REGULATION OF COMPETITION IN A GLOBAL ECONOMY

Roscar du Toit

Institute of Comparative Law
Faculty of Law, McGill University
Montréal, Canada
February 1999

A thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfilment of the requirements
for the degree of Master of Laws.

ABSTRACT

This thesis examines the possible approaches to the control of anticompetitive business practices with an international or cross-border dimension. The study commences with a discussion of the importance of competition regulation in the domestic policies of states and the impact that globalization has had on competition regulation. It then proceeds to analyse the various approaches to the regulation of international competition. Reference is made to the development, benefits and drawbacks of the existing methods of unilateral and bilateral regulation and suggestions are made regarding the further elaboration of these methods. A major part of the discussion deals with plurilateral and multilateral competition regulation, analysing the effectiveness of existing regulatory mechanisms and considering a number of recent proposals relating to multilateral regulation. Particular attention is given to the potential role of the WTO in this regard. In conclusion, suggestions are made regarding possible future developments.

RESUME

Cette thèse examine les approches envisageables pour réglementer la concurrence au niveau international, dans la sphère des relations transfrontalières. L'étude débute par une discussion sur l'importance de la réglementation en matière de concurrence dans les politiques internes des États et envisage l'impact de la mondialisation. Puis, les différentes approches d'une réglementation de la concurrence au niveau international sont présentées. Des références sont faites aux développements, aux avantages et aux inconvénients des systèmes de réglementations unilatérales et bilatérales actuels et des suggestions visant à leurs améliorations sont apportées. La majeure partie de la discussion porte sur les réglementations plurilatérales et multilatérales en matière de concurrence. L'efficacité des mécanismes régulateurs existants est discutée et des propositions de nouvelles méthodes de réglementations multilatérales sont avancées. Une attention particulière est porté au rôle de l'O.M.C. dans ce débat. En conclusion, des suggestions sur les développements futurs sont proposées.

ACKNOWLEDGMENTS

I would like to express my appreciation to the Canadian Commonwealth Scholarship and Fellowship Program for awarding me a scholarship, and the Canadian Government for providing the funding for my studies at McGill University. I am furthermore indebted to my supervisor, Prof. Armand de Mestral, for his advice and support in the writing of this thesis and to Tambi Madiega for translating the abstract. Finally, I would like to thank Denise Prévost for her help in proof-reading this thesis and providing me with feedback, encouragement and support throughout.

TABLE OF CONTENTS

INTRODUCTION

The regulation of competition among producers of goods or services is an important issue for states desiring to create and maintain efficient markets and reap the resulting social and economic benefits. In accordance with the concept of sovereignty, states have the authority to regulate competition within their territories, *i.e.* at a domestic level, and many states indeed do so. With the emergence of the practice of applying national competition laws extraterritorially in the 1940s, it became evident that states were also concerned about the control of anticompetitive business practices occurring outside their borders. Since that time, the ongoing process of globalization and the world-wide trend towards economic integration have resulted in an increased interest in the development of methods to control anticompetitive practices with an international dimension. The aforementioned interest is reflected in a number of international agreements relating to the issue and the work currently being done at the regional and multilateral levels by *inter alia* the EU, the OECD, UNCTAD and the WTO.

This thesis is intended to provide a critical survey of the existing mechanisms of international competition regulation and discuss the possible methods which may be employed to regulate competition internationally in the future. The study will commence with an explanation of the significance of competition regulation and indicate what impact globalization has had in this area. The extraterritorial application of domestic competition laws will then be examined in order to determine the acceptability of this approach to the regulation of international restrictive business practices. Tracing the further development of transnational competition regulation, chapter 2 will deal with various bilateral, regional and multilateral agreements relating to the topic. Emphasis will be placed on how effective these agreements are in addressing the relevant regulatory problems which may arise. Finally, in chapter 3, the future of international competition regulation will be discussed. Reference will be made to the various proposals which have been put forward in this regard and a submission will be made as to what the way forward could be.

CHAPTER 1: COMPETITION REGULATION & EXTRATERRITORIALITY

I. Competition Regulation and its Economic Significance

1. General

Competition regulation forms part of many governments' economic or social policy[1] and is typically entrenched in some form of legislation.[2] The purpose or aim of competition regulation may vary among states and a state may even employ competition regulation to achieve several goals. However, it is generally accepted that the core objective of competition regulation is to ensure the efficiency of markets.[3] According to most economic analyses, efficiency in this context refers to the economic efficiency of markets, the notion being that by ensuring efficient markets, social welfare will be maximised.[4] The concept of an efficient market is manifested in lower consumer prices and a wider choice of higher quality products.[5] In this regard it is important to note that an efficient market does not necessarily have to be a competitive market - in certain markets a monopolist may be a more efficient producer (for instance, due to economies of scale) than a group of producers in a perfectly competitive market would be.

---

[1] As of the end of 1996, seventy countries possessed competition laws. Of these laws, 61% dated from 1990 or later and 79% dated from 1980 or later. See M.R.A. Palim, "The worldwide growth of competition law: an empirical analysis" (1998) XLIII Antitrust Bull. 105 [hereinafter Palim] at 109.

[2] According to the practice employed by most OECD members, "competition policy" can be defined as "the body of laws and regulations governing business practices...". Some countries have a wider definition which includes government policies that may affect competition. OECD, Committee on Competition Law and Policy, *Interim Report on Convergence of Competition Policies*, Doc. No. OCDE/GD(94)64, (1994), reproduced in (1994) World Competition 18:1 167 at 171.

[3] R.A. Posner, *Antitrust Law*, (Chicago: The University of Chicago Press, 1976) at 4; *supra* note 2 at 172.

[4] "Welfare" is defined as the sum of consumer surplus and producer surplus in the industry under consideration. For a detailed discussion of the economics of competition policy see WTO, *Annual Report 1997 Volume I - Special topic: Trade and competition policy*, (Geneva: WTO, 1997) [hereinafter the 1997 WTO Report] at 34-38; E.T. Sullivan & J.L. Harrison, *Understanding Antitrust and Its Economic Implications*, 2d ed. (New York: Matthew Bender & Co., 1994); L. Phlips, *Competition Policy: A Game-Theoretic Perspective*, (Cambridge: University Press, 1995) and F.M. Scherer, *Competition Policies for an Integrated World Economy*, (Washington, D.C.: The Brookings Institution, 1994).

[5] *Supra* note 2 at 172.

Other than efficiency, objectives which may be pursued by using competition policy include consumer protection,[6] the promotion of economic integration,[7] the facilitation of economic liberalisation,[8] the promotion of democratic values,[9] the promotion of economic and social development,[10] and the protection of opportunities for smaller businesses.[11] It is important to keep these different objectives in mind when looking at competition regulation from an international perspective as the different objectives envisaged by differing policies may have an effect on the way competition policies will be formulated, interpreted and enforced in different states.[12] Furthermore, different objectives pursued within the same policy may be inconsistent with one another,[13] for instance the objective of protecting small businesses may conflict with the efficiency objective.

It should be noted that there is no general consensus amongst governments or economists as to the correct theory to be employed in the design of competition policy, some theories even holding that competition regulation is unwarranted as it itself leads to market

---

[6] It is accepted that consumer protection is the overriding goal of US antitrust policy. See the 1997 WTO Report, *supra* note 4 at 44.

[7] A good example of competition policy being employed to achieve this goal is provided in Articles 2 and 3(g) of the *Treaty Establishing the European Economic Community*, 25 March 1957, 298 U.N.T.S. 3, as amended [hereinafter the *Treaty of Rome*] in terms of which the European Community is to ensure economic cohesion among its Members by *inter alia* making use of "a system ensuring that competition in the internal market is not distorted".

[8] Transitional economies, such as that of China, which are economic systems in transition from socialist to market-driven economic structures, use competition policy as an instrument to help achieve liberalisation. See B. Song, "Competition Policy in a Transitional Economy: The Case of China" (1995) 31 Stan. J. Int'l L. 387.

[9] For example, see the Preamble of the new South African *Competition Act 1998*, No. 89 of 1998 which provides that one of the act's aims is "to provide all South Africans equal opportunity to participate fairly in the national economy".

[10] WTO, Working Group on Trade and Competition Policy, *Report (1998) of the Working Group on the Interaction between Trade and Competition Policy to the General Council*, WTO Doc. WT/WGTCP/2 (1998) [hereinafter WTO 1998 Working Group Report] at 12.

[11] *Ibid.* at 20.

[12] Compare, for instance, the different approaches followed in the United States, the European Union and Japan. See A. Mattoo & A. Subramanian, "Multilateral Rules on Competition Policy - A Possible Way Forward" (1997) 31:5 J. World T. 95 [hereinafter Mattoo & Subramanian] at 99; P. Nicolaides, "Towards Multilateral Rules on Competition - The Problems in Mutual Recognition of National Rules" (1994) 17:3 World Comp. 5 [hereinafter Nicolaides (1994)] at 9-35.

[13] L. Waverman, W.S. Comanor & A. Goto, eds., *Competition Policy in the Global Economy*, (London: Routledge, 1997) [hereinafter Waverman] at 34.

imperfections.[14] However, regardless of the differences in objectives among national competition policies and the theories on which these policies are based, it may be said that the competition laws of most states have a number of main elements in common. These include regulations relating to the prohibition of certain horizontal agreements,[15] vertical market restraints,[16] mergers[17] and abuses of dominant positions.[18]

The differences and discrepancies between different states' competition regulations would not pose any kind of problem to trade if the competitiveness of markets was a purely domestic phenomenon, which could be regulated effectively within the limits a given state's borders and was not influenced by what happened in foreign markets. The fact is, however, that trade across state borders is an everyday occurrence, the resulting interaction between domestic markets and involvement in international markets having a far-reaching effect on the economies of trading states, which have become largely

---

[14] E.-U. Petersmann, "International Competition Rules for Governments and for Private Business" (1996) 30:3 J. World T. 5 [hereinafter Petersmann (1996)] at 7-9; the 1996 WTO Report, *supra* note 4 at 38-39; P.S. Crampton, "Alternative Approaches to Competition Law - Consumers' Surplus, Total Surplus, Total Welfare and Non-Efficiency Goals" (1994) 17:3 World Comp. 55 [hereinafter Crampton]; I. De León, "Should We Promote Antitrust in International Trade?" (1997) 21:2 World Comp. 35 [hereinafter De León].

[15] Horizontal arrangements, an example of which are cartels, are explicit or implicit arrangements between firms active on the same production level of the same market. These agreements may *inter alia* relate to price fixing, market sharing or reduction of output, all of which have a negative impact on consumer welfare. See the 1997 WTO Report, *supra* note 4 at 40-42; E.M. Fox & J.A. Ordover, "The Harmonization of Competition and Trade Law - The Case for Modest Linkages of Law and Limits to Parochial State Action" (1996) 19:4 World Comp. 5 [hereinafter Fox & Ordover] at 17-30; and P. Nicolaides, "Competition Policy in the Process of Economic Integration" (1997) 21:1 World Comp. 117 [hereinafter Nicolaides (1997)] at 135.

[16] Vertical market restraints, which include exclusive dealing agreements and tying arrangements, are agreements between firms operating on different levels of the production and marketing chain of a product. In effect, these agreements put restrictions on firms' ability to freely compete in markets which, once again, may be to the detriment of consumers. Resale price maintenance, a form of vertical market restraint, may be employed to combat double marginalization, the practice in terms of which enterprises at each level of a production chain add a surcharge to the product price, and may therefore have a positive effect on consumer welfare despite its anticompetitive nature. *Ibid.*

[17] A merger, simply put, entails the process by which two or more independent firms amalgamate into a new one. Mergers can be to the advantage of consumers, *e.g.* when economies of scale resulting from the merger are passed on to the consumer, but may also have anticompetitive consequences, *e.g.* when the merger has a monopolising or oligopolising effect. *Ibid.*

[18] The abuse of a dominant position entails the practice employed by firms dominant in a particular market to maintain, enhance or exploit that position. Examples of such abuses include exclusive dealing, tied selling and price predation. The abuse of a dominant position, just like the other restrictive business practices referred to above, may hold negative consequences for consumer welfare and it is therefore clear why most competition law regimes will contain provisions prohibiting these practices. *Ibid.*

economically interdependent over the last 50 years.[19] These external effects or "spillovers" may have positive or negative consequences in foreign markets, negative spillovers resulting from the fact that nationally pursued competition policies affect foreign consumers and producers, but do not address their interests.[20]

2. Private vs. governmental restraints to trade

Both governments and private entities may indulge in practices which have a negative impact on competition in international trade.[21] Governments may, through the imposition of trade instruments such as tariffs and subsidies, seriously distort transnational trade. Such practices must be distinguished from the private anticompetitive practices of companies, *e.g.* vertical restraints, which may also have a negative effect on cross-border trade. As will be explained in more detail later, governmental restraints to trade have to a very large extent been nullified by international agreements on the subject. Private restraints, however, remain and it is the regulation of these private restraints that constitute the main topic of this thesis.[22] Certain governmental restraints linked to these private restraints, *e.g.* the failure of governments to legislate or enforce adequate domestic competition rules, will, however, also be discussed.

3. The increasing international impact of domestic competition regulation

From what was said above, it is clear that domestic competition policies (or the lack thereof) may have a cross-border effect. In recent years, competition regulation in the

---

[19] M.R. Joelson, "Harmonization: A Doctrine for the Next Decade" (1989) 10 Nw. J. Int'l L. & Bus. 133 at 134.

[20] The 1997 WTO Report, *supra* note 4 at 52.

[21] *Ibid.* at 33; E.-U. Petersmann, "International Competition Rules for the GATT-MTO World Trade and Legal System" (1993) 27 J. World T. 35 [hereinafter Petersmann (1993)] at 35.

[22] In most countries, competition policy focuses on the private sector, but in some jurisdictions, such as the EU, government behaviour such as subsidisation, is also addressed by competition policy. See Waverman, *supra* note 13 at 34.

international sphere has received an increasing amount of attention. This is due to several developments linked to the globalization of the world economy.[23]

There are two factors which have been identified as underlying the process of globalization, the first being recent developments in the technology related to communication, information and transportation. These developments have not only made it easier for enterprises to seek out and enter new foreign markets, but have also resulted in the possibility for enterprises to create and manage globally dispersed production systems, both of which have resulted in a higher volume of cross-border trade.

The second factor underlying globalization which, it is submitted, is more important for the purposes of competition regulation, is the success achieved in the various General Agreement on Tariffs and Trade (GATT) Rounds in the creation of a climate conducive to international trade. This has been accomplished by lowering national, government-imposed barriers to international trade, such as tariffs and subsidies. With the removal of these governmental restraints to trade, the focus has been shifted to national private restraints, *i.e.* anticompetitive behaviour by enterprises, which have consequently become relatively more important than before.[24] Not only has the removal of governmental restraints resulted in existing private restraints becoming more obvious, but the resultant freer trade has engendered new defensive private restraints as enterprises, previously protected from foreign competition by governmental restraints, now look for other ways to protect themselves.[25]

Closely linked to the decline in trade barriers is the decline in barriers to investment. As more and more enterprises have become involved in foreign direct investment, a raised awareness regarding the potential restraining effect of foreign states' competition policies

---

[23] The 1997 WTO Report, *supra* note 4 at 33; C.W.L. Hill, *International Business: Competing in the Global Marketplace*, 2d ed. (Chicago: Irwin, 1997) [hereinafter Hill] at 5-12.

[24] L. Brittan & K. Van Miert, "Towards an International Framework of Competition Rules" (1996) 24 I.B.L. 454 at 454.

[25] E.M. Fox, "Toward World Antitrust and Market Access" (1997) 91 A.J.I.L. 1 [hereinafter Fox (1997)] at 3.

on international trade has resulted. The reverse side of this is that there has been a increase in the number of bilateral, regional and multilateral agreements relating to the protection of foreign company interests operating within a country's borders. The opinion exists that this protection should be counterbalanced with some form of international co-operation with regard to the control of restrictive business practices by these companies. The result of the decline in trade and investment barriers is consequently that anticompetitive practices by enterprises are much more likely to have an international dimension and effect than was previously the case. The impact of multinational enterprises on competitiveness in international markets is further accentuated by the many horizontal global organisational forms that have developed in recent years, such as joint ventures, strategic alliances and R&D consortia.[26]

Additional reasons for the growing interest in international competition regulation arise from the perceived advantages which would flow from the international harmonisation of competition policies.[27] For instance, it is argued that there are advantages in having the activities of businesses involved in cross-border transactions assessed by the same or compatible competition criteria as this would simplify business planning and reduce certain transaction costs, *e.g.* the costs involved in multiple notifications in transnational mergers.

A final factor which has contributed to the growing interest in the international regulation of competition is the developing international consensus that competition law is the appropriate instrument to combat anticompetitive practices by enterprises.[28] The use of trade instruments, such as antidumping levies, may themselves lead to market distortions and can therefore not be regarded to be the most suitable way to address restrictive business practices.

---

[26] Waverman, *supra* note 13 at 1.
[27] See Fox & Ordover, *supra* note 15 at 111.
[28] The 1997 WTO Report, *supra* note 4 at 33.

II. Extraterritorial application of competition law

1. General

In its earliest and least developed form, international competition regulation was (and often still is) effected by means of the extraterritorial application of domestic competition law, *i.e.* a state would apply its domestic competition laws to practices occurring outside its borders. The question may be asked why states are not able to achieve their competition policy goals by simply relying on each other's competition laws. A number of reasons can be cited in response. First and foremost, there are still states which lack competition laws which would obviously make this approach unworkable in many cases.[29] Secondly, it is sometimes the case that when states do have competition laws, the exemptions provided in them or the lack of enforcement of the laws' provisions by the relevant state authorities, may render them ineffective from another state's point of view. Lastly, even if all states had competition laws and these laws were enforced consistently, different legal concepts, interpretations and underlying policy objectives of the various laws make it unlikely that one state's competition policy goals would be achieved by relying on another state's laws.

Extraterritoriality has frequently led to protests by foreign states regarding the violation of their sovereignty and often results in jurisdictional conflicts when two or more states assert their jurisdiction over the same anticompetitive transaction or practice. Consequently the extraterritorial application of laws is a contentious issue. There is, however, a general international consensus that the extraterritorial application of laws, including competition laws, may be justified in certain instances, *e.g.* in the case of purely private cartels causing direct harm to buyers in the regulating state.[30]

Apart from the matter of prescriptive jurisdiction, which raises the aforementioned question of sovereignty, extraterritorial application of competition laws is further complicated by the more practical issues of enforcement jurisdiction. In this regard one may refer to the complications which may arise if a private complainant or government

---

[29] *Ibid.* at 74.

competition agency is not able to get access to information relating to a dispute abroad or is not able to enforce a judgement abroad, despite having prescriptive jurisdiction.[31] These practical problems are often addressed in bilateral agreements between governments.

In the following section, the origin and development of the extraterritorial application of domestic competition law based on, *inter alia*, the effects theory will be examined, with reference to a number of jurisdictions including the United States (US), the European Union (EU) and Germany. Due to the leading role it has played in the development of extraterritoriality, the US position will necessarily receive more attention. Particular reference will be made to the development of the effects theory, the methods employed to limit conflicts which may potentially arise from extraterritorial application of competition laws and the methods used to thwart such application.

2. Bases for extraterritorial competition regulation

2.1 The United States

The US statutes relating to federal competition (or antitrust as it is known in the US) matters in general and mergers in particular are the *Sherman Act*[32] and the *Clayton Act*,[33] respectively.[34] The *Sherman Act* was initially deemed not to have extraterritorial

---

[30] Fox (1997), *supra* note 25 at 3.

[31] R.B. Starek, "International Aspects of Antitrust Enforcement" (1996) 19:3 World Comp. 29 [hereinafter Starek] at 33.

[32] *Sherman Act*, 15 U.S.C. §§ 1-7 (1890) [hereinafter the *Sherman Act*]. The enforcement of the *Sherman* and *Clayton Acts* is the shared responsibility of the Antitrust Division of the United States Department of Justice (DOJ) and the Federal Trade Commission (FTC). Private parties are also statutorily empowered to apply for injunctions and sue for damages arising from behaviour in violation of federal antitrust laws (§§15,26) and it is therefore possible that anticompetitive behaviour will be challenged by an individual where neither the DOJ nor the FTC are pursuing the matter. Similarly, the state attorneys-general of the US have the authority (independent of DOJ or FTC action) to seek damages or bring an injunctive action under the *Clayton Act* where a resident of their state has been injured due to certain conduct in violation of antitrust provisions (§15c).

[33] *Clayton Act*, 15 U.S.C. §§ 12-27 (1914) [hereinafter the *Clayton Act*].

[34] Reference is only being made to statutes relating to the extraterritorial application of US domestic antitrust law. The US also has other unilateral methods of ensuring the competitiveness of foreign markets, *e.g.* Section 301 of the *Trade Act*, 19 U.S.C. § 2411 (1974). In terms of Section 301(d)(3)(B)(i)(IV), the US may take action, *e.g.* restrict imports, against foreign governments which *inter*

application as it was held to apply only to activities or practices within the territory of the US.[35] Since the *Alcoa* decision,[36] however, the US has undoubtedly supported the exercise of extraterritorial jurisdiction based on the so-called effects theory.

In terms of the effects theory, a state may exercise jurisdiction over extraterritorial conduct where such conduct has an effect within its territory.[37] The court's formulation of the effects theory in the *Alcoa* case was very wide[38] and later application of US antitrust provisions in terms thereof has been the source of much controversy.[39] Subsequently, US courts have made various attempts to reformulate the theory in order to limit conflicts with other states.

Continued support for the extraterritorial application of the *Sherman Act* based on the effects theory may be gleaned from recent decisions, *e.g. United States v. Nippon Paper Industries Co.*[40] Acceptance of the effects theory may also be found in the *Foreign Trade Antitrust Improvements Act*,[41] the American Law Institute's *Restatement (Third) of the*

---

alia tolerate "systematic anticompetitive activities by enterprises or among enterprises in the foreign country that have the effect of restricting ... access of United States goods or services to a foreign market".

[35] *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909). *In casu* it was held (at 511) that the "general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done".

[36] *United States v. Aluminium Co. of America*, 148 F. 2d 416 (2nd Cir. 1945).

[37] M.W. Janis, *An Introduction to International Law*, (Toronto: Little, Brown, 1988) at 241.

[38] *Supra* note 36 at *444*. The Court formulated the effects principle as follows: "...it is settled law ... that any state may impose liabilities, even upon persons not within its borders which the State reprehends; and these liabilities other states will ordinarily recognize."

[39] Some notable cases in this regard are: *United States v. General Electric Co.*, 82 F. Supp. 753 (D.N.J. 1949) 115 F. Supp. 835 (D.N.J. 1953); *United States v. Imperial Chemical Industries Ltd.*, 105 F. Supp. 215 (S.D.N.Y. 1952); and *Laker Airways Ltd. v. Sabena*, 731 F.2d 909 (D.C. Cir. 1984).

[40] *United States v. Nippon Paper Industries Co., Ltd.*, 109 F.3d 1 (1st Cir. 1997), *cert. denied*, _ U.S. _ , 118 S Ct. 685 (1998). Cited and discussed by G. Castañeda *et al.*, "International Antitrust" (1998) 32 Int'l Lawyer 291 [hereinafter Castañeda] at 292-293; and J. Davidow, "US Antitrust in 1997 - The International Implications" (1998) 21 World Comp. 25 [hereinafter Davidow] at 27-28. *In casu* the court held that defendants subject to the personal jurisdiction of US courts, could be prosecuted under the *Sherman Act* for antitrust violations committed abroad if the violations were targeted directly against the US.

[41] *Foreign Trade Antitrust Improvements Act*, 15 U.S.C. § 6a (1988) [hereinafter the FTAIA]. The FTAIA provides that federal courts have subject matter jurisdiction over foreign conduct, other than imports, having a "direct, substantial and reasonably foreseeable effect" on commerce within the US. (15 U.S.C § 7).

Foreign Relations Law of the United States (1987)[42] and the *DOJ and FTC 1995 Antitrust Enforcement Guidelines for International Operations.*[43]

2.2 The European Union

The basis for extraterritorial jurisdiction in the EU is not so clear. The competition law rules of the EU are set out in Articles 85 and 86 of the *Treaty of Rome*[44] and are enforced in accordance with the provisions of a number of regulations such as Council *Regulation 17/62*[45] and *Regulation 4064/89.*[46] As is the case with US antitrust laws, the EU's competition laws may be applicable outside its Members' territories.[47] Would such application also be based on the effects theory?

Although it is established in EU law that behaviour which has an effect on trade within the EU may fall within the scope of Articles 85 and 86, neither the European Commission nor the European Court of Justice have ever expressly endorsed the effects theory as a basis for jurisdiction.[48] To date, the closest the Court of Justice has come to accepting the effects theory was by confirming the European Commission's jurisdiction in cases where *implementation* of an anticompetitive agreement took place within the territory of one of the Member States even though the relevant undertakings were established outside the

---

[42] [Hereinafter the *Restatement (Third)*], cited and discussed by R.C. Reuland, "Hartford Fire Insurance Co., Comity and the Extraterritorial Reach of United States Antitrust Laws" (1994) 29 Texas Int'l L.J. 159 at 189. The *Restatement (Third)* provides in Section 402 that "a state has jurisdiction to prescribe law with respect to ... conduct outside its territory that has or is intended to have substantial effect within its territory".

[43] *US Department of Justice and Federal Trade Commission 1995 Antitrust Enforcement Guidelines for International Operations*, 34 I.L.M. 1080 (1995), ¶3.1.

[44] *Supra* note 7. Article 85 prohibits certain practices which have as their object or effect the prevention, restriction or distortion of competition within in the EU. Article 86 prohibits the abuse, by one or more undertakings, of a dominant position the undertaking(s) may have in the common market insofar as it may affect trade between the Member States. Enforcement of EU competition law is the responsibility of Directorate-General IV (DG IV) of the European Commission.

[45] EC, *Council Regulation 17/62 of 21 February 1962 First Regulation implementing Articles 85 and 86 of the Treaty*, [1962] O.J. L.204/13 [hereinafter *EC Regulation 17/62*].

[46] EC, *Council Regulation 4064/89 of 12 December 1989 on the control of concentrations between undertakings*, [1989] O.J. L. 391/1, as amended O.J. L. 257/15 (Sept. 21, 1990), O.J. L. 180/97 (July 9, 1997) [hereinafter the *Merger Control Regulation*].

[47] J.W. Rowley & D.I. Baker, eds., *International Mergers The Antitrust Process*, vol. 1, 2nd ed. (London: Sweet & Maxwell, 1996) at 455.

aforementioned states' territories.[49] This is the approach the Court of Justice took in the *Wood Pulp* case.[50] An alternative basis that has been used by the EU for establishing extraterritorial jurisdiction was formulated in the *Dyestuffs* case[51] and is called the "economic unit doctrine". In terms of this doctrine, jurisdiction over foreign parent companies is established by imputing the behaviour of a subsidiary company operating in the EU to its parent company.[52]

Reference may also be made to the provisions of the *Merger Control Regulation*[53] which sets out DG IV's policy and powers relating to the control of mergers. In terms of Article 1 of the Regulation, the Commission has jurisdiction over mergers with a so-called "Community dimension". Since the method of establishing the existence of a Community dimension involves examining the EU turnover of the undertakings concerned,[54] the Commission may in certain cases have jurisdiction over mergers of companies incorporated outside the EU whether or not they have subsidiaries within the EU. A case in point in the recent merger of Boeing and McDonnell Douglas, two US-based companies.[55] Clearly such jurisdiction would be based on the effect in the EU market of conduct outside the Member States' territories and consequently it is submitted that the Commission's jurisdiction in such cases is based on the effects principle.[56]

---

[48] *Ibid.*
[49] *Ibid.*
[50] *E.C.J., Ahlström Osakeyhtiö and others v. EC Commission*, Joined cases 89,104, 114, 116, 117 and 125 to 129/85, [1988] 4 C.M.L.R. 901.
[51] *E.C.J., I.C.I. Ltd, J.R. Geigy AG and Sandoz AG v. EC Commission*, Cases 48, 52 and 53/69, [1972] 11 C.M.L.R. 557.
[52] *Supra* note 47 at 455.
[53] *Supra* note 46.
[54] *Ibid.*, Article 1(2) & Article 1(3).
[55] EC, *Commission Decision 97/816/CE of 8 December 1997 in Case IV/M.877, Boeing/McDonnell Douglas*, [1997] O.J. L. 366/97, [1997] 5 C.M.L.R. 270. This cased is discussed *infra* in chapter 2, section 2.2.
[56] Mention should also be made of EC, *Regulation 3286/94 of 22 December 1994 laying down Community procedures in the field of common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organisation*, [1994] O.J. L.349/71, which is the EU equivalent of Section 301 of the US *Trade Act*, *supra* note 34. In terms of Article 4(1) of the Regulation, a Community enterprise may lodge a complaint with the Commission where the enterprise "ha[s] suffered adverse trade effects as a result of obstacles to trade that have effect on the market of a third country". From the further wording of the section, it is clear that any complaint must be based on a violation of international trade law as contained in a multilateral or plurilateral agreement. Pure "effects" will therefore not provide a basis for a complaint.

2.3 Germany

Germany, a Member State of the EU, has a very well-developed competition law of its own, the *Law against Restraints on Competition*.[57] In terms of Section 98(2), the GWB is to be applied to all restraints on competition which have a domestic effect even if they have been initiated outside Germany.[58] In principle, therefore, the German approach to the exercise of extraterritorial jurisdiction is the same as that of the US - however, German courts have developed the issue a bit differently from their US counterparts.[59]

The first case of relevance is the *Organic Pigments* case[60] in which the German Supreme Court required that the anticompetitive conduct on which jurisdiction is to be based must have a direct effect on the German market and that such effect must be substantial. This corresponds with the US approach as formulated in the *Foreign Trade Antitrust Improvements Act*. In the *Bayer/Firestone* case,[61] the German Federal Appeals Court lay down the further requirement that external factors, *i.e.* external or foreign restraints on the application of the GWB, must also be taken into account before Section 98(2) can be applied to a particular case.

The external restraints issue was again raised in the *Morris/Rothmans* case[62] where a two-dimensional test to take foreign interests into account was developed.[63] This test consists of firstly weighing up the German government's interest in preventing specific anticompetitive behaviour against the interests of the foreign state involved, and secondly, weighing up German regulatory interests against the disadvantage foreign enterprises or

---

[57] *Gesetz gegen Wettbewerbsbeschraenkungen* (Germany), 1957 *Bundesgesetzblatt* [BGBl] I 1081 (July 27). [hereinafter the GWB]. The government agency entrusted with enforcing German antitrust law is the *Bundeskartellamt* (Federal Cartel Office or FCO) which has the authority to issue orders prohibiting violations of the GWB and set fines for such violations. See D.J. Gerber, "The Extraterritorial Application of the German Antitrust Laws" (1983) 77 A.J.I.L. 756 [hereinafter Gerber (1983)] at 758.

[58] *Supra* note 47 at 640.

[59] *Supra* note 57 at 756 *et seq.*

[60] *Organic Pigments, Bundesgerichtshof*, 29 May 1979, WuW/E BGH 1613 (*Organische Pigmente*). Cited and discussed by Gerber (1983), *ibid.* at 772-773.

[61] *Bayer/Firestone, Oberlandesgericht*, 26 November 1980, WuW/E OLG 2411 (*Synthetischer Kautschuk I, 1980*). Cited and discussed by Gerber (1983), *ibid.* at 773-775.

[62] *Morris/Rothmans*, Federal Cartel Office, 24 February 1982, WuW/E BKartA 1943 (Morris/Rothmans). Cited and discussed by Gerber (1983), *ibid.* 775-779.

governments would suffer as a result of the exercise of jurisdiction. The opinion exists that this two-dimensional test may provide a solution for US courts' difficulties in applying the effects principle, as the US approach allegedly does not define the effects theory clearly enough and fails to adequately take the sovereign interests other states into account - criticism which remains valid despite recent developments in the US.[64]

2.4 Other states

Many other states also provide for the application of their competition laws to anticompetitive practices having an effect within their borders. Jurisdictions which may serve as examples in this regard include Canada[65] and England.[66] The effects theory has also achieved acceptance in developing countries such as South Africa.[67] Despite this emerging international consensus regarding the need for and legitimacy of the effects theory, its practical application still leads to conflicts between states.

3. Methods of conflict avoidance

A number of methods have been devised to limit the conflicts which may arise from the extraterritorial application of domestic law. This section contains a general discussion of the methods of conflict avoidance states have adopted when applying their laws to practices occurring in other states' territories. Reference will also be made to the methods employed by states to protect their interests against expansive jurisdictional claims by other states.

---

[63] Gerber (1993), *ibid.* at 780.
[64] *Ibid.* at 756.
[65] See J.-G. Castel, ed., *The Canadian Law and Practice of International Trade*, 2d ed. (Toronto: Emond Montgomery, 1997) [hereinafter Castel] at 688-601.
[66] *Competition Act 1980* (U.K.), 1980, c. 21, s. 2(1). The effects theory has also been accepted as a basis for extraterritorial jurisdiction by *inter alia* France, Denmark, Sweden and the member states of Ancom and Mercosur. See D.J. Gerber, "Beyond Balancing: International Law Restraints on the Reach of National Laws" (1984) 10 Yale J. Int'l L. 185 [hereinafter Gerber (1984)] at 201-202; G. Mancero-Bucheli, "Anti-Competitive Practices by Private Undertakings in ANCOM and MERCOSUR: an Analysis from the Perspective of EC Law" (1998) 47 I.C.L.Q. 149 [hereinafter Mancero] at 160.
[67] *Supra* note 9. Article 3(1).

3.1 Comity, the balancing of state interests and the doctrine of forum non conveniens

3.1.1 Comity

Comity has become an international standard used in restraining the assertion of extraterritorial jurisdiction - it is, however, not a rule of international law but a discretionary rule of domestic law.[68] In utilising the principle of comity, a state and its courts will refrain from applying the state's laws extraterritorially where such application "would unduly interfere with foreign sovereign interests, or if the subject matter in question has greater contacts with the foreign state".[69] A distinction is made between positive and negative comity, positive comity meaning that a state takes positive action for reasons of comity, *e.g.* forbidding domestic anticompetitive behaviour which affects other states, and negative comity which means that a state will refrain from acting in a certain way, *e.g.* not applying its laws extraterritorially.

The principle of negative comity in antitrust cases was addressed by US courts in *Timberlane Lumber Co v. Bank of America.*[70] It was held that, since the effects test fails to take other states' interests into consideration, additional factors should be taken into account to determine whether the interests of the US are "sufficiently strong, *vis-à-vis* those of other nations to justify an assertion of extraterritorial authority".[71] These factors include the degree of conflict with foreign law or policy, the relative significance of effects on the US compared to other states, the extent to which there is an intent to cause harm to or affect US commerce and the foreseeability of such effect. In terms of this decision, therefore, a state can be assumed to have extraterritorial antitrust jurisdiction in a given case if there are sufficient connecting factors, *e.g.* place of conduct or effects, present - relevant state interests in the case may, however, require that application of domestic law be restrained.[72] This rule of reason has been criticised as it is difficult to apply and it does

---

[68] J.-G. Castel, ed., *Extraterritoriality in International Trade - Canada and the United States of America Practices Compared*, (Toronto: Butterworths, 1988) at 233-234.
[69] H. Booysen, *International Transactions and the International Law Merchant*, (Pretoria: Interlegal, 1995) at 125.
[70] *Timberlane Lumber Co. v. Bank of America*, 549 F. 2d 597 (9th Cir. 1976).
[71] *Ibid.* at 613.
[72] K.M. Meessen, "Antitrust Jurisdiction under Customary International Law" (1984) 78 A.J.I.L. 783 at 785.

not provide foreign parties with a clear answer as to whether the US will exercise jurisdiction in a given case.[73]

A significantly different approach was taken in the *Laker Airways* case,[74] where it was determined that once US antitrust law was found to be applicable in a case, its application could not be declined or modified on comity grounds as courts are bound to follow the directives of their respective states' political branches. It was, however, held that in cases where foreign interests outweigh those of the US, "comity may have a strong bearing on whether application of United States antitrust laws should go forward".[75] In terms of this judgement, any conflict between states arising from extraterritorial application of legislation can only be resolved by way of negotiations between the states concerned.[76]

The opinion exists that the approach taken in *Laker Airways*, although it will lead to more conflicts, is better than refusing extraterritorial application of competition on comity grounds as any resulting governmental negotiations will most likely lead to bilateral and multilateral agreements regarding such application.[77] Feigning support of the comity approach whilst having courts make decisions with parochial results would be more damaging to international relations than it would be to assert jurisdiction without reference to comity.

More recently, in *Hartford Insurance Co. v. California*,[78] the US Supreme Court decided that US courts should only restrain their exercise of jurisdiction on the basis of comity where foreign law requires foreign parties to act contrary to US antitrust law or where compliance with both the laws of the US and the foreign jurisdiction is impossible. This approach of the Supreme Court has been criticised as it does not allow US courts to properly take foreign concerns into account and consequently increases the potential for

---

[73] *Supra* note 69 at 122.
[74] *Supra* note 39.
[75] *Ibid.* at 938.
[76] *Supra* note 72 at 787.
[77] R.J. Weintraub, "The Extraterritorial Application of Antitrust and Securities Laws: An Enquiry into the Utility of a "Choice of Law" Approach" (1992) 70 Texas L. Rev. 1799 at 1817.

international conflict.[79] The *Hartford* decision has furthermore resulted in legal uncertainty due to the fact that the US circuit courts have interpreted the decision in different ways. Currently, the Ninth Circuit still applies the *Timberlane* comity factors, the First Circuit follows *Hartford* to the exclusion of *Timberlane* and will only consider comity if there is a actual conflict between US and foreign law, and the Second Circuit falls somewhere in between, applying the *Timberlane* comity factors once a true conflict in terms of the *Hartford* decision has been established.[80] This is clearly not an acceptable situation since the result of a case involving the extraterritorial application of US antitrust law may vary depending on which circuit court is involved.

The EU's approach to the assertion of extraterritorial jurisdiction also takes account of negative comity. The European Court of Justice has considered comity in cases such as the *Wood Pulp* case[81] and the European Commission is obliged to give due regard to comity in competition cases of which extraterritoriality is an element.[82]

As domestic courts world-wide have failed to provide a clear definition for comity[83] and there is uncertainty as to whether the basis for comity is legal or political, it is a difficult principle to apply.[84] This undermines the principle's effectiveness as a method for solving international jurisdictional conflicts, especially in the field of trade and business where legal certainty is indispensable. Some argue that, when dealing with matters of competition regulation, there is actually no room for considerations of comity at all. This argument is based on the fact that competition laws represent the public economic policy of their respective countries and would therefore carry considerable weight when compared to the laws of other countries.[85] An argument to the contrary is that comity may be useful "to

---

[78] *Hartford Insurance Co. v. California*, 509 U.S. 764 (1993).
[79] *Supra* note 42 at 161.
[80] J.S. McNeill, "Extraterritorial antitrust jurisdiction: continuing the confusion in policy, law and jurisdiction" (1998) 28 Cal. W. Int'l L.J. 425 at 442-444.
[81] *Supra* note 50.
[82] *Supra* note 47 at 456.
[83] *Supra* note 68 at 234 *et seq.*
[84] *Supra* note 69 at 125.
[85] H. Hovenkamp, *Federal Antitrust Policy*, (St. Paul, Minn.: West Publishing Co., 1994) at 699.

gauge the merits of jurisdictional standards in order to promote a system conducive to international business planning and co-operation among states".[86]

3.1.2. Balancing of state interests

An alternative solution suggested for the problem of conflicting jurisdictions and which is related to comity, is the balancing of state interests.[87] As comity also requires the balancing of state interests, the two are sometimes regarded to be one and the same solution.[88] In terms of the balancing of interests solution, it must be determined in a given conflict between states which state's vital interests are most affected by the matter in question.[89] An example of the balancing of interests solution in practice is to be found in the German approach to extraterritorial assertion of jurisdiction as illustrated in the *Morris/Rothmans* case.[90]

3.1.3. Forum non conveniens

Jurisdictional conflicts may also be avoided by applying the doctrine of *forum non conveniens*, which embraces elements of both comity and the balancing of interests. This is a discretionary doctrine which "allows a court to decline to exercise jurisdiction when it appears more appropriate to try the case elsewhere".[91] The main purpose of the doctrine is therefore not to avoid jurisdictional conflicts, although it may be employed with this aim in mind, but to ensure that disputes of a multijurisdictional nature will be heard and resolved by the most appropriate forum.

In applying the *forum non conveniens* doctrine and deciding on the appropriate forum, a court will take account of both private and public considerations.[92] The public considerations in question correspond with the factors considered in a comity or balancing

---

[86] *Supra* note 68 at 243.
[87] *Supra* note 69 at 126.
[88] *Ibid.*
[89] *Ibid.*
[90] *Supra* note 62.
[91] M.D. Kresic, "The Inconvenient Forum and International Comity in Private Antitrust Actions" (1983) 52 Fordham L. Rev. 399 at 405.
[92] *Ibid.* at 408.

of state interests analysis, whereas private considerations include issues such as "the ease of access to evidence, the availability of compulsory process over witnesses ... and any other factors that may make the trial 'easy, expeditious, and inexpensive'".[93] Therefore, besides the fact that it ensures that an alternative forum is available to the plaintiff, the doctrine of *forum non conveniens* differs from comity in that it gives consideration to the interests of the litigants involved.

An important factor in the application of *forum non conveniens* is the fact that a plaintiff should not be relegated to a forum which does not have a comparable cause of action.[94] This has been one of the reasons why the doctrine, despite support from academics, has not historically received support in practice.[95] However, due to the fact that an increasing number of states have developed and implemented effective competition laws, the doctrine should now be considered to represent a viable solution to certain jurisdictional conflicts in international competition disputes. In fact, US District Courts have recently accepted and applied the doctrine of *forum non conveniens* in a number of antitrust cases involving foreign jurisdictions.[96]

3.2 Conflict of laws

The conflict of laws solution provides that a court should, in cases of conflicting jurisdictions, merely apply its conflicts of laws rules to the relevant transaction and so determine the applicable competition law.[97] The competition law found to be applicable in this manner will then be applied to the exclusion of other states' legal regimes. This solution is not without its problems.

---

[93] *Ibid.* at 408.
[94] *Ibid.* at 414.
[95] This is particularly the case in the US. See Davidow, *supra* note 40 at 30.
[96] *Capital Currency Exchange, N.V. v. National Westminster Bank, Plc*, No. 96 Civ. 6465 (S.D.N.Y. 1997) and *Filetech SARL v. France Telecom*, 978 F. Supp. 464 (S.D.N.Y. 1997) cited and discussed by Davidow, *ibid.* at 30-31.
[97] *Supra* note 69 at 128.

In the first place, there is the issue of whether the forum state actually recognises the other state's (normally the state where the effects of an anticompetitive practice are felt) interest in applying its competition rules to a particular case. It is clear that if the forum state rejects the notion that the country where the effects are felt should have any prescriptive jurisdiction in such cases, *i.e.* the effects theory, the conflict of laws solution has no value.[98]

Secondly, a state's competition law often will form a part of its mandatory domestic law which national courts are obliged to apply. Thus, even if the relevant choice of law rule indicates that another state's law should be applied, the court may be under an obligation to apply the competition law of the forum.[99] Closely related to this is the question of whether courts should be allowed decide on the application of conflicting foreign laws in the first place - may a court apply another state's competition law where the legislature has expressly provided for the extraterritorial application of its domestic competition laws?[100]

Finally, there is the potential that the foreign law indicated by the choice of law rules may not provide adequate protection for the citizens of the forum state. An example of this would be where a US export cartel's activities had an effect on the economy of a foreign state. Should the foreign state's conflict of laws rules indicate US law to be the governing law, the US cartel could not be held liable as the FTAIA expressly exempts US export cartels transactions which do not injure the US economy, from the *Sherman Act*'s provisions.[101]

3.3 Blocking statutes

A number of states have enacted statutes the purpose of which are to counteract the assertion of extraterritorial jurisdiction by *inter alia* forbidding state authorities and

---

[98] D.P. Wood, "International Jurisdiction in National Legal Systems: The Case of Antitrust" (1989) 10 Nw. J. Int'l L. & Bus. 56 at 68.
[99] *Supra* note 69 at 128.
[100] *Ibid.* at 129.
[101] FTAIA, *supra* note 41, §7.

nationals to co-operate with foreign states exercising such jurisdiction.[102] Statutes of this nature are called blocking statutes and may provide for one or more methods of "blocking", *e.g.* judgement blocking, discovery blocking and clawback, the latter providing parties who have been forced to pay damages in terms of foreign extraterritorially applied competition law, with a means to recoup any penal portion of the damages paid.[103] The first two blocking statutes, those of Ontario and Quebec, were enacted shortly after the inception of the effects theory in *Alcoa* and were aimed at undermining US attempts to obtain evidence in Canada relating to an alleged antitrust offence having an effect in the US[104] - it is thus clear that blocking statutes' origins flow from the extraterritorial application of competition laws.

A good example of a blocking statute which provides for all the three of the aforementioned blocking methods is the British *Protection of Trading Interests Act*[105] the aim of which, according to the British Secretary of State at the time of the enactment thereof, is "to reassert and reinforce the defenses of the United Kingdom against attempts by other countries to enforce their economic and commercial policies unilaterally on [the United Kingdom]".[106]

Section 1 of the Act is applicable when a foreign state has or proposes extraterritorial measures which "...are damaging or threaten to damage the trading interests of the United Kingdom".[107] In such cases the Secretary of State has the discretionary authority to forbid British citizens and businesses to comply with orders of foreign authorities.[108] In

---

[102] *Supra* note 69 at 130. States which have enacted such blocking statutes include the Netherlands, Germany, Great Britain, Australia, Canada and South Africa. See T.S. Murley, "Compelling Production of Documents in Violation of Foreign Law: An Examination and Reevaluation of the American Position" (1982) 50 Fordham L. Rev. 877 at 879.

[103] J.H. Jackson & W.J. Davey, eds., *Legal Problems of International Economic Relations*, 3d ed. (St. Paul, Minn.: West Publishing Co., 1995) [hereinafter Jackson & Davey] at 1062.

[104] *Supra* note 72 at 791; *supra* note 102 at 879.

[105] *Protection of Trading Interests Act 1980* (U.K.),1980, c. 11.

[106] 973 PARL. DEB., H.C. (5th ser.) 1533 (1979) cited by A. Lowe, "Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980" (1981) 75 A.J.I.L. 257 [hereinafter Lowe] at 257.

[107] *Protection of Trading Interests Act, supra* note 105, Section 1.

[108] *Ibid.* Section 1(3).

exercising this discretion, the Secretary of State will take into account the relative state interests in a particular case as well as considerations of international comity.[109] In addition to this discretionary power, there is an absolute obligation on British courts not to enforce foreign judgments awarded for multiple damages.[110] Finally, the Act has a clawback provision applicable to awards made and enforced against British citizens or companies or persons carrying on business in the United Kingdom.[111]

Whether blocking statutes provide a feasible solution for conflicts arising from the extraterritorial exercise of jurisdiction is questionable. Certainly such unilateral, "retaliatory" measures cannot be conducive to good international relations which is of particular importance in matters relating to trade.[112] Furthermore, in certain cases it may be questioned whether the blocking statutes are being applied in a *bona fide* manner. An example which illustrates this problem is the *Beecham* case.[113]

The relevant facts in the *Beecham* case are that a US court order was made against Beecham, a UK company, for the discovery of certain documents required in an antitrust case. In terms of the *Protection of Trading Interests Act*, the British Secretary of State for Trade ordered Beecham not to comply with the US order. The US court then absolved Beecham from any liability arising from non-compliance with the discovery order but at the same time indicated that adverse findings of fact would result from such non-compliance. Beecham subsequently applied to the British government for release from the non-compliance order which release was granted. It is unclear what the British government's motivation in this case was. The fact that it could so easily be persuaded by Beecham to change its views regarding a measure supposedly threatening to damage the United Kingdom's trading interests, indicates the potential for abuse of blocking statutes.

---

[109] Lowe, *supra* note 106 at 276.
[110] *Protection of Trading Interests Act*, *supra* note 105, Section 5.
[111] *Ibid.* Section 6.
[112] A.F. Lowenfeld, "Sovereignty, Jurisdiction and Reasonableness: A Reply to A.V. Lowe" (1981) 75 A.J.I.L. 629 at 637.
[113] Cited and discussed by Lowenfeld, *ibid.* at 631-636.

III. Conclusion

The regulation of RBPs with a cross-border or global effect is becoming an important issue in the competition policies of states. Where a state is not satisfied that another state's competition laws will have the desired regulatory effect with regard to RBPs occurring in the latter state, one solution for the former state would be to apply its own laws extraterritorially to those practices. It is, however, clear that the extraterritorial application of domestic competition law will often lead to some kind of conflict between the regulating jurisdiction and the foreign jurisdiction concerned. These conflicts may arise due to disagreements about to the existence of jurisdiction or, in cases where a foreign state concedes that the exercise of jurisdiction by the regulating state is justified, due to the foreign state's perception that its interests are not being duly taken account of by the regulating state. Conflicts may also arise because of differences in the interpretation of legal and economic concepts, differences in policy, exemptions provided for in competition laws and lack of (enforcement of) competition laws.[114] Not one of the methods states have employed to minimise conflicts arising in this manner, provides a universally acceptable solution.

A further point of criticism that may be levelled against extraterritoriality as a method of international competition regulation is that it can only be used effectively by states possessing the necessary economic and political power, such as the US and the EU. It is difficult for other countries with less clout to enforce their competition laws in this way.[115] Add to the aforementioned problems the growing importance of the international regulation of competition and it must be concluded that unilateral methods of international competition regulation do not represent the best way to control restrictive business practices with cross-border effects.

---

[114] Fox (1997), *supra* note 25 at 23; E.M. Fox, "Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade" (1995) 4:1 Pacific Rim L. & Pol'y J. 1 [hereinafter Fox (1995)] at 14.

[115] Nicolaides (1997), *supra* note 15 at 131.

It becomes clear that an alternative method of regulation is required which will realise an effective and universally acceptable regulatory mechanism. To achieve such acceptance the regulatory mechanism must deal with the issues not addressed by extraterritoriality, *i.e.* it must provide for competition rules or norms acceptable to the states involved, it must ensure either homogenous or internationally acceptable interpretation of these norms and it must provide for effective enforcement of the norms. There have been a number of bilateral, regional and multilateral agreements dealing with these and other issues, a number of which will discussed in the following chapter.

CHAPTER 2: INTERNATIONAL AGREEMENTS REGULATING COMPETITION

I. Harmonization of competition laws

As was illustrated in the previous chapter, employing unilateral methods of international competition regulation to counteract negative spillovers resulting from (the lack of) national competition policies, may lead to conflicts and friction between states. As a solution to this problem, states have entered into an array of bilateral, regional and multilateral agreements, some of which deal exclusively with competition regulation and some of which deal with a wider range of issues including competition.

Many international agreements attempt to resolve or avoid competition-related conflicts through the harmonisation of domestic competition laws. Harmonisation in this sense, may be defined as "a process or phenomenon that relieves tensions between and among the laws and policies of different nations by bringing those laws and policies into a state of greater compatibility".[116] As will be gleaned from the various agreements referred to, harmonisation may be achieved in a number of ways, *i.e.* the adoption of a common competition law and policy, the adoption and implementation of common goals, or co-operation between national authorities applying their own competition law at a national level. Harmonisation may also be achieved more passively, or spontaneously, outside the context of an agreement through cross-fertilisation of competition laws.[117]

An agreement in terms of which harmonisation is to be achieved may be aimed at the harmonisation of substantive law, *e.g.* it could define certain terms or set out which particular practices will be deemed anticompetitive, or it may focus on the harmonisation of procedural aspects, such as notification procedures in mergers.[118] The agreement may be limited to specific tensions and opportunities and have a narrowly focused agenda or it

---

[116] Fox & Ordover, *supra* note 15 at 7.
[117] *Ibid.* at 8; Fox (1995), *supra* note 114 at 10.
[118] *Supra* note 103 at 1092.

may be drafted with the intention of being all-encompassing and cover all aspects of competition regulation.[119]

There are many arguments in favour of harmonisation, some of which have already been alluded to in the previous chapter. Harmonisation can address the problem of so-called externalities, which are practices that firms or states engage in that impose costs for others but not for the firm or state involved in the practice, an example of which is a state allowing hard-core export cartels to operate from within its borders.[120] Although the cartel does not affect the relevant state, consumers in other states will carry the burden of resulting higher prices. By harmonising their laws and making the same rules applicable to both domestic and foreign markets, states may agree not to adhere to such "beggar-thy-neighbor" policies.

Differing views of a transaction by national competition authorities may lead to varying approaches to a particular case and may result in conflicting opinions as to whether a particular transaction is welfare enhancing or not. An example one may refer to here are the lawsuits the US and EC had instituted against IBM in the 1980s.[121] Whereas the US withdrew its lawsuit (presumably on the ground that it did not want to impede technological progress), the EC proceeded, maintaining that the suit would result in enhanced competition and progressiveness. Although IBM and the EC eventually reached a settlement, it is clear that the EC's policy could have had an external effect, *i.e.* slowing down technological innovation, in other states.

Due to externalities such as the aforementioned, some cases can only be effectively solved by way of a common solution as it does not make economic or practical sense to have a

---

[119] Fox (1995), *supra* note 114 at 10.

[120] E.M. Fox, "Harmonization of law and procedures in a globalized world: why, what, and how?" (1991) 60 Antitrust L.J. 593 [hereinafter Fox (1991)] at 594. See also K. Stockmann, "The Janus-Face of Competition Policies" (1989) 10 Nw. J. Int'l L. & Bus. 31[hereinafter Stockman] at 31.

[121] Case cited and discussed by Fox (1995), *supra* note 114 at 27; E.M. Fox, "Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity, and Fairness" (1986) 61 Notre Dame L. Rev. 981 [hereinafter Fox (1986)] at 1011-1017; and K.M. Meessen, "Competition of Competition Laws" (1989) 10 Nw. J. Int'l L. & Bus. 17 [hereinafter Meessen] at 22.

number of national standards applicable to such cases.[122] Consequently, these cases call for a harmonised "vision from the top" in order to appreciate what global benefits or drawbacks will arise from a particular transaction.[123] In practice, such a harmonised vision could *inter alia* be achieved if competition authorities agreed to apply a world welfare standard, rather than a myopic national welfare standard, when deciding whether a potentially restrictive cross-border transaction should be opposed.[124]

Unnecessary transaction costs may also be addressed by harmonisation. An example which has already been mentioned in this regard is the existence of various national merger regulations which merging companies may have to comply with. The extra costs attached to such transactions may sometimes have the effect that the transaction does not take place at all, which may result in a loss of benefit to society.[125]

Considering the aforementioned benefits, it may seem that the harmonisation of competition laws should be pursued without hesitation. Harmonisation does, however, have a number of obstacles and drawbacks.[126] As has already been noted, there is disagreement among states regarding economic and competition theory and policy, and the relevant principles are interpreted differently from state to state. Consequently, the question of the feasibility and practicability of harmonisation of competition law arises, particularly with regard to exemptions to competition rules and regulated sectors.[127] One may ask if there really is an ideal set of rules all states can agree on. Even if such a set of rules for competition policy could be formulated, it may be difficult to separate other

---

[122] Fox (1991), *supra* note 120 at 594.
[123] Fox (1995), *supra* note 114 at 27; P. Nicolaides, "Competition Among Rules" (1992) 16:2 World Comp. 113 [hereinafter Nicolaides (1992)] at 116.
[124] The national welfare standard represents the total income of a nation's population whereas the world welfare standard represents the "aggregate level of consumer benefits and profit realized by consumers and firms in all pertinent countries". See Fox & Ordover, *supra* note 15 at 14-17; P.S. Crampton & C.L. Witterick, "Trade Distorting Private Restraints and Market Access: Learning to Walk Before We Run" (1996) 24:10 I.B.L. 467 [hereinafter Crampton & Witterick] at 467.
[125] A merger may, for instance, have resulted in the achievement of economies of scale which could have been passed on to the consumer. See Fox (1991), *supra* note 120 at 594; Nicolaides (1992), *supra* note 123 at 114.
[126] Fox (1991), *ibid.* at 596; Fox & Ordover, *supra* note 15 at 10-11.
[127] Nicolaides (1997), *supra* note 15 at 136.

policy considerations, such as industrial policy, from competition policy.[128] Would other areas of state activity which are linked to competition policy have to be harmonised too? Clearly there are limits to how far harmonisation can be pursued.[129]

Efforts to harmonise law can be time-consuming with the costs of harmonisation eventually outweighing the benefits. Additionally, the process can become a political one, with the parties involved being pressured into making unwanted compromises. Closely connected to this aspect of harmonisation is the danger that economically stronger states may hijack and steer the harmonisation process towards the adoption of their domestic standards, irrespective of whether those standards are "better" or even appropriate for other states.

There seems to be widespread acceptance of the notion that, although harmonisation of competition law is desirable, a measure of diversity between states' competition policies must be maintained, particularly with respect to substantive issues.[130] Such an approach would allow governments to retain a degree of sovereignty with regard to regulated sectors and government activities, and allow for differences in culture and policies to be taken into account.

Just as importantly, maintaining a degree of diversity allows for what is referred to as "competition among rules" in terms of which the various regulatory regimes that exist compete with one another, the most effective or efficient regime being adopted by other competition authorities. Were all states to adopt a standard set of codified rules, competition among competition rules would not be possible and competition regulation rules would be less dynamic and unresponsive to economic realities, and would begin to

---

[128] See Meessen, *supra* note 121 at 21.

[129] Conversely, the harmonisation of competition law will be facilitated should it be pursued along with the harmonisation industrial and other social policies, as is the case in the European Union.

[130] Fox & Ordover, *supra* note 15 at 12; Fox (1995), *supra* note 114 at 10; Fox (1991), *supra* note 120 at 593; Nicolaides (1992), *supra* note 123 at 114; Nicolaides (1997), *supra* note 15 at 136; Meessen, *supra* note 121 at 29.

stagnate. Finally, competition among competition rules would also sustain the elements of political choice and personal freedom, which are important in a democratic society.[131]

Having provided a brief introduction to the concept of harmonisation, a number of relevant international agreements will be discussed. The discussion will include bilateral, regional and multilateral agreements as well as codes relating to multilateral competition regulation.

II. Bilateral agreements

1. General

In the first two decades of cross-border competition law conflict, private litigation in international cases was rare and judicial involvement was consequently not called for. As a result, the task of solving international competition conflicts rested solely with the regulating and foreign governments involved. Either the regulating government would ignore any protest made by the foreign government, a compromise would be reached with the foreign government or the regulating government would yield to the foreign government's interests.[132]

It seems logical that if there were a large number of competition law conflicts involving two particular governments, some sort of conflict resolution procedure would be established between them. This was, in fact, the situation with Canada and the US. In light of their proximity and the resulting high volume of cross-border business between them, the opportunities in which the US could, and indeed did, apply its antitrust laws extraterritorially to Canada were ample. The US and Canada subsequently adopted an informal antitrust notification and consultation procedure in 1959 in terms of which the two states had to consult with each other when it seemed that the enforcement of one's competition laws would affect the interests of the other.[133] A Memorandum of Understanding (MOU) formalising such consultation procedures was entered into by the

---

[131] See Meessen, *ibid.* at 21.
[132] *Supra* note 72 at 795.

two countries in 1984[134] and has since been replaced by a further developed *Agreement Regarding the Application of their Competition and Deceptive Marketing Practices Laws* in 1995.[135]

As was explained earlier, the US is arguably the largest proponent of the extraterritorial application of competition law. It therefore comes as no surprise that besides entering into agreements with Canada, the US has concluded formal agreements relating to co-operation and co-ordination in competition law matters with a number of its other major trading partners, including Australia,[136] Germany,[137] and the EU.[138] The latter agreement will be discussed in more detail in the following section as it provides a good example of the content and practical application of this kind of agreement.

Canada, too, has entered into bilateral agreements with a number of other states and regional blocs such as the EC,[139] Israel[140] and, most recently, Chile.[141] Although these agreements are general trade agreements, they all contain provisions relating to the co-ordination of competition regulation.[142] Furthermore, Canada is currently negotiating an additional agreement with the EC relating exclusively to the application of the two

---

[133] See Castel, *supra* note 65 at 604.

[134] *Memorandum of Understanding between the Government of Canada and the Government of the United States of America as to Notification, Consultation and Co-operation with Respect to the Application of National Antitrust Laws*, 9 March 1984, (1984) 23 I.L.M. 275.

[135] *Memorandum of Understanding between the Government of Canada and the Government of the United States of America as to Notification, Consultation and Co-operation with Respect to the Application of National Antitrust Laws*, 9 March 1984, (1984) 23 I.L.M. 275. See Castel, *supra* note 65 at 605; Starek, *supra* note 31 at 37.

[136] *Australia-US: Agreement Relating to Cooperation on Antitrust Matters*, 29 June 1982, (1982) 21 I.L.M. 702.

[137] *Germany-US: Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices*, 23 June 1976, (1976) 15 I.L.M. 1282.

[138] *European Communities - United States: Agreement Regarding the Application of their Competition Laws*, 23 September 1991, (1991) 30 I.L.M. 1487 [hereinafter the US/EU Agreement].

[139] *Framework Agreement for Commercial and Economic Cooperation between the European Communities and Canada*, 6 July 1976, Can. T.S. 1976 No. 35 (entered into force 1 October 1976) [hereinafter CEECFA].

[140] *Canada-Israel Free Trade Agreement*, 31 July 1996, T.W.C. 1997/1, CD-ROM: *Treaties with Canada* (Toronto: Lawauthority, 1998) [hereinafter CIFTA].

[141] *Canada-Chile Free Trade Agreement*, 5 December 1996, (1997) 36 I.L.M. 1067 (entered into force 5 July 1997) [hereinafter CCFTA].

[142] CEECFA Article II; CIFTA Chapter 7; and CCFTA Chapter J.

jurisdictions' competition laws,[143] the content of which is similar to the US/EU Agreement.[144] Naturally, states outside of the Canada-US context have also entered into bilateral agreements of this nature - as an example one may cite the *France-Germany: Agreement Concerning Cooperation on Restrictive Business Practices.*[145]

Bilateral agreements relating to competition law do not necessarily promote the harmonisation of substantive competition law. More often than not, they deal with co-operation between national competition policy enforcement agencies with a view to minimising policy conflicts between the relevant jurisdictions. Most recent bilateral agreements in this field provide for a measure of harmonisation of procedure, but not for harmonisation of matters of substance. Newer agreements are furthermore aimed at co-operative international action against anticompetitive practices, whereas older ones were more concerned with avoiding conflicts among national competition authorities.[146]

The Organisation for Economic Co-operation and Development (OECD) has played an important role in the promotion of bilateral agreements relating to competition regulation[147] and has supported the concept of international antitrust co-operation since

---

[143] *Draft Agreement between the European Communities and the Government of Canada regarding the Application of their Competition Laws*, online: European Commission DG IV <http://europa.eu.int/comm/dg04/interna/en/dftcanada.htm> (date accessed: 21 January 1999).

[144] Castañeda, *supra* note 40 at 296.

[145] *France-Germany: Agreement Concerning Cooperation on Restrictive Business Practices*, 28 May 1984, (1987) 26 I.L.M. 531.

[146] UNCTAD, Trade and Development Board, *Experiences gained so far with International Cooperation on Competition Policy Issues and the Mechanisms used*, UN Doc. TD/B/COM.2/CLP/3 (1998), at paragraph 3.

[147] The OECD has as its sole function the direction of co-operation between the governments of its member countries. Co-operation, for purposes of the OECD, means co-operation amongst member states on domestic policies, in particular trade policies, which interact with those of other members. Member countries seek to adapt their domestic policies in order to minimise conflict with one another. See "About the OECD: The OECD And Its Origins", online: Organisation for Economic Cooperation and Development <http://www.oecd.org/about/origins/html> (last modified: 11 April 1997). The OECD organ which deals with competition matters is the OECD Committee on Competition Law and Policy. It primarily aims at the promotion of understanding and co-operation between competition policy authorities and its work includes the making of Recommendations on international co-operation. See "Committee on Competition Law and Policy", online: Organisation for Economic Cooperation and Development <http://oecd.org/daf/ccp/commte.html> (date accessed: 12 August 1998).

1967.[148] In the *Revised Recommendations of the Council of the OECD Concerning Cooperation between Member Countries on Restrictive Business Practices Affecting International Trade* of 1986,[149] the OECD recognised that anticompetitive behaviour "may constitute an obstacle to the achievement of economic growth, trade expansion and other economic goals of Member countries"[150] and that unilateral extraterritorial application of national law could infringe upon the sovereignty of the foreign state concerned.[151] Consequently the OECD encourages its members to have their competition regulation authorities co-operate by way of notification and consultation with one another in cases where actions being taken by one of these authorities may affect the interests of other member states. These Recommendations have resulted in a number of bilateral agreements between OECD members, some of which were referred to above. The Recommendations were revised in 1995,[152] again emphasising co-operation and co-ordination between investigation authorities.

The advantages flowing from bilateral agreements related to competition law need not be limited to the more efficient regulation of international RBPs and the resolution or avoidance of the conflict of jurisdictions. The *Australia and New Zealand Closer Economic Relations Trade Agreement*[153] illustrates how a bilateral agreement may employ harmonised competition law principles to eliminate certain trade policies having a restrictive effect on trade, *i.e.* antidumping policies.

---

[148] Starek, *supra* note 31 at 31; B.E. Hawk, "The OECD Guidelines for Multinational Enterprises: Competition" (1977-78) 46 Fordham L. Rev. 241 [hereinafter Hawk (1977)] at 243.

[149] OECD Council, *Revised Recommendations of the Council of the OECD Concerning Cooperation between Member Countries on Restrictive Business Practices Affecting International Trade* adopted on 21 May 1986, Doc. No. C(86)44 (Final), reproduced in (1986) 25 I.L.M. 1629.

[150] *Ibid.* Preamble.

[151] *Ibid.*

[152] OECD Council, *Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade* of 27 and 28 July 1995, Doc. No. C(95)130 Final, online: OECD, <http://www.oecd.org/daf/ccp/rec8com.htm> (date accessed: 8 December 1998).

[153] *Australia and New Zealand Closer Economic Relations Trade Agreement*, 28 March 1983), (1983) 22 I.L.M. 948 (entered into force 1 January 1983) [hereinafter ANZCERTA]. See M.J. Trebilcock "Competition Policy and Trade Policy - Mediating the Interface" (1996) 30:4 J. World T. 71 at 79.

Antidumping duties are imposed by states to counteract the effect of dumping, which occurs when products are sold by an exporter in a foreign market for less than the normal price charged in the exporter's domestic market.[154] The duties may then be imposed in order to protect the foreign market's domestic producers. Although various economic arguments have been put forward to justify the use of antidumping duties, the opinion exists that that in many cases dumping will be to the benefit of the foreign consumer as he will pay less for the relevant product, and that antidumping duties are merely protectionist and represent a flagrant and unacceptable exception to the GATT national treatment principle.[155]

In terms of ANZCERTA, Australia and New Zealand agreed to amend their trade laws by abolishing antidumping actions between them. They furthermore undertook to amend their competition laws relating to the misuse or abuse of dominant positions, so as to allow plaintiffs in one country to lodge complaints against producers in the other. In this way, grievances which were previously addressed by using trade instruments, *i.e.* antidumping duties, can now be resolved by using competition law.[156] Certain procedural changes were also adopted to regulate jurisdictional matters between the two states. From a competition law perspective, ANZCERTA is thus beneficial to trade in two ways: in the first place, antidumping duties can no longer be used to distort competition between the two signatories; and secondly, cross-border disputes regarding an abuse of a dominant position can be dealt with effectively without needing to deal with conflicts of jurisdiction arising

---

[154] See Castel, *supra* note 65 at 504.

[155] Trebilcock, *supra* note 153 at 77-81.

[156] As the high level of trade liberalisation and co-ordination and harmonisation of competition policies between Australia and New Zealand is not prevalent among other states (with the exception of the EU Member States), it is unrealistic to expect bilateral agreements between other states to completely replace antidumping with competition law. As an alternative to the approach taken in ANZCERTA, therefore, states with less integrated competition and trade regimes could agree to initiate antidumping procedures only in those cases where a particular practice, allegedly constituting dumping, is not contestable under the competition regime of the exporting state. In this way, the levying of competition-distorting antidumping duties would be limited, but still be available as a trade instrument. B.M. Hoekman & P.C. Mavroidis, "Dumping, Antidumping and Antitrust" (1996) 30:1 J. World T. 27 [hereinafter Hoekman & Mavroidis (1996)] at 27-28, 36; see also EC, Commission, *Towards an international framework of competition rules* COM(96)284, online: EU Commission, DG IV <http:europa.eu.int./en/comm/dg04/interna/com284.htm> (date accessed: 8 October 1998) [hereinafter EC COM(96)284], section IV.

from the extraterritorial application of laws, since each state applies it own laws to alleged abuses occurring within its borders.

2. *The US/EU Agreement Regarding the Application of their Competition Laws*

2.1 General

In 1990 the Commissioner of Directorate-General IV of the European Commission proposed that an agreement be negotiated between the US and EU to allocate jurisdiction in transnational merger cases.[157] This proposal was made in view of the coming into force of the 1990 EC *Merger Control Regulation* which gave the EC significant new enforcement authority with respect to transnational mergers and therefore increased the likelihood of jurisdictional conflicts between the US and EC authorities. The resultant *US/EU Agreement Regarding the Application of their Competition Laws*,[158] which largely formalises practices that had been in force between the US and EC for a number of years but also contains a number of innovative procedures, was signed in 1991.[159]

The US/EU Agreement differs in approach from earlier bilateral competition-related agreements entered into by the US since, where previous agreements were geared towards the protection of sovereign interests of one state from competition law encroachments by the other,[160] this agreement is designed to promote co-operative, even co-ordinated, enforcement of competition law and thus to avoid conflicts from arising altogether.[161]

Articles II and III of the US/EU Agreement deal with notification and exchange of information between the parties, and formally commit the US and the EU to an

---

[157] J.P. Griffin, "EC/U.S. Antitrust Cooperation Agreement: Impact on Transnational Business" (1993) 24 L. & Pol'y Int'l Bus. 1051 at 1055.

[158] *Supra* note 138.

[159] The US/EU Agreement was initially declared invalid by the European Court of Justice on the ground that it did not have the necessary approval of the EU Council. This approval was finally given in 1995. Both the US and EU continued to co-operate under the US/EU Agreements' terms throughout the period of invalidity. See Starek, *supra* note 31 at 36.

[160] C.F. Rule, "European Communities-United States: Agreement on the Application of their Competition Laws - Introductory Note" 30 I.L.M. 1487 (1991) at 1488.

unprecedented level of co-operation.[162] Under Article II, a Party is obligated to notify the other when the enforcement activities of its competition authorities may affect the other's interests. Paragraph 1 of Article III provides that "[t]he Parties agree that it is in their common interest to share information that will (a) facilitate effective application of their respective competition law, or (b) promote better understanding by them of economic conditions and theories relevant to their competition authorities' enforcement activities and interventions...".

Co-operation and co-ordination of enforcement activities are expressly dealt with in Article IV of the US/EU Agreement in which it is provided that the competition authorities of the US and EC will assist one another in their relative enforcement activities insofar as there is no conflict between their law and interests, and taking into account the availability of resources. The article also refers to the situation where both the EU and US authorities have an interest in pursuing the same antitrust matter and sets out a number of factors to be taken into account when deciding whether enforcement activities should be co-ordinated in such cases.

The concept of positive comity is dealt with in Article V which provides that if one party feels that anticompetitive behaviour in the territory of the other is having an adverse effect on its economic interests, the former party may request that the latter's authorities initiate enforcement action. Article VI deals with negative comity and commits the parties to take each other's interests into account when deciding whether to initiate an investigation, when deciding what the scope of such an investigation should be and during all stages of enforcement.

---

[161] *Supra* note 138, Article I.
[162] *Supra* note 160 at 1488.

2.2 The Agreement in practice

The US/EU Agreement's practical value may be inferred from two recent cases involving transnational competition issues, the *Microsoft* case[163] and the Boeing/McDonnell Douglas merger.[164] The former case provides an example of co-operation between two national authorities with regard to the same RBP and the latter is an example of how bilateral agreements of this nature may resolve conflicts between states exercising concurrent jurisdiction.

- **The *Microsoft* case**

In 1994 the US Department of Justice investigated certain practices of the Microsoft Corporation and came to the conclusion that Microsoft was guilty of anticompetitive behaviour. The practices in question were that Microsoft, by way of licensing and other long term agreements with personal computer manufacturers in the US, was threatening to impede competition and innovation in a section of the computer industry. The Department of Justice eventually entered into a consent decree in terms of which Microsoft agreed to end the alleged anticompetitive practices.

The computer industry is a global one and as Microsoft is a major force in this industry, it would have been able to maintain the artificial barriers to competition in the US by entering into licensing agreements, similar to the ones with US manufacturers, to create a monopoly elsewhere in the world (in this case, the EU).[165] However, simultaneously with the Department of Justice's investigation, the European Commission for Competition had decided launch a similar investigation into Microsoft's practices.[166] A number of contacts between the two authorities ensued which allowed a co-ordinated approach to the matter. This co-operation enabled the two antitrust authorities to obtain simultaneous complementary settlements with Microsoft regarding its anticompetitive behaviour. In so

---

[163] *United States v. Microsoft Corporation* No. 94-1564 (D.D.C. filed July 15, 1994) cited and discussed by J. Klein & P. Bansal, "International Antitrust Enforcement in the Computer Industry" (1996) 41 Villanova L. Rev. 173 [hereinafter Klein & Bansal].
[164] *Supra* note 55.
[165] *Supra* note 163 at 179.
[166] *Ibid.* at 178.

doing, the Department and the Commission in combination were able to combat a restrictive business practice on a global scale effectively which might not have been possible had the agencies been working in isolation.

- **The Boeing/McDonnell Douglas merger**

During the course of 1996 it was announced that Boeing and McDonnell Douglas (MMD), two US-based aircraft manufacturers intended to merge. In the US, the Federal Trade Commission dealt with the investigation of the merger and eventually gave it unconditional approval. However, the market for large commercial aircraft is global and the merger would inevitably also influence the European commercial aircraft market. In terms of the EU *Merger Control Regulation*, the European Commission may investigate mergers if the merging companies meet certain turnover thresholds,[167] which in fact was the case.

Consequently, the European Commission exercised jurisdiction with regard to the transaction and initiated an investigation at the conclusion of which it found that the merger would have an anticompetitive effect in the EU. The Commission laid down certain conditions which Boeing had to adhere to in order to obtain the Commission's approval for the transaction and, after Boeing made the relevant undertakings, the merger was eventually approved.

Throughout the period of the investigation, consultations between the Commission and the FTC were carried out in terms of the US/EU Agreement. The US was particularly concerned about its defence interests being prejudiced as both Boeing and MDD had stakes in US military aviation. Although this did not move the Commission to drop its investigation, it was required to take US concerns into account and accordingly limited its investigation to the civil side of the merger. This may be seen as an exercise of the principle of negative comity as intended in Article VI of the Agreement.

---

[167] *Supra* note 46, Article 1.

2.3 Effect of the Agreement

Since the signing of the Agreement, the flow of information between the two enforcement authorities has increased significantly. While the US authorities sent only four notifications and received only two from the EU in the year prior to the Agreement, the US sent approximately sixty and received about forty in the first two years following the signing thereof.[168] The resultant increase in the authorities' ability to work together when dealing with international RBPs should by no means be underestimated since the competition law and policy of the two jurisdictions are significantly divergent, as was indicated earlier. The successes achieved under the Agreement are indicative of the problem-solving and problem-avoidance potential this method holds for multijurisdictional competition law cases.[169]

In recognition of the fact that the US/EU Agreement had contributed significantly to co-ordination, co-operation and avoidance of conflicts in competition law enforcement, and in the belief that further elaboration of the principles of positive comity would enhance the US/EU Agreement's effectiveness, the US and EU entered into a supplementary bilateral agreement in June 1998 dealing solely with the principle of positive comity.[170] The 1998 Agreement constitutes a further step towards harmonisation of competition laws which may serve as an example for agreements of this nature between other states and may also inspire additional harmonisation initiatives between the US and EU.

3. Mutual Legal Assistance Treaties

A distinction may be drawn between the various agreements referred to above and mutual legal assistance treaties (MLATs). Whereas the first group of agreements are memoranda of understanding (MOUs), representing "soft" law which is not binding upon the signatory

---

[168] *Supra* note 157 at 1063.

[169] Similar successes have been achieved in terms of the Canada-US Agreement. For a brief overview of some of these cases, see B.E. Hawk, ed., *1995 Fordham Corporate Law Institute - International antitrust law & policy*, (Yonkers, N.Y.: Juris Publishing, 1996) [hereinafter Hawk (1995)] at 30-31.

[170] *Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of their Competition Laws*, 4 June 1998, (1998) 37 I.L.M. 1070 [hereinafter the 1998 Agreement].

states, the latter group constitute "hard" law to which the signatory states are bound.[171] The advantage that a MLAT has over a MOU is therefore that a state is more likely to honour its undertakings with regard to competition law enforcement matters in terms of a MLAT. Examples of MLATs are the *Canada-United States Treaty on Mutual Legal Assistance in Criminal Matters*[172] and the more recent *United States-Australia Agreement on Mutual Antitrust Enforcement Assistance*.[173] As may be gathered from their titles, the former agreement is limited to enforcement assistance in criminal matters only, whereas the latter agreement provides for competition enforcement assistance in both civil and criminal matters.[174]

Although not always strictly confined to competition law matters, it is clear that MLATs may have a significant impact on the effectiveness of cross-border competition regulation. MLATs may allow for the prosecution and suppression of offences, various kinds of assistance, *e.g.* executing requests for searches and seizures, and where two countries' enforcement agencies are both investigating the same individual or enterprise, MLATs may allow for the sharing of confidential information relating to the investigation between the enforcement agencies concerned. Without the existence of such agreements, this sharing of information by competition enforcement authorities would in many jurisdictions, subject to whatever protection the relevant domestic law provides in this regard, only be allowed in cases where the individuals or enterprises under investigation waived their right to confidentiality.[175] In the light of recent legislative initiatives taken by a number of states to allow for the negotiation of MLATs,[176] it may be expected that more such treaties will be entered into in the near future.

---

[171] See Klein & Bansal, *supra* note 163 at 183.

[172] *Canada-United States Treaty on Mutual Legal Assistance in Criminal Matters*, 18 March 1985, (1985) 24 I.L.M. 1092.

[173] *Agreement between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance*, 1997, online: US Department of Justice <http://www.usdoj.gov/atr/public/international/docs/usaus7.htm> (date accessed: 21 January 1999).

[174] See Davidow, *supra* note 40 at 34.

[175] This is the position in the US. See Starek, *supra* note 31 at 38.

[176] For instance, the US *International Antitrust Enforcement Assistance Act*, 15 U.S.C. §§ 6201-6212 (1994), the Canadian *Mutual Legal Assistance in Criminal Matters Act*, R.S.C. 1985 (4th Supp.), c. 30, as amended, and the Australian *Mutual Assistance in Business Regulation Act 1992* cited in Hawk (1995), *supra* note 169 at 33.

4. Other bilateral arrangements

States may, as an alternative to entering into MOUs or MLATs, attempt to resolve frictions arising from differences in their competition policies and laws by entering into negotiations outside the context of an agreement or treaty. Examples of such negotiations would be the Structural Impediments Initiative (SII) and its successor, the *Japan-US Framework for a New Economic Partnership*.[177]

The SII was launched in 1989 and was intended to help eliminate the structural problems leading to the trade imbalance between the US and Japan. It was unique in the sense that it dealt with matters of domestic policy and regulation, issues which did not normally feature in international trade negotiations.[178] Some of the problems which were addressed in the negotiations pursuant to the SII were the inadequacy of Japanese competition law enforcement as well as market access barriers limiting exports to Japan. The process was *inter alia* intended to bring Japanese competition policy, law and enforcement in line with what the US expected it to be. Japan did make certain commitments to reform its competition regulation regime, and it may be accepted that a measure of harmonisation was achieved by the SII.

In 1993 the SII was replaced by the Framework talks which, similarly to the SII, were intended to address a whole range of economic issues between the two countries.[179] As was the case with the SII, the Framework talks also deal with matters relating to competition policy and have also resulted in a degree of harmonisation.[180]

---

[177] See Klein & Bansal, *supra* note 163 at 188-189. For a more detailed discussion of the SII, see M. Matsushita, "The Structural Impediments Initiative: An Example of Bilateral Trade Negotiation" (1991) 12 Michigan J. Int'l L. 436 [hereinafter Matsushita (1991)].

[178] Matsushita (1991), *ibid.* at 436.

[179] *Japan-United States: Joint Statement on the Framework for a New Economic Partnership*, 10 July 1993, (1993) 32 I.L.M. 1414.

[180] DOJ - Antitrust Division: International Documents "First Joint Status Report on the U.S.-Japan Enhanced Initiative on Deregulation and Competition Policy", online: US Department of Justice <http://www.usdoj.gov/atr/public/international/docs/1792.htm> (last modified: 15 May 1998); see Klein & Bansal, *supra* note 163 at 188.

5. Conclusions

Bilateral agreements relating to the extraterritorial application of competition laws may certainly go a long way in resolving the conflicts which may arise from extraterritoriality. Furthermore, the co-ordination of enforcement efforts made possible by bilateral agreements may increase the effectiveness of national competition authorities' attempts to address competition violations with a global dimension.[181] Bilateral competition agreements additionally play an important role in the harmonisation of competition law as the mutual trust and understanding resulting from co-operation in terms of these agreements should lead to further procedural and substantive harmonisation.[182] The opinion exists that even if international consensus on substantive competition issues could be reached, bilateral agreements would remain important as competition authorities could still encounter impediments to co-ordination and co-operation.[183]

Whether bilateral agreements represent the ultimate method to regulate RBPs with an international element, is open to debate. One problem is that the bilateral agreement approach does not provide for a mechanism to resolve disputes between competition authorities which may arise under a particular agreement.[184] Furthermore, the application of the principle of positive comity, which represents an integral element of such agreements, might not always have the desired regulatory results. This is due to the fact that the principle is dependant on the vigorous enforcement of strong competition laws by the respective states. Many national competition laws are less than a decade old[185] and consequently the relevant enforcement authorities are still in the process of developing the necessary expertise to enforce these laws properly.[186] Additionally, states possessing well-established competition law regimes do not always enforce them consequently. As an

---

[181] OECD, Trade Committee & Committee on Competition Law and Policy, *Strengthening the Coherence between Trade and Competition Policies*, Joint Report, Doc. No. OCDE/GD (96)90, OECD (1996), Annex paragraph 12.
[182] Starek, *supra* note 31 at 42.
[183] *Ibid.* at 40.
[184] J.O. Haley & H. Iyori, eds., *Antitrust: A New International Trade Remedy?*, (Seattle: Pacific Rim Law & Policy Association, 1995) [hereinafter Haley & Iyori] at 360.
[185] Palim, *supra* note 1 at 109.
[186] Klein & Bansal, *supra* note 163 at 187.

example of the latter problem one may cite the long-standing US criticism of Japan's failure to enforce its competition laws.[187]

Even in the US/EU context, where the authorities involved have a high degree of mutual confidence in each other's regulatory regimes, the respective enforcement agencies have reserved the authority to act unilaterally and enforce their competition laws extraterritorially should they deem it necessary.[188] Consequently, the prevailing approach taken by enforcement authorities is that, notwithstanding the successes of bilateral competition agreements, effective competition law enforcement can only be achieved by a combination of co-ordinated enforcement, positive comity and extraterritoriality.[189]

Considering the plethora of such bilateral agreements which already exist and the number of them which will probably be entered into in the future, one may ask whether it would not be practical to establish plurilateral or multilateral agreements of this nature. Furthermore, considering the linkage between competition and trade, the question arises whether such agreements should be created within the ambit of existing regional or multilateral trade agreements, such as NAFTA or the WTO.

III. Multilateral and regional agreements

1. General

The number of regional and multilateral trade agreements in existence today reflects states' awareness of their economic interdependence.[190] These agreements contemplate the attainment of various levels of economic integration, *i.e.* the free trade area (the lowest level of integration), the customs union, the common market, economic union and political

---

[187] J.O. Haley, "Competition and Trade Policy: Antitrust Enforcement: Do Differences Matter?" (1995) 4:1 Pacific Rim L. & Pol'y J. 303 [hereinafter Haley (1995)] at 303-304.
[188] The US/EU Agreement. Article V.4; the 1998 Agreement. Article IV.4; see Klein & Bansal, *supra* note 163 at 190.
[189] Klein & Bansal, *ibid.* at 192; Crampton & Witterick, *supra* note 124 at 468.
[190] Between 1980 and 1994, forty-four regional trade agreements were notified to the GATT in terms of GATT Article XXIV. Hill, *supra* note 23 at 222.

union (the highest level of integration).[191] Many, if not most, of such regional and multilateral agreements will, in recognition of the important link between competition and trade, have provisions relating to the maintenance of competitive domestic markets or the control of RBPs.

In the following section, a number of such trade agreements will be discussed. Particular reference will be made to the substantive competition rules applicable in the various regimes as well as the methods of enforcement provided for.

2. The European Union

The European Union represents the most advanced example of economic integration and regional harmonisation of competition law and policy and consequently many lessons may be learnt from the EU harmonisation experience. At the same time, however, it must be kept in mind that the ongoing process which led to the creation of first the EC and now the EU has been driven by a unique set of factors absent elsewhere in the world.[192]

In order to realise their quest for economic integration, the Member States charged the European Community with a number of responsibilities including the responsibility to develop economic activity within the Community.[193] This goal was to be achieved by *inter alia* creating a common commercial policy and a system which would ensure that competition in the internal market would not be distorted.[194] The aforementioned competition system is today embodied in Articles 85 and 86 of the Treaty, the various Regulations relating to competition law, *e.g. Regulation 17/62* and *Regulation 4064/89*,[195] and related case law.

---

[191] *Ibid.* at 223-225.
[192] See G.A. Bermann *et al.*, *Cases and Materials on European Community Law*, (St. Paul, Minn.: West Publishing Co., 1993) [hereinafter Bermann] at 2-20; EC COM(96)284, *supra* note 156, section IV.
[193] *Treaty of Rome*, *supra* note 7, Article 2.
[194] *Ibid.*, Article 3.
[195] *Supra* notes 45 and 46, respectively.

In the light of the direct applicability of Regulations in Member States[196] and the doctrine of supremacy of Community law,[197] the competition regulation regime created by EC law is applicable in all Member States to anticompetitive practices affecting competition between the Member States or in the common market.[198] The implication of this is that the Member States all keep their individual competition regulation regimes and enforce them with regard to domestic anticompetitive practices, but as soon as an anticompetitive practice has any kind of cross-border effect between Member States, the common EC laws will apply.

Similar to the situation between Australia and New Zealand after implementation of ANZCERTA, the harmonisation of competition laws among the Member States has allowed for the abolition of antidumping actions between the Members.[199] Complainants who would normally seek redress through antidumping actions must now make use of EU competition law, primarily those rules relating to predatory pricing.[200]

The homogeneity of the application and development of the EC competition regulations is ensured by the fact that the responsibility for the enforcement thereof lies with one supranational body, the EU Commission, more specifically Directorate-General IV.[201] Uniformity of interpretation of the competition regulations among the Members is furthermore ensured by the fact that the Member States' national courts, when applying EC competition law, may refer questions of interpretation of competition law provisions to the European Court of Justice[202] or the Commission.[203]

---

[196] *Treaty of Rome*, Article 189.
[197] See Bermann, *supra* note 192 at 192-203.
[198] Article 85 is applicable to certain agreements, decisions and concerted practices "which may affect trade *between the Member States* and which have as their object or effect the prevention, restriction or distortion of competition *within the common market...*"; Article 86 prohibits the abuse of a dominant position "insofar as it may affect trade *between Member States*"; and *Regulation 4064/89* is applicable to concentrations with a *Community dimension*. [Emphasis added].
[199] EC COM(96)284, *supra* note 156, section IV.
[200] See Trebilcock, *supra* note 153 at 79.
[201] "Mission of DG IV - Competition", online: European Commission, DG IV <http://europa.eu.int/comm/dg04/misc/mission.htm> (date accessed: 19 October 1998).
[202] *Treaty of Rome*, Article 177.
[203] EC, *Notice on Cooperation Between National Courts and the Commission in applying Article 85 and 86 of the EC Treaty*, [1993] O.J. C.39/1993/02/13/6.

The Commission may decide to investigate an alleged anticompetitive practice on its own initiative or upon application by a Member State or natural or legal person with a legitimate interest. Should the Commission find that a practice infringes Articles 85 or 86,[204] it may require the parties involved to end the practice[205] and may impose fines where appropriate.[206] Alternatively, if it is found that the alleged RBP is, in fact, not contrary to EC law, it may grant a negative clearance with regard to the practice in question.[207] The Commission is also empowered to grant so-called block exemptions with regard to categories of practices which, although anticompetitive in nature, have a welfare enhancing result.[208]

3. NAFTA

The North American Free Trade Agreement[209] entered into force on January 1, 1994, and promotes both negative and positive integration between its three members, Canada, Mexico and the US.[210] Negative integration implies the removal of government imposed barriers to trade, whereas positive integration consists of promoting common forms of regulation with a view to facilitate integration within the domestic economies of the states involved.[211]

Alongside the provisions for the removal of governmental impediments to trade and other trade-related issues, the NAFTA also, in Chapter 15, deals with competition policy matters. The NAFTA requires the Parties to maintain or adopt measures to combat RBPs

---

[204] The Commission's powers with regard to merger regulation are set out in the *Merger Control Regulation*, *supra* note 46.
[205] *EC Regulation 17/62*, *supra* note 45, Article 3.
[206] *Ibid.*, Article 15.
[207] *Ibid.*, Article 2.
[208] *Treaty of Rome*, Article 85(3).
[209] *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can. T.S. 1994 No. 2, (1993) 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].
[210] See Castel, *supra* note 65 at 69.
[211] *Ibid.*

and to enforce those measures.[212] The Parties are furthermore required to co-operate and co-ordinate their competition law enforcement efforts, which is to be done by way of consultation, mutual legal assistance and notification, and the exchange of information relating to the enforcement of competition laws in the free trade area.[213] The aforementioned mechanisms are typically provided for in bilateral competition agreements - only here one sees them applied in a trilateral context - and the Parties would have to enter into additional bilateral or trilateral agreements where necessary.

Matters arising under Article 1501, *i.e.* the duty to combat RBPs and the duty to co-operate and co-ordinate enforcement efforts, cannot be referred to the NAFTA dispute settlement procedures under Chapter 20.[214] It should be pointed out that, insofar as governmental anticompetitive practices are concerned, no such prohibition is made.[215]

In terms of the Agreement, a Working Group on Trade and Competition is to report and make recommendations "concerning the relationship between competition laws and policies and trade in the free trade area" within five years of the date of entry into force of the NAFTA.[216] The Working Group has been actively fulfilling its mandate, *inter alia* comparing the national competition laws of each Party, discussing key concepts and approaches to trade and competition laws, and developing links with the private sector.[217] It is submitted that, depending on what kind of results co-operation and co-ordination between competition enforcement agencies have delivered with respect to harmonisation of competition laws, the Working Group may recommend in its report to the NAFTA Commission that the NAFTA also deal with disputes arising from private anticompetitive practices.

---

[212] Article 1501(1). This subarticle does not define any specific RBPs. Consequently, the determination of which RBPs are to be addressed are left to the respective Parties.
[213] Article 1501(2).
[214] Article 1501(3).
[215] Anticompetitive governmental practices include governmental policies relating to monopolies and state enterprises (Article 1502 and 1503) and antidumping and countervailing matters (Chapter 19).
[216] Article 1504. The Working Group's report to the NAFTA Commission was prepared by January 1999, but is not yet ready for release. Interview with G. King (20 January 1999).
[217] "NAFTA Operational Review", online: <http://www.infoexport.gx.ca/nafta/CHART-E.asp> (last modified: November 1998).

Should the Commission decide that private anticompetitive practices with a NAFTA dimension are to be regulated under the Agreement, existing NAFTA law would prove useful in drafting the relevant provisions. In this regard reference may be made to Chapter 13, which deals with telecommunications. The chapter requires the Parties to provide persons of the other Parties with access to their public telecommunications transport networks and services, which access should be given on reasonable and non-discriminatory terms.[218] From a competition law perspective, Article 1305 is of particular interest. The Article provides that, where a Party has designated a monopoly to provide public telecommunications services, that Party must ensure that the monopoly does not engage in anticompetitive practices which adversely affect a person of one of the other Parties.[219] Accordingly, the Parties are required to adopt measures to prevent such anticompetitive conduct, *e.g.* measures relating to access.[220] It is suggested that Article 1305 could serve as an example for a more general NAFTA competition rule, requiring Parties to adopt market access and related competition measures.

4. ANCOM & MERCOSUR

4.1 General

The Andean Community (Ancom) and the Southern Common Market (Mercosur), which together cover practically cover all of South America, also possess certain rules and procedures pertaining to the regulation of competition between their respective member states. Ancom, which was created in 1969,[221] is an economic community pursuing objectives similar to those of the European Community, although its level of integration is not as advanced. Mercosur, which was formed more recently in 1991,[222] is a free trade

---

[218] Article 1302; see "An Analytical Compendium of Western Hemisphere Trade Arrangement" online: Organisation of American States <http://www.sice.oas.org/cp061096/english/03010401.stm> (last modified: 6 October 1996).
[219] Article 1305(1).
[220] Article 1305(2).
[221] Ancom was established under the *Cartagena Agreement*, cited and discussed by Mancero, *supra* note 66. Its current members are Bolivia, Colombia, Ecuador, Peru and Venezuela.
[222] Mercosur was established under the *Treaty of Asuncion*, Argentina, Brazil, Paraguay and Uruguay, 26 March 1991, (1991) 30 I.L.M. 1034. Chile is an associate member of Mercosur.

area. Whereas Ancom, like the EU, has established powerful supranational institutions to regulate the activities of the bloc, Mercosur makes use of administrative bodies, such as the Common Market Council and the Common Market Group, to co-ordinate the implementation of the treaty provisions among its members.

Ancom embarked on the development of a competition policy as a part of its trade strategy with a view to increasing international and intra-regional trade after a period of trade stagnation in the region in the 1980s.[223] Competition policy also plays an important role in integrating the economies of the Ancom countries. One of Mercosur's objectives is to ensure free competition between its members - this is to be achieved by co-ordinating the members' macro-economic and sector policies - while at the same time pursuing unification of the market.[224]

4.2 Ancom

The Ancom rules relating to the control of RBPs have their basis in Chapter VIII of the *Cartagena Agreement*. In terms of the chapter's provisions, the Andean Commission has the power to establish rules to prevent or correct business practices which may have a distorting effect on trade in the region. The substantive rules relating to the control of anticompetitive practices by both states and private businesses are set out in more detail in various Commission Decisions,[225] the most recent and important of which is *Decision 285*.[226] Practices addressed by the provisions of this Decision include dumping, horizontal and vertical arrangements, and concerted practices having or threatening to have an anticompetitive effect within the region.[227]

---

[223] Mancero, *supra* note 66 at 153.
[224] *Ibid.*
[225] *Ibid.* at 155.
[226] *Andean Commission Decision 285: Norms for the Prevention or Correction of Distortions in Competition Caused by Practices that Restrict Free Competition* of March 21, 1991 (unofficial translation), online: Organisation of American States <http://www.sice.oas.org/cp_comp/english/cpa/cpa2/e.stm> (date accessed: 16 December 1998).
[227] *Ibid.*, Section I. It is interesting to note that one of the anticompetitive practices identified in the Decision is the practice of sharing sources of supply and the distortion of the "normal" supply of raw materials (Article 4(c)). This reflects an important issue for developing countries which would probably not be found in the competition regimes of developed countries such as the US or the EU and could

In terms of *Decision 285*, member states and persons, both natural and legal, are entitled to apply for redress for damage suffered due to restrictive business practices.[228] Persons, however, are only allowed to seek redress to the extent provided for by their respective national laws. Application for redress is made to the Secretariat General, a body established in terms of the *Cartagena Agreement*, which *inter alia* has the responsibility to monitor the application of competition rules.

Once the Secretariat General has established that the practice in question is contrary to the treaty's provisions, it has discretionary powers to apply a number of different measures.[229] In the first place, the Secretariat can deliver a declaration of prohibition in terms of which it may require the party concerned to cease the practice in question. Secondly, it can determine measures to eliminate or rectify the distortions in question. Member states have the power to adopt measures to counteract anticompetitive practices but may only do so after the aforementioned determination of the measures to be applied has been made by the Secretariat. Finally, the Secretariat General may direct recommendations aimed at bringing the practice to an end. Unfortunately there is no provision establishing a duty on the infringing party to adhere to such a recommendation nor is there any enforcement mechanism to ensure its fulfilment.

4.3 Mercosur

The competition guidelines of Mercosur are to be found in *Decision 21/94* of the Common Market Council. *Decision 21/94* deals with the promotion of competition and may be seen as the equivalent of Articles 85 and 86 of the EC Treaty.[230] The Mercosur provisions prohibit agreements, practices and decisions by associations of undertakings which *inter alia* have an anticompetitive objective or effect in the common market and affect trade between its members. More recently, a Protocol for the Defence of Competition was

---

represent a systems friction between the competition regimes of developed and developing countries and trade blocs.

[228] *Ibid.*, Article 6.

[229] *Ibid.*, Section III; see Mancero, *supra* note 66 at 166.

[230] *Ibid.* at 155.

established under *Decision 17/96*, the provisions of which indicate guidelines for a common competition policy in the region.[231] This protocol, the national implementation of which is pending subject to the approval of the individual member states, has three goals.[232] It firstly provides for mechanisms to control RBPs with a Mercosur dimension. Secondly, it calls for a convergence of domestic competition laws, *i.e.* harmonisation of competition laws. Lastly, it creates a mechanism to study government policies which may distort competition.

Decision 21/94 does not lay down any rules or establish any sanctions concerning the consequences of anticompetitive practices. It merely imposes a duty on the Trade Commission, the body responsible for the implementation and monitoring of legal norms issued by Mercosur, to ensure that the provisions of the *Decision* are complied with. This is to be ensured by promoting co-operation and co-ordination among the member states. Furthermore, provision is made for a system of co-ordination between the competition authorities of the members and the Trade Commission in terms of which the regulation of anticompetitive practices is left largely to the national authorities with the Commission playing a supervisory role. This approach to competition regulation may be criticised as there will be a lack of uniformity among member states even when contesting a practice which is deemed to be anticompetitive under the common Mercosur provisions.[233] The opinion exists, however, that the system of co-ordination between member states will ensure homogenous treatment of practices throughout the bloc.[234] In this regard, the co-operation agreements between Argentina and Brazil have already had a positive impact on the unification of standards used by the respective states' competition agencies.[235] Furthermore, the process of harmonisation of competition policy envisaged under *Decision*

---

[231] *Protocol for the Defence of Competition*, online: Organisation of American States <http://www.sice.oas.org/cp_comp/english/cpa/cpa3_e.stm> (last modified: 6 October 1996); see J.T. De Araujo, Jr. & L. Tineo, "Harmonization of competition policies among Mercosur countries" (1998) XLIII Antitrust Bull. 45 [hereinafter De Araujo & Tineo] at 46.

[232] De Araujo & Tineo, *ibid.* at 58.

[233] A further problem in this regard is that neither Uruguay nor Paraguay currently have competition laws in place. *Ibid.* at 65.

[234] Mancero, *supra* note 66 at 168.

[235] WTO 1998 Working Group Report, *supra* note 10 at 27.

17/96, which was to be completed by the end of 1998,[236] should help to rectify any lack of conformity.

Should an anticompetitive practice continue within Mercosur after the imposition of a sanction by a member state, it is possible for a legal or natural person to file a claim before the Trade Commission. These claims must be filed through the national sections of the Trade Commission with the result that it is actually the relevant state, and not the person, which appears as the claimant before the Commission - the process therefore becomes intergovernmental in nature. The claim will then be discussed by the Commission which will either make a decision regarding the claim itself or refer the claim to a Technical Committee. If the Commission is not able to reach a consensus regarding a claim, it will refer the matter to the Common Market Group who will then make a decision. Once a decision is made, the member state against whom the complaint was filed must adopt the measures determined by the Commission or Common Market Group.

If a member state against whom a decision was made fails to comply with it, the applicant state may refer the matter to a compulsory arbitration procedure under the auspices of Mercosur's Arbitration Court. The Arbitration Court is empowered to grant interim relief and will, after hearing the complaint, make a finding based on the provisions of Mercosur and applicable international law. If a member state does not comply with the finding, which is not appealable, within a certain period, the plaintiff member state may adopt compensatory measures, *e.g.* the suspension of concessions, in order to effect compliance.

4.4 Remarks in conclusion

From the discussion, it is apparent that the competition regulation regimes of Mercosur and Ancom are subject to criticism for various reasons - Mercosur *inter alia* for the absence of detailed substantive rules and Ancom for its lack of an enforcement mechanism. In both systems the institutional structures are heavily politicised and the powers given to

---

[236] De Araujo & Tineo, *supra* note 231 at 64.

the supranational organs are inadequate.[237] In order to ensure that the recent trend of increased trade and foreign investment in South America continues, it is clear that an effective system of competition regulation is needed in the region.

Ancom is currently discussing the establishment of a free trade area with Mercosur. Furthermore, there has been a favourable reaction world-wide to the idea of establishing a South American Free Trade Area, involving the merging of Ancom and Mercosur.[238] Effecting such a union, particularly in view of the diverging competition enforcement procedures involved, would be difficult but it would also provide an opportunity to rectify current shortcomings.

5. The World Trade Organization

5.1 Early attempts to regulate RBPs: the ITO and its legacy

It is common knowledge that the *General Agreement on Trade and Tariffs 1947*[239] had its origins in the *Havana Charter*,[240] in terms of which the International Trade Organisation (ITO) was to be established. The ITO was to function alongside the International Monetary Fund and the World Bank in rebuilding post-World War II national economies and facilitating economic co-operation.[241]

An entire chapter of the Charter, Chapter V, was allocated to dealing with restrictive business practices. In terms of the Chapter's provisions, the signatory states would be obliged to prevent anticompetitive business practices if such practices had a negative effect on the expansion of international production or trade.[242] The Charter also identified a

---

[237] See Mancero, *supra* note 66 at 171.
[238] *Ibid.* at 173.
[239] *General Agreement on Tariffs and Trade*, 30 October 1947, 58 U.N.T.S. 187, Can. T.S. 1947 No. 27 (entered into force 1 January 1948) [hereinafter GATT 1947].
[240] UN, *Havana Charter for an International Trade Organization*, UN Doc. E/Cont. 2/78, reproduced in UN Doc. ICITO/114 (1948).
[241] See Castel, *supra* note 65 at 16.
[242] Article 46(1).

number of RBPs which would not be tolerated.[243] Furthermore, provision was made for consultation and investigation procedures,[244] co-operative remedial arrangements,[245] and special procedures to deal with RBPs in the services sector.[246]

In the interim, pending the adoption of the *Havana Charter* (which never realised), the GATT 1947 was drafted utilising parts of the *Havana Charter* relating to tariff negotiations, most-favoured-nation and national treatment provisions - the provisions relating to restrictive business practices were, however, not included in the GATT 1947. Attempts by the Contracting Parties to the Agreement during the 1950's to bring international competition regulation under its ambit were unsuccessful.[247] One of the reasons why it was determined that the GATT 1947 could not be employed to regulate international competition was that the consensus between countries required for such an agreement did not exist.[248]

In 1960, the GATT Parties adopted a report by an Expert Group on Restrictive Business Practices in which it was again recommended that the Contracting Parties should address the issue of restrictive practices.[249] The *Arrangements for Consultations*[250] on RBPs which evolved from this report *inter alia* recommends that, where a Contracting Party requests bilateral or multilateral consultations with another Contracting Party regarding particular restrictive business practices, the latter Party should give due consideration to the requesting Party's complaint with a view to reaching a mutually acceptable solution.

---

[243] Article 46(3).
[244] Articles 47 and 48, respectively.
[245] Article 51.
[246] Article 53.
[247] See Jackson & Davey, *supra* note 103 at 1093; D.L. Miller & J. Davidow, "Antitrust at the United Nations: A Tale of Two Codes" (1982) 18 Stan. J. Int'l L. 347 [hereinafter Miller & Davidow] at 352.
[248] GATT, Group of Experts on Restrictive Business Practices, *Report on Arrangements for Consultations Adopted by the Contracting Parties on 2 June 1960*, GATT Doc. L/1015, 9th Supp. B.I.S.D. (1961) 170 [hereinafter GATT 1960 Report] at 171; see Jackson & Davey, *ibid.* at 1093.
[249] GATT 1960 Report, *ibid.* at 171.
[250] *Arrangements for Consultations*, GATT C.P. Dec. of 19 November 1960, 16th Sess., 9th Supp. B.I.S.D. (1961) 28.

Since their creation, the procedures under the *Arrangement* have only been invoked once and were subsequently suspended by the invoking party.[251]

5.2 The WTO/GATT 1994

The World Trade Organisation was established on January 1, 1995[252] subsequent to the completion of the Uruguay Round of multilateral trade negotiations.[253] The Marrakesh Agreement comprises a number of agreements,[254] *e.g.* the GATT 1994 which incorporates and amends the GATT 1947, the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), representing products of the Uruguay Round. As of 20 December 1998, 133 countries were members of the WTO,[255] which is indicative of the impact of the WTO agreements on international trade.

5.2.1 Substantive provisions

Although the WTO agreements are aimed at the regulation of trade and not competition issues, their market-oriented competitive character has led many to regard the agreements as the first step towards the creation of a code of international competition rules.[256] The WTO agreements do contain a number of provisions relating to competition policy issues. In this regard one may refer to Article XVII of the GATT 1994 in terms of which Members are obligated to ensure that state enterprises or enterprises granted special or exclusive privileges function in a competitive environment. Article 9 of the Agreement on

---

[251] See N. Komuro, "*Kodak-Fuji Film* Dispute and the WTO Panel Ruling" (1998) 32 J. World T. 161 at 171-172; M.-C. Malaguti, "Restrictive Business Practices in International Trade and the Role of the World Trade Organization" 32 J. World T. 117 [hereinafter Malaguti] at 126; Petersmann (1993), *supra* note 21 at 39.

[252] "About the WTO - Summary", online: World Trade Organisation <http://www.wto.org/htbin/htimage/wto/map.map?102,36> (date accessed: 13 October 1998).

[253] The results of the Uruguay Round are contained in the *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, (1994) 33 I.L.M. 1 [hereinafter the Marrakesh Agreement].

[254] These agreements will be referred to as the WTO agreements.

[255] "About the WTO - Members", online: World Trade Organisation <http://www.wto.org/wto/about/organsn6.htm> (last modified: 21 December 1998).

[256] N. Yacheistova, "The International Competition Regulation" (1994) 18:1 World Comp. 99 at 100.

Trade Related Investment Measures (TRIMS) provides for an opportunity to amend TRIMS by complementing its text with competition policy provisions. Article 40(2) of TRIPS lists a number of anticompetitive practices which may have an adverse effect on trade and may therefore be addressed in Members' national legislation, and Articles VIII and IX of GATS provide for the non-abuse of monopolies and elimination of restrictive business practices respectively, thus imposing an obligation on governments to control certain RBPs. In terms of Article 11 of the Agreement on Safeguards, Members are prevented from restraining exports or imports of goods not falling within the provisions of GATT 1994 Article XIX,[257] and are further not allowed to encourage or support private practices intended to restrain imports or exports.

Finally, reference should be made to the *Agreement on Telecommunications Services.*[258] There were 69 signatories to the *Telecoms Protocol*, the aim of which is promote access to the relevant states' telecommunications sectors.[259] Aside from agreeing to certain market access commitments, the signatory states also agreed to a number of pro-competitive regulatory principles to enable service suppliers entering a new market to compete with existing monopolies in that sector. In particular, the signatories undertook to maintain measures to prevent monopolist suppliers from engaging in or continuing anticompetitive practices, such as anticompetitive cross-subsidisation.[260]

Although all the aforementioned provisions cannot be said to impose a general duty (beyond their specific content) on Members to ensure that RBPs within their territories are eliminated, they reflect an acceptance by Members that RBPs should not be allowed to frustrate the objectives of the WTO agreements.[261] At the same time, however, it should be kept in mind that the WTO agreements contain a number of provisions which allow the

---

[257] Article XIX allows Members to take action against imports causing or threatening to cause "serious injury to domestic producers in [the Member's] territory of like or directly competitive products".
[258] *WTO Agreement on Telecommunications Services (Fourth Protocol to General Agreement on Trade in Services)*, 15 February 1997, (1997) 36 I.L.M. 354 [hereinafter the *Telecoms Protocol*].
[259] For a detailed discussion of the provisions of the *Telecoms Protocol*, see M.C.E.J. Bronckers & P. Larouche, "Telecommunications Services and the World Trade Organization" (1997) 31:3 J. World T. 5.
[260] *Telcoms Protocol*. Reference Paper, Article 1.
[261] Malaguti, *supra* note 251 at 124.

Members to take or maintain measures that affect competition domestically and internationally.[262] An example of the aforementioned is GATT Article VI, which allows Members to protect domestic industries from foreign competitors by levying antidumping duties.

5.2.2 Dispute resolution

The WTO dispute settlement procedure is contained in Annex 2 to the WTO Agreement and is called the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The rules and procedures of the DSU are administered by the Dispute Settlement Body (DSB). A complaint may be brought against a Member State under the DSU if (1) the Member's failure to carry out its WTO obligations (violation complaint), (2) application of measures by the Member (non-violation complaint) or (3) the existence of any other situation (situation complaint) has the result of impeding the attainment of an objective of the WTO agreements or has led to the nullification or impairment of another Member State's WTO rights.[263] A Member State which has such a complaint will first request consultations with the infringing party with a view to finding a solution to the dispute.[264] Should consultations not result in a mutually acceptable solution, the dispute may be referred to a panel[265] or to arbitration.[266] It should be noted that interested third party Member States may participate in the panel process.[267] Private parties have no standing under the rules of the DSU.

A panel's function is to assist the DSB in the execution of its responsibilities under the DSU and it will make findings regarding the dispute which will help the DSB make recommendations or a ruling in the matter.[268] A report drafted by a panel is circulated

---

[262] See WTO 1998 Working Group Report, *supra* note 10, paragraph 136.
[263] GATT 1994 Article XXIII(1).
[264] GATT 1994 Article XXII.
[265] DSU Article 4(7).
[266] DSU Article 25.
[267] DSU Article 10.
[268] DSU Article 11.

among the members after which it will be considered for adoption by the DSB.[269] Panel decisions may be appealed to the Appellate Body of the DSB.[270]

Should a panel or the Appellate Body in a violation dispute find that a Member State's measure is inconsistent with its WTO agreement obligations, it can recommend that the Member bring its measure into conformity with its obligations and it may also suggest how the recommendations may be implemented.[271] Likewise, where it is found that a Member State's measure in a non-violation dispute is nullifying or impairing benefits intended under the WTO agreements, the panel or Appellate Body can make similar recommendations.[272] The panel or Appellate Body's recommendations will be referred to the DSB for adoption and will be adopted automatically unless the DSB decides by consensus not to adopt them or if the panel decision is appealed.[273] Where recommendations or rulings are not implemented within a reasonable time, remedies available to the complaining member are compensation and the suspension of concessions under WTO agreements.[274]

5.3 The WTO/GATT 1994 and competition regulation

In view of the fact that WTO law does, albeit only to a very limited degree, deal with competition issues, there has been a call for the inclusion of a wider range of competition rules which could then be administered under the auspices of the WTO. Support for this idea may be found in the fact that, besides having recourse to the specific competition-related provisions referred to above, it is possible to contest anticompetitive governmental restraints to trade under the general GATT provisions, such as the most-favoured-nation (MFN) and national treatment (NT) provisions, Articles I and III respectively, and Article XI which deals with the prohibition of restrictions on imports and exports.[275]

---

[269] DSU Article 16.
[270] DSU Article 17.
[271] DSU Article 19.
[272] DSU Article 26.
[273] DSU Article 16(4) and Article 17(14).
[274] DSU Article 22.
[275] See Malaguti, *supra* note 251 at 128-130.

Practical examples of where the aforementioned GATT provisions have been employed in this manner are the *Semi-conductor* dispute[276] and the recent *Kodak/Fuji* case,[277] both involving Japan and the US. Whereas the former dispute was settled by way of a bilateral agreement between the states,[278] the *Kodak/Fuji* case was eventually referred to a WTO Panel for adjudication.

In the latter case, the US had referred a dispute to the DSB in terms of which it claimed that Japan was in violation of its GATT Article III and Article X obligations and that these violations and other measures had nullified or impaired the benefits the US was entitled to under the GATT. In particular, the US alleged that Japan had implemented a number of "liberalisation countermeasures" to limit market access for imported photographic film and paper and protect its domestic film industry.[279]

Responding to the Japanese contention that the US claims required a "dramatic expansion" of GATT provisions to "not only government measures, but also to private conduct allegedly encouraged by government action",[280] the US indicated that it was only challenging the Japanese Government's measures, not private business practices or market structures.[281] In its decision, the Panel accepted that, due to the international nature of the WTO Agreement, only governmental measures, and not policies or actions of private parties, could provide the basis for a valid claim under Article XXIII(1)(b).[282] However, the Panel pointed out that it was not always easy to determine the extent to which *prima facie* private actions could be attributed to a government due "some governmental

---

[276] See Hill, *supra* note 23 at 250-253.
[277] *Japan - Measures Affecting Consumer Photographic Film and Paper (Complaint by the United States)* (1998), WTO Doc. WT/DS44/R (Panel Report) [hereinafter the *Kodak/Fuji* case].
[278] *Arrangement Concerning Trade in Semi-conductor Products (Japan-United States)* (1986), GATT Doc. L/6076.
[279] These measures, is was claimed, were not only in conflict with general GATT obligations under Articles III and X, but also nullified or impaired, within the meaning of Article XXIII(1)(b) of GATT, the tariff concessions that Japan made on black and white and colour consumer photographic film and paper during the Kennedy Round, Tokyo Round, and Uruguay Round multilateral tariff negotiations. *Kodak/Fuji* case, *supra* note 277 at 1.
[280] *Ibid.* at 172.
[281] *Ibid.* at 174.
[282] *Ibid.* at 386.

connection to or endorsement of those actions".[283] Referring to a number of previous panel decisions, the Panel came to the conclusion that "the fact that an action is taken by private parties does not rule out the possibility that it may be deemed to be governmental if there is sufficient government involvement with it. It is difficult to establish bright-line rules in this regard, however. Thus, that possibility will need to be examined on a case-by-case basis."[284] The Panel subsequently found that Japan did not violate its GATT obligations under Articles III or X and that the measures referred to by the US did not constitute a valid basis for a non-violation complaint.[285]

It is consequently clear that the WTO agreements' provisions will only be applicable to anticompetitive practices involving government action or hybrid government/private action.[286] A purely private anticompetitive practice can therefore not be addressed under current WTO law except in cases where the members have a specific obligation to ensure that private parties do not indulge in the relevant practice.[287] In order to provide for the coverage of all international RBPs within the WTO regime, it would consequently be necessary to extend the scope of the WTO provisions.[288]

5.4 The WTO Working Group on the Interaction between Trade and Competition Policy

At the WTO Ministerial Conference held in Singapore in December 1996, the Ministers agreed to establish two Working Groups, the first to examine with the relationship

---

[283] *Ibid.* at 385.

[284] *Ibid.* at 386. For instance in *Japan - Trade in Semi-Conductors (ECC v. Japan)* (1988), GATT Doc. L/6309, 35th supp. B.I.S.D. (1988) 116, para. 117, the Panel found that, despite the absence of governmental measures requiring Japanese exporters to export semi-conductors at a particular price, "an administrative structure had been created by the Government of Japan which operated to exert maximum possible pressure on the private sector to cease exporting at prices below company-specific costs ... the Panel considered that the complex of measures exhibited the rationale as well as the essential elements of a formal system of export control".

[285] *Kodak/Fuji* case at 486.

[286] See D.E. Rosenthal, "Jurisdiction and Enforcement: Equipping the Multilateral Trading System with a Style and Principles to Increase Market Access" (1998) 6 George Mason U. L. Rev. 543 at 543.

[287] For example, Articles VIII and IX of GATS.

[288] This could be done by increasing the rules which obligate Members to combat RBPs domestically or by creating rules directly applicable to private parties. See Malaguti, *supra* note 251 at 138-139.

between trade and investment, and the second[289] to study the interaction between trade and competition policy.[290] The purpose of the latter Working Group's study was to identify areas of trade-competition policy interaction which merit further attention within the framework of the WTO.

In the two years ensuing its creation, the Working Group held seven formal meetings during which Members of the WTO raised and discussed relevant issues, such as the relationship between the objectives, principles and instruments of trade and competition policy, the interaction between trade and competition policy, and the relationship of these two policies to development and economic growth.[291] In terms of its mandate, the Working Group also met and co-operated with intergovernmental organisations such as the OECD, UNCTAD, the IMF and the World Bank.[292]

In December 1998, the Working Group presented its first report to the WTO General Council in which its activities were set out.[293] The Group's work to date has consisted of surveying existing policies and it has not yet made any recommendations regarding new initiatives relating to the regulation of competition within in the WTO. It did, however, recommend that it continue its study with a focus on three particular topics: "(i) the relevance of fundamental WTO principles of national treatment, transparency, most-favour-nation treatment to competition policy and vice versa; (ii) approaches to promoting cooperation and communication among Members ... ; and (iii) the contribution of competition policy to achieving the objectives of the WTO, including the promotion of international trade".[294]

---

[289] The Working Group on the Interaction between Trade and Competition Policy [hereinafter: the Working Group].
[290] WTO, Ministerial Conference Singapore, *Ministerial Declaration*, (December 1996), WTO Doc. WT/MIN(96)/DEC, paragraph 20.
[291] WTO 1998 Working Group Report, *supra* note 10 at 5-7.
[292] *Ibid.* at 4.
[293] *Ibid.*
[294] *Ibid.*, paragraph 154.

IV. Other international competition law codification initiatives

1. General

In contrast with the regional and multilateral agreements discussed in the previous section, which all deal with international competition as an element within the larger framework of international trade, there are a number of initiatives which focus more specifically on the international regulation of restrictive business practices. Proposals for such codes date back to 1925 when the League of nations made a study in this regard.[295]

Attempts to create competition codes have been made for two reasons,[296] the first being that such codes could mitigate actual and potential conflicts in competition law enforcement, *i.e.* harmonisation of competition laws could be achieved. The second reason, most frequently raised by developing countries, is the perceived need to regulate the activities of MNEs in foreign countries.[297] As will be seen from the examples discussed, these codes may differ with respect to the goals pursued in their provisions, scope of application and the intentions of the drafters.

2. The OECD Guidelines for Multinational Enterprises

Mention has already been made of the OECD's role in promoting co-operation between the competition authorities of its members. In addition to this, the OECD, in its *Guidelines for Multinational Enterprises*,[298] adopted of a set of competition rules

---

[295] See Miller & Davidow, *supra* note 247 at 351. As was the case with the GATT initiatives in the 1950s, the League of Nations initiative was eventually shelved due to the disparate national approaches to RBPs.
[296] Hawk (1977), *supra* note 148 at 241.
[297] The use of business practice codes to regulate the MNEs doing business in foreign countries is not based on traditional competition concerns but rather on developing countries' concerns regarding the social, economic and political power of MNEs and developing countries' aspirations with regard to the transfer of technology. *Ibid.* at 242.
[298] OECD, *The OECD Guidelines for Multinational Enterprises (1994)*, (Paris: OECD, 1994) [hereinafter the Guidelines (1994)]. The Guidelines were originally published as an Annex to the OECD *Declaration of 21 June 1976 on International Investment and Multinational Enterprises* (as revised on 13 June 1979), reproduced in R. Blanpain, *The OECD Guidelines for Multinational Enterprises and Labour Relations 1976-1979*, (Deventer: Kluwer, 1979) [hereinafter Blanpain] at 277.

applicable to the practices of MNEs operating in member states' territories.[299] The Guidelines are the result of negotiations in the Committee on International Investment and Multinational Enterprises (CIME), a body created by the OECD in 1975.[300]

The primary purpose of the Guidelines is not to harmonise domestic competition laws, but to ensure that MNEs operate in harmony with the national policies of the states in which they operate.[301] Accordingly, the Guidelines require MNEs to conform with the competition rules and policies of the countries in which they are active, *i.e.* host states, and include prohibitions on practices such as anticompetitive acquisitions, predatory behaviour towards competitors, anticompetitive abuse of intellectual property rights and discriminatory pricing. Furthermore, the Guidelines encourage MNEs to refrain from participating in or strengthening the effects of restrictive agreements or international and domestic cartels.

Although the Guidelines merely set voluntary standards of behaviour for MNEs and therefore lack any binding legal force,[302] the Guideline provisions do have an impact in practice. This is *inter alia* due to the fact that the governments involved in the OECD have the political will for the Guidelines to succeed and will therefore implement the policies reflected in the Guidelines domestically.[303]

A consultation procedure administered by the CIME[304] is used to clarify the application of the Guidelines.[305] Additionally, major reviews of the Guidelines, dating between 1979 and 1994, have led to further clarification as well as a few amendments to the original text.[306]

---

[299] The Guidelines (1994) also contain rules relating to the disclosure of information by MNEs, financing, taxation, employment and industrial relations, and science and technology.
[300] See Blanpain, *supra* note 298 at 29.
[301] See Hawk (1977), *supra* note 148 at 246.
[302] Guidelines (1994), *supra* note 298, Introductory paragraph 6.
[303] Blanpain, *supra* note 298 at 267.
[304] It should be noted that the CIME is not a judicial or quasi-judicial body and therefore does not have the authority to pass any kind of judgement regarding the activities of individual enterprises. The Guidelines (1994), *supra* note 298 at 21; OECD, *The OECD Guidelines for Multinational Enterprises (1986)*, (Paris: OECD, 1986) at 51.
[305] See Blanpain, *supra* note 298 at 34.
[306] Guidelines (1994) at 22.

The competition provisions in the 1994 edition, however, remain identical to those originally published in 1976.[307]

It is acknowledged that the Guidelines alone cannot provide precise competition rules for MNEs to follow and that reference should be made to the applicable national laws of the member states to interpret the Guidelines' competition provisions.[308] Recent editions of the Guidelines accept that the UN RBP Code, which will be discussed in the following section, may be seen as an illustration of the principles contained in the Guidelines.[309] Consequently, the latter code may be deemed to be interpretative of the Guidelines' provisions to a certain degree.

3. The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices

The *Set of Principles and Rules*,[310] which was adopted as a resolution by the UN General Assembly in 1980, is considered to be the most detailed internationally agreed declaration relating to RBPs.[311] Three factors are said to have facilitated the project to draft the RBP Code: the demand by developing countries for a measure of control over MNE conduct within their borders;[312] the realisation by developed countries that RBPs could be harmful to trade; and the further realisation by developed countries that if a code of this nature was to be adopted by the UN, it would be in their interest to be present during the drafting thereof.[313]

---

[307] It has been suggested that as the CIME is not likely to be active in the area of competition law, the Guideline provisions dealing with competition will probably not have any such impact in practice. See Jackson & Davey, *supra* note 103 at 1095.
[308] The Guidelines (1994) at 37-38.
[309] *Ibid.* at 38.
[310] *Set of Principles and Rules for the Control of Restrictive Business Practices*, GA Res., 35th Sess., UN Doc. TD/RBP/10 (1980) [hereinafter the RBP Code].
[311] Jackson & Davey, *supra* note 103 at 1095.
[312] See EC COM(96)284, *supra* note 156, Section IV.
[313] See E.M. Fox, "Harnessing the Multinational Corporation to Enhance Third World Development - the Rise and Fall and Future of Antitrust as Regulator" (1989) 10 Cardozo L. Rev. 1981 [hereinafter Fox

The RBP Code embodies specific competition rules applicable to enterprises which rules are similar to those contained in the OECD's Guidelines,[314] prohibiting *inter alia* price fixing, collusive tendering, market allocation agreements, predatory behaviour towards competitors and anticompetitive mergers.[315] In addition, the RBP Code also contains a number of principles applicable to states in terms of which they are urged to implement measures to promote competitive markets.[316] These principles include the active elimination of restrictive business practices at national, regional and international levels, and bilateral and multilateral government collaboration to improve the control of such practices.[317]

The non-binding nature of the RBP Code arises from the fact that it takes the form of a UN General Assembly resolution and therefore, in terms of Article 12 of the UN Charter, merely constitutes a recommendation to Member States. The introductory text of the RBP Code itself also provides that the code represents a set of recommendations.[318] Due to the voluntary character of the RBP Code, enforcement of its provisions was not envisaged and consequently, as is the case with the OECD Guidelines, it does not provide for an enforcement mechanism. It does, however, allow a state to request a consultation with another state regarding an issue concerning the control of RBPs "with a view to finding a mutually acceptable solution".[319]

An Intergovernmental Group of Experts on RBPs constitutes the institutional machinery for the Code.[320] As is the case with the OECD's CIME, the Group of Experts is precluded

---

(1989)] at 1992; S.E. Benson, "The UN Code on Restrictive Business Practices: An International Antitrust is Born" (1981) 30 Am. U. L. Rev. 1031 [hereinafter Benson] at 1031.

[314] The developed countries involved in negotiating the RBP Code insisted that its substantive provisions be limited to competition law principles reflected in their domestic laws and in the OECD Guidelines. See Benson, *ibid.* at 1032.

[315] RBP Code, Section D.

[316] Section C.

[317] Sections E & F.

[318] During the negotiations leading to the RBP Code, the developing countries lobbied for making the RBP Code binding, while the developed countries insisted that it be voluntary of nature. See Benson, *supra* note 313 at 1032.

[319] Section F.4.

[320] Section G.

from acting as a judicial forum or enforcement body for the Code's provisions, its functions being limited to activities such as the provision of a forum for multilateral consultations, the study of matters relating to the RBP Code and the dissemination of information relating to the Code.

The RBP Code provides for a number of bilateral and multilateral measures aimed at achieving co-operation among states.[321] Aside from the consultation mechanism for the resolution of disputes referred to above, mention may be made of the provisions for technical assistance to developing countries. These provisions constitute a very important part of the Code as their main purpose is to foster the advancement of developing countries by improving their ability to control RBPs that restrain their trade.[322] Reference should also be made to Section F.5 of the Code which provides for the elaboration of a model law on RBPs with a view to assisting developing countries in creating their own competition laws. Providing countries with such a model law to adapt according to their own needs not only furthers the cause of having RBP controls internationally, but it also, to a certain degree, has a harmonising effect. This effect arises from the fact that competition laws which use the model law as their basis will be in conformity with the generally accepted competition principles contained therein. The RBP Conference has been working on such a model law on RBPs[323] for a number of years and is still in the process of elaborating it.[324]

Provision is made for the review of the RBP Code[325] and a number of review conferences have subsequently been convened, the next one which is to be held in the year 2000.

---

[321] Section F.
[322] Benson, *supra* note 313 at 1047.
[323] UNCTAD, *Model Law on Restrictive Business Practices*, UN Doc. TD/B/RBP/81 (1991).
[324] See UNCTAD, *Continued Work on the Elaboration of a Model Law or Laws on Restrictive Business Practices - Draft commentaries to possible elements for articles of a model law or laws*, UN Doc. TD/B/RBP/81/Rev.5 (1998).
[325] Section G(iii).

Although various resolutions have been made at these conferences,[326] the provisions of the RBP Code have remained unchanged.

It has been argued that the success of the RBP Code should be judged on the basis of whether it provides a reasonably clear guide for MNEs and governments regarding the regulation of RBPs.[327] Such guidance should assist in alleviating frictions between governments and MNEs as both would have a better idea of what is expected from them. The opinion exists that the RBP Code is unsuccessful as it has not met with enough acceptance and it has failed to provide sufficient linkage between the drafted text and national laws and their implementation.[328] It seems that developing countries, in general, are of the opinion that the RBP Code has not been properly implemented as they believe that RBPs by MNEs are still restricting trade in developing countries.[329]

4. The Draft International Antitrust Code

The Draft International Antitrust Code[330] was drafted in 1993 by a group of legal academics and practitioners in the belief that a model agreement of its nature would fuel

---

[326] In 1990, the UN RBP Conference adopted a resolution in which the continued importance of the RBP Code was acknowledged and in which a strengthening of the implementation of the code was called for. This was to be achieved mainly by way of co-operation between states, particularly between developed states with experience in the drafting and implementation of competition laws and states which either had no competition legislation, had recently drafted competition legislation (or were in the process of doing so) or had competition legislation but did not enforce it effectively. See UNCTAD, *Report of the Second United Nations Conference to Review all Aspects of the Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, UN Doc. TD/RBP/CONF.3/9 (1991). The third UN review conference was held in 1995 and resulted in a RBP Conference resolution in terms of which the common ground between states with regard to competition law and policy was to be identified and further strengthened. This resolution was made in the light of the world-wide trend towards the adoption and reform of competition laws and reflects an aspiration for the further harmonisation of domestic competition laws. See UNCTAD, *Third United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, UN Doc. TD/RBP/CONF.4/14 (1995).

[327] Benson, *supra* note 313 at 1033.

[328] See the Introductory Note to the *Draft International Antitrust Code*, (1993) World Trade Materials 5 126 at 10.

[329] P. Brusick, M. Gibbs & M. Mashayekhi "Anticompetitive Practices in the Services Sector" in UNCTAD, *Uruguay Round - Further Papers on Selected Issues* (New York, UN, 1988) 129 at 133.

[330] *Draft International Antitrust Code*, (1993) World Trade Materials 5 126 [hereinafter the DIAC].

the debate on the necessity of a set of international competition laws.[331] It may therefore be distinguished from the OECD Guidelines and the RBP Code in that the latter two were drafted with the intention of being applied in practice, whereas the DIAC is a proposal intended to facilitate the creation of a binding international competition code.

The members of the team involved in drafting the DIAC were not influenced or restricted by any kind of governmental, business or other agenda as they acted in their private capacities. This made it possible to provide the DIAC with provisions reflecting the drafters' individual scholarly opinions.[332] As a consequence, the DIAC contains detailed provisions relating to both substantive and procedural international competition issues, which would probably not have been possible if governments were involved in the drafting thereof.[333] The DIAC and its provisions will be discussed in detail in the following chapter.

V. Conclusion

The conflicts which arise from unilateral regulation of international competition may be resolved and even prevented by harmonising the competition laws of different states. Bilateral agreements have to a great extent been successfully employed to this end, as may be observed from the application of the US/EU Agreement. Consequently, the conclusion of more such agreements would most certainly be regarded as a positive development. Bilateral agreements of this nature are, however, subject to certain limitations, *e.g.* they depend on the effectiveness of the respective parties' competition law regimes. Furthermore, the link between competition and trade makes it more logical to regulate competition within the framework of the international trade regime. The various trade regimes in existence today also address some cross-border competition issues.

---

[331] See Petersmann (1993), *supra* note 21 at 78-79.
[332] DIAC, Introduction. Paragraph VIII.
[333] A minority of the members of the Working Group involved in drafting the DIAC do not support the adoption of the DIAC's substantive text and believe that a minimal approach, involving a limited number

NAFTA lacks substantive norms relating to the regulation of competition as, aside from the provisions relating to telecommunications, it only places a general obligation on its members to combat RBPs. Combined with the absence of procedural rules and resolution procedures for RBP disputes, one may safely say that NAFTA fails to provide for effective cross-border RBP regulation. Ancom, the EU and Mercosur all possess substantive norms relating to cross-border RBPs, but differ in other respects. Ancom lacks an effective enforcement mechanism since its central authority only has the power to make *recommendations* with regard to RBPs. Mercosur's norms are enforced by its members' national authorities and disputes arising from RBPs are resolved through a complicated intergovernmental dispute resolution system. The EU regime, with its detailed set of substantive and procedural competition rules, its powerful central enforcement agency and the direct applicability of its norms to all Member States has been the most successful in creating an effective and functional regulatory system.

It seems that beyond the actual competition-related provisions of a trade agreement, the feasibility of creating a truly harmonised competition regulation regime, capable of regulating cross-border RBPs effectively, is largely determined by the level of economic integration contemplated in the agreement and the success in achieving that level of integration.[334] As a region achieves a higher level of integration, the subsequent harmonisation of economic policies makes it more practicable to create a uniform competition regime. As the necessary level of harmonisation of competition policies is not likely to be achieved at lower levels of economic integration, the question arises whether the idea of regulating RBPs under the auspices of the WTO (representing a lower level of integration) is realistic. Conversely, considering the fact that the WTO regime contains a number of provisions which may be, and have been, utilised to combat governmental and hybrid governmental/private anticompetitive practices, the notion of having the WTO regulate international private anticompetitive practices in the future is not that farfetched.

---

of general principles, would be a more appropriate method to regulate international competition. For a discussion of this approach, see *infra* chapter 3, section II.2.1.

[334] But see P. Nicolaides, "For a World Competition Authority" (1996) 30:4 J. World T. 131 [hereinafter Nicolaides (1996)] at 131.

The competition codes referred to, *i.e.* the OECD Guidelines, the RBP Code and the DIAC, do not aspire to create a functional plurilateral or multilateral competition regulation mechanism. These codes do, however, play an important role in the harmonisation of substantive competition laws and the determination of international competition principles. Aside from harmonised competition laws or international competition principles, an international competition regulation mechanism also requires a framework in which it can function effectively. There have been a plethora of proposals with regard to these substantive and institutional aspects of international competition regulation, a number of which be discussed in chapter 3.

CHAPTER 3: THE FUTURE OF INTERNATIONAL COMPETITION REGULATION

I. General

The growing appreciation of the international effects of RBPs has resulted in a number of proposals suggesting ways in which competition with an international element could be regulated. Many of these proposals are similar or overlap, but one can distinguish between a few distinct approaches to the issue, ranging from the creation of a detailed international competition code with a supranational enforcement agency, to the limitation of institutional regulation of competition to an absolute minimum.

This chapter will provide an overview of various proposals, referring to the nature of the substantive and procedural principles (if any) guiding the proposal and the institutional framework in which the proposal is to function. Finally, a conclusion will be reached with regard to existing and future methods of competition regulation at the international level.

II. Proposals for multilateral competition regulation

1. A detailed international competition code: the DIAC approach

The most radical way international competition problems could be dealt with would be to create a detailed international agreement or treaty on a uniform or harmonised global competition law.[335] Given the divergence in national competition laws and policies, this approach may be regarded to be over-ambitious and impractical - consequently proposals based on this approach are very unrealistic.

Although rejecting the notion of a detailed international agreement or treaty on competition,[336] the drafters of the DIAC have put forward a proposal which comes close

---

[335] Introduction to DIAC, *supra* note 330, paragraph VI.
[336] *Ibid.* Paragraph VI.

to this idea. The DIAC proposal, which was briefly referred to earlier,[337] is based on five basic principles.[338]

Firstly, it advocates the use of national substantive law to solve international competition cases. Secondly, equal treatment of both foreigners and nationals under national competition laws, *i.e.* national treatment, similar to that provided for in Article III of the GATT, must be effected. In the third place, the national competition laws must comply with certain minimum standards, which standards will be agreed upon and encoded in an international agreement. The fourth principle is what the drafters call "the principle of international procedural initiatives". In terms of this principle, the effectiveness of international competition law will be ensured, where necessary, by procedural initiatives taken by an international body or agency and other parties to the agreement who have been adversely affected by a particular restraint to competition. This procedural principle is necessary as the DIAC is not intended to be self-executing. The final principle is that the DIAC is applicable only to anticompetitive practices with a cross-border dimension, excluding purely domestic cases from its scope.

The DIAC may be divided into two parts, the first dealing with the institutional framework within which an international antitrust code is to function and the second consisting of the applicable substantive rules. With regard to the institutional framework, the drafters support the idea that the WTO would best provide the necessary infrastructure. This reasoning is *inter alia* based on the effectiveness of the WTO dispute settlement system and the fact that an international competition agreement must take into account the interrelationships between its own provisions and rules relating to trade and intellectual property rights.[339] As far as the substantive rules are concerned, the DIAC deals in detail with horizontal and vertical restraints, the control of concentrations and restructuring and the abuse of dominant positions. Since these substantive rules represent minimum

---

[337] *Supra* chapter 2, section IV.4.
[338] DIAC. Introduction, paragraph VI.
[339] *Ibid.*, paragraph V; Petersmann (1993), *supra* note 21 at 79.

standards members to such an agreement would have to conform with, allowance is made for divergent national competition laws and experimentation.[340]

As stated above, one of the principles on which the DIAC is based is that national law should be applied to solve international competition problems. With respect to the enforcement of competition law, it is therefore logical that the DIAC would rely on the enforcement of substantive competition law provisions by national authorities.[341] In terms of the DIAC, national laws must provide for various remedies, such as injunctive relief, fines and damages, and determine the competent authorities for remedial action.[342] Should a particular national authority fail to take remedial action in terms of the provisions of the agreement, a party to the agreement may refer the dispute to the International Antitrust Authority.

The International Antitrust Authority (IAA) is one of several institutional bodies envisaged by the DIAC, its function being the international implementation of the DIAC. The powers which are accordingly granted to the IAA include the following: the right to request national authorities to initiate competition cases; the right to bring an action against a national authority where the relevant authority fails to take appropriate action against a RBP; the right to sue private persons and enterprises for anticompetitive practices in national courts; and the right to sue a party to the DIAC before the International Antitrust Panel for violations of the DIAC.[343] The IAA would therefore assume a supervisory role over national competition authorities and could resolve disputes between them, a mechanism currently lacking in bilateral competition relations.

The International Antitrust Panel (IAP) is to function within the framework and subject to the rules of the WTO DSU, with parties to the DIAC having the right to bring actions against one another for violations of DIAC provisions before the IAP.[344] Similar to the

---

[340] Petersmann (1993), *ibid.*
[341] DIAC. Article 15.
[342] The specific content of the various remedies are all elaborated upon in the DIAC's text.
[343] DIAC. Article 19, Section 2.
[344] Article 20. Section 1.

situation under the WTO DSU, a request for a panel may only be made once consultations between the IAA and the parties concerned have failed to resolve the dispute. What sets the IAP procedure apart from the WTO DSU, is that private parties and undertakings concerned in a case before the IAP would have a right to be heard.[345] Decisions made by the IAP would be legally binding.

The DIAC is subject to criticism in various respects.[346] For instance, it does not deal with some interface problems of trade and competition rules, *e.g.* the need to address the laxness of GATT rules regarding state monopolies. Another problem is that a number of the substantive standards it contains are too detailed and over-ambitious which will make it difficult to achieve the necessary conforming changes to domestic competition law. It is also argued that some of the proposals relating to institutions, legal sanctions and dispute settlement procedures are too far-reaching, *e.g.* the competence of the proposed International Antitrust Authority to enforce international rules against national competition authorities and private businesses through national courts by way of national dispute settlement procedures.

Some of the rules contained in the DIAC would be unacceptable to many countries, for instance the US would regard as unacceptable the rules relating to vertical restraints and abuse of dominant positions.[347] As a result, and again given the divergence in national competition policies and laws, the approach envisaged by the DIAC drafters may be regarded as unfeasible. An agreement regarding competition standards achieved in a multinational context would realistically only result in standards or rules at the highest level of generality. Such an agreement would not serve any purpose in practice as the harmonisation of competition laws will not be promoted by such general standards or rules.

---

[345] Article 20. Section 3.
[346] See Petersmann (1993), *supra* note 21 at 79-80; Fox (1997), *supra* note 28 at 15-16; Fox (1995), *supra* note 114 at 11; W. Fikentscher, "On the Proposed International Antitrust Code" in Haley & Iyori, *supra* note 184, 345 at 355-357
[347] Fox (1997), *ibid.* at 16.

A further argument which may be raised against the DIAC approach is that the creation of a code of substantive rules combined with an international enforcement agency, as intended in the code's provisions, would require states to give up a measure of national power they may not deem to be justified given the benefits. It may therefore be questioned whether many states would be willing to be party to such an agreement. Finally, codifying a detailed set of rules will inevitably make those rules unresponsive to future social and economic changes.

2. The codification of broad consensus principles

The majority of proposals relating to the international regulation of competition fall within this category, which supports the idea of creating a broad set of international competition principles, rather than a detailed competition code, as a method to regulate international competition. Despite their similarities, the proposals discussed in this section all have a slightly different approach to addressing the issue.

2.1 A targeted constitutional solution: the DIAC minimal approach

Although the majority of the scholars involved in the drafting of the DIAC agreed with the proposal discussed above, a number of the group's members dissented and support a minimal approach to codification as a method to regulate international competition.[348] Supporters of the minimal approach accept that national laws are inadequate to deal with international competition issues and are furthermore prone to be parochial and protectionist in nature - fundamental international principles of competition are therefore called for. At the same time, however, they acknowledge the importance of having and allowing for a diversity of competition laws among states. Consequently, an approach was devised which, according to its supporters, allows for both international competition principles and national diversity. The solution, sometimes referred to as the targeted constitutional approach, is to identify specific tensions in the international

competition/trade system and devise a narrowly focused agenda in response to these tensions.[349]

The minimal approach advocates a number of consensus principles to which nations contracting to the envisaged code should adhere when a transaction or conduct with an international dimension is involved. These consensus principles entail the adoption and enforcement of a limited number of rules of major market importance.[350] The rules would relate to matters such as the elimination of cartels with an internationally anticompetitive effect, market access, notification of export collaborations among competitors and bringing antidumping rules in line with price-predation laws.[351]

States party to the code would agree to adopt the consensus principles into their domestic laws. The states would, however, possess a measure of discretion as to the method of implementation since they may use whatever formulation they deem fit as long the principle is applied effectively and non-parochially.[352] The resultant national laws should afford persons or entities within the territory of any of the member states the protection intended by the consensus principles. Aggrieved states, persons and entities would have the right to seek and obtain redress within the host nation's territory and in terms of its laws and enforcement procedures.[353] The code would also provide for the application of positive and negative comity between member states.[354]

As disputes among states will predictably arise, the smooth functioning of this approach necessitates an acceptable dispute resolution system.[355] Consequently, the creation of a

---

[348] DIAC. Introduction, paragraph VIII; E.M. Fox, "International antitrust: against minimum rules; for cosmopolitan principles" (1998) XLIII Antitrust Bull. 5 [hereinafter Fox (1998)]; Fox (1997), *supra* note 25; and Trebilcock, *supra* note 153.
[349] Fox (1995), *supra* note 114 at 10.
[350] Fox (1997), *supra* note 25 at 19.
[351] DIAC. Introduction, paragraph VIII; Fox & Ordover, *supra* note 15 at 33. A similar set of principles is proposed in M. Matsushita, "Competition Law and Policy in the Context of the WTO System" (1995) 44 DePaul L. Rev. 1097 at 1112-1114.
[352] Fox (1997), *supra* note 25 at 23.
[353] *Ibid.* at 19.
[354] DIAC. Introduction, paragraph VIII.
[355] Fox & Ordover, *supra* note 15 at 33.

body, such as the International Antitrust Authority proposed by the majority of the DIAC's drafters, is also supported under the minimal approach. Specifically, the IAA would: act as a forum for appeals from national courts in respect of international competition disputes; upon the request of a national competition authority, examine the global impact of anticompetitive practices and report any conclusions to the national authority in question, thus providing the "vision from the top" lacking in unilateral and bilateral competition regulation; make findings with regard to member states' positive and negative comity obligations; explore the harmonisation of merger procedures among member states; and promote further convergence between member states' substantive competition laws.[356]

It may be argued that the minimal approach is subject to some of the same criticism levelled against the complete international code approach (DIAC approach) in that divergent national competition laws and policies also make any agreement regarding consensus principles, for instance a market access principle, unlikely. However, by leaving the exact formulation of the competition laws contemplated by these principles to the states, this problem is solved - each state can, using the aforementioned example, define for itself what it considers to be an unjustifiable market access restraint. This is subject to the condition that the relevant law is formulated "in a credible, non-discriminatory, clear and understandable way".[357]

If states are allowed to decide for themselves how to define certain basic principles, it is likely that some states will have more lax and some more stringent definitions of basic principles and therefore competition policies. This raises the question of reciprocity, which plays a central role in international trade policy.[358]

---

[356] DIAC. Introduction, paragraph VIII.
[357] Fox (1997), *supra* note 25 at 24.
[358] See Trebilcock, *supra* note 153 at 99.

Consider, for instance, vertical restraint rules in the US and Japan. The US rules are traditionally more stringent than those of Japan.[359] If both states were to become signatories to an agreement setting out minimum standards of vertical restraint rules but allowing for a measure of flexibility in the rules' implementation, it is possible, if not probable, that the US rules will still be more stringent than those of Japan. Due to the variation in strictness of the rules between the two states, companies from Japan will find it easier to access the US domestic market whereas US companies will find it more difficult to access Japanese markets, both as exporters and investors.[360] This may result in Japanese companies having a comparative advantage over the US companies. Should the US authorities try to rectify this imbalance by applying different rules depending on whether a company is domestic or Japanese, *i.e.* should the US attempt to protect its companies and "punish" Japanese companies for Japan's less stringent rules under the guise of reciprocity?

The opinion exists that reciprocity should not replace national treatment as the criterion to address differences in domestic competition policies, as this would limit the potential for diversity among competition laws and policies.[361] Consequently, it is argued that as long as a state applies its competition laws indiscriminately to both domestic and foreign individuals and entities, and they conform with the minimum standards required in an international code, the fact that the state has more lax or stringent rules can not provide the basis for any complaint.

In the aforementioned example, the US will therefore not be able to complain about Japan's more lax standards as long as Japan's market access rules conform to the minimum standards required internationally. The reasoning behind this argument is that, when

---

[359] Consider Japan's positive attitude towards *keiretsu*, or business groupings. A. Goto & K. Suzumura, "Keiretsu - Interfirm relations in Japan" in Waverman, *supra* note 13 at 361; J. Tamura, "Foreign Firm Access to Japanese Distribution Systems: Trends in Japanese Antitrust Enforcement" (1995) 4:1 Pacific Rim L. & Pol'y J. 267 at 269.

[360] M. Kotabe, K.W. Wheiler, *Anticompetitive Practices in Japan*, (Westport, Conn.: Praeger, 1996) at 1-10.

deciding on their domestic policies, states have presumably done so taking all externalities into account - including foreign trade and investment - and should not be allowed to export their policies to foreign markets.[362]

The adherents of the minimal approach look to the WTO to provide an institutional framework for the agreement. The agreement could be made voluntary for states willing to adhere to its consensus principles (*i.e.* constituting an Annex 4 WTO agreement) or it may be made obligatory for all members of the WTO (in this case constituting an Annex 1 agreement).[363] An alternative opinion exists in terms of which the WTO MFN and NT principles could be complemented by a general market access principle, which would apply to all areas covered by the WTO agreements.[364] The latter proposal therefore intends the amendment of the existing WTO agreements by including a market access principle, rather than concluding a new Annex 1 or Annex 4 agreement.

2.2 Phasing in a competition regulation mechanism: Scherer

Another proposal which attempts to balance the necessity of international principles with respect for national sovereignty and individual states' need for exceptions from general competition rules, has been offered by Scherer.[365] This proposal is to be implemented over a period of seven years. The first step of the proposal involves the ratification of an international competition agreement and the establishment of an international competition authority, the International Competition Policy Office (ICPO). The ICPO, which is to function within the WTO framework, will have investigative and enforcement powers.

---

[361] Trebilcock, *supra* note 153 at 100. *Contra* EC, Group of Experts on Competition, *Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules*, (Brussels: EC, 1995) [hereinafter EC Experts Proposal] at 3.

[362] It has been argued that allowing states to "export" their policies in this manner expands the notion of extraterritoriality to an unacceptable extent. Trebilcock, *supra* note 153 at 100.

[363] Fox (1997), *supra* note 25 at 24.

[364] See Malaguti, *supra* note 251 at 141-142.

[365] *Supra* note 4 at 91-97.

In the second year of the international agreement, all "substantial"[366] monopolies, single-nation export and import cartels and cartels having cross-border operation must be registered with the ICPO. Additionally, the ICPO will, on petition by a signatory nation, begin to study alleged monopolistic practices restraining international trade and, where applicable, make recommendations for corrections. The competition and judicial authorities of the signatory states will be obliged to provide assistance in the discovery of relevant evidence.

By the third year Scherer foresees an agreement between signatory states relating to common merger notification procedures for multinational or substantial enterprises. All ensuing mergers involving multinational or substantial domestic enterprises must be notified to the ICPO prior to the merger. The ICPO will be responsible for the distribution of the information to interested national competition authorities. This should lower the transaction costs of these types of mergers as multiple notifications would no longer be necessary.

Within five years from the ICPO's creation, signatory states will enact national laws in terms of which export cartels will be prohibited from operating within their territories. Scherer foresees that states will demand exceptions from such an anti-cartel rule, but will not be able to reach consensus as to what criteria should be applied to determine which industries may be exempted.[367] Consequently, his proposal allows each state to choose three industries, subject to certain restrictions, which will be exempted. Signatory states will also enact national laws prohibiting import cartels within the same time-frame. Import cartels created with the aim of neutralising the effect of export cartels or dominant firms will be exempted from these laws.

---

[366] "Substantial" means "any single enterprise, or confederation of enterprises participating together in a cartel, [sustaining] international sales of $100 million a year or more in any relevant four-digit category of the Standard International Trade Classification". *Ibid.* at 92.

[367] See Petersmann (1997), *supra* note 15 at 78.

It is intended that by the seventh year of its existence, the ICPO will accept complaints from signatory states relating to anticompetitive mergers, practices by cartels and substantial enterprises and other practices not expressly covered by the agreement which have a distortive effect on international trade. The ICPO will investigate and make recommendations regarding these practices and where the relevant national authorities fail to take appropriate action in light of the recommendations, the WTO may authorise injured states to institute sanctions against the state from where the practices emanate.

Scherer submits that, by implementing the provisions of his proposal in phases, states will be able to see the process evolve prior to committing themselves to the "full enforcement program".[368] The gradual implementation of the competition regulation system is also intended to reflect the manner in which individual states and the European Union have introduced and progressively expanded their competition policies. This may be regarded to be a more realistic way of implementing a world competition regulation system than the one-off implementation of a complete system as envisaged under the proposals discussed thus far.

2.3 Bilateral agreements within a plurilateral framework: The EC Group of Experts

The EC Group of Experts (the Group) proposal is the result of a 1995 study by the Group relating to international competition policy.[369] The proposal is based on the view that effective international competition regulation may be achieved by deepening bilateral co-operation among states and developing a plurilateral framework based on bilateral agreements. The creation of an international competition code and authority is viewed as unrealistic for the time being, and will only be feasible in a climate created by a lasting and closer co-operation between national authorities combined with a convergence of national competition laws.

---

[368] Scherer, *supra* note 4 at 96.
[369] EC Experts Proposal, *supra* note 361.

According to the Group, instances of international co-operation are limited not only due to the differences in competition policy, law and enforcement between countries, but also by restrictions with regard to the exchange of confidential information relating to competition disputes. Additionally to the aforementioned limitations, current bilateral competition agreements have not yet been fully exploited, particularly insofar as the application of the notion of comity is concerned.[370] Finally, the Group points to the absence of a multilateral framework to deal with disputes between competition authorities, resulting in less incentives for competition authorities to achieve practical results through bilateral co-operation.

The Group therefore recommends the elaboration of a plurilateral agreement based on existing bilateral agreements[371] supplemented with a mechanism to settle disputes arising between national competition authorities.[372] This agreement will ensure the effective monitoring of cross-border RBPs and limit frictions resulting from divergences among national competition laws. The membership of the agreement will initially be limited and could consist of the OECD members (a number of which have experience in competition co-operation, *e.g.* the US, Canada, the EU, Australia and New Zealand[373]) and industrialised Asian countries, such as Korea and Taiwan. The agreement could later be extended to the most economically advanced Latin American countries.

The agreement would, like the targeted constitutional approach, contain minimum principles which participating states would incorporate into their national laws. As is the case with EU directives, states would have an obligation with regard to the result to be

---

[370] The Group believes that the restrictive approach the US Supreme Court took regarding the concept of comity in the *Hartford* case (see *supra* chapter 1, section II.3.1) limiting it to cases of pure conflict of law, should be avoided. A wide interpretation of comity obligations would have a far-reaching effect on competition authorities' tendency not to be concerned with the external effects of their decisions. *Ibid.* at 11.

[371] Petersmann, refers to this as the "building block approach" and indicates that this approach was employed in modelling the GATT 1947 on the more than 30 bilateral trade agreements to which the US was party. He suggests that the US/EU Agreement could serve as a model for the proposed agreement. *Ibid.* at 36-37.

[372] Participating states not having effective national competition laws and independent competition authorities, would be required to provide for them. *Ibid.* at 37.

[373] See relevant sections of chapter 2 *supra*.

achieved, and would therefore have a measure of freedom with regard to the content and implementation of their competition laws. Although the Group believes that it is too early to make a detailed list of common principles, the agreement could prohibit practices which are internationally accepted as being anticompetitive, such as cartels relating to the fixing of prices or sharing of markets. A rule of reason approach could be applied to anticompetitive practices not regarded to be unacceptable by all participating states. The agreement should also provide for the harmonisation of merger procedures.

No recommendation is made as to the institutional framework in which the agreement would function, although the Group does consider its conclusion under Annex 4 of the WTO Agreement to be an option.[374] Whatever the framework, the Group envisages an international body which would have three functions. In the first place it will serve as a forum for drafting and reviewing common principles of competition laws to be implemented in participating states' national laws. Secondly, it will establish a register of anticompetitive practices occurring in both participating and non-participating states.[375] Finally, the body will provide a structure, similar to the WTO DSB, for the settlement of disputes arising between participating countries.

Disputes which should be actionable under the dispute settlement mechanism include disputes regarding a state's failure to notify an anticompetitive practice, disputes regarding international *per se* prohibitions and rules of reason, and disputes regarding nullification and impairment of market access as a result of anticompetitive practices.[376] Allowing for

---

[374] Placing the agreement within the WTO framework would make it possible for the agreement to deal with interface problems between competition rules and the WTO rules contained in the GATT, GATS, TRIMS and TRIPS. EC Experts Proposal, *supra* note 361 at 43. In an official DG IV Communication based on the Expert Group Report, express support for using the WTO as the framework for the agreement is given. See EC COM(96)284, *supra* note 156, Section II.

[375] Anticompetitive practices must be notified by contracting states for inclusion in the register and will comprise those practices which they have required or encouraged, such as EU block exemptions. Practices occurring outside contracting states will be included in the register as they come to the knowledge of the international body which could question contracting states likely to apply such practices. EC Experts Proposal, *ibid.* at 18.

[376] Difficult procedural and substantive law questions will be raised by the resultant relationship between the enforcement of domestic competition rules through domestic courts and international dispute settlement procedures. The opinion exists that the practical experience governments and trade lawyers

the adjudication of the latter kind of dispute by the dispute settlement mechanism would enhance the complementary relationship between trade and competition policy.

Although the plurilateral agreement will contain all the elements of existing bilateral agreements including positive comity provisions, the Group does not believe that the plurilateral agreement should replace bilateral ones. In fact, it submits that the two kinds of agreements should be developed in parallel as they are complementary and mutually supportive.

States whose competition interests differ from those of a group of states willing to negotiate a plurilateral agreement, should not be forced to become a party to the agreement. It would be more appropriate for such states to enter into one or more bilateral agreements with their trading partners and perhaps become a party to the plurilateral agreement later. Furthermore, the negotiation of a plurilateral agreement will take some time - bilateral agreements are not only necessary to regulate relations between states in the meantime, but will also facilitate the creation of the plurilateral agreement.[377]

2.4 A system of regional blocs: Nicolaides

Nicolaides, in accordance with the majority of the proposals discussed thus far, believes that attempts to create a set of common competition law rules for states "may be neither feasible (politically unacceptable) or desirable (policy inflexibility)".[378] Consequently, he too proposes the adoption of general principles about desirable competition policy outcomes and the creation of a common procedure or agency with powers to ensure that states adhere to those principles.[379] What sets this proposal apart from the others discussed thus far is that it argues for the regulation of international competition in regional blocs. This is because regional blocs are regarded to be more conducive to the

---

have in such procedural and substantive issues within the context of the GATT/WTO could be successfully applied to deal with competition law issues. *Ibid.* at 40.

[377] *Ibid.* at 20.

[378] Nicolaides (1997), *supra* note 15 at 125.

[379] *Ibid.* at 125.

creation and enforcement of common competition principles than a multilateral international framework would be.[380]

Various reasons are submitted for this reasoning, *i.e.*: it is more probable that regional blocs will include like-minded states with compatible policies; it is easier to identify and execute trade-offs, which facilitate mutual concessions, within a smaller group of countries with closer economic ties; the monitoring of competition rules can be achieved more easily at a regional level;[381] finally, as a country will be affected to a greater extent by the decisions of its main trading partners, it would be more compelled to co-operate with these countries than with others.[382] Regional blocs can decide for themselves what level of harmonisation would be pursued - this, of course, would depend on the blocs' ambitions. Where there is an absence of strong political motives to bind partner countries in a bloc, Nicolaides warns, attempts to integrate may fail.[383]

Nicolaides argues that the most compelling reason against having a single world authority is that the enforcement of competition rules, regardless at what level they are created, will become slow and ineffective.[384] This does not, however, rule out co-operation at the multilateral level as there is certainly scope for such co-operation between regional blocs.[385] Consequently, although the above factors lead him to conclude that regional competition policy regulation is the optimum method for the *enforcement* of international competition policy, Nicolaides accepts that the adoption of international competition rules may still be done at multilateral level.

---

[380] *Ibid.* at 117.

[381] As an example, one may refer to the question of vetting transnational mergers. The current situation necessitating the approval of a number of national authorities is clearly not satisfactory. However, an international authority would not be able to perform the task effectively as it would either be inundated with work or it would only vet the very largest mergers, potentially creating a gap which smaller transnational mergers would fall through. Thus regional vetting appears to be most appropriate. *Ibid.* at 138.

[382] *Ibid.* at 137-138.

[383] Nicolaides (1996), *supra* note 334 at 140.

[384] Nicolaides (1997), *supra* note 15 at 139.

[385] *Ibid.* at 139.

2.5 Minimum standards and conflict of laws: Giardina & Zampetti

Yet another proposal based on the codification of broad consensus principles has been suggested by Giardina and Zampetti.[386] They advocate a limited set of international principles applicable to private action affecting the conduct of international business, accompanied by a dispute settlement system to which private parties would have direct access.[387]

With regard to substantive issues, the system should follow a "traffic light approach" which will differentiate between: *per se* illegal restrictive business practices (red light); RBPs the legality of which will be determined on a case-by-case basis (yellow light); and practices which, although being potential restrictive, have redeeming values, *e.g.* the raising of consumer welfare, which make them acceptable (green light). The system will also rely on national laws to provide the missing regulatory elements of the international framework. To this end, an appropriate conflict of laws rule must be created to indicate which national law will be applicable to practices not covered by the agreement. Giardina and Zampetti suggest that the law of the state whose market has been affected most seriously by the RBP should be applicable as such a rule would be consistent with both the traditional rule indicating the *lex loci delicti* and the effects theory.[388]

The advantage of this approach, it is argued, is its incremental nature.[389] The general principles to be included in the international agreement, and which form the basis of the "traffic light approach" should reflect the current state of international harmonisation of competition law principles. The conflict of laws rule would indicate the applicable domestic law in cases where consensus principles do not yet exist. Further international principles, which will take shape in the light of continued convergence of national competition laws and decisions by the dispute resolution mechanism, will be included in the international agreement which will, in turn, result in less application of domestic laws.

---

[386] A. Giardina & A.B. Zampetti, "Settling Competition-Related Disputes - The Arbitration Alternative in the WTO Framework" (1997) 31:6 J. World T. 5 [hereinafter Giardina & Zampetti].
[387] *Ibid.* at 9-10.
[388] *Ibid.* at 21-22.

Giardina & Zampetti propose that arbitration between private parties be used to resolve disputes to which the envisaged agreement is applicable.[390] Private parties, both natural and legal, will therefore have direct access to dispute resolution procedures and will not have to depend on their governments to act on their behalf. Arbitration is to be done by a permanent arbitration body, the International Mechanism for Settlement of Competition-related market Access Disputes (IMSCAD), which should be based on the ICSID[391] and established under the auspices of the WTO.[392]

In order to ensure the effective resolution of disputes by arbitration, the states party to the agreement have to agree not to enforce jurisdiction in matters falling within the ambit of the agreement and for which the arbitration mechanism is competent. It is submitted that the jurisdictional and mandatory norm problems which may arise from the conflict of laws element of the proposal,[393] may be overcome if the signatory states also come to an agreement in this regard. Providing the international arbitration mechanism with exclusive jurisdiction in this way will prevent forum shopping and promote legal certainty.[394] Legal certainty may also be promoted by including in the agreement a provision that arbitral awards made by the mechanism have the character of *res judicata* in contracting states.

3. An international agreement regarding competition law enforcement

Some believe that an international agreement on the enforcement of competition law alone would be the best way to ensure that international RBPs do not undermine the multilateral

---

[389] *Ibid.* at 12.
[390] *Ibid.* at 7.
[391] The International Centre for Settlement of Investment Disputes established under the *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 1965 (4) I.L.M. 532.
[392] A similar proposal was made by Meessen, *supra* note 72 at 809-810. In terms of this proposal an International Centre for the Settlement of Antitrust Disputes (ICSAD) should be established. This centre could set up an arbitration tribunal whenever necessary to which domestic courts dealing with international competition disputes could refer questions of the interpretation of applicable international law, similar to the way in which the domestic courts of the Member States of the EU may refer questions of interpretation to the European Court of Justice in terms of Article 177 of the *Treaty of Rome*. The law applicable, however, would be customary international competition law, rather than treaty law.
[393] See *supra* chapter 1, section II.3.2.
[394] *Supra* note 386 at 16.

trading system.[395] This notion is based on the argument that, among all the categories of reasons commonly cited in support of the creation of international competition rules, the only one which has clearly led to trade frictions between states, and therefore merits attention at the multilateral level, is the category of tensions involving enforcement of competition laws, *i.e.* inadequate or weak enforcement.[396]

The solution is therefore an international agreement, similar to the WTO TRIPS Agreement, which would obligate signatory states to ensure the efficient enforcement of their existing national competition laws.[397] Obligations contained in the agreement would firstly relate to the enforcement procedures to be followed by national competition authorities, which must be made available to aggrieved private parties. Secondly, the agreement would contain obligations regarding standards of performance which national enforcement procedures would have to comply with.

In arguing for both public and private enforcement of competition laws, *i.e.* enforcement by both competition authorities and private individuals, Mattoo & Subramanian distinguish between RBPs by enterprises which harm other producers and such practices which harm consumers. They submit that in the latter case, collective action problems which arise from consumers' inability or unwillingness to institute action, necessitate the public enforcement of competition law. In the former case, however, the aggrieved producers should be able to initiate action in their private capacities.[398]

The features of the proposed agreement would be the following: NT and MFN obligations to ensure non-discrimination; agreed standards of enforcement, which would include the commitment to grant private and foreign parties standing; agreed standards with regard to effectiveness and expediency of enforcement; creation of a dispute settlement procedure to challenge states not fulfilling their enforcement obligations; and consultation and co-

---

[395] Mattoo & Subramanian, *supra* note 12 at 96. *Contra* Giardina & Zampetti, *supra* note 386 at 9.
[396] Mattoo & Subramanian, *ibid.* at 108. *Contra* Haley (1995), *supra* note 187 at 321.
[397] Mattoo & Subramanian, *ibid.* at 96.
[398] *Ibid.* at 109.

operation provisions to allow for the exchange of information between national competition authorities.[399]

Signatory states will not be placed under any obligation with regard to the substantive content of their national competition laws. Consequently, the problem of a "more full-fledged" negotiation (supported to some degree by all the proposals discussed thus far) are avoided insofar as there is no need to accommodate the diversity of substantive national competition principles and rules.[400]

Limiting the agreement in this way does, however, have its drawbacks as it does not address all problems which may arise in the field of international competition regulation. For example, it does not address negative regulatory externalities caused by the domestic application of national competition rules.[401] Furthermore, one may ask what the situation would be with regard to states having ineffective or unacceptably lax competition rules. Frictions between such states and states with effective or strict competition rules would most probably arise.

4. Extraterritoriality and enforcement agency co-operation

This approach does not really represent a new proposal, but rather reflects the view that the international regulation of competition cannot develop any further than it already has. Supporters of this approach are sceptical about the feasibility of creating an international agreement at a multilateral bargaining table and believe that international competition can be regulated effectively through the application of national competition laws, co-operation among national enforcement agencies and sectoral trade agreements.[402] As the ability to effectively apply outbound extraterritoriality is an essential element of this approach, it

---

[399] *Ibid.* at 112-113.
[400] *Ibid.* at 97.
[401] On this point, Mattoo and Subramanian argue that in most cases where the question of negative external effects is involved, the state causing the effects is not ignoring the welfare consequences of others, but is failing to pursue an optimal policy from its own perspective. *Ibid.* at 111.
[402] Fox (1997), *supra* note 25 at 14.

comes as no surprise that US antitrust enforcement authorities represent the approach's staunchest supporters.[403]

The opinion exists that this approach exaggerates the difficulties attached to achieving a multilateral solution and the extent to which a combination of the application of national law and agency co-operation can solve all competition problems. It is argued that agency co-operation is only successful where the agencies involved have common interests and elect to co-operate.[404]

5. Limit government intervention

National competition policies and laws, and accordingly international competition policy and law, is determined by prevailing economic theory.[405] De León submits that, as competition theory is not able to grasp (and consequently regulate) competition, competition policy does not promote trade, but restricts it.[406] He therefore argues that it is wrong to presume that competition regulation is a necessary complement to a liberal trade policy and concludes that proposals aimed at introducing competition regulation into the international sphere, which would include all the proposals discussed thus far, are flawed.[407]

These flaws, he argues, are a result of the following circumstances: competition policy is geared towards perfect markets which do not exist in reality; competition authorities cannot really be subject to accountability and judicial control - as a result of this unaccountable discretion, competition regulation does not protect, but diminish, individuals rights; and competition regulation is subject to regulatory capture by lobby groups pursuing their own rent-seeking interests.[408] Proposals calling for international competition intervention, De León concludes, endanger the transparency of government

---

[403] *Ibid.*; EC Experts Proposal, *supra* note 361 at 35; Klein & Bansal, *supra* note 163 at 192.
[404] Fox (1997), *ibid.* at 18.
[405] *Supra* note 85 at 61.
[406] De León, *supra* note 14 at 36.
[407] *Ibid.* at 43.

action, which transparency is of great importance to international trade. Introducing competition rules and principles into the international trade regime increases opportunities for states to develop opportunistic and disguised forms of trade protectionism.[409]

Consequently, De León believes, an alternative approach to promoting international trade is called for which would limit government discretion over trade and economic transactions to a minimum - any institution aimed at promoting trade and competition should be designed with this objective of minimum government discretion in mind. De León further argues that there must be a proper demarcation in the sphere of individual rights, which would provide clarity with regard to the initial assignment and subsequent transmission of rights over things. In addition, an efficient dispute resolution mechanism must be available to eliminate any uncertainty regarding the assignment and transmission of rights which may arise despite the demarcation.[410]

The ultimate goal of this proposal is to "enhance the predictability of market participants through the reduction of uncertainty over their economic rights".[411] This would be made possible by creating an Economic Constitution on the International Economic Order, which will set out the aforementioned rights.[412] De León does not elaborate the content of this Economic Constitution, but it would be surprising if the "economic rights" contained therein would not include competition-related issues, such as market access.

III. The WTO as a framework for an international competition agreement

Although the proposals discussed above differ from one another to a greater or lesser extent, most of them support the idea that the WTO should provide the framework in which any future international competition agreement would function. Many arguments

---

[408] *Ibid.* at 43-60.
[409] *Ibid.* at 59.
[410] *Ibid.* at 60-61.
[411] *Ibid.* at 62.
[412] *Ibid.*

have been provided for this reasoning,[413] *e.g.* the effectiveness of the DSU, the interrelationship between competition and trade issues addressed by the WTO agreements, using competition rules to fill in the gaps in trade policy rules so as to rectify the current "patchwork of antitrust policies" reflected in WTO law, and the fact that the WTO, having near universal membership, may be used as an efficient negotiation forum. Using the WTO to provide the framework for a competition agreement would furthermore have the important result of recognising the protection of consumer interests within the international trade regime, which has traditionally focused on the protection of producers and has been open to regulatory capture by protectionist interest groups, both of which may be to the detriment of consumers.[414]

Should states be able to reach an agreement as to the content of international competition principles or rules, the resultant multilateral or plurilateral agreement on international competition could be concluded under Annex 1 or Annex 4 of the WTO Agreement. Inclusion of such an agreement in the WTO regime would therefore not pose a problem in theory. The question may, however, be raised whether the current WTO dispute resolution mechanism would be able to deal with competition-related disputes effectively and efficiently, since a number of problematic procedural and substantive law issues could arise from the relationship between domestic enforcement and international dispute settlement procedures.[415] A number of these issues, *i.e.* standards of review, private party access and remedies, will briefly be examined.

1. Standards of review

It is possible that an international competition agreement could require the WTO DSB to determine whether the decisions made by national competition authorities conform with

---

[413] See E.A. Vermulst, "A European Practioner's View of the GATT System" (1993) 16:3 World Comp. 5 [hereinafter Vermulst] at 14-15; Petersmann (1993), *supra* note 21 at 64-66; Crampton, *supra* note 14 at 4; Jackson & Davey, *supra* note 103 at 1090; Matsushita, *supra* note 351 at 1115; Malaguti, *supra* note 251 at 145; EC Experts Proposal, *supra* note 361 at 34-35; and EC COM(96)284, *supra* note 156, Section II.

[414] Petersmann (1993), *ibid.* at 38, 81-82; D.I. Baker & W.T. Miller, "Antitrust Enforcement and Non-Enforcement as a Barrier to Imports" (1996) 24:10 I.B.L. 488 [hereinafter Baker & Miller] at 488.

international norms. The DSU's general standards of review obliges a panel, in its "objective assessment of the matter before it, [to include] an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements".[416] The fact-intensive nature of competition disputes could pose problems for a panel required to make such an assessment. It would therefore perhaps be appropriate to draw on relevant WTO experience in other fact-intensive fields of law, such as antidumping and countervailing law, to establish a more appropriate and functional standard of review for competition regulation cases.[417]

In this regard, reference should be made to the WTO Annex 1 *Agreement on Implementation of Article VI of the GATT 1994* (the Article VI Agreement), which *inter alia* concerns the revision by panels of domestic antidumping decisions made in conformity with national antidumping laws. As opposed to the general standard of DSB review set out in DSU Article 11, Article 17(6)(i) of the Article VI Agreement provides that, in reviewing a matter under the Article VI Agreement, a panel must determine whether the authority properly established the facts of the matter and whether the authority's evaluation of those facts was unbiased and objective. If the authority in a particular case has indeed established the facts properly and made an unbiased and objective evaluation of those facts, the panel will not be able to overturn the authority's decision even if the panel would have come to a different conclusion on the facts.[418]

Providing for a similar standard of review in competition regulation matters, and thereby limiting the review powers of the DSB, would be in conformity with the proposals advocating the codification of broad consensus principles, particularly the targeted constitutional approach (advocated by Fox and the DIAC minority group)[419] in terms of which states are allowed to define the content of agreed consensus principles, such as

---

[415] EC Experts Proposal, *supra* note 361 at 40.
[416] DSU Article 11.
[417] See Malaguti, *supra* note 251 at 145; P.C. Mavroidis & S.J. Van Siclen, "The Application of the GATT/WTO Dispute Resolution System to Competition Issues" (1997) 31:5 J. World T. 5 [hereinafter Mavroidis & Van Siclen] at 19.
[418] See Malaguti, *ibid.* at 146.

'unjustifiable' market access restraints, for themselves. A panel reviewing a national competition authority's decision relating to, for instance, a market access restraint, will, under the suggested limited powers of review, only evaluate the authority's application of the domestic market access rule and not the content of the rule.[420]

2. Private party access to dispute settlement procedures

Although competition law enforcement often falls within the sole prerogative of national competition regulation authorities, some states do allow for enforcement by private parties,[421] which implies private party access to the relevant domestic dispute settlement procedures. The current provisions of the WTO agreements, in view of the intergovernmental nature of the WTO, do not provide for private party access to WTO dispute settlement and enforcement procedures.

There is disagreement among scholars as to whether private parties should have such a right within the framework of the WTO.[422] Those supporting the inclusion of the right of private party access, argue that business people should be allowed to participate in WTO dispute resolution as they are in a better position to understand the effects of anticompetitive practices than governmental officials are. Others believe that allowing private parties to "meddle" in this manner will become an obstacle to finding solutions to WTO disputes, which, they argue, is the main purpose of the DSU.[423] Regardless of this debate, there are a number of ways in which private parties may potentially participate in the enforcement of WTO law, most of which depend on the legal regime of the jurisdiction involved.

---

[419] *Supra* section II.2.1.
[420] Subject to the condition that the domestic rule is credible, non-discriminatory, clear and understandable. Fox (1997), *supra* note 25 at 24.
[421] For instance, the US *Sherman Act*, *supra* note 32.
[422] M. Lukas, "The Role of Private Parties in the Enforcement of the Uruguay Round Agreements" (1995) 29 J. World T. 181 [hereinafter Lukas] at 202.
[423] DSU Article 3(7).

Private parties can approach their respective governments with a request to enforce WTO/GATT rights against alleged violators of WTO law. In this regard, the US and the EU expressly provide their citizens with the legal right, subject to certain conditions, to lodge a complaint with the relevant authorities, the United States Trade Representative and the European Commission, who will investigate the matter further and possibly initiate the WTO dispute settlement mechanism.[424] In states where no express right of indirect access to the DSB is provided for in legislation, private parties may still be able to approach their governments with a request to enforce WTO rules against other WTO members, for instance in Canada a private party can make representations in this regard to the Minister of International Trade.[425] The problem with this method of private party access is that the relevant government maintains a discretion (which may be influenced by non-trade issues) whether or not to institute proceedings.[426]

Many states posses domestic administrative procedures relating the levying of antidumping or countervailing duties. Although these procedures are not intended to directly enforce WTO rules, they are subject to certain WTO agreements and may therefore be examined in a subsequent dispute under the jurisdiction of the DSB.[427] The WTO Annex 1 agreements relating to antidumping and countervailing,[428] both provide that domestic governmental investigations preceding the imposition of duties may be initiated by private parties.[429] Furthermore, a private party who is the object of an investigation as well as "all interested [private] parties" will have standing in these national procedures.[430] The WTO rules therefore ensure private party access in antidumping and countervailing procedures, but only at the domestic level and only with regard to domestic proceedings.

---

[424] US *Trade Act*, *supra* note 34, Section 301 and EC *Regulation 3286/94*, *supra* note 56, respectively.
[425] See Castel, *supra* note 65 at 24.
[426] See Lukas, *supra* note 422 at 200-201; B.M. Hoekman & P.C. Mavroidis, "Policy Externalities and High-Tech Rivalry: Competition and Multilateral Cooperation Beyond the WTO" (1996) 9 Leiden J. Int'l L. 273 at 316-317.
[427] Lukas, *ibid.* at 186.
[428] The Article VI Agreement and the *Agreement on Subsidies and Countervailing Measures* [hereinafter the SCM Agreement], respectively.
[429] Article VI Agreement Article 5(1) and SCM Agreement Article 11(1).
[430] Article VI Agreement Article 6 and SCM Agreement Article 12.

Another option which might be available to a private party is to seek the enforcement of WTO law against a state in domestic judicial proceedings.[431] A party may, for instance, initiate an action in terms of which an administrative act of the forum state is challenged as being inconsistent with its WTO/GATT obligations. The ability to initiate such an action will, again, depend on the legal regime of the particular state.[432] A further problem is that, even if all states' regimes allowed for such actions, the application of WTO law would probably not be applied in a uniform way by all members and the consistency and predictability of international trade law would be undermined.[433]

Closely connected to the aforementioned, is the matter of international obligations providing for the domestic enforcement of private rights. Reference may be made to TRIPS which *inter alia* obligates members to provide for a minimum level of protection of intellectual property rights in their domestic laws and furthermore obligates members to provide for procedures which will allow private parties to enforce these rights domestically.[434] Should a state fail to fulfil its obligations to provide for this minimum level of protection, the foreign private party concerned will have to rely on its government to take the matter further.

If a future international agreement on competition, using TRIPS as a model, places obligations on states to ensure that certain minimum competition principles are adhered to domestically and to further provide for (foreign) private party access to domestic courts (which indeed seems to be the approach envisaged in most proposals), the current situation, *i.e.* no direct private party access to the international dispute mechanism, may be satisfactory.[435] If, however, the agreement creates obligations which are directly

---

[431] Lukas, *supra* note 422 at 193.
[432] In the US and the EU, for instance, WTO law cannot provide a basis for a private right of action. In Japan, however, due to the direct applicability of treaty law domestically, such a claim may be possible. See Lukas, *ibid.* at 193-194.
[433] *Ibid.* at 201.
[434] TRIPS Part I and Part III.
[435] Although, depending on the role national competition authorities will play in terms of the international competition agreement, it might be appropriate to give these authorities standing as well. See EC Experts Proposal, *supra* note 361 at 45.

applicable to private parties, the DSU procedures should be revised to allow for direct private party access to the dispute settlement mechanism.

3. Remedies

The remedies available under WTO law consist of recommending or ruling that the member concerned bring the infringing practice or measure into conformity with WTO law,[436] offering compensation to the plaintiff member[437] and the suspension of concessions.[438] Compensation and the suspension of concessions are temporary measures which are only to be used where the transgressing member fails to implement a recommendation or ruling "within a reasonable time", furthermore it should be noted that the payment of compensation is voluntary.[439] Remedies available at the domestic level in response to infringements of national competition laws typically include orders to cease engaging in the infringing behaviour, the payment of fines to the state and the payment of damages to injured parties.[440] Although comparisons may be drawn between the remedies available at domestic and WTO levels, it is questionable whether the remedies available at the latter level would prove to be acceptable at the former level.

Consider, for instance, the place of compensation in the WTO regime - it is a secondary and voluntary remedy and is not intended to compensate the plaintiff state for damages suffered prior to the ruling of the DSB. Private parties would hardly be encouraged to institute actions when the likelihood of obtaining a binding award for compensation, which is not even linked to the actual damages suffered,[441] is improbable. This would be of particular importance should a future international competition agreement intend private parties to play an important role in the enforcement of its provisions, as is the case with the enforcement of domestic antitrust law in the US. With regard to the question of how to

---

[436] DSU Article 19(1).
[437] DSU Article 22.
[438] DSU Article 22.
[439] DSU Article 3(7) and Article 22(1).
[440] See Mavroidis & Van Siclen, *supra* note 417 at 36.

provide for effective remedies against competition law transgressions, it would be more appropriate to again follow the TRIPS model and obligate members to provide for and enforce certain minimum remedies at a domestic level.[442] The WTO remedies would be reserved for application against member states should they fail to conform with the aforementioned obligations.

4. Remarks in conclusion

As may be concluded from the above discussion, the necessity of adapting the DSU to deal with international competition regulation disputes would depend to a great extent on the eventual provisions of an agreement on competition. From a theoretical point of view, adapting the WTO dispute settlement mechanism to deal with competition disputes would not pose a problem, as the DSU provides for the creation of special or additional rules and procedures on dispute settlement where necessary.[443] As exemplified by the case of standards of review, the experience that governments and trade lawyers have gained over the last 50 years in similar substantive and procedural issues within the framework of the GATT/WTO dispute settlement system would prove useful in determining the content of any special or additional rules necessary.[444] Petersmann suggests that by introducing the dispute settlement procedures of a plurilateral competition agreement progressively, concerns raised by those who are sceptical with regard to international dispute settlement procedures could be accommodated.[445]

---

[441] In terms of DSU Article 22, compensation is not intended to compensate the plaintiff state for damages suffered due to the WTO inconsistent action, but rather to compensate it for the infringing state's failure to implement the DSB recommendations in good time.
[442] TRIPS provides that members' domestic judicial bodies will have the authority to grant injunctions and award damages for infringement of intellectual property rights (Article 44 and Article 45, respectively).
[443] DSU Article 1(2) and Appendix 1 to the DSU.
[444] For example, the fields of antidumping and countervailing law. See EC Experts Proposal, *supra* note 361 at 40.
[445] *Ibid.*

IV. Conclusion

1. Existing methods of international competition regulation

The economic theory underlying competition law, the content of competition law rules, the objectives pursued through competition regulation and, indeed, whether competition is regulated at all, are matters which may vary from state to state. In light of the principle of sovereignty, states are free to design and implement whatever domestic competition regime they deem appropriate. However, these differences between regimes may cause certain frictions when competition issues of a transnational nature arise. The main causes of these frictions, which are becoming increasingly prevalent due to globalization, are the lack of internationally acceptable competition rules or norms, differences in interpretation of basic competition principles and the lack of enforcement of domestic competition laws.

As a method to deal with the problems arising from differences between competition regimes, some states apply their competition laws extraterritorially to anticompetitive business practices having an effect within their borders. This method of international competition regulation has a number of drawbacks since it may lead to further conflicts relating to prescriptive and enforcement jurisdiction issues. Consequently, jurisdictions which have embraced the notion of extraterritorial application of competition law, have sought methods through which extraterritoriality would become more acceptable to other states, such as the application of the principle of comity and balancing of interests. As the aforementioned methods are not based on any form of international agreement, but are unilaterally formulated and applied by the relevant jurisdictions, it is not surprising that these techniques of limiting extraterritoriality have not always been accepted by states on the receiving end.

There has been a high degree of success in regulating competition at an international level through the use of bilateral agreements in terms of which the competition laws or procedures of the states involved have been harmonised - the US/EU Agreement provides a good example of such an agreement. Harmonisation does not only address jurisdictional conflicts between states, but it may also be employed to deal with externalities, lower the

costs of international transactions and solve interface problems between competition and trade. Bilateral competition agreements draw from the extraterritorial application of competition law as they often contain provisions relating to negative comity, but also add new elements, such as co-operation between national competition authorities and the notion of positive comity. Some bilateral arrangements additionally provide for the exchange of confidential law enforcement information which may bolster international competition enforcement efforts.

Despite the successes achieved using bilateral agreements to regulate competition at an international level, such agreements cannot be effectively employed in all situations. Bilateral agreements of this nature depend on vigorous enforcement of national competition laws by the competition authorities involved and many states either lack competition authorities with the necessary experience and powers to enforce these laws properly or have no competition law whatsoever. Some states, such as Japan, although possessing both well-established laws and competition authorities, do not enforce their competition laws consequently. Furthermore, bilateral agreements do not provide a mechanism to resolve disputes between national authorities. Finally, one should keep in mind that, in view of the linkage between competition and trade, is not always appropriate to deal with the competition issues in separate bilateral agreements - it may be more efficient to address competition and trade issues within the same framework as was done in ANZCERTA.

A number of regional blocs, representing various levels of economic integration, have made attempts to address the harmonisation of competition laws within the trade agreements establishing the blocs, the EU being the only bloc to have been successful in this regard. Other blocs, *e.g.* NAFTA and Mercosur, continue to pursue the matter.

Aside from bilateral and regional attempts to harmonise competition law, mention must be made of the efforts of the OECD and UNCTAD in creating international codes dealing with restrictive business practices. Both the OECD's Guidelines and UNCTAD's RBP

Code, the provisions of which are applicable to private parties, have the drawback that they are non-binding and non-enforceable. The importance of these two codes, however, lies in the guidance they can provide to states in the creation and development of competition regulation regimes.

Since December 1996, the WTO has become actively involved in the discussion of how international competition could be regulated in a multilateral forum. The WTO already plays an important role in regulating governmental acts which are restrictive to trade and the question arises whether it could do the same with regard to restrictive business practices. Many of the proposals relating to the topic of multilateral competition regulation indeed envisage that the WTO will provide the necessary framework for such regulation.

2. Further development of existing instruments of regulation

Most commentators agree that the creation of a multilateral agreement on competition is still some way off into the future. At present, therefore, the current instruments of international competition regulation, *i.e.* bilateral and regional agreements between states and extraterritoriality, are all that are available to us and must be developed and refined further. The creation of additional bilateral agreements, both within and outside of regional blocs, may relieve many of the tensions which result from the regulation of restrictive business practices with a cross-border effect. Conflicts between states may also be avoided if jurisdictions which enforce their competition laws extraterritorially, pursue methods which ensure that the interests of other states are properly taken into account. Employing the two-dimensional external restraints test developed in Germany or the doctrine of *forum non conveniens* when deciding whether to exercise jurisdiction, or a world welfare standard, rather than a national welfare standard, when determining whether a potentially restrictive practice should be opposed, may prove helpful in this regard.

There is also potential for further development within existing regional blocs. As indicated by Nicolaides, harmonisation should be more feasible at regional level than multilateral

level. Trade blocs such as NAFTA and Mercosur, must follow the example provided by the EU and create competition regimes (including both substantive and procedural rules) applicable to cross-border transactions within the blocs. Providing for competition regulation within the blocs' respective trade regimes not only takes into account the trade-competition linkage but will also allow the bloc to use the existing trade regulation framework for competition regulation purposes. Considering the differences between the goals and levels of integration of the various trade blocs, the degree of harmonisation within the blocs' competition regimes will not be the same as that of the EU. This, however, is not an issue as each bloc should be allowed to progress at its own pace and according to its own needs.

Once the blocs have established workable competition regimes, the next step would be for the various regional blocs, *e.g.* the EU, NAFTA, Mercosur and Australia and New Zealand, to enter into bilateral competition agreements with one another. These bilateral agreements could be modelled on the US/EU Agreement and would initially relate to procedural issues, for instance positive comity, negative comity and merger notifications procedures, and may eventually be expanded to include substantive issues. Harmonisation achieved through interregional competition regulation should facilitate eventual multilateral regulation.

3. Developing a multilateral regime for international competition regulation

The proposals relating to multilateral competition regulation range from the one extreme, *i.e.* creating a detailed code of international competition rules, to the other, which entails limiting government regulation of competition to a bare minimum. In view of the differences between national competition regimes, it is highly improbable that any kind of international agreement on detailed rules of competition will be achieved. Due to the importance of competition regulation and policy, it is also unlikely that governments will agree to self-regulation of competition, whether domestically or internationally. It is therefore submitted that proposals supporting these two extremes are unrealistic and should be rejected.

A more realistic approach would be to base an international competition agreement on the codification of broad consensus principles, as argued in the proposals put forward by *inter alia* the DIAC minority, the EC Group and Nicolaides. Providing states with a measure of discretion regarding the content of their competition laws will make them more willing to become party to an international competition agreement, allows competition laws to be tailored according to the specific needs of the states in question and allows for competition among competition laws.

How exactly the process of harmonisation of domestic competition rules or the creation of consensus principles should proceed is a debatable issue. The creation and implementation of principles over a period of time, as suggested by Scherer, seems to be most appropriate method. Considering the importance of enforcement of domestic competition laws, it is submitted that an agreement on this issue should be the first step in creating an international competition agreement. Substantive issues could initially be avoided and states would merely commit themselves to enforcing their existing laws properly. The states involved could also agree to phase in rules regarding minimum standards of enforcement similar to those provided for in TRIPS Part I and Part II. Other procedural issues could also be addressed, for instance the agreement could provide for a uniform notification procedure for cross-border mergers.

It is suggested that the WTO provide the framework for this agreement on enforcement of domestic competition laws. As has been indicated, there are many advantages to this approach, *e.g.* the trade-competition linkage, the protection of consumer interests within the international trade regime, and the fact that the agreement could deal with the interface problems between competition and existing WTO law. Furthermore, the fact that the suggested agreement would only place obligations on governments, and not private parties, is in conformity with the intergovernmental nature of WTO negotiation and dispute resolution. As was shown, adapting the WTO dispute settlement mechanism to suite competition law disputes, is both practically and theoretically feasible. It is submitted that the envisaged agreement be concluded under Annex 4 of the WTO Agreement as this

would enable like-minded Members to enter into the agreement initially, while other Member States could become party to it later, if and when they are ready.

Private party access to the dispute resolution mechanism need not be provided for, although it may be appropriate to allow national competition authorities to refer disputes to it. In terms of the minimum standards of enforcement provided for in domestic laws, private parties (including foreign parties) would have the right to institute competition-related actions in domestic courts. Thus there would be a two-tier approach to competition law enforcement: national competition authority and private party enforcement of domestic laws at national level; and governmental and national competition authority enforcement of international competition obligations at the multilateral level.

As further harmonisation of domestic competition laws is achieved, it may be possible to slowly introduce substantive law principles, such as a general market access principle, and further procedural issues into the agreement. This harmonisation would be realised by the work currently being done by international forums, such as the OECD, UNCTAD and the WTO, as well as through progress made with regard to harmonisation at regional and bilateral levels. As suggested by Giardina and Zampetti, the parties could also agree on a conflict of laws rule applicable to matters not expressly addressed in the agreement. From a procedural point of view, it would be prudent to allow national courts and competition authorities to refer questions of interpretation of harmonised competition rules or principles to the DSB, similar to the procedure allowed for in the EU under Article 177 of the *Treaty of Rome*. This would result in a more consistent application of the international competition principles among Members.

Due to the heterogeneity of national competition laws and policies, the creation of a multilateral agreement on competition is not feasible for the time being. It should, however, not be ruled out over the longer term. It is submitted that, while the efforts at the multilateral level should continue, it is important that attention also be given to cross-border competition regulation at the bilateral and regional levels. Progress made at the

latter levels not only represents an end in itself, but also represents the means by which a higher degree of harmonisation between domestic competition laws and a deepened understanding and trust among national competition authorities, both of which are necessary for a multilateral initiative, will be achieved. Given sufficient time and effort, and with the necessary support of the major players in the global economy, a meaningful international competition regulation regime, capable of addressing all the frictions which may arise from transnational competition issues, should evolve.

BIBLIOGRAPHY

LEGISLATION & REGULATIONS

European Union

EC, *Council Regulation 17/62 of 21 February 1962 First Regulation implementing Articles 85 and 86 of the Treaty*, [1962] O.J. L.204/13.

EC, *Council Regulation 4064/89 of 12 December 1989 on the control of concentrations between undertakings*, [1989] O.J. L. 391/1, as amended O.J. L. 257/15 (Sept. 21, 1990), O.J. L. 180/97 (July 9, 1997).

EC, *Regulation 3286/94 of 22 December 1994 laying down Community procedures in the field of common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organisation*, [1994] O.J. L.349/71.

EC, *Notice on Cooperation Between National Courts and the Commission in applying Article 85 and 86 of the EC Treaty*, [1993] O.J. C.39/1993/02/13/6.

United States

Clayton Act, 15 U.S.C. §§ 12-27 (1914).

Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (1988).

Sherman Act, 15 U.S.C. §§ 1-7 (1890).

Trade Act, 19 U.S.C. § 2411 (1974).

Other

Competition Act 1980 (U.K.), 1980, c. 21.

Protection of Trading Interests Act 1980 (U.K.), 1980, c. 11.

Competition Act 1998 (South Africa), No. 89 of 1998.

Gesetz gegen Wettbewerbsbeschraenkungen (Germany), 1957 *Bundesgesetzblatt* [BGBl] I 1081 (July 27).

Andean Commission Decision 285: Norms for the Prevention or Correction of Distortions in Competition Caused by Practices that Restrict Free Competition of March 21, 1991 (unofficial translation), online: Organisation of American States <http://www.sice.oas.org/cp_comp/english/cpa/cpa2/e.stm> (date accessed: 16 December 1998).

TREATIES AND INTERNATIONAL AGREEMENTS

Multilateral & Plurilateral

Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, (1994) 33 I.L.M. 1.

General Agreement on Tariffs and Trade, 30 October 1947, 58 U.N.T.S. 187, Can. T.S. 1947 No. 27 (entered into force 1 January 1948).

North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States, 17 December 1992, Can. T.S. 1994 No. 2, (1993) 32 I.L.M. 289 (entered into force 1 January 1994).

Treaty Establishing the European Economic Community, 25 March 1957, 298 U.N.T.S. 3, as amended.

Treaty of Asuncion, Argentina, Brazil, Paraguay and Uruguay, 26 March 1991, (1991) 30 I.L.M. 1034.

WTO Agreement on Telecommunications Services (Fourth Protocol to General Agreement on Trade in Services), 15 February 1997, (1997) 36 I.L.M. 354.

Bilateral

Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of their Competition Laws, 4 June 1998, (1998) 37 I.L.M. 1070.

Agreement between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance, 1997, online: US Department of Justice <http://www.usdoj.gov/atr/public/international/docs/usaus7.htm> (date accessed: 21 January 1999).

Australia and New Zealand Closer Economic Relations Trade Agreement, 28 March 1983), (1983) 22 I.L.M. 948 (entered into force 1 January 1983).

Canada-Chile Free Trade Agreement, 5 December 1996, (1997) 36 I.L.M. 1067 (entered into force 5 July 1997).

Canada-Israel Free Trade Agreement, 31 July 1996, T.W.C. 1997/1, CD-ROM: *Treaties with Canada* (Toronto: Lawauthority, 1998).

Canada-United States: Agreement regarding the application of their competition and deceptive marketing practices laws, 1 & 3 August 1995, (1996) 35 I.L.M. 309.

Canada-United States Treaty on Mutual Legal Assistance in Criminal Matters, 18 March 1985, (1985) 24 I.L.M. 1092.

Draft Agreement between the European Communities and the Government of Canada regarding the Application of their Competition Laws, online: European Commission DG IV <http://europa.eu.int/comm/dg04/interna/en/dftcanada.htm> (date accessed: 21 January 1999).

European Communities - United States: Agreement Regarding the Application of their Competition Laws, 23 September 1991, (1991) 30 I.L.M. 1487.

Framework Agreement for Commercial and Economic Cooperation between the European Communities and Canada, 6 July 1976, Can. T.S. 1976 No. 35 (entered into force 1 October 1976).

Memorandum of Understanding between the Government of Canada and the Government of the United States of America as to Notification, Consultation and Co-operation with Respect to the Application of National Antitrust Laws, 9 March 1984, (1984) 23 I.L.M. 275.

JURISPRUDENCE

European Union

E.C.J., Ahlström Osakeyhtiö and others v. EC Commission, Joined cases 89,104, 114, 116, 117 and 125 to 129/85, [1988] 4 C.M.L.R. 901.

E.C.J., I.C.I. Ltd, J.R. Geigy AG and Sandoz AG v. EC Commission, Cases 48, 52 and 53/69, [1972] 11 C.M.L.R. 557.

EC, *Commission Decision 97/816/CE of 8 December 1997 in Case IV/M.877, Boeing/McDonnell Douglas*, [1997] O.J. L. 366/97, [1997] 5 C.M.L.R. 270.

Germany

Bayer/Firestone, Oberlandesgericht, 26 November 1980, WuW/E OLG 2411 (*Synthetischer Kautschuk I, 1980*).

Morris/Rothmans, Federal Cartel Office, 24 February 1982, WuW/E BKartA 1943 (Morris/Rothmans).

Organic Pigments, Bundesgerichtshof, 29 May 1979, WuW/E BGH 1613 (*Organische Pigmente*).

United States

American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

Hartford Insurance Co. v. California, 509 U.S. 764 (1993).

Laker Airways Ltd. v. Sabena, 731 F.2d 909 (D.C. Cir. 1984).

Timberlane Lumber Co. v. Bank of America, 594 F. 2d 597 (9th Cir. 1976).

United States v. Aluminium Co. of America, 148 F. 2d 416 (2nd Cir. 1945).

United States v. Nippon Paper Industries Co., Ltd., 109 F.3d 1 (1st Cir. 1997), *cert. denied*, _ U.S. _, 118 S Ct. 685 (1998)

WTO/GATT

Japan - Measures Affecting Consumer Photographic Film and Paper (Complaint by the United States) (1998), WTO Doc. WT/DS44/R (Panel Report).

Japan - Trade in Semi-Conductors (Complaint by the ECC) (1988), GATT Doc. L/6309, 35th supp. B.I.S.D. (1988) 116.

SECONDARY MATERIAL

Books

Bermann, G.A. *et al.*, *Cases and Materials on European Community Law*, (St. Paul, Minn.: West Publishing Co., 1993).

Blanpain, R., *The OECD Guidelines for Multinational Enterprises and Labour Relations 1976-1979*, (Deventer: Kluwer, 1979).

Booysen, H., *International Transactions and the International Law Merchant*, (Pretoria: Interlegal, 1995).

Castel, J.-G., ed., *The Canadian Law and Practice of International Trade*, 2d ed. (Toronto: Emond Montgomery, 1997).

Castel, J.-G., ed., *Extraterritoriality in International Trade - Canada and the United States of America Practices Compared*, (Toronto: Butterworths, 1988).

Haley, J.O. & Iyori, H., eds., *Antitrust: A New International Trade Remedy?*, (Seattle: Pacific Rim Law & Policy Association, 1995).

Hawk, B.E., ed., *1995 Fordham Corporate Law Institute - International antitrust law & policy*, (Yonkers, N.Y.: Juris Publishing, 1996).

Hill, C.W.L., *International Business: Competing in the Global Marketplace*, 2d ed. (Chicago: Irwin, 1997).

Hovenkamp, H., *Federal Antitrust Policy*, (St. Paul, Minn.: West Publishing Co., 1994).

Jackson, J.H. & Davey, W.J., eds., *Legal Problems of International Economic Relations*, 3d ed. (St. Paul, Minn.: West Publishing Co., 1995).

Janis, M.W., *An Introduction to International Law*, (Toronto: Little, Brown, 1988).

Kotabe, M. & Wheiler, K.W., *Anticompetitive Practices in Japan*, (Westport, Conn.: Praeger, 1996).

Phlips, L., *Competition Policy: A Game-Theoretic Perspective*, (Cambridge: University Press, 1995).

Posner, R.A., *Antitrust Law*, (Chicago: The University of Chicago Press, 1976).

Rowley, J.W. & Baker, D.I., eds., *International Mergers The Antitrust Process*, vol. 1, 2nd ed. (London: Sweet & Maxwell 1996).

Scherer, F.M., *Competition Policies for an Integrated World Economy*, (Washington, D.C.: The Brookings Institution, 1994).

Sullivan, E.T. & Harrison, J.L., *Understanding Antitrust and Its Economic Implications*, 2d ed. (New York: Matthew Bender & Co., 1994).

Waverman, L., Comanor, W.S. & Goto, A., eds., *Competition Policy in the Global Economy*, (London: Routledge, 1997).

Articles

Baker, D.I. & Miller, W.T., "Antitrust Enforcement and Non-Enforcement as a Barrier to Imports" (1996) 24:10 I.B.L. 488.

Benson, S.E., "The UN Code on Restrictive Business Practices: An International Antitrust is Born" (1981) 30 Am. U. L. Rev. 1031.

Brittan, L. & Van Miert, K., "Towards an International Framework of Competition Rules" (1996) 24 I.B.L. 454.

Bronckers, M.C.E.J. & Larouche, P., "Telecommunications Services and the World Trade Organization" (1997) 31:3 J. World T. 5.

Castañeda, G., *et al.*, "International Antitrust" (1998) 32 Int'l Lawyer 291.

Crampton, P.S., "Alternative Approaches to Competition Law - Consumers' Surplus, Total Surplus, Total Welfare and Non-Efficiency Goals" (1994) 17:3 World Comp. 55.

Crampton, P.S. & Witterick, C.L., "Trade Distorting Private Restraints and Market Access: Learning to Walk Before We Run" (1996) 24:10 I.B.L. 467.

Davidow, J., "US Antitrust in 1997 - The International Implications" (1998) 21 World Comp. 25.

De Araujo, Jr., J.T. & Tineo, L., "Harmonization of competition policies among Mercosur countries" (1998) XLIII Antitrust Bull. 45.

De León, I., "Should We Promote Antitrust in International Trade?" (1997) 21:2 World Comp. 35.

Fox, E.M., "Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity, and Fairness" (1986) 61 Notre Dame L. Rev. 981.

Fox, E.M., "Harnessing the Multinational Corporation to Enhance Third World Development - the Rise and Fall and Future of Antitrust as Regulator" (1989) 10 Cardozo L. Rev. 1981.

Fox, E.M., "Harmonization of law and procedures in a globalized world: why, what, and how?" (1991) 60 Antitrust L.J. 593.

Fox, E.M., "Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade" (1995) 4:1 Pacific Rim L. & Pol'y J. 1.

Fox, E.M., "Toward World Antitrust and Market Access" (1997) 91 A.J.I.L. 1.

Fox, E.M., "International antitrust: against minimum rules; for cosmopolitan principles" (1998) XLIII Antitrust Bull. 5.

Fox, E.M. & Ordover, J.A., "The Harmonization of Competition and Trade Law - The Case for Modest Linkages of Law and Limits to Parochial State Action" (1996) 19:4 World Comp. 5.

Gerber, D.J., "The Extraterritorial Application of the German Antitrust Laws" (1983) 77 A.J.I.L. 756.

Gerber, D.J., "Beyond Balancing: International Law Restraints on the Reach of National Laws" (1984) 10 Yale J. Int'l L. 185.

Giardina, A. & Zampetti, A.B., "Settling Competition-Related Disputes - The Arbitration Alternative in the WTO Framework" (1997) 31:6 J. World T. 5.

Griffin, J.P., "EC/U.S. Antitrust Cooperation Agreement: Impact on Transnational Business" (1993) 24 L. & Pol'y Int'l Bus. 1051.

Haley, J.O., "Competition and Trade Policy: Antitrust Enforcement: Do Differences Matter?" (1995) 4:1 Pacific Rim L. & Pol'y J. 303.

Hawk, B.E., "The OECD Guidelines for Multinational Enterprises: Competition" (1977-78) 46 Fordham L. Rev. 241.

Hoekman, B.M. & Mavroidis, P.C., "Dumping, Antidumping and Antitrust" (1996) 30:1 J. World T. 27.

Hoekman, B.M. & Mavroidis, P.C., "Policy Externalities and High-Tech Rivalry: Competition and Multilateral Cooperation Beyond the WTO" (1996) 9 Leiden J. Int'l L. 273.

Joelson, M.R., "Harmonization: A Doctrine for the Next Decade" (1989) 10 Nw. J. Int'l L. & Bus. 133.

Klein, J. & Bansal, P., "International Antitrust Enforcement in the Computer Industry" (1996) 41 Villanova L. Rev. 173.

Komuro, N., "*Kodak-Fuji Film* Dispute and the WTO Panel Ruling" (1998) 32 J. World T. 161.

Kresic, M.D., "The Inconvenient Forum and International Comity in Private Antitrust Actions" (1983) 52 Fordham L. Rev. 399.

Lowe, A., "Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980" (1981) 75 A.J.I.L. 257.

Lowenfeld, A.F., "Sovereignty, Jurisdiction and Reasonableness: A Reply to A.V. Lowe" (1981) 75 A.J.I.L. 629.

Lukas, M., "The Role of Private Parties in the Enforcement of the Uruguay Round Agreements" (1995) 29 J. World T. 181.

Malaguti, M.-C., "Restrictive Business Practices in International Trade and the Role of the World Trade Organization" 32 J. World T. 117.

Mancero-Bucheli, G., "Anti-Competitive Practices by Private Undertakings in ANCOM and MERCOSUR: an Analysis from the Perspective of EC Law" (1998) 47 I.C.L.Q. 149.

Matsushita, M., "The Structural Impediments Initiative: An Example of Bilateral Trade Negotiation" (1991) 12 Michigan J. Int'l L. 436.

Matsushita, M., "Competition Law and Policy in the Context of the WTO System" (1995) 44 DePaul L. Rev. 1097.

Mattoo, A., & Subramanian, A., "Multilateral Rules on Competition Policy - A Possible Way Forward" (1997) 31:5 J. World T. 95.

Mavroidis, P.C., & Van Siclen, S.J., "The Application of the GATT/WTO Dispute Resolution System to Competition Issues" (1997) 31:5 J. World T. 5.

McNeill, J.S., "Extraterritorial antitrust jurisdiction: continuing the confusion in policy, law and jurisdiction" (1998) 28 Cal. W. Int'l L.J. 425.

Meessen, K.M., "Antitrust Jurisdiction under Customary International Law" (1984) 78 A.J.I.L. 783.

Meessen, K.M., "Competition of Competition Laws" (1989) 10 Nw. J. Int'l L. & Bus. 17.

Miller, D.L. & Davidow, J., "Antitrust at the United Nations: A Tale of Two Codes" (1982) 18 Stan. J. Int'l L. 347.

Murley, T.S., "Compelling Production of Documents in Violation of Foreign Law: An Examination and Reevaluation of the American Position" (1982) 50 Fordham L. Rev. 877.

Nicolaides, P., "Competition Among Rules" (1992) 16:2 World Comp. 113.

Nicolaides, P., "Towards Multilateral Rules on Competition - The Problems in Mutual Recognition of National Rules" (1994) 17:3 World Comp. 5.

Nicolaides, P., "For a World Competition Authority" (1996) 30:4 J. World T. 131.

Nicolaides, P., "Competition Policy in the Process of Economic Integration" (1997) 21:1 World Comp. 117.

Palim, M.R.A., "The worldwide growth of competition law: an empirical analysis" (1998) XLIII Antitrust Bull. 105.

Petersmann, E.-U., "International Competition Rules for the GATT-MTO World Trade and Legal System" (1993) 27 J. World T. 35.

Petersmann, E.-U., "International Competition Rules for Governments and for Private Business" (1996) 30:3 J. World T. 5.

Reuland, R.C., "Hartford Fire Insurance Co., Comity and the Extraterritorial Reach of United States Antitrust Laws" (1994) 29 Texas Int'l L.J. 159.

Rosenthal, D.E., "Jurisdiction and Enforcement: Equipping the Multilateral Trading System with a Style and Principles to Increase Market Access" (1998) 6 George Mason U. L. Rev. 543.

Rule, C.F., "European Communities-United States: Agreement on the Application of their Competition Laws - Introductory Note" (1991) 30 I.L.M. 1487.

Song, B., "Competition Policy in a Transitional Economy: The Case of China" (1995) 31 Stan. J. Int'l L. 387.

Starek, R.B., "International Aspects of Antitrust Enforcement" (1996) 19:3 World Comp. 29.

Stockmann, K., "The Janus-Face of Competition Policies" (1989) 10 Nw. J. Int'l L. & Bus. 31.

Tamura, J., "Foreign Firm Access to Japanese Distribution Systems: Trends in Japanese Antitrust Enforcement" (1995) 4:1 Pacific Rim L. & Pol'y J. 267.

Trebilcock, M.J., "Competition Policy and Trade Policy - Mediating the Interface" (1996) 30:4 J. World T. 71.

Vermulst, E.A., "A European Practioner's View of the GATT System" (1993) 16:3 World Comp. 5.

Weintraub, R.J., "The Extraterritorial Application of Antitrust and Securities Laws: An Enquiry into the Utility of a "Choice of Law" Approach" (1992) 70 Texas L. Rev. 1799.

Wood, D.P., "International Jurisdiction in National Legal Systems: The Case of Antitrust" (1989) 10 Nw. J. Int'l L. & Bus. 56.

Yacheistova, N., "The International Competition Regulation" (1994) 18:1 World Comp. 99.

OTHER MATERIAL

European Union

EC, Commission, *Towards an international framework of competition rules* COM(96)284, online: EU Commission, DG IV <http:europa.eu.int./en/comm/dg04/interna/com284.htm> (date accessed: 8 October 1998).

EC, Group of Experts on Competition, *Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules*, (Brussels: EC, 1995).

"Mission of DG IV - Competition", online: European Commission, DG IV <http://europa.eu.int/comm/dg04/misc/mission.htm> (date accessed: 19 October 1998).

OECD

OECD, *The OECD Guidelines for Multinational Enterprises (1994)*, (Paris: OECD, 1994).

OECD, *The OECD Guidelines for Multinational Enterprises (1986)*, (Paris: OECD, 1986).

OECD Council, *Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade* of 27 and 28 July 1995, Doc. No. C(95)130 Final, online: OECD, <http://www.oecd.org/daf/ccp/rec8com.htm> (date accessed: 8 December 1998).

OECD Council, *Revised Recommendations of the Council of the OECD Concerning Cooperation between Member Countries on Restrictive Business Practices Affecting International Trade* adopted on 21 May 1986, Doc. No. C(86)44 (Final), reproduced in (1986) 25 I.L.M. 1629.

OECD, Committee on Competition Law and Policy, *Interim Report on Convergence of Competition Policies*, Doc. No. OCDE/GD(94)64, (1994), reproduced in (1994) World Competition 18:1 167.

OECD, Trade Committee & Committee on Competition Law and Policy, *Strengthening the Coherence between Trade and Competition Policies*, Joint Report, Doc. No. OCDE/GD (96)90, OECD (1996).

"About the OECD: The OECD And Its Origins", online: Organisation for Economic Cooperation and Development <http://www.oecd.org/about/origins/html> (last modified: 11 April 1997).

"Committee on Competition Law and Policy", online: Organisation for Economic Cooperation and Development <http://oecd.org/daf/ccp/commte.html> (date accessed: 12 August 1998).

UNCTAD

Set of Principles and Rules for the Control of Restrictive Business Practices, GA Res., 35th Sess., UN Doc. TD/RBP/10 (1980).

UNCTAD, *Continued Work on the Elaboration of a Model Law or Laws on Restrictive Business Practices - Draft commentaries to possible elements for articles of a model law or laws*, UN Doc. TD/B/RBP/81/Rev.5 (1998).

UNCTAD, Trade and Development Board, *Experiences gained so far with International Cooperation on Competition Policy Issues and the Mechanisms used*, UN Doc. TD/B/COM.2/CLP/3 (1998).

UNCTAD, *Model Law on Restrictive Business Practices*, UN Doc. TD/B/RBP/81 (1991).

UNCTAD, *Report of the Second United Nations Conference to Review all Aspects of the Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, UN Doc. TD/RBP/CONF.3/9 (1991).

UNCTAD, *Third United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, UN Doc. TD/RBP/CONF.4/14 (1995).

UNCTAD, *Uruguay Round - Further Papers on Selected Issues* (New York, UN, 1988).

UN, *Havana Charter for an International Trade Organization*, UN Doc. E/Cont. 2/78, reproduced in UN Doc. ICITO/114 (1948).

WTO/GATT

Arrangements for Consultations, GATT C.P. Dec. of 19 November 1960, 16th Sess., 9th Supp. B.I.S.D. (1961) 28.

GATT, Group of Experts on Restrictive Business Practices, *Report on Arrangements for Consultations Adopted by the Contracting Parties on 2 June 1960*, GATT Doc. L/1015, 9th Supp. B.I.S.D. (1961) 170.

WTO, Ministerial Conference Singapore, *Ministerial Declaration*, (December 1996), WTO Doc. WT/MIN(96)/DEC.

WTO, *Annual Report 1997 Volume 1 - Special topic: Trade and competition policy*, (Geneva: WTO, 1997).

WTO, Working Group on Trade and Competition Policy, *Report (1998) of the Working Group on the Interaction between Trade and Competition Policy to the General Council*, WTO Doc. WT/WGTCP/2 (1998).

"About the WTO - Members", online: World Trade Organisation <http://www.wto.org/wto/about/organsn6.htm> (last modified: 21 December 1998).

"About the WTO - Summary", online: World Trade Organisation <http://www.wto.org/htbin/htimage/wto/map.map?102,36> (date accessed: 13 October 1998).

Other

Draft International Antitrust Code, (1993) World Trade Materials 5 126.

Japan-United States: Joint Statement on the Framework for a New Economic Partnership, 10 July 1993, (1993) 32 I.L.M. 1414.

"NAFTA Operational Review", online: <http://www.infoexport.gx.ca/nafta/CHART-E.asp> (last modified: November 1998).

DOJ - Antitrust Division: International Documents "First Joint Status Report on the U.S.-Japan Enhanced Initiative on Deregulation and Competition Policy", online: US Department of Justice <http://www.usdoj.gov/atr/public/international/docs/1792.htm> (last modified: 15 May 1998).

US Department of Justice and Federal Trade Commission 1995 Antitrust Enforcement Guidelines for International Operations, 34 I.L.M. 1080 (1995).

"An Analytical Compendium of Western Hemisphere Trade Arrangement" online: Organisation of American States <http://www.sice.oas.org/cp061096/english/03010401.stm> (last modified: 6 October 1996).

Protocol for the Defence of Competition, online: Organisation of American States <http://www.sice.oas.org/cp_comp/english/cpa/cpa3_e.stm> (last modified: 6 October 1996).

Interview with G. King (20 January 1999).