Prepared Statement of the Federal Trade Commission
presented by Robert Pitofsky, Chairman[(1)]
before the
Subcommittee on Antitrust, Business Rights, and Competition
Committee on the Judiciary
United States Senate
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The Federal Trade Commission appreciates the opportunity to provide this follow-up report to the Subcommittee on the Commission's experience with the positive comity process.

The Subcommittee's hearing last October focused attention on the role that positive comity can play as an antitrust enforcement tool. The testimony offered at that hearing also, however, illustrated that positive comity, like other enforcement tools, is not a panacea. For positive comity to be an effective means of redressing harm from foreign anticompetitive practices, antitrust enforcement authorities must agree to help each other by taking on, and giving due priority to, cases that involve anticompetitive conduct in their own territory that inflicts harm in other countries. Even where such agreement and commitment exist -- as manifested in the bilateral agreements into which the United States has entered with the European Community,[(2)] Canada,[(3)] and Israel[(4)] - we can never be certain that the antitrust authority that investigates and prosecutes the case will be successful.

Although positive comity may be a valuable tool, it is important to recognize that it is a small piece in a developing mosaic that reflects broad cooperation in antitrust enforcement among the United States and its major trading partners.[(5)] Much of the Commission's testimony for this Subcommittee's hearing last October was devoted to describing our enforcement efforts that have involved cooperation with foreign antitrust enforcement authorities. That work has continued in the intervening months, as was demonstrated by the settlements we reached in cooperation with the European Commission (EC) in the *ABB/Elsag Bailey* and *Zeneca/Astra* merger cases. Thus, evaluating positive comity in isolation may miss important developments in the forest by concentrating on this individual tree. For example, only a small fraction of the cases that come before us lend themselves to referral under positive comity. In the seven months since this Subcommittee's last hearing, the FTC has not referred or received a referral of a "formal" positive comity case, nor have we been involved in any new matters that could be classified as informal positive comity.

While there are few instances where formal or even informal positive comity comes into play, positive comity could be a device for assuring availability of relief and recognizing legitimate business concerns -- without unduly contributing to international friction. In other words, positive comity could be a constructive, albeit rarely used, device.

The Subcommittee's hearings in October 1998 focused on possible ways of improving the positive comity arrangements. We believe there is room for improvement and, in this regard, we believe the testimony presented by SABRE[(6)] at the October 1998 hearings was particularly helpful. The FTC, along with the Antitrust Division, has been evaluating in recent months how to make the positive comity process work as efficiently and effectively

as possible. We believe we can implement some of the suggestions offered at the October hearing.

A few additional comments about positive comity, particularly as to case selection and procedure, may be useful. First, positive comity is still a relatively new experience for the U.S. agencies. There has been only one formal referral to the EC, and none to the U.S., in the eight years since the 1991 Agreement was signed. Thus, with respect to formal referrals, the Commission would be hesitant to burden the process with rules and obligations that might make it less likely that the process would be used in the future. On an informal basis, we have discussed a small number of matters with our foreign counterparts, including the Parma ham matter that was mentioned in our testimony last October.[(7)]

Second, and speaking for the moment just about our Agreements with the EC, while we might ask the EC to agree to certain conditions in its review in response to a positive comity request, whether the EC's Competition Directorate, DG-IV, agrees to those conditions is within its discretion. Only in cases within the scope of the deferral provisions of Article IV of the 1998 Agreement[(8)] would DG-IV be obligated to fulfill certain conditions, and even these can be waived by agreement of the parties as appropriate. In other positive comity cases - *i.e.*, in those outside the scope of the deferral presumption and in so-called informal positive comity cases - DG-IV (like the FTC or DOJ if the U.S. were the Requested Party) would not have any obligation to agree to conditions on accepting the referral, and might well be reluctant to handle such a case in a way that significantly differed from its procedures in comparable cases outside the positive comity ambit. Moreover, many -- perhaps most -- cases to which the deferral presumption applies will be cases that the U.S. agencies could not or would not bring themselves. In some cases, we may lack the necessary subject matter or personal jurisdiction to prosecute the case and impose a remedy. For example, anticompetitive conduct affecting a U.S. firm located in and doing business in a foreign country -- exporting from Norway to Turkey, for example -- would not be reachable under U.S. law. Even if we could arguably assert jurisdiction, it may be so difficult to collect evidence and/or impose an effective remedy that we would not, as a matter of prosecutorial discretion, choose to allocate scarce resources to the matter. In such cases, there is no credible probability that we would bring our own case. This is the situation we would face not only in relation to the EC, but also in relation to other jurisdictions to which the U.S. agencies might seek to refer a matter under the positive comity provisions of either a bilateral agreement (Canada and Israel) or the OECD Recommendation.[(9)] Nonetheless, the U.S. agencies would still, in appropriate cases, ask DG-IV and other authorities to whom we might refer a matter under positive comity to agree to apply the procedures described below.

With the above caveats, the Commission believes we can improve the positive comity process in certain cases under our Agreements with the EC. First, SABRE has suggested that, once the EC accepts a positive comity referral, the U.S. antitrust agencies should agree with the EC upon a time frame within which we anticipate that the investigation, including issuing any relief, would be concluded. The Commission agrees that this is a useful idea. In fact, Article IV.2.(c)(v) of our 1998 Agreement with the EC provides for such an understanding in cases falling under the deferral provisions of that Agreement. In retrospect,

the six-month time frame in the agreement was probably too ambitious - the Commission does not complete most of its domestic investigations within that period, and positive comity cases may be more complex than our typical domestic investigation. However, the Commission is prepared to discuss with DG-IV an appropriate time frame in which DG-IV expects to complete its process.

Of course, predicting how long an investigation will take is inherently uncertain. For example, critical evidence may be more difficult to obtain than anticipated -- or may not exist at all -- and the target of the investigation may raise plausible defenses which must be investigated. The Commission, therefore, believes that it would be more productive to choose a target date once DG-IV has had a chance to start its procedure. Accordingly, we would expect to agree on a target date approximately three months after a positive comity referral takes place.

The Commission also has considered possible options if the anticipated completion date for the investigation arrives without final resolution. As a practical matter, there may be little or nothing the FTC could do because of the jurisdictional and evidentiary obstacles mentioned earlier. However, the FTC regularly re-evaluates its investigations to determine whether we are proceeding on the right course. Such re-evaluations typically occur at certain investigational points, such as completion of depositions, when we assess the strength of the evidence supporting our theory of violation. The same would be true in a positive comity referral. Thus, during the course of an investigation pursuant to a positive comity referral, we may ask whether the referral is proceeding as expected, and even whether we should consider terminating the referral and initiating our own case, as provided for by the 1998 Agreement. The passing of the anticipated action date is the type of event that would normally cause us to focus on the referral and to consider what response, if any, would be warranted at that point. The action the FTC decides to take would depend on many factors, such as the reason the investigation has taken longer than expected, the time frame in which DG-IV expects to act, and our satisfaction with how the investigation is being conducted. Our range of options at that point would include, among other things: taking no action; having an in-depth discussion with DG-IV staff; setting a new deadline; and initiating our own case.

Another productive suggestion made by SABRE at the October hearing was that the U.S. antitrust enforcement agencies maintain regular contact with DG-IV once DG-IV begins its investigation of a matter referred under the positive comity agreement. This is contemplated in Article IV.2.(c)(iii) and (iv) of the 1998 Agreement, which pertains to cases meeting the deferral presumption criteria. The Commission believes it would be useful to have someone from the FTC's staff in contact with an appropriate member of the DG-IV staff whenever there is a significant development in the investigation, but, in any event, at least once every six weeks. Sometimes, as a result of our meetings with U.S. complainants, those complainants continue their own efforts through their counsel, without asking our help. Sometimes the U.S. agencies make an informal inquiry of the reviewing authority about the status of the matter on behalf of a complainant, much as the FTC has done with respect to Marathon Oil Company's complaint that remains under EC investigation.[(10)] The Commission believes that regular communications will affirm our commitment to these

provisions of the agreement and make it easier for both sides to fulfill their respective commitments.

SABRE also suggested that the referring U.S. agency maintain regular contact with the U.S. complainant on developments in the DG-IV investigation. While this is a good suggestion, some caution is appropriate. Some of the information we learn from DG-IV is confidential, and the U.S. agency would be prohibited from disclosing it to the U.S. complainant. For example, it may involve nonpublic (but not confidential commercial) information concerning a third party, or it may concern DG-IV's internal nonpublic processes. The Commission does not routinely provide status reports on its investigations to domestic complainants concerning investigations of U.S. firms, and there does not appear to be any reason to provide complainants in positive comity matters with any greater rights. Nonetheless, the Commission is willing to inform the complainant that we intend to be in regular contact with DG-IV about the matter, and that the complainant is free to contact us for whatever information we are able to provide.[(11)] Again, we have generally followed that procedure in the Marathon matter.

In conclusion, the Commission appreciates the Subcommittee's continuing interest, which we share, in making the positive comity process work as effectively as possible. The Commission believes that the practices described in this statement can help improve the positive comity process. We understand and appreciate the concerns that the Subcommittee and witnesses before the Subcommittee have raised, and we will continue to work with you to make the process as effective as possible.

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1. This written statement represents the views of the Federal Trade Commission. My oral presentation and responses to questions are my own and do not necessarily reflect the views of the Commission or any other Commissioner.

2. Agreement between the Government of the United States of America and the European Communities regarding the application of their competition laws, Sept. 23, 1991, *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,504, and OJ L 95/45 (27 Apr. 1995), *corrected at* OJ L 131/38 (15 June 1995) (hereafter "1991 Agreement"); Agreement between the Government of the United States of America and the European Communities regarding the application of positive comity principles in the enforcement of their competition laws, June 4, 1998, *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,504A; OJ L 173/26 (18 June 1998) (hereafter "1998 Agreement").

3. Agreement between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws, Aug. 3, 1995, *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,503.

4. Agreement between the Government of the United States of America and the Government of the State of Israel Regarding the Application of Their Competition Laws, Mar. 15, 1999, *reprinted in* 76 ATRR 279 (Mar. 18, 1999).

5. *See, e.g.,* Approaches to Promoting Cooperation and Communication among Members, Including in the Field of Technical Cooperation, Submission of the U.S. Government to the World Trade Organization, April

1999, WT/WGTCP/W/116.

6. The SABRE Group, Inc., of Fort Worth, Texas, markets computerized reservation system (CRS) services and offered testimony before the Subcommittee's October hearing concerning its complaint against operators of CRS systems in Europe, which the Department of Justice formally referred to the EC under the positive comity article of the 1991 Agreement.

7. As mentioned in the Commission's testimony of last October, the FTC informally encouraged the Italian Competition Authority (AGCM) to end a production quota agreement by a consortium of ham producers that exported to the United States, harming U.S. consumers with supracompetitive prices. The FTC held up its investigation while the AGCM conducted its investigation, which resulted in a finding that the consortium's production quota violated Italian law and an order under which the consortium agreed to end the quota.

8. Under these provisions, the Requesting Party (that is, the competition authority making a positive comity request) will normally defer or suspend its own enforcement activities in favor of enforcement action by the Requested Party (that is, the competition authority receiving and acting on the request) where the anticompetitive activities at issue occur principally in the Requested Party's territory and the Requested Party agrees to certain conditions. In summary, these conditions include: (A) The adverse effects on the Requesting Party's interests can be and are likely to be fully and adequately investigated and remedied pursuant to the Requested Party's laws, procedures, and available remedies; and (B) the competition authorities of the Requested Party agree to (1) devote adequate resources to the case, (2) use their best efforts to pursue all reasonably available sources of information, (3) inform the competition authorities of the Requesting Party, on request or at reasonable intervals, of the status of their enforcement activities and intentions, and (4) use their best efforts to complete their investigation and to obtain a remedy or initiate proceedings within six months of the Requesting Party's deferral or suspension of enforcement, or such other time as agreed to by the competition authorities of the Parties.

9. The 1995 Recommendation of the OECD Council Concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade, OECD Doc. C(95)130/FINAL (1995), *available at* < http://www.oecd.fr/daf/clp/rec8com.htm>.

10. Since last October's hearing, Commission staff has been in regular contact with DG-IV on the Marathon matter, and has kept the Subcommittee staff apprised of developments in this matter as appropriate.

11. As indicated in our follow-up responses to the questions posed by Chairman DeWine and Senator Kohl, some of SABRE's suggestions, while well intentioned, cannot be implemented in the current legal environment -- specifically, SABRE's recommendations that the U.S. antitrust agencies develop and share confidential evidence with other antitrust agencies, and that each party to a cooperation agreement enlist and use the active assistance of professional staff supplied by the other party to overcome resource limitations.