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ADDENDUM
FROM INTERNATIONAL COMPETITIVE CARRIER TO THE WTO: A
SURVEY OF THE FCC'S INTERNATIONAL TELECOMMUNICATIONS
POLICY INITIATIVES 1985-1998

*Lawrence J. Spiwak**

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* B.A. (with Special Honors), George Washington University, 1986; J.D., Benjamin N. Cardozo School of Law, 1989. President and Chairman of the Board of Editorial Advisors of the Phoenix Center for Advanced Legal and Economic Public Policy Studies, Washington, D.C. (www.phoenix-center.org). The views expressed in this Addendum do not represent the views of the Phoenix Center, its Adjunct Fellows, or any of its individual Editorial Advisory Board Members.

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I. Introduction

[*520]In the December 1998 issue, the *Federal Communications Law Journal* published a law review article surveying the Federal Communication Commission's (FCC or Commission) international policy initiatives between 1985 and 1998.¹ As that article explained, one of the centerpieces of the FCC's international policies was its *Benchmarks Order*, in which the FCC unilaterally imposed maximum benchmarks on the amount U.S. carriers may pay their foreign correspondents to hand off U.S.-originated International Message Telecommunications Service (IMTS) traffic.² As that law review article further argued, the FCC's actions raised serious questions from both a legal and overall policy perspective.

Less than one month after the *Federal Communications Law Journal* published that article, however, the D.C. Circuit Court of Appeals in *Cable & Wireless v. FCC* (C&W)—to the unbridled giddiness of the FCC and to the dismay of various parties representing over 100 foreign governments, regulators, and telecommunications companies³—upheld the FCC's *Benchmarks Order* in its "entirety."⁴ In doing so, the D.C. Circuit has not only placed major areas of previously settled case law in flux, but—even assuming *arguendo* the court ruled correctly—also has approved nakedly the FCC's role of "cartel manager" and

1. Lawrence J. Spiwak, *From International Competitive Carrier to the WTO: A Survey of the FCC's International Telecommunications Policy Initiatives 1985-1998*, 51 FED. COMM. L.J. 111 (1998) [hereinafter Spiwak, *Survey*].

2. International Settlement Rates, *Report and Order*, 12 F.C.C.R. 19,806, 9 Comm. Reg. (P & F) 1 (1997) [hereinafter *Benchmarks Order*].

3. *Statement of FCC Chairman William E. Kennard on Today's Court Decision Upholding the FCC's Benchmarks Order*, Jan. 12, 1999 (visited Feb. 15, 1999) <<http://www.fcc.gov/Speeches/Kennard/Statements/stwek902.html>>; cf. Heather Fleming, *C&W Loses Battle for Higher U.S. Interconnect Rates*, BLOOMBERG NEWS, Jan. 13, 1999, available at <<http://www.totaltele.com>>.

4. *Cable & Wireless P.L.C. v. FCC*, No. 97-1612 et al., 1999 WL 7824, at *1 (D.C. Cir. Jan. 12, 1999).

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destroyed what little chance there was to avoid an all-out international telecommunications trade war.

II. The Court's Decision

In upholding the Commission's *Benchmarks Order*, the *C&W* court's arguments essentially fell into two broad categories: In the first category, the court concluded that the Commission reasonably exercised its rate-making authority under the Communications Act.⁵ In support of this decision, the court held that: (a) the FCC had sufficient jurisdiction under the Communications Act to impose settlement rate benchmarks; (b) the [*521] Commission had adequately demonstrated its use of the Tariff Components Rate methodology; and (c) the FCC's actions were a legitimate exercise of its authority under the *Mobile-Sierra* doctrine.⁶ As demonstrated below, however, the court was only able to reach this conclusion by ignoring well-settled ratemaking jurisprudence.

In the second category, the court apparently concluded that if the political stakes are high enough, mercantile trade concerns can trump legal precedent, economic theory, and the factual record itself. To wit, the court both upheld the FCC's argument that benchmarks were necessary to protect U.S. firms against ephemeral price squeeze behavior by foreign firms and found that—international comity aside—the FCC's actions *in toto* did not violate international law.⁷ Indeed, in finding that the Commission's actions “to strengthen the bargaining position of domestic telecommunications companies in negotiations with their foreign counterparts”⁸ were a legitimate exercise of the FCC's “public interest” authority, the court violated the heretofore golden rule that the “Commission is

5. *Id.*

6. *Id.* at *8.

7. *Id.* at *4, *11, *13.

8. *Id.* at *1.

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not at liberty . . . to subordinate the public interest to the interest of ‘equalizing competition among competitors.’”⁹ Each category is discussed more fully below.

A. The Demise of Ratemaking Law

1. *Jurisdictional Issues*

The court held that there were essentially three reasons why the FCC could assert jurisdiction to impose settlement rate benchmarks. First, the court held that the FCC was not asserting jurisdiction over foreign carriers or foreign telecommunications in violation of the Communications Act.¹⁰ Rather, the FCC was asserting jurisdiction only over the settlement rates that U.S. carriers must pay their foreign correspondents for termination of U.S.-originated traffic. While the court was quick to point out that both it and the FCC were engaging in legal hair-splitting—that is, “that regulating what domestic carriers may pay and regulating what foreign carriers may [*522] charge appear to be opposite sides of the same coin”¹¹—the court reasoned that:

by focusing only on the *Order’s* effects on foreign carriers, petitioners overlook the crucial economic reality that makes the Commission’s position that it is only regulating domestic carriers reasonable: Because domestic carriers operate in a competitive market, they face a serious dilemma when they bargain with monopolist foreign carriers. As a group, U.S. carriers would be best off if each decided not to accept settlement rates higher than FCC benchmarks. But if one U.S. carrier maintained this position to the point of impasse in negotiations with a foreign carrier, a

9. *SBC Comm. Inc. v. FCC*, 56 F.3d 1484, 1491 (D.C. Cir. 1995) (citing *Hawaiian Tel. Co. v. FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974) (finding that it was “all too embarrassingly apparent that the Commission has been thinking about competition, not in terms primarily as to its benefit to the public, but specifically with the objective of equalizing competition among competitors”)); *see also* *Western Union Tel. Co. v. FCC*, 665 F.2d 1112, 1122 (D.C. Cir. 1981).

10. *Cable & Wireless*, 1999 WL 7824, at *4.

11. *Id.* at *5.

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competing U.S. carrier would make the foreign carrier a higher offer.¹²

The preceding analysis raises two significant concerns. First, the language cited above indicates that the court either did not understand accurately (or petitioners' counsel did not explain sufficiently), the basic facts of the case. For example, the court assumes that the United States is the only country in the world with a significant outpayment deficit. Contrary to popular belief, however, this assumption simply is *not* true. Indeed, this "victim" mentality is a bit disingenuous considering the facts that, for example, Japan-based carriers have large deficits with Taiwan, the Philippines, South Korea, Singapore, and other major Asian countries. Similarly, France Telecom has large outflows to Africa, the Middle East, and even Latin America. Moreover, the same holds true for British Telecom, Deutsche Telekom, Telecom Italia, and other large overseas telephone companies.¹³ Similarly, the court again appears to assume that the United States is the only "competitive" market. Again, this is not so. Numerous other countries such as the United Kingdom, New Zealand, Sweden, and Denmark would probably both beg to differ and take great umbrage with the court's blanket conclusion. Moreover, if the court wants to make blanket conclusions, then it should look at the local termination markets in the United States, which, unfortunately, are still characterized by dominant providers and are likely to remain so for the foreseeable future.¹⁴ [*523]

12. *Id.*

13. See *International Communications Survey Memorandum Re: Addressing the "Accounting Rates Challenge"*, TELECOMM. POL'Y REV., Jan. 5, 1997.

14. See, e.g., George S. Ford, *Opportunities for Local Exchange Competition Are Greatly Exaggerated*, ELECTRIC LIGHT & POWER, Apr. 1998, at 20-21; see also *Reconcentration of Telecommunications Markets After the 1996 Act: Implications for Long-Term Market Performance (Second Edition)*, PHOENIX CENTER POLICY PAPER SERIES, Policy Paper No. 2, at 36 (July 1998) (visited Feb. 15, 1999) <<http://www.phoenix-center.org/pcpp/pcpp2.doc>> (noting that Ray Smith, Chairman of Bell Atlantic, proclaimed proudly on CNN the very night the FCC approved the merger between Bell Atlantic and NYNEX that the merged company "accounts for 50 percent of all the European international traffic" originating and terminating in the United States); *The Busiest Bell*, BUS. WK., Jan. 11, 1999, at 80 (naming Ed Whitacre of SBC among its top-10 executives of the year, citing Whitacre's SBC-Ameritech deal, which, once the deal closes, "Whitacre will head a telecom giant (Footnote Continued. . . .)

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The second concern is perhaps more egregious: The court's language cited above blatantly condones and indeed encourages the FCC's efforts to help U.S. firms engage in a group boycott against foreign firms. Clearly, this stretches any reasonable interpretation of either the *Noerr-Pennington* or State Action doctrines.¹⁵

Moreover, if the court applies its factual assumptions to its reasoning, then the court actually concedes its point that U.S. firms are always at the mercy of foreign monopolists. Quite to the contrary, given the huge amount of revenue U.S. traffic represents, when U.S. firms act as a cartel, they actually have significant monopsony power—or more accurately, *bargaining* power—with foreign firms and should be (and are) able to exercise this power to their advantage. If readers recall from the original article, this is precisely what happened in the “Telintar Trade War.”¹⁶

The court next reasoned that even if the FCC was taking jurisdiction over foreign entities, this action was essentially benign because the FCC lacked an effective enforcement mechanism. Indeed, reasoned the court,

Far from threatening foreign carriers with enforcement actions, the *Order* at most states that the FCC will contact “responsible [foreign] government authorities” to “seek their support in lowering settlement rates.” Given the structure of the global telecommunications industry and its resulting incentives, we find reasonable the Commission's view that the *Order* regulates domestic carriers, not foreign carriers.¹⁷

with some 57 million local phone lines—*almost a third of all phone lines in the country.*” (emphasis added). According to the article, “It's all part of Whitacre's plan to take on AT&T and MCI Worldcom. ‘We can sit here and get picked on,’ he says, ‘or get bigger and have more clout.’”)

15. See *Parker v. Brown*, 317 U.S. 341 (1943).

16. See Spiwak, *Survey*, *supra* note 1, at 164.

17. *Cable & Wireless*, 1999 WL 7824, at *5 (citation omitted) (alteration in original).

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As explained in more detail in the original article, however, the lack of an effective enforcement mechanism is one of the primary problems with the FCC's policies, primarily because a U.S. carrier is hardly going to ask the FCC to declare its own rates unlawful if a foreign carrier refuses to negotiate a settlement rate at or below the FCC's benchmarks within the exact time specified by the FCC.¹⁸ Indeed, the whole reason why the international telecommunications community entered into treaties such as the International Telecommunication Union (ITU) in the first instance was to mitigate the risk that traffic would be interrupted if the "negotiations" referenced by the court prove unsuccessful. As such, by flagrantly violating [*524] its international commitments,¹⁹ the only thing the FCC's mercantile rhetoric will achieve will be to create (if not exacerbate an existing) substantial *disincentive* for both foreign governments and carriers to engage in good faith negotiations with U.S. carriers to enter their home markets (which, paradoxically, is supposed to be the whole goal of such an approach in the first place). As such, both U.S. consumers and business should really not be surprised when the economic costs of neo-mercantilism outweigh the very economic benefits the FCC promised that they would receive.²⁰

Finally, the court gave the "so what" defense to the FCC's actions. In the court's own words, while the "practical effect" of the FCC's *Order* will be to reduce settlement rates charged by foreign carriers, "the Commission does not exceed its authority simply because a regulatory action has extraterritorial consequences."²¹ Thus, reasoned the court, the FCC's actions in the *Benchmarks Order* are identical to the situations where "the Environmental Protection Agency regulates the automobile industry when it requires states and localities to comply with national ambient air quality standards, or [when] the Department of

18. Spiwak, *Survey*, *supra* note 1, at 184-87, 207-13.

19. *See infra* Part II.B.2.

20. *See, e.g.*, Spiwak, *Survey*, *supra* note 1, at 137-51.

21. *Cable & Wireless*, 1999 WL 7824, at *6 (citations omitted).

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Commerce regulates foreign manufacturers when it collects tariffs on foreign-made goods.”²²

Sadly, this analogy simply is not accurate—rather, it is inapposite. First, a trade tariff is nothing more than a naked barrier to entry, usually imposed by xenophobic and protectionist policymakers to insulate American firms from (and thus deny American consumers the benefits of) the lower prices and additional choices resulting from cheaper goods produced off-shore (hence the derogatory term for this conduct—*dumping*).²³ Because lower prices and more choices are supposed to be *good* for consumers, however, such mercantile actions are anticompetitive and harm consumer welfare.²⁴ Similarly, the FCC’s actions in the *Benchmarks Order* are not akin to [*525] imposing national environmental standards because while the U.S. Constitution clearly provides the U.S. government with preemption authority over states and localities for such environmental issues,²⁵ as explained in more

22. *Id.*

23. See Paul Magnusson, *Getting a Grip on Trade Sanctions*, BUS. WK., Nov. 17, 1997, at 115. Magnusson reports that “[i]n the past four years, President Clinton has signed 62 laws and executive actions targeting 35 countries.” *Id.* These numbers account “for more than *half* the sanctions imposed [by the United States] *in the past 80 years.*” *Id.* (emphasis added). Moreover, Magnusson reported that “the direct cost to U.S. exporters in lost sales in 1995 alone was as high as \$20 billion[, a]n estimated 250,000 [U.S.] jobs also disappeared, and *no one can measure the damage to relations with angry allies.*” *Id.* (emphasis added).

24. See Lawrence J. Spiwak, *The Search for Meaningful Definitions in a Sea of Analytical Rhetoric*, ANTITRUST REP., Dec. 1997, *passim* [hereinafter Spiwak, *The Search for Meaningful Definitions*]; see also James C. Miller, III, *Reindustrialization Through the Free Market*, 53 ANTITRUST L.J. 121 (1984). Miller argues that when government takes “an activist,” collaborative approach to work with industry in order to promote “competition,” it is virtually impossible to avoid the inevitable conclusion that the outcome of such policies “could do anything but restrict output, raise prices and retard innovation.” *Id.* at 125. Because such an approach ignores “the distinct interests of over 200 million American consumers in lower prices and higher product quality,” most consumers should “start counting their silverware.” *Id.* at 124-25. As such, argues Miller, “*Why kick Santa Claus in the fact? If other countries foolishly subsidize U.S. consumers . . . why should we object? It could only be a distortion of our economy if they had any chance to achieve monopoly power to recoup the subsidies we would now be enjoying.*” *Id.* at 126 (footnote omitted) (emphasis added).

25. See, e.g., *California v. FERC*, 495 U.S. 490 (1990); see also *AT&T Corp. v. Iowa Utils. Bd.*, No. 97-826 et al., 1999 WL 24568, at *8 (U.S. Jan. 25, 1999) The Court upheld the FCC’s jurisdiction to prescribe rate methodology for states, finding that

(Footnote Continued. . . .)

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detail *infra*, the U.S. government does *not* have the right under either express international treaty or the legal concept of comity to trump *another co-sovereign entity* by unilaterally prescribing international settlement rates.²⁶

In contrast, the FCC's Benchmarks policy is a situation where the U.S. international telecommunications cartel essentially petitioned the U.S. government to reduce a common input, even when the Commission's own International Settlements Policy (with its proportionate return requirements eliminating the possibility of whipsaw effects) is expressly designed to keep the cartel "fat and happy" and deter foreign entry—a point that the *C&W* court seems to ignore deliberately.²⁷ Accordingly, contrary to the court's analogy, the instant situation is more akin to the hypothetical situation where the U.S. shippers pressure the U.S. Maritime Commission to formulate a single universal fee (based on their internal proprietary data provided by the largest U.S. carrier), and then have the U.S. government "force" them to only pay that universal fee whenever U.S.-flagged ships seek to enter foreign ports—regardless of the underlying cost structure of the individual harbors.

2. *Tariff Components Price Methodology*

The court also upheld the FCC's use of the tariff components price methodology (TCP). In doing so, the *C&W* court specifically rejected petitioners' arguments that "the TCP methodology fails to produce cost-based settlement rates because it does not use data on the actual cost of foreign [*526] termination services, petitioners claim that the calculated rates undercompensate foreign carriers."²⁸

[t]he FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory "Pricing standards" set forth in § 252(d). It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances. That is enough to constitute the establishment of rates.

Id.

26. See discussion *infra* Part II.B.2.

27. See Spiwak, *Survey*, *supra* note 1, at 148; *but cf.* *Cable & Wireless*, 1999 WL 7824, at *1.

28. *Cable & Wireless*, 1999 WL 7824, at *9.

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According to the court, the record overwhelmingly indicated that “the Commission meticulously documented and carefully considered a wide range of public comments concerning the TCP methodology” and, moreover, that the “final *Order* contains several passages explaining why the method more than fully compensates foreign carriers.”²⁹

What particularly troubled the court, however, is the fact that, in the court’s view, “Throughout the rulemaking process . . . petitioners [that is, foreign carriers] withheld the very cost data that would have enabled the Commission to establish precise, cost-based rates” despite “repeated[]” invitations from the FCC “to suggest alternative methods for calculating settlement rates.”³⁰ Thus, reasoned the court,

Since petitioners refused to let the Commission see their cost data, and since the Commission thoroughly explained why “the TCP methodology provides a reasonable basis for establishing settlement rate benchmarks in the absence of carrier-specific cost data,” we have no firm basis for accepting petitioners’ claim that the benchmark rates are not fully compensatory.³¹

Similarly, the court rejected the notion that the FCC used nonrecord data—in particular, U.S. outgoing call distribution data provided by AT&T on a confidential basis to calculate country-by-country prices for national extension services (one of the three TCP components)—even though: (1) this data was made available for inspection for only a two-week period; (2) the FCC refused to lengthen the comment period on the grounds that the data was concise and easy to understand; and (3) that at least one party submitted comments criticizing the Commission’s reliance on the data.³² According to the court:

29. *Id.* (citations omitted).

30. *Id.* at *10.

31. *Id.* (citations omitted).

32. *Id.* at *11.

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foreign carriers had in their hands all the incoming call distribution data they needed to contest the accuracy of the Commission's calculated price for national extension services. In other words, even if the Commission's handling of the AT&T data was less than ideal, it did not impair the ability of foreign carriers to challenge the national extension component of the benchmark rates.³³

So what really happened here? Not to anyone's surprise, the FCC cleverly and expectedly took jurisdiction over just U.S. carriers (despite its "extraterritorial" effects), and the court upheld the FCC's actions. As discussed in greater detail *infra* (and as history is replete with examples of), [*527] however, just because the FCC can regulate something does not necessarily mean that it is actually a good idea. Yet, looking beyond this question for the moment, the *C&W* decision raises two significant questions that have yet to be answered.

First, accepting the court's logic for the moment *arguendo*, it is unclear how foreign firms were ever to escape the FCC's jurisdictional "Catch-22"—that is, the *Benchmarks Order* states (and *C&W* upholds) that if foreign carriers fail to come forward with proprietary evidence about their costs, then the FCC can assume those costs for them (even though it admittedly does not know what those costs are). Yet, if the foreign carriers decide to come forward to produce their costs (which, under the clear language of the FCC's invitation they did not have to do because this proceeding only applied to U.S. carriers), then by doing so they would effectively waive their jurisdiction in the first instance.

Second, even though the court correctly stated that the FCC may prescribe a ratemaking methodology³⁴ and chastised foreign carriers for failing to produce country-specific data, the court fails to answer why it is also acceptable to use average costs based on teledensity. It is black-letter law that administrative

33. *Id.*

34. See *AT&T Corp. v. Iowa Utils. Bd.*, No. 97-826 et al., 1999 WL 24568, at*7 (U.S. Jan. 25, 1999).

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agencies must account for different market conditions when analyzing rates,³⁵ and teledensity—which measures only the amount of telephone *penetration*—cannot by definition reveal what the underlying costs are for serving individual countries. Thus, as explained in the original article:

the FCC’s “one-size” —or, more accurately “five-sizes” —“fits all” approach to ratemaking is specious at best. The costs of wiring Uzbekistan are simply not the same as the costs of wiring Uruguay, and, moreover, if either Uzbekistan or Uruguay fail to meet the FCC’s benchmarks, *the costs of wiring either country are still not the same as the (U.S.) \$0.08 the FCC thinks is the cost of wiring Sweden.*³⁶

More important, however, is the fact that the court failed to recognize that the use of teledensity actually harms—rather than promotes—consumer welfare (albeit the consumers of developing countries). That is to say, under the FCC’s *Benchmarks Order*, the FCC requires countries to negotiate lower settlement rates over a five-year period of time, depending on teledensity—the lower the teledensity, the longer a foreign firm may charge higher settlement rates. Accordingly, rather than appropriately encouraging infrastructure development in those very countries that need it the most, the FCC’s *Benchmarks Order* instead provides Post, Telegraph [*528] and Telephone Administrations from developing countries with the perverse incentive to *delay*—rather than *accelerate*—new infrastructure development in order to maximize revenues.

3. *The Evisceration of the Mobile-Sierra Doctrine*

Finally, the court held that the FCC’s actions were appropriate and did not violate the *Mobile-Sierra* doctrine. As explained in great detail in the original article, under the *Mobile-Sierra* doctrine, the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful and “to modify other provisions of private contracts when necessary to serve the public

35. See, e.g., *City of Batavia v. FERC*, 672 F.2d 64, 90 (D.C. Cir. 1982).

36. Spiwak, *Survey*, *supra* note 1, at 210.

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interest.”³⁷ As the exegesis of the law further explained, however, this discretion is not unfettered. Under the D.C. Circuit’s landmark decision in *Papago Tribal Authority v. FERC*, the court holds that *Mobile-Sierra*’s “public interest standard is practically insurmountable.”³⁸ Indeed, the D.C. Circuit specifically held in *Western Union*—the very case the D.C. Circuit relies upon in *C&W*—that regulators have an exceptionally high burden of proof to show why a contractual term is not in the public interest, and for that specific reason held that the FCC was not justified in abrogating the settlement agreement, which established compromise rates for leasing special access facilities and set specific procedures for changing those rates in the future.³⁹ Yet, nowhere in the *C&W* court’s opinion is either *Papago* mentioned specifically or *Western Union* cited accurately. Instead, stretching *Chevron*’s mandate that courts must give administrative agencies great deference (in this case, upholding expressly the FCC’s role of cartel manager), the court upheld the FCC’s actions with limited discussion.⁴⁰

Accordingly, by eviscerating the law, the D.C. Circuit now essentially has given every regulatory agency *carte blanche* to abrogate a contract that it believes subjectively to be against the “public interest.” The “public interest” is not an arbitrary standard that regulators may use to promote political pet projects, however. Quite to the contrary, as now-Justice Breyer wrote in his landmark decision, economic regulation—just like antitrust law enforcement—should fulfill identical public policy goals: “low and economically efficient prices,

37. See *Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987).

38. See, e.g., *Papago Tribal Authority v. FERC*, 723 F.2d 950, 954 (D.C. Cir. 1983); *but cf.* *Northeast Utils. Serv. Co. v. FERC*, 55 F.3d 686, 691 (1st Cir. 1995) (“We do not think that *Papago*, read in context, means that the ‘public interest’ standard is practically insurmountable in all circumstances. It all depends on whose ox is gored and how the public interest is affected.”).

39. See, e.g., *Western Union Tel. Co.*, 815 F.2d at 1501-02.

40. Indeed, the court curiously focused primarily on counsel’s argument that *Mobile-Sierra* somehow was contingent on the underlying transaction of the contract rate in question, rather than attempting to determine whether the FCC had presented sufficient justification to escape *Papago*’s “practically insurmountable” test.

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innovation, and efficient production methods.”⁴¹ Stated more colloquially: “[E]conomic regulation is supposed to be a *substitute for*, and *not a complement of* competitive rivalry. It is not, contrary to popular belief, ‘*because we can*.’”⁴²

Like it or not (and perhaps without realizing it), moreover, the court’s decision on this issue will have lasting and far-reaching implications beyond the boundaries of this case because the *Mobile-Sierra* doctrine applies to a wide variety of circumstances beyond just settlement rates. For example, this case will impact significantly how the FCC resolves issues of reciprocal compensation.⁴³ More importantly, however, this case will have significant implications for the U.S. electric utility and natural gas industries (the industries from which the *Mobile-Sierra* doctrine arose), for this case will now give the Federal Energy

41. *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990); *accord* *United States v. FCC*, 652 F.2d 72, 88 (D.C. Cir. 1980) (“[T]he basic goal of direct governmental regulation through administrative bodies and the goal of indirect governmental regulation in the form of antitrust law is the same—to achieve the most efficient allocation of resources possible.” (quoting *Northern Natural Gas Co. v. FCC*, 399 F.2d 953, 959 (D.C. Cir. 1968))).

42. Spiwak, *The Search for Meaningful Definitions*, *supra* note 24, at 8.

43. See, e.g., *Remarks of William E. Kennard, Chairman of the FCC, to the National Association of Regulatory Commissioners, Orlando, Florida*, Nov. 11, 1998 [As Prepared for Delivery] (visited Feb. 15, 1999) <<http://www.fcc.gov/Speeches/Kennard/spwek 833.html>>.

I know that a large number of states have already weighed in on the issue of reciprocal compensation between local carriers handling Internet traffic. I believe that those states have been right to decide that issue when it has been presented to them and I do not believe it is the role of the FCC to interfere with those state decisions in any way.

Parties should be held to the terms of their agreements, and if a state has decided that a reciprocal compensation agreement provides for the payment of compensation for Internet-bound traffic, then that agreement and that decision by the state must be honored.

Now the debate over reciprocal compensation of course raises the issue of jurisdiction. I fully respect the interests of state and local government and its regulators to protect the state’s vital interests and consumers. At the same time, in this global economy, vital national interests are also at stake. We must not allow our mutual legitimate interests be used to divide us as we pursue our mutual and consistent goals.

Id.

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Regulatory Commission (FERC) even greater license to abrogate contracts to implement its flawed restructuring paradigms.⁴⁴ [*530]

B. How Politics Now Trumps Law, Economics, and Facts

As highlighted above, much of the *C&W* court's reasoning was justified by inferring an "America-first" rationale (e.g., only the United States has outpayment deficit; only the U.S. market is competitive; the FCC needs to protect U.S. competitors, not competition; U.S. firms need to engage in joint boycotts against foreign firms, etc.) In this section, however, one can see how the court justified its actions with "explicit" mercantile arguments.

1. *Evisceration of the Price Squeeze Doctrine*

The first example of "explicit" mercantilism can be found in the *C&W* court's discussion of potential price squeeze behavior. In the *C&W* decision, the court reasons that the FCC's Benchmark Condition is necessary because

foreign carriers with U.S. affiliates can use their monopoly power to distort competition in the United States. This occurs when a foreign carrier and its U.S. affiliate act together as an integrated firm, competing in the U.S. market as a provider of international long-distance services while serving as a monopoly supplier of a necessary input, i.e., termination services in the foreign country. By extracting above-cost settlement rates from U.S. carriers, the foreign carrier enables its U.S. affiliate to undercut its competitors, since the above-cost portion of the settlement rate is essentially an internal transfer for the foreign-affiliated U.S. carrier; *for other competitors, it represents a real cost.* Economically, this "price squeeze" behavior has the same effect as if the foreign carrier

44. See, e.g., *FERC Merger Analysis Post-Order No. 888: Where Do We Go from Here?*, PHOENIX CENTER POLICY PAPER SERIES, Policy Paper No. 3, at 13-14 (Aug. 1998) (visited Feb. 15, 1999) <<http://www.phoenix-center.org/wps.html>>.

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engaged in price discrimination by charging its U.S. affiliate a lower settlement rate than it charged all other U.S. carriers.⁴⁵

Moreover, the court went on to reason that even though the FCC originally believed that its “Effective Competitive Opportunities” test would be sufficient to “reduce the monopolist leverage essential for price squeeze behavior,” by 1997, [*531]

at least two things had changed. First, because the United States had committed to allowing foreign competitors freer entry into the U.S. market pursuant to the World Trade Organization Basic Telecom Agreement of February 1997, the Commission had proposed eliminating the effective competitive opportunities test. Second, despite the Commission’s expectation that increased global competition would drive rates toward cost-based levels, “settlement rates remain[ed] far above cost-based levels.” *In light of these changed conditions*, we think the Commission reasonably adopted its current section 214 authorization *policy to deal with the heightened risk of price squeeze behavior*.⁴⁶

There are several major problems with the D.C. Circuit’s analysis from both an antitrust and factual perspective, however.

45. Cable & Wireless P.L.C. v. FCC, No. 97-1612 et al., 1999 WL 7824, at *2 (D.C. Cir. Jan. 12, 1999) (emphasis added). For example, the court found that in the case of Hong Kong:

The Commission’s *Order* assigns Hong Kong’s international carrier, HKTI, a settlement rate of \$0.15 per minute—a rate which, according to petitioners, cannot possibly compensate HKTI for the \$0.29 per minute government-mandated charge that it must pay Hong Kong’s local carrier for terminating each incoming international call. But, according to the intervenors on behalf of the FCC, HKTI is a wholly owned subsidiary of Hong Kong Telecom, and Hong Kong Telecom owns Hong Kong Telephone Company, the monopoly provider of local service in Hong Kong. The \$0.29 per minute charge is therefore simply a “left pocket-right pocket” transaction between two subsidiaries of the same company. Asked about this at oral argument, petitioners had no response.

Id. at *10 (citation omitted).

46. *Id.* at *12 (citations omitted) (emphasis added) (alteration in original).

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As explained in the original article, the primary problem with the FCC's price squeeze analysis is that it ignores the very bedrock of price squeeze law (both regulatory cases and cases brought under section 2 of the Sherman Act)—that is, *that the alleged squeeze must be capable of producing a tangible antitrust injury*.⁴⁷ As further shown in the previous article, under the current and emerging structure of international telecommunications markets, any attempt at a price squeeze is unlikely to succeed for U.S.-originated traffic.⁴⁸

Indeed, if the court thought about it for a moment, not only is it highly unlikely that any foreign firm is actually going to harm competition by being able to drive out a U.S. firm and then recouping super-competitive prices via a “price squeeze,” but if U.S. consumers start to switch over to the supposedly “cheaper” foreign supplier—subsidized ostensibly by those above-cost settlement rate outpayments—then U.S. firms would *a fortiori* lose traffic, and the subsidies to foreign firms would therefore concurrently decline, thus preventing foreign firms from offering service at cheaper rates. As such, the whole notion is a *self-defeating exercise*. As explained in the original article, if the FCC wants to mitigate strategic vertical conduct by a foreign firm, the key is to get standard interconnection rates at the terminating end—the key objective of the World Trade Organization (WTO) but inapposite to the FCC's mercantile policy of mandating entry by U.S. firms.⁴⁹ [*532]

The court, however, had no real understanding (nor apparently did counsel for the petitioners again succeed in educating the court) of these facts. By affirming the FCC's flawed analysis, therefore, the D.C. Circuit has changed price squeeze law to mean that plaintiffs need not show antitrust injury to

47. See, e.g., *Cities of Anaheim v. FERC*, 941 F.2d 1234 (D.C. Cir. 1991); *Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990); *Boroughs of Ellwood City v. FERC*, 731 F.2d 959, 979 (D.C. Cir. 1984) (“It is primarily the *effects* of the price squeeze and its prospective remedy that should guide the Commission's exercise of discretion”); *City of Batavia v. FERC*, 672 F.2d 64 (D.C. Cir. 1982).

48. Spiwak, *Survey*, *supra* note 1, at 205-07.

49. *Id.* at 176-77.

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prevail; rather, they need only show that the defendant had “evil” in his heart and that there was some ephemeral “very high risk to competition.”⁵⁰

There are other significant factual errors in the D.C. Circuit’s price squeeze analysis as well. For example, the court essentially affirms the FCC’s erroneous assumption that settlement rates suddenly will become more “affordable” if they are priced in line with “true costs.” As explained in the first article, however:

Foreign carriers and regulators (i.e., parties reaping the benefits from the above-cost settlement rates) are unsurprisingly reluctant to reduce settlement rates. Yet, even though economic theory indicates that prices are related to cost, for U.S. carriers the settlement rate does *not* measure the settlement cost of providing a minute of IMTS service. With multiple carriers and proportionate returns, the cost relevant to the setting of prices is not only a function of the settlement rate but of the input-output ratio (the ratio of inbound to outbound IMTS traffic) and the carrier’s market share. Only for a monopolist is the settlement rate equal to the marginal settlement cost of the carrier. Given the absence of monopoly in the United States, therefore, there is no reason to expect that the IMTS prices of U.S. carriers should be directly related to the settlement rate.⁵¹

As such, both the court’s and the FCC’s notion of “perfect competition” is just “a Shangri-La up to which no real-world market can measure.”⁵²

50. *Id.* at 205-07.

51. *Id.* at 203.

52. STEPHEN MARTIN, INDUSTRIAL ECONOMICS: ECONOMIC ANALYSIS AND PUBLIC POLICY 16 (1988); Spiwak, *The Search for Meaningful Definitions*, *supra* note 24, at 10-11 (“[B]ecause telecommunications . . . [is] characterized by high fixed and sunk costs, marginal cost pricing (the *raison d’être* of perfect competition) makes ‘perfect competition’ impossible to achieve.”); *see also* AT&T Corp. v. Iowa Utils. Bd., No. 97-826 et al., 1999 WL 24568, at *10 (U.S. Jan. 25, 1999) (“In a world of perfect competition, in which all carriers are providing their service at marginal cost, the
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Tragically, the factual errors do not end there. For example, the court also assumes that—even in the post-WTO world—(1) every country aside from the United States is characterized by a monopoly provider (which is simply not true); and (2) even assuming *arguendo* point (1), it is impossible for regulators to formulate adequate safeguards to mitigate transfer-pricing abuses with a dominant incumbent. Yet, as the court itself admits, [*533] if things are actually getting *better* as a direct result of the WTO and other international liberalization efforts, and as the FCC’s own admission that “increased global competition would drive rates towards cost-based levels,”⁵³ then why is *more* regulation needed to deal with a “heightened risk of price squeeze behavior”?⁵⁴

On the other hand, however, assuming *arguendo* that the court’s factual assertions are correct, then *a fortiori* the FCC should also be incapable of formulating an adequate methodology to protect firms from transfer-pricing abuses from America’s very own dominant suppliers of local access—the regional Bell operating companies—from successfully engaging in price squeeze behavior. This is not so. In the FCC’s *Access Charge Reform Order*, the FCC found specifically that “although an incumbent LEC’s control of exchange and exchange access facilities may give it the incentive and ability to engage in a price squeeze,”⁵⁵ the FCC’s regulatory safeguards, coupled with the structural conditions of the market, make a successful price squeeze unlikely to occur.⁵⁶

Commission’s total equating of increased cost (or decreased quality) with ‘necessity’ and ‘impairment’ might be reasonable; but it has not established the existence of such an ideal world.”).

53. *Cable & Wireless P.L.C. v. FCC*, No. 97-1612 et al., 1999 WL 7824, at *12 (D.C. Cir. Jan. 12, 1999).

54. *Id.* Sadly, this illogical “things-are-better-so-we-need-more-regulation” attitude was also the centerpiece of the FCC’s adjudication of the since-aborted BT/MCI merger. See Spiwak, *Survey*, *supra* note 1, at 216-27.

55. See *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges*, *First Report and Order*, 12 F.C.C.R. 15,982, para. 278, 7 Comm. Reg. (P & F) 1209 (1997).

56. *Id.* paras. 275-82. As the FCC explained, a price squeeze is possible in the domestic context if the incumbent LEC could

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Moreover, when this *Order* was challenged in court, the Eighth Circuit held specifically that the FCC's access charges (the domestic version of settlement rates) imposed on long-distance providers that include LECs' universal service costs are not "above-cost" "since universal service contributions are a real cost of doing business."⁵⁷ Accordingly, if international settlement rates are—as the D.C. [*534] Circuit posits—"real costs,"⁵⁸ then if the logic of the Eighth Circuit is followed, current settlement rates are similarly not "above-cost," since international settlement rates are also simply "a real cost of doing business."⁵⁹ It follows, therefore, that the letter "D" in "domestic" should not also stand for "different."

2. *Evisceration of International Law*

According to the *C&W* court, the FCC's *Benchmarks Order* does not violate the International Telecommunication Union's 1998 Melbourne Treaty (ITU Treaty), which sets the ITU's International Telecommunication Regulations (ITR).⁶⁰ In the court's opinion:

rais[e] the price of interstate access services to all interexchange carriers, which would cause competing in-region carriers to either raise their retail rates to maintain their profit margins or to attempt to maintain their market share by not raising their prices to reflect the increase in access charges, thereby reducing their profit margins. If the competing in-region, interexchange providers raised their prices to recover the increased access charges, the incumbent LEC's interexchange affiliate could seek to expand its market share by not matching the price increase. The incumbent LEC affiliate could also set its in-region, interexchange prices at or below its access prices. Its competitors would then be faced with the choice of lowering their retail rates for interexchange services, thereby reducing their profit margins, or maintaining their retail rates at the higher price and risk losing market share.

Id. para. 277.

57. *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 554 (8th Cir. 1998).

58. *Cable & Wireless*, 1999 WL 7824, at *10. Of course, the great unanswered question is from which economics hornbook did these courts derive the definition of "real costs."

59. Spiwak, *Survey*, *supra* note 1, at 203-04.

60. The International Telecommunication Regulations (Melbourne, 1988) were ratified by the United States on December 23, 1992, and became effective on April 6, 1993, the date of deposit with the ITU. International Telecommunication Regulations, Dec. 9, 1988, S. TREATY DOC. NO. 102-13 (Footnote Continued. . . .)

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Although the treaty provides that carriers “shall by mutual agreement establish and revise accounting rates to be applied between them,” . . . a separate provision “recognize[s] the right of any member, subject to national law . . . to require that administrations and private operating agencies, which operate in its territory and provide an international telecommunication service to the public, be authorized by that member.”⁶¹

Moreover, the court agreed with the FCC that “the right to authorize a carrier to provide service in a given country necessarily includes the right to attach reasonable conditions to such authorization to safeguard the public interest” finding that the ITU Treaty’s preamble “makes clear that ‘it is the sovereign right of each country to regulate its telecommunications.’”⁶²

Sadly, the court in *C&W*—once again—is wrong. First, the court (like most American regulators) has blatantly misread and misconstrued the ITU Treaty. As mentioned *supra*, the court upheld the FCC’s actions on the ground that the ITU Treaty’s preamble states that “‘it is the sovereign right of each country to regulate its telecommunications.’”⁶³ This is [*535] not true. Had the court taken the time to read the actual language of the preamble, it would have found that there is no such absolute right because the words “it is” do not even appear. Rather, the preamble provides the exact opposite:

(1991). Together with the Radio Regulations, they compose the “administrative regulations” of the ITU, some version of which is binding on all ITU Members (*see, e.g.*, Constitution and Convention of the International Telecommunication Union, Dec. 22, 1992, S. TREATY DOC. NO. 104-34, art. 4 (1996)). Compared with the Radio Regulations (now a four-volume set), the ITR are brief—12 pages of text supplemented by eight pages of integrated annexes. They are to the wireline world roughly what the Radio Regulations are to the radio world.

61. *Cable & Wireless*, 1999 WL 7824, at *6 (citations omitted) (alteration in original).

62. *Id.* (citation omitted).

63. *Id.* (emphasis added) (citation omitted).

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While the sovereign right of each country to regulate its telecommunications is fully recognized, the provisions of the present Regulations supplement the International Telecommunication Convention, with a view to attaining the purposes of the International Telecommunication Union in promoting the development of telecommunication services and their most efficient operation while harmonizing the development of facilities for worldwide telecommunications.⁶⁴

In other words, by signing the ITU Treaty (a.k.a. a “contract” among sovereign nations), member states agreed to *waive*—and *not* to reserve—some of their sovereign rights in the telecommunications arena in order to fulfill the broader goals of the ITU. Thus, taking the court’s gross misinterpretation of the preamble that parties agreed to reserve, rather than waive, their sovereign rights, there would be no need for a treaty and no need for a dispute settlement agreement since no party to the treaty could ever be wrong or in violation of the treaty—it would simply be exercising its sovereign rights.

Second, even assuming *arguendo* the court read and interpreted the Melbourne Treaty correctly, the court once again ignores the facts. As demonstrated *passim*, the United States is *not* the only country with a net settlement outpayment deficit. If the court’s logic is followed to its (il)logical conclusion, therefore, and if those countries that also have substantial settlement outpayments deficits enact similar measures, then these countries’ actions would also be perfectly acceptable and legal, despite the FCC’s inevitable argument that such action would be nothing more than an anticompetitive effort to codify above-cost subsidies to foreign monopolists. Thus, to avoid this inevitable conflict, the ITR regime deliberately envisions and requires (yet the FCC and *C&W* court consistently ignore) that there be “mutual agreement” on a route-by-route and service basis (rather than unilateral action based on country groupings).⁶⁵ This is especially important given the fact that while there is often

64. International Telecommunication Regulations, Dec. 9, 1988, S. TREATY DOC. NO. 102-13, preamble (1991) (emphasis added).

65. *Id.* art. 6.2.1.

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general agreement that settlement rates should be “cost based,” there often remains the question as to what costs should be included or how those costs should be calculated.

That is to say, section 6.2.1 of the ITR provides that: “For each applicable service in a given relation, administrations [or recognized private [*534] operating agency(ies)] shall by *mutual agreement* establish and revise accounting rates to be applied between them, in accordance with the provisions of Appendix 1”⁶⁶ As discussed above and in the original article, the FCC’s actions have clearly ignored this requirement. Similarly, these same “administrations or recognized private operating agency(ies)” must also “tak[e] into account relevant CCITT [now TSB] Recommendations and relevant cost trends.”⁶⁷ As explained in the main article, however, the ITU specifically recommended in a new draft Annex to ITU Recommendation D.140 *against* adopting the FCC’s benchmark regime, finding, *inter alia*, that: “The FCC methodology makes no allowance for dependence on net settlement payments. In almost all cases the average rate of reduction necessary under the FCC’s methodology is steeper than even the worst case under the Focus Group methodology” and, therefore, in marked contrast to the FCC’s “exacting” draconian unilateral actions in which rates are prescribed arbitrarily, the ITU recommended that “[t]he exact form that a smoother transition path could take is better left to bilateral negotiations.”⁶⁸

Moreover, this issue can be particularly acute in the case of universal service payments. As explained in the original article, the international community is already dismayed (including specific statements by the ITU) over the fact that

66. *Id.* (emphasis added).

67. *Id.*

68. See *Methodological Note on Transition Paths to Cost-Oriented: Revision 1 of Contribution from the ITU Secretariat*, Nov. 9, 1998 (visited Feb. 15, 1999) <http://www.itu.int/intset/focus/transition_path%20rev1.pdf>. Indeed, the significance of the fact that the ITU—the official telecommunications agency of the United Nations—went so far as to actually use exclamation points in its critique (i.e., a diplomatic communiqué) of the FCC’s actions cannot be discounted. (As a measure of comparison, even U.N. Security Council resolutions condemning Saddam Hussein have yet to include any exclamation points in the text.)

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every time a call is terminated in the United States, a caller must pay into the FCC's universal service fund.⁶⁹ As further explained *supra*, the Eighth Circuit has held recently that these universal service charges, when rolled into access charges, are not "above cost" because they are a "real cost of doing business." Yet, given its actions and policies to date, it is highly doubtful that the United States would react positively if, for example, a country hypothetically defined its internal version of universal service as "a wireline phone to every family unit with installation and usage charges not to exceed those in the United States, 90% funded by international carriers in the settlement-of-account process based on their volume of calls terminating in U.S. territory," even though such a [*537] universal service program would seem to meet all the criteria of the WTO Reference Paper.

Fourth, the court ignores the fact that the ITU offers several (albeit admittedly underutilized) dispute settlement mechanisms.⁷⁰ If the U.S. government had laid an appropriate predicate, then it would have been an option open to immediate action.

Finally, the *C&W* court completely ignores the concept of international "comity" and the importance of this concept in American jurisprudence. *Black's Law Dictionary* defines "comity of nations" as: "The recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another

69. Spiwak, *Survey*, *supra* note 1, at 213-16.

70. The first two paragraphs of Article 56 of the ITU Constitution are quoted below. The third paragraph deals with a compulsory settlement arrangement (in the form of a protocol attached to the Constitution) to which the United States is not party.

(1) Members may settle their disputes on questions relating to the interpretation or application of this Constitution, the Convention or of the Administrative Regulations by negotiation, through diplomatic channels, or according to procedures established by bilateral or multilateral treaties concluded between them for the settlement of international disputes, or by any other method mutually agreed upon.

(2) If none of these methods of settlement is adopted, any Member party to a dispute may have recourse to arbitration in accordance with the procedure defined in the Convention.

Constitution and Convention of the International Telecommunication Union, Dec. 22, 1992, S. TREATY DOC. NO. 104-34, art. 56 (1996); *see also id.* art. 41.

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nation, having due regard 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.”⁷¹ The primary reason to provide comity is to avoid the pitfalls of mercantilism that Adam Smith warned about nearly 200 years ago, and, as such, both courts⁷² and enforcement agencies must consider international comity when enforcing the U.S. antitrust laws and policing other disputes.⁷³ Like it or not, because [*538] there exists for international telecommunications services an international legal regime that describes the rights and obligations of countries in terms of reaching “mutual agreement,” there is a significant comity problem in this case that simply cannot be ignored.⁷⁴

71. BLACK’S LAW DICTIONARY 267 (6th ed. 1990).

72. See, e.g., *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976).

73. See U.S. DEP’T OF JUSTICE & FTC, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS (1995) where both the DOJ and the FTC must, “in determining whether to assert jurisdiction to investigate or bring an action, or to seek particular remedies in a given case, . . . take into account whether significant interests of any foreign sovereign would be affected.” *Id.* § 3.2; see also *id.* § 3.2 n.73 (noting that both the DOJ and the FTC have agreed to consider the legitimate interests of other nations in accordance with the recommendations of the OECD and various other bilateral agreements).

Specifically, section 3.2 requires that:

In performing a comity analysis, the [DOJ and the FTC must] take into account all relevant factors, [including *inter alia*:] (1) the relative significance to the alleged violation of conduct within the United States, as compared to conduct abroad; (2) the nationality of the persons involved in or affected by the conduct; (3) the presence or absence of a purpose to affect U.S. consumers, markets, or exporters; (4) the relative significance and foreseeability of the effects of the conduct on the United States as compared to the effects abroad; (5) the existence of reasonable expectations that would be furthered or defeated by the action; (6) the degree of conflict with foreign law or articulated foreign economic policies; (7) the extent to which the enforcement activities of another country with respect to the same persons, including remedies resulting from those activities, may be affected; and (8) the effectiveness of foreign enforcement as compared to U.S. enforcement action.

Id. § 3.2. For a full discussion of comity in relation to agency enforcement of antitrust laws, see *Id.* § 3.2, at 20-22.

74. Indeed, assuming *arguendo* there were no international legal regime applicable to the commodity or service in question, would the United States be affronted if a foreign government were to act unilaterally so as to limit the ability of U.S.-domiciled entities to contract freely with
(Footnote Continued. . . .)

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III. Implications for the Future

The above discussion shows that, tragically, the D.C. Circuit's decision in *C&W* has dire implications for the future of telecommunications law. Just for the sake of argument, however, assume *arguendo* that the D.C. Circuit was correct and the FCC's actions are wholly lawful. In this hypothetical case, was it still the right thing to do? This Addendum submits that, from a policy perspective, it was not.

First, and perhaps most egregiously, the D.C. Circuit essentially lawfully codifies the notion that "FCC" should, in fact, stand for "Facilitating Cartels and Collusion."⁷⁵ Indeed, by openly approving the fact that the whole purpose of the FCC's actions was to "strengthen the bargaining position of domestic telecommunications companies in negotiations with their foreign counterparts" and by encouraging and condoning U.S. carriers' efforts to engage in what amounts to a group boycott, the D.C. Circuit has bastardized the "public interest" standard into a concept that inappropriately promotes individual competitor interests over competition and American consumer welfare.⁷⁶ To argue that by "protecting competitors we *a fortiori* protect competition" just does not pass the economic giggle test.⁷⁷ [*539]

Second, this case (along with other recent U.S. Trade Representative and FCC actions) sends a clear signal to the international telecommunications community that the United States now considers the 1997 WTO February Accord essentially to

their foreign counterparts in the supply and delivery of a necessary good or service? Would the United States be likely to consult with its allies regarding an appropriate response if a foreign entity took comparable unilateral action affecting all OECD countries? All ITU Members? All WTO Members? Obviously, because the answer to each one of these rhetorical questions is "Yes," there is a comity problem.

75. Spiwak, *The Search for Meaningful Definitions*, *supra* note 24, at 34 n.73.

76. *Id. passim*.

77. *Id.*

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be worthless.⁷⁸ Indeed, the rest of the WTO's signatories certainly did not agree to commit to an arrangement where the United States would be "first among equals" and, more insulting, that their own respective efforts would be discounted by both U.S. regulators and courts. As such, U.S. firms should not be surprised if they find their international counterparts suddenly less cooperative and foreign regulators and courts suddenly more hostile to their interests.⁷⁹

IV. Conclusion

Sadly, despite numerous caveats to the contrary, the Clinton Administration still cannot get the simple concept that Adam Smith explained over 200 years ago: *Mercantilism hurts consumers—and yes, even American consumers*. Indeed, it is still unclear what it hopes to achieve in the long run by burning all of these bridges. Does the Administration really want U.S. firms to be perceived immediately as the "ugly American" every time they enter a foreign counterpart's or regulator's office? If so, then everyone should get out his Nehru jacket and get used to the catcalls of "Yanqui Go Home" because free trade, competition, and deregulation are the last things the FCC's international telecommunications policies are ever going to produce.

78. See, for example, the FCC's recent actions backpedaling against Mexico's admittedly poor WTO offer. See also the plethora of material on the FCC Web page dedicated to the *FCC's International Bureau Actions Concerning Accounting Rates on the U.S./Mexico Route and Potential Violations Telmex/Sprint Communications' Authorization to Serve Mexico* (visited Feb. 15, 1999) <http://www.fcc.gov/Bureaus/International/News_Releases/1998/telmex-sprint.html>. If the FCC suddenly realizes this fact and wants to get out of a bad deal, however, then maybe it should not have accepted such a poor offer in the first instance.

79. See Spiwak, *Survey*, *supra* note 1, *passim*; see also Guy Daniels, *Huffing and Puffing*, COMM. INT'L, Oct. 1998, at 8 ("As a possible trade war looms and Uncle Sam blusters over compatibility issues, . . . the European Community is holding firm in the face of determined U.S. efforts to muscle-in on the third generation mobile standards agenda."); Robert Aamo, *One Law for the Rich*, COMM. INT'L, Nov. 1998 ("The U.S. Federal Communications Commission's international settlement rate policies have caused such disquiet in the global telecomms community that . . . several of the world's largest carriers—and their governments—are prepared to go to law to get things changed.").

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