furthermore, in enumerating the circumstances under which an Affected Party normally should defer or suspend its own enforcement activities, the agreement clarifies for the public how competition laws normally will be enforced. Finally, the exercise of positive comity is enhanced by the agreement's inclusion of specific provisions relating to the oversight and advisory role for the Affected Party, communications from the Territorial Party regarding investigations and a presumptive six-month timeframe for concluding investigations.

In sum, the Section strongly supports the principles embodied in the proposed agreement and believes, with the specific suggestions noted below, that it can serve as a model for similar agreements between the U.S. and other jurisdictions.

Specific Suggestions

In keeping with its desire to further the development of positive comity principles, the Section offers the following suggestions and comments on the text of the proposed agreement. These comments attempt to take into account both competition law objectives and

concerns regarding the burden of duplicative enforcement and potentially inconsistent outcomes.

Expanding the Use of Positive Comity

The use of positive comity principles seems particularly appropriate in cases of extraterritorial conduct allegedly harming the ability of companies to export to, invest in, or otherwise compete in other countries ("export restraint cases") because the difficulties of obtaining evidence by the Affected Party are particularly acute in export restraint cases. The Section is concerned, however, that the agreement might be interpreted as rejecting the use of positive comity in most cases other than export restraint cases. This approach would produce an anomalous effect, the Section believes, given that the benefits derived from exercise of comity principles noted above may, in some circumstances, be as strong in other extraterritorial conduct cases as they are in export restraint cases. To avoid this misperception, and to strengthen the commitment to positive comity, the Section recommends that the parties to the agreement consider two changes.

The first suggested change for consideration is revising Article IV, paragraph 2(a), to state:

The anticompetitive activities at issue occur principally in the other Party's territory and are directed principally toward territories other than the Affected Party's territory.

This proposed revision would have two effects, both of which enhance the use of positive comity and minimize unnecessary duplicative enforcement activity and the risk of inconsistent enforcement actions.

By eliminating Article IV, paragraph 2(a)(i), this suggested revision to Article IV, paragraph 2(a), places all antitrust claims on the same footing and extends the Affected Party's commitment to "normally defer and suspend their own enforcement activities" equally to all "anticompetitive activities." As currently drafted, Article IV, paragraph 2(a)(i), distinguishes export restraint cases from cases involving a "direct, substantial and reasonably foreseeable effect on consumers in the Affected Party's territory." To state that only export restraints cases would "normally" be the subject of deference and suspension might be seen as suggesting that export restraints cases are somehow less important to the enforcement agencies of the Affected Party or that the benefits of positive comity (e.g., access to witnesses and documentary evidence) somehow are greater in export restraints cases than other cases of extraterritorial conduct. While there may be cases of harm to the Affected Party's consumers in which deference and suspension would be inappropriate, the Section believes that those cases are adequately addressed by the exceptions to the norm set forth in Article IV, paragraphs 2(b) and 2(c).

Also, by changing the last phrase from "the other Party's territory" to "territories other than the Affected Party's territory," the suggested revision to Article IV, paragraph 2(a), avoids what we believe to be an unintentional limitation on the norm of deference contemplated by Article IV, paragraph 2, in those cases where the anticompetitive activities occur principally in the territory of the other Party but are directed instead principally toward the territory of a third party. Subject to the limitations of Article IV, paragraphs 2(b) and 2(c), positive comity and deference or suspension should be the norm if the conduct does not occur in the territory of the Affected Party and is not directed principally toward the territory of the Affected Party.

The second suggested change for consideration is eliminating the partial exclusion of mergers in the definition of "Competition law(s)," Article II, paragraph 4. While many mergers may fail to satisfy Article IV, paragraph 2(a), as revised above, there is no compelling rationale for not applying positive comity, deference and suspension to those mergers that do satisfy Article IV, paragraph 2(a), as revised. We note that mergers are included within the scope of the 1991 agreement and that mergers falling outside Regulation (EEC) No. 4064/89 (on the control of concentrations between undertakings) or Title II of the

Hart-Scott-Rodino Antitrust Improvement Act of 1976, 15 U.S.C. § 18a, are not excluded from this agreement's reach.
Reaffirming the Commitment to Coordination

Finally, recognizing that the agreement merely supplements but does not replace the 1991 Agreement, the Section believes it would be useful if the agreement reaffirmed or perhaps strengthened Article IV of the 1991 Agreement regarding cooperation and coordination in enforcement activities. Where positive comity and deferral or suspension is not possible, the Section believes that the U.S. and the E.C. should nonetheless make the greatest possible effort to coordinate their respective investigations so as to minimize the burden of duplicative enforcement activities and potentially inconsistent outcomes. We suggest that Article IV, paragraph 4, be revised to add an additional sentence stating that "[i]n such circumstances, the Parties will nonetheless use their best efforts to coordinate their respective investigations so as to minimize the burden and inefficiency of duplicative enforcement activities." The commitment to coordination will be particularly important in mergers that often may fail the Article IV, paragraphs 2(a) or 2(b) tests.
Reaffirming the Commitment to Confidentiality

We understand that Article V of the draft Agreement strictly preserves the confidentiality protections presently afforded parties under U.S. law as recognized in

Article VIII of the 1991 US-EC Agreement. The Section believes this is proper and would continue to urge the Department to be vigilant in its efforts to protect confidential business information obtained in the course of an investigation.

We hope these comments are useful to your deliberations. To facilitate your review of these comments, we have included a black-lined version of the draft incorporating our proposed changes.