EXTRA-JURISDICTIONAL REMEDIES INVOLVING PATENT LICENSING

By Koren Wong-Ervin, Bruce H. Kobayashi, Douglas H. Ginsburg & Joshua D. Wright [1]

I. INTRODUCTION

In the last several years, competition agencies around the world have imposed or considered imposing extra-jurisdictional remedies on patent holders, particularly owners of standard-essential patents ("SEPs") upon which the patent holder has made a commitment to license on fair, reasonable and non-discriminatory ("FRAND") terms. For example, in January 2013, the U.S. Federal Trade Commission ("FTC") entered into a consent agreement with Motorola Mobility and its parent (Google) that, except in limited circumstances, prohibits the companies worldwide from seeking injunctive relief against infringers of any FRAND-assured SEP in its global portfolio.[2] Similarly, the Korea Fair Trade Commission and the Taiwan Fair

[1] Koren W. Wong-Ervin is the Director of the Global Antitrust Institute (GAI) at Antonin Scalia Law School at George Mason University (Scalia Law), an Adjunct Professor of Law at Scalia Law, and former Counsel for Intellectual Property and International Antitrust at the U.S. Federal Trade Commission. Professor of Law and Associate Dean for Research and Faculty Development Bruce H. Kobayashi, Ph.D. (economics), is a GAI Senior Scholar and Founding Director. Professor of Law Douglas H. Ginsburg is a Senior Judge, U.S. Court of Appeals for the District of Columbia Circuit, Chairman of the International Board of Advisors of GAI and a former Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice. University Professor Joshua D. Wright, Ph.D. (economics), is the Executive Director of the GAI and a former U.S. Federal Trade Commissioner. The authors thank Scott Robins and Jacob Hamburger for their research assistance.

[2] Agreement Containing Consent Order, *Motorola Mobility LLC & Google Inc.*, FTC File No. 121-0120 (Jan. 3, 2013), https://www.ftc.gov/sites/default/files/documents/cases/2013/01/130103googlemotorolaagree.pdf; Final Order,

Trade Commission are reportedly considering imposing worldwide restraints on Qualcomm's enforcement of its global patent portfolio in order to remedy alleged competition violations involving the company's patent licensing practices.

Imposing worldwide remedies can conflict with principles of international comity and result in significant substantive conflicts with the antitrust agencies of other countries given the wide variety of approaches taken globally on antitrust matters involving intellectual property rights ("IPRs"), particularly with respect to honoring an IPR holder's core right to exclude. This has the potential to produce significant negative effects on competition and welfare, particularly if conduct that is widely considered to be generally procompetitive is the object of the worldwide prohibition. Even when attacking universally condemned activity such as price fixing, global remedies risk over-deterrence when national authorities do not coordinate to adjust the penalties they impose. Moreover, extra-jurisdictional remedies are likely unnecessary to resolve any alleged harm to consumers in the jurisdiction imposing them.

Each competition agency forgoing global remedies does not prevent competition law solutions to global harms, and is appropriate to mitigate the risk of over-deterrence. Honoring principles of comity also can mitigate a race to the bottom in competition law enforcement by preventing the lowest common denominator approach to competition law remedies from governing across the board. Indeed, some, including officials at the highest levels of the U.S. government, have raised concerns that foreign governments may be "using numerous mechanisms, including [antitrust laws] to lower the value of foreign-owned patents" in order to benefit those within their countries who implement foreign technology;[3] that is, the competition authority may be enforcing competition law not solely to protect their consumers from potentially anticompetitive licensing practices, but also to benefit local implementers or a "national champion" in a way that is inconsistent with the procompetitive goals of the competition laws of other jurisdictions.[4] While competition officials across the globe have emphatically denied such claims, imposing welfare reducing global remedies on patent licensing, in addition to reducing competition and welfare, will also draw increased criticism and threaten to harm an agency's credibility with stakeholders, the international antitrust community, and the public.

Motorola Mobility LLC & Google Inc., FTC File No. 121-0120 (July 24, 2013), https://www.ftc.gov/sites/default/files/documents/cases/2013/07/130724googlemotorolado.pdf.

[3] Michael Martina & Matthew Miller, *As Qualcomm Decision Looms, U.S. Presses China on Antitrust Policy*, REUTERS (Dec. 15, 2014, 11:05 PM), http://www.reuters.com/article/us-qualcomm-china-antitrust-idUSKBN0JU0AK20141216 (quoting White House National Security spokesperson Patrick Ventrell and referring to a 2014 letter sent from U.S. Treasury Secretary Jack Lew to Chinese Vice Premier Wang Yang recommending that China avoid using antitrust law to lower royalty rates). According to Ventrell, "President Obama raised these concerns about the enforcement of China's anti-monopoly law directly with President Xi when they met in Beijing last month." Id.

[4] See, e.g. Paul B. Stephan, *Against International Cooperation, in* COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY (Richard A. Epstein & Michael S. Greve eds., 2004); U.S. CHAMBER OF COMMERCE, COMPETING INTERESTS IN CHINA'S COMPETITION LAW ENFORCEMENT: CHINA'S ANTI-MONOPOLY LAW APPLICATION AND THE ROLE OF INDUSTRIAL POLICY (2014), https://www.uschamber.com/sites/default/files/aml_final_090814_final_locked.pdf; Laurie Burkitt & Bob Davis, *U.S. Treasury Warns China Over Anti-Monopoly Efforts*, WALL ST. J. (Sept. 14, 2014, 7:02 AM), http://www.wsj.com/articles/u-s-treasury-warns-china-over-antimonopoly-efforts-1410687635.

This article discusses the various approaches taken thus far, as exemplified by four recent decisions: one by the FTC against Google/MMI; two by the European Commission ("DG Comp") against Motorola and Samsung, respectively; and one by China's National Development and Reform Commission ("NDRC") against Qualcomm. In contrast with the FTC's investigation, the latter three limit remedies to the patent holder's domestic practices in the licensing of their domestic patents (i.e. activity and patents within the territory of the investigating authority), illustrating remedies that are consistent with principles of international comity.

II. THE ECONOMICS OF COMPETITION LAW CONFLICTS

The proliferation of competition laws across the globe was a predictable and potentially beneficial response to economic globalization, allowing more individual jurisdictions to address anticompetitive conduct. A consequence of the proliferation of distinct competition laws in multiple jurisdictions is the additional cost imposed on those subject to the laws of multiple jurisdictions.[5] There are two main types of costs generated by the existence of competition laws in multiple jurisdictions. The first are the transaction costs involved in having to deal with multiple jurisdictions. These costs are present even when the laws of the different jurisdictions are similar. The second type of costs is generated by multiple jurisdictions with different and often inconsistent laws applied to transactions or conduct with potentially distinct competitive effects in different jurisdictions or markets.

To examine the first type of costs, consider conduct that is universally and uniformly prohibited, such as naked horizontal price fixing. From an economic perspective, price fixing is a costly and inefficient way to transfer welfare from consumers to producers; it should be prohibited because, in addition to transferring consumer surplus from consumers to the cartel members, the deadweight losses reduce total welfare. Applying the theory of optimal penalties, optimal deterrence will be achieved when the cartel members fully internalize the costs caused by the behavior.[6] This is achieved through a total fine equal to the harm caused (in this case the transfer plus the deadweight losses) divided by the probability of punishment.[7]

In theory, optimal deterrence can be achieved at the lowest cost when one jurisdiction imposes the optimal fine on one cartel member, calculated on the basis of all the harm the cartel caused worldwide. The reason is that optimal deterrence requires only that the potential cartel members internalize *ex-ante* the full harm caused by their actions, so in this idealized setting it does not matter for this purpose that all guilty persons are not punished,[8]

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[5] See Richard A. Epstein & Michael S. Greve, *Introduction: The Intractable Problem of Antitrust Jurisdiction, in* COMPETITION LAWS IN CONFLICT, *supra* note 4.
[6] Gary S. Becker, *Crime and Punishment: An Economic Approach,* 76 J. POL. ECON. 169 (1968).
[7] See William M. Landes, *Optimal Sanctions for Antitrust Violations,* 50 U. CHI. L. REV. 652 (1983); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis,* 111 HARV. L. REV. 869 (1998).
[8] See, e.g. Frank H. Easterbrook et al., *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J.L. & ECON. 331 (1980).

nor does it matter that all who are harmed are unable to sue and recover damages.[9] Optimal damages and penalties in such a case could certainly include extra-jurisdictional remedies.

However, even in the case of cartels, a strategy that allows one jurisdiction to impose optimal sanctions based on worldwide harms can generate over-deterrence costs, if other jurisdictions also impose sanctions based upon the same behavior. Under these conditions, the resulting fines and penalties can be greater than the optimal sanction, resulting in over-deterrence. This is especially true in cases where sanctions fall upon the shareholders of corporations rather than the individual agents responsible for the illegal activity of the corporations that employed them.[10]

The second type of costs from extra-jurisdictional application of antitrust remedies is inconsistency costs, which include the error costs that result from applying a uniform rule to non-uniform circumstances. Consider the case in which the proposed remedy, although efficient in the jurisdiction imposing it, is not efficient in all jurisdictions. For example, consider a merger that has different competitive effects in different jurisdictions or markets. The imposition of a uniform worldwide remedy (enjoining the merger) will reduce welfare relative to a jurisdiction-by-jurisdiction approach that takes the jurisdiction-specific competitive effects into account. If jurisdiction or market-specific divestitures are feasible, then a uniform worldwide remedy, as opposed to remedies limited to activity in a particular jurisdiction, impose welfare losses on the margin. Extra-jurisdictional remedies also increase the probability that the transaction would be deterred in its entirety. This would also be true, *a fortiori*, where the proposed worldwide remedy is based upon a non-competition goal in the law of the jurisdiction imposing the remedy but is inconsistent with the procompetitive goals of competition laws in most other jurisdictions.

Another type of inconsistency cost is incurred when the best approach to a particular competition law problem is unclear, and different jurisdictions adopt different approaches. Those different approaches can promote experimentation that generates valuable information regarding the effect of the various policies without necessarily imposing upon other jurisdictions the costs of any one jurisdiction's approach.[11] An example would be the different approaches taken in various jurisdictions to certain vertical restraints, such as resale price maintenance. In contrast, the application of remedies that apply worldwide impose one jurisdiction's particular approach and related costs on all other jurisdictions, which can suppress the benefits of experimentation and the jurisdictional competition that would serve to mitigate the costs of antitrust enforcement in the long run.

The existence of the costs identified above does not necessarily imply that a regime in which each jurisdiction's remedies are limited to conduct or effects within its borders will be

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[9] See, e.g. William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick*, 46 U. CHI. L. REV. 602, 615-21 (1979).

[10] Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, COMPETITION POL'Y INT'L, Autumn 2010, at 3; Bruce H. Kobayashi, *Antitrust, Agency, and Amnesty: An Economic Analysis of the Antitrust Laws Against Corporations*, 69 GEO. WASH. L. REV. 715 (2001).

[11] A regime of experimentation will generate transitory costs when welfare reducing policies are chosen. For example, domestic remedies can harm incentives to innovate in other jurisdictions if remedies are imposed to lower royalty rates of foreign companies below the level required to induce investment.

superior to a unitary enforcement strategy or a regime of international antitrust governed by a body of jurisdictional and territorial rules that attempt to coordinate enforcement.[12] But, in the absence of cooperation and effective coordination among those responsible for enforcement of the competition laws worldwide, such costs are likely to be significant insofar as there are aspects of competition policy as to which there is no consensus. Under these circumstances, territorial limits, including jurisdictional rules[13] and extraterritorial limits on remedies,[14] can be a second-best efficient solution to the problems created by multiple and diverse laws.

III. ALTERNATIVE APPROACHES TO EXTRA-JURISDICTIONAL REMEDIES

In 2013, the FTC entered into a consent order with Motorola Mobility and its parent (Google) that included extra-jurisdictional restrictions on the companies' exercise of their patent rights.[15] Specifically, the FTC alleged that Motorola, by seeking injunctive relief on FRAND-assured SEPs against "willing licensees," violated the "unfair methods of competition" provision in Section 5 of the FTC Act The order prohibits the companies from seeking or enforcing "injunctive relief," defined as "a ruling of any legal or administrative tribunal, whether in or outside of the United States,"[16] on any "patent claim" on a patent "issued or pending in the United States or anywhere else in the world."[17] The FTC's remedy is controversial as a matter of economics, as critics have pointed out the potential welfare costs of preventing a patent holder from using injunctive relief to protect its property rights.[18] The

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[12] See, e.g. Stephan, *supra* note 4.

[13] See Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (2012); *see also* Michael J. Trebilcock & Edward M. Iacobucci, *National Treatment and Extraterritoriality, Defining the Domains of Trade and Antitrust Policy*, *in* COMPETITION LAWS IN CONFLICT, *supra* note 4.

[14] *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (limiting use of extraterritorial activity as basis for punitive damages); but see Polinsky & Shavell, *supra* note 7 (optimal damages could include extraterritorial damages in the *Gore* case). See also *Morrison v. Nat'l Austl. Bank*, 561 U.S. 247 (2010) (limiting extraterritorial reach of the Securities Exchange Act).

[15] Statement of the FTC, *Motorola Mobility LLC & Google Inc*., FTC File No. 121-020 (Jan. 3, 2013), https://www.ftc.gov/sites/default/files/documents/cases/2013/01/130103googlemotorolastmtofcomm.pdf; Complaint, *Motorola Mobility LLC & Google Inc*., FTC File No. 121-020 (Jan. 3, 2013), https://www.ftc.gov/sites/default/files/documents/cases/2013/01/130103googlemotorolacmpt.pdf.

[16] Final Order, *Motorola Mobility LLC & Google Inc*., FTC File No. 121-0120, at 4 (July 24, 2013), https://www.ftc.gov/sites/default/files/documents/cases/2013/07/130724googlemotorolado.pdf.

[17] Id. at 5. Before the change in the policies of the Antitrust Division of the U.S. Department of Justice with regard to patent licensing, see Abbott B. Lipsky, Jr., *Current Antitrust Division Views on Patent Licensing Practices*, 50 ANTITRUST L.J. 515 (1982) (text of remarks before the American Bar Association Antitrust Section, Washington, D.C. (Nov. 5, 1981)), the agency entered into settlements that imposed remedies on foreign patents, albeit not SEPs. See, e.g. *United States v. Inco, Ltd*., 1978 U.S. Dist. LEXIS 19900 (E.D. Pa. 1978) (order requiring defendant to license foreign patents); *United States v. Imperial Chem. Indus*., 105 F. Supp. 215 (S.D.N.Y. 1952) (granting antitrust relief covering foreign patents owned by a foreign company).

[18] See, e.g. Douglas H. Ginsburg et al., *The Troubling Use of Antitrust to Regulate FRAND Licensing*, CPI ANTITRUST CHRON., Autumn 2015, at 1 [hereinafter Ginsburg et al., *The Troubling Use of Antitrust*]; Douglas H. Ginsburg et al., *Enjoining Injunctions: The Case Against Antitrust Essential Patent Holders Who Seek Injunctions*, ANTITRUST SOURCE (Oct. 2014),

prohibition is also unsupported by U.S. case law, which treats breach of FRAND assurances as a contract issue — absent evidence of deception that results in the unlawful acquisition of market power — and thus inappropriately exports a remedy that was extracted through the consent process but could almost certainly not have been obtained through litigation.[19]

In contrast, the antitrust agencies of the European Commission and of China limit their remedies to domestic conduct pertaining to domestic patents. In April 2014, DG Comp entered into a settlement with Samsung and issued a decision against Motorola Mobility essentially prohibiting the companies from seeking injunctive relief against willing licensees except under certain limited circumstances.[20] DG Comp specifically limited its remedy to conduct occurring in the European Economic Area ("EEA"), and only on patents granted in the EEA.

Likewise, in NDRC's 2015 penalty decision against Qualcomm for allegedly abusing a dominant position by charging unreasonably high royalties, bundling SEP and non-SEP licenses without justification, and imposing other challenged conditions in licenses and on the sale of baseband chips (such as waiving the right to challenge the license), the agency limited remedies to conduct occurring within China and related to Chinese patents.[21] Specifically, the NDRC approved the "rectification plan" submitted by Qualcomm, under which the company agreed: (1) not to bundle Chinese SEPs and non-SEPs and to provide patent lists during negotiations; (2) to charge royalties of not more than 5 percent for Chinese 3G SEPs and 3.5 percent for Chinese 4G SEPs using a royalty base of 65 percent of the net selling price of the device; (3) not to condition the sale of baseband chips on signing a licensing agreement with terms NDRC found to be unreasonable (i.e. a no-challenge clause); and (4) to provide existing licensees with an opportunity to elect to take the new terms for

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http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct14_ginsburg_10_21f.authcheckdam.pdf.

[19] See, e.g. Ginsburg et al., *The Troubling Use of Antitrust*, *supra* note 18, at 1; Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Settlements: The Culture of Consent*, *in* 1 WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE—LIBER AMICORUM (Nicolas Charbit et al. eds., 2012). We note, however, that the FTC's remedy in the *MMI/Google* case also allows the parties to resolve disputes through worldwide portfolio arbitration, which is arguably the most efficient means of resolving such disputes.

[20] Press Release, EUR. COMM'N, Antitrust: Commission Accepts Legally Binding Commitments by Samsung Electronics on Standard Essential Patent Injunctions (Apr. 29, 2014), http://europa.eu/rapid/press-release_IP-14-490_en.htm; Case AT.39985—Motorola—Enforcement of GPRS Standard Essential Patents (Apr. 29, 2014), http://ec.europa.eu/competition/antitrust/cases/dec_docs/39985/39985_928_16.pdf; see also generally Koren W. Wong-Ervin, *The European Commission's Safe Harbor Approach to the Seeking of Injunctive Relief on FRAND-Encumbered SEPs*, MONOPOLY MATTERS, Fall 2014, at 16, https://www.ftc.gov/system/files/attachments/key-speeches-presentations/wong-ervin_-_ecs_safe_harbor_approach_-_fall_2014.pdf.

[21] Press Release, Qualcomm, Qualcomm and China's National Development and Reform Commission Reach Resolution-NDRC Accepts Qualcomm's Rectification Plan-Qualcomm Raises Midpoints of Fiscal 2015 Revenue and Non-GAAP EPS Guidance (Feb. 9, 2015), http://files.shareholder.com/downloads/QCOM/3864235320x0x808060/382E59E5-B9AA-4D59-ABFF-BDFB9AB8F1E9/Qualcomm_and_China_NDRC_Resolution_final.pdf [hereinafter Rectification Plan]; see also Koren W. Wong-Ervin, *Antitrust and IP in China: Quo Vadis?*, SPRING MEETING CLE (ABA Section of Antitrust Law) 5–6 (Apr. 16, 2015), https://www.ftc.gov/system/files/attachments/key-speeches-presentations/wong-ervin_-_2015_aba_spring_meeting_4-16-15.pdf.

sales of branded devices for use in China.[22]

IV. COMITY AND THE CASE AGAINST EXTRA-JURISDICTIONAL REMEDIES

As defined by U.S. antitrust agencies, comity "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.'"[23] The Organization for Economic Cooperation and Development ("OECD") has described comity as the "international legal principle whereby a country agrees to take other countries' important interests into account while conducting its law enforcement activities."[24] According to the OECD, "for over 100 years, public international law has acknowledged comity as a means of tempering the effects of the unilateral assertion of extraterritorial jurisdiction."[25]

As set out above, following principles of comity can protect against multiple and excessive punishments for the same conduct, and are particularly important when the laws and the approach to enforcing vary among jurisdictions. Under these latter circumstances, the principles of comity allow individual jurisdictions to follow or experiment with unique approaches to competition law without necessarily imposing the costs of those approaches on other jurisdictions.[26] (However, as noted above, domestic remedies may also impose costs on other jurisdictions by, for example, punishing conduct that may be procompetitive or benign and thus reducing incentives to innovate.)

Two factors in particular underscore the importance of applying comity principles to antitrust matters involving IPRs: (1) the inclusion of non-competition factors in the competition decisions of some national agencies, and (2) the dramatically different approaches among national competition agencies to matters involving IPRs.

First, in contrast to the U.S. approach, under which competition law is supposed to be focused exclusively upon economic or consumer welfare, many foreign competition laws, particularly in Asia, explicitly provide for the consideration of non-competition factors, such as "fairness," "social public interest" and "promoting the healthy development of the socialist market economy."[27] Consideration of such non-competition factors can lead to significantly

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[22] Rectification Plan, *supra* note 21.

[23] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS § 3.2 (1995). See also U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION [PROPOSED UPDATE] (2016) (proposed update replacing 1995 guidelines).

[24] ORG. FOR ECON. COOPERATION & DEV., INTERNATIONAL CO-OPERATION IN COMPETITION LAW ENFORCEMENT 8 (2014), https://www.oecd.org/mcm/C-MIN(2014)17-ENG.pdf.

[25] Id.

[26] See generally COMPETITION LAWS IN CONFLICT, *supra* note 4; Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEG. STUD. 131 (1996).

[27] Anti-Monopoly Law art. 1 (China); see also Monopoly Regulation and Fair Trade Act art. 1 (Korea) (providing that the purpose of the Act includes the promotion of "fair" competition and the achievement of "balanced economic development"); Antimonopoly Act art. 1 (Japan) (stating that purpose of the Act is "to promote fair and free competition, . . . to heighten the level of employment and actual national income, and thereby to promote the democratic and wholesome development of the national economy as well as to assure the interests of general

different analyses and conflicting outcomes. Imposing global remedies on foreign patents would lead to the lowest-common denominator governing globally.

Second, in addition to the use of non-competition factors, the substantive approach to antitrust matters involving IPRs varies widely, with the U.S. taking a less interventionist approach and certainly one that recognizes an IPR holder's core right to exclude as fundamental, indeed essential, to protect the incentive to innovate. For example, unlike that of many countries, U.S. antitrust law does not authorize the agencies to regulate licensing or to set prices, and instead protects the right of firms and IPR holders to set unilaterally or to negotiate privately the prices of their products. In addition, unlike many countries, U.S. antitrust law generally avoids remedies that directly regulate or set prices, and instead protects the right of firms and IPR holders unilaterally to set or privatively to negotiate the prices of their products. Similarly, the U.S. strongly disfavors requiring IPR holders to share them with others — especially their competitors — while some Asian competition agencies appear much more comfortable sanctioning refusals to license and making licensing compulsory. The U.S antitrust agencies also recognize that conduct such as tying and bundling, discriminatory licensing, cross-licensing and grantbacks is often procompetitive and, therefore, such licensing restraints do not violate the U.S. antitrust laws unless they harm competition and have anticompetitive effects greater than their procompetitive virtues.[28] The U.S. approach is based on its view of economic theory and empirical evidence that vertical restraints are generally procompetitive or benign, and on the link between strong protection of IPRs and economic growth and innovation. In contrast, some competition agencies appear to presume that certain licensing practices are anticompetitive.

These differences suggest that principles of comity require that countries limit use of extra-jurisdictional remedies. As noted above, limiting remedies to the issuing jurisdiction can also be consistent with economic considerations of efficiency and welfare. The actions of both the EU and China in the examples discussed above are consistent with the principles of comity. In contrast, the worldwide prohibition on seeking injunctive relief, as the FTC has done under its stand-alone Section 5 authority, violates these principles.[29]

V. CONCLUSION

Worldwide antitrust law remedies in matters involving IPRs conflict with principles of

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consumers"); Competition Act intro. (India) (stating that, in interpreting the Act, the Competition Commission should "keep[] in view . . . the economic development of the country.").

[28] See, e.g. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 3.4 (1995); U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (2007).

[29] See Joshua D. Wright & Douglas H. Ginsburg, *Whither Symmetry?: Antitrust Analysis of Intellectual Property Rights at the FTC and DOJ*, COMPETITION POL'Y INT'L, Autumn 2013. It is unclear whether the FTC could prohibit injunctive relief under its standalone Section 5 authority under its 2015 "Unfair Methods of Competition" Policy Statement. See, e.g. Joshua D. Wright & Angela M. Diveley, *Unfair Methods of Competition After the 2015 Commission Statement*, ANTITRUST SOURCE (Oct. 2015), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct15_wright_10_19f.authcheckdam.pdf.

international comity and can result in significant substantive conflicts among antitrust agencies given the dramatically different approaches taken globally on antitrust matters. They can have significantly negative effects upon competition and welfare if a single agency prohibits globally conduct recognized in other jurisdictions as generally procompetitive.

In addition, it is difficult to imagine when a global remedy would be necessary to resolve any harm to consumers in the jurisdiction imposing it. For example, any harm to consumers from conduct such as tying SEPs and non-SEPs would arguably be resolved by prohibiting the conduct with respect to domestic patents. A global remedy seems necessary only if the aim is to protect domestic manufacturers that export, which is not the goal of U.S. antitrust law nor even consistent with the mainstream approach to competition policy, which is focused upon harm to the competitive process and to consumers, as opposed to protection of domestic firms against foreign rivals.

Global remedies also risk over-deterrence when national authorities are not coordinated to adjust penalties simultaneously. Therefore, avoiding global remedies is appropriate to mitigate that risk, and honoring comity principles would prevent the lowest common denominator from governing across the board.