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The three faces of international antitrust, and the paradox for international merger control

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Abstract

The term ‘international antitrust’ is a convenient yet inaccurate means of describing the national rules, bilateral agreements, and multilateral initiatives that attempt to fill the vacuum created by the failure to agree upon international antitrust rules. The ‘stillborn’ International Trade Organisation (ITO) would have integrated international antitrust rules into the multilateral trading system and provided a twin track to trade liberalisation, but was never ratified. The three faces of international antitrust – unilateralism, bilateralism and multilateralism – have developed in parallel to the increasing globalisation of trade, removal of state-imposed barriers and economic integration and interdependency. International cooperation and convergence efforts in antitrust are essential in order to safeguard the benefits that should flow from trade liberalisation. Cooperation and convergence also diminishes the risk of conflict between antitrust authorities, which would otherwise increase due to: the extraterritorial enforcement of national antitrust rules; the growing number of antitrust regimes; and ‘ripple effects’ due to globalisation of trade. In analysing the activities that comprise the international antitrust dialogue, this thesis suggests that the primary objective of the dialogue is to support and supplement trade liberalisation. There is doubt however, as to whether the operation of the international merger control framework (which consists of a plethora of national merger control regimes, bilateral engagement, and multilateral convergence efforts) is consistent with the primary objective.

Mergers and acquisitions (M&A) are important means of foreign direct investment and can create cross-border synergies, which should help realise the benefits to be reaped from trade liberalisation. While anti-competitive M&A jeopardise those benefits, and are correctly scrutinised (and occasionally blocked), multi-jurisdictional merger review must balance the need to intervene in anti-competitive M&A, with the desire to facilitate all other M&A. A paradoxical position arises however, if multi-jurisdictional merger review unduly hinders those M&A which would further the cause of trade liberalisation, whilst attempting to control the anti-competitive mergers. Hence the operation of multi-jurisdictional merger review is potentially inconsistent with the primary objective of the international antitrust dialogue. This thesis focuses upon the international merger control framework in chapter 5, and evaluates whether reforms are needed to ensure greater consistency with the primary objective. This thesis concludes by offering several recommendations regarding the international antitrust dialogue, particularly with regard to the international merger control framework, but recommends against the creation of an international merger control regime (IMCR), or a common pre-merger notification system at the current time. This thesis is intended to be up to date as of 1 May 2007.

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List of abbreviations

ACCC	Australian Competition and Consumer Commission
AMC	Antitrust Modernization Commission (United States)
APEC	Asia Pacific Economic Co-operation
ASEAN	Association of South East Asian Nations
BIAC	Business and industry advisory committee to the Organisation for Economic Co-operation and Development
CARICOM	Caribbean Community
CC	Competition Commission (United Kingdom)
CCC	COMESA Competition Commission
CCB	Canadian Competition Bureau
CDC	Committee for the Defence of Competition (MERCOSUR)
CET	Common external tariff
CFI	Court of First Instance (EU)
COMESA	Common Market for Eastern and Southern Africa
DAAG	Deputy Assistant Attorney General within the Antitrust Division of the US Department of Justice
DOJ	Department of Justice (United States)
EC	European Community (formerly the EEC – European Economic Community)
ECJ	European Court of Justice (EU)
ECMR	European Community Merger Regulation
EEA	European Economic Area
EFTA	European Free Trade Association
ESA	EFTA Surveillance Authority
EU	European Union
FDI	Foreign direct investment
FTAA	Free Trade Area of the Americas
FTC	Federal Trade Commission (United States)
GATT	General Agreement on Tariffs and Trade
GCI	Global competition initiative

IAEAA	International Antitrust Enforcement Assistance Act (1994 U.S. Act of Congress which facilitates MLATs)
ICC	International Chamber of Commerce
ICN	International Competition Network
ICPAC	International Competition Policy Advisory Committee (United States)
IMCR	International merger control regime
ITO	International Trade Organisation
JFTC	Japanese Fair Trade Commission
M&A	Mergers and acquisitions
MFCC	Mexican Federal Competition Commission
MLAT	Mutual Legal Assistance Treaty
MSG	Merger Streamlining Group
NAFTA	North American Free Trade Area
NCA	National competition authority (primarily within EU)
NGO	Non-governmental organisation
NZCC	New Zealand Commerce Commission
OECD	Organisation for Economic Co-operation and Development
OFT	Office of Fair Trading (United Kingdom)
OJ	Official Journal of the European Communities
PCA	Partnership and co-operation agreements (external relations of the EU)
RTA	Regional Trade Agreement
SAP	Stabilisation and association process (external relations of the EU)
TAIEX	Technical assistance and information exchange programme (EU accession programme)
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organisation

Introduction and methodology

1.1 In search of a parallel approach to trade liberalisation

1.1.1 Article 46(1) of the Havana Charter for the creation of the International Trade Organisation (ITO) sets forth:

‘Each Member shall take appropriate measures and shall co-operate with the Organisation to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other objectives [of the ITO].’

The provision highlights a safeguard that was built into the ITO framework in 1948; a requirement that states engaging in the trade liberalisation process provide parallel rules protecting against restrictive business practices (more commonly referred to as competition or antitrust laws). In the intervening near-60 years, many states, international bodies, practitioners and academics have grappled with this parallel approach to trade liberalisation, and debated how best to fill the vacuum left by the failure to ratify the ITO in 1950.¹ The trade liberalisation process has continued steadily in the ITO’s absence, initially under the General Agreement on Tariffs and Trade (GATT) framework, and more recently under the auspices of the World Trade Organisation (WTO), yet neither includes antitrust provisions. The imbalance between increasing globalisation of trade and the lack of counterpart international antitrust provisions threatens the realisation of the benefits that should flow from free trade policies. Commercial behaviour can

¹ For a concise commentary on the failure to ratify see discussion *infra* at 2.2.2.

create or reinforce distinct geographic markets, adopt discriminatory practices and engage in other forms of anti-competitive behaviour that undermine the removal of state-imposed barriers to trade. Most observers would acknowledge that there should be some form of international antitrust, yet agreement as to the form, substance, and forum for such rules has been elusive.

1.1.2 In the absence of an international antitrust agreement, three distinct approaches have gradually developed to provide some form of antitrust at an international level. The unilateral approach was first developed by the United States' judiciary and antitrust authorities in the 1940s, which was supplemented by bilateral engagement between principal antitrust jurisdictions in the latter half of the 20th century, and there have been various multilateral initiatives concerning international antitrust since the failure of the ITO. The three approaches are not mutually exclusive, but have tended to evolve incrementally at separate points in time. Unilateralism, bilateralism and multilateralism represent the three faces of international antitrust, and it is the combination of these activities that form the international antitrust dialogue, which is discussed in later chapters. US unilateralism manifests itself as the extraterritorial application and enforcement of US antitrust laws, on the basis of the 'effects doctrine'.² The US second Circuit Court of Appeals Judge Learned Hand proclaimed: 'any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its

² Which was recognised in: *United States v. Aluminium Co. of America (Alcoa)*, 148 F, 2d 416 (2nd Circuit Court of Appeals, 1945).

borders which the state reprehends' in the 1945 *Alcoa* case.³ Judge Learned Hand held that there was an infringement of the Sherman Act on the basis of effects within the US, notwithstanding that the firm involved in the case was Canadian and the effects resulted from activity based in Switzerland. Extraterritoriality is inherently controversial and can be logically regarded as encroaching upon the sovereignty of other states, and has often been described as contrary to international law.⁴ Unsurprisingly therefore, there has been a lot of criticism of the use of extraterritoriality in US antitrust, although over time the criticism has given way to pragmatism. Two factors likely prompted the shift towards bilateral antitrust engagement from the 1970s onward: the increasing number of jurisdictions adopting and enforcing antitrust laws; and the increasing acceptance of extraterritoriality to ensure effective enforcement.

1.1.3 The number of antitrust jurisdictions has dramatically increased from the mid-20th century: from 24 in 1964⁵ to in excess of 100 today,⁶ and this has challenged the efficacy of unilateralism. Notwithstanding the increasing number of antitrust regimes, there are many potential sources of divergence between jurisdictions, which can include policy, procedural and substantive differences. The underlying differences can cause 'system friction'⁷ when extraterritoriality becomes the norm

³ *Ibid.* at 443.

⁴ See discussion of the arguments surrounding the legality of extraterritoriality *infra* at 2.7.1-2.7.2.

⁵ M.R.A. Palim, 'The worldwide growth of competition law: an empirical analysis' (1998) 43 *Antitrust Bulletin* 105.

⁶ See A.B. Lipsky, 'The Global Antitrust Explosion: Safeguarding Trade and Commerce or Runaway Regulation?' (2002) 26-FALL *Fletcher Forum of World Affairs* 59 at 60. Also, R. Whish, *Competition Law* (5th Ed, London, LexisNexis Butterworths, 2003) at p.782.

⁷ See discussion in: A. Ezrachi, 'Merger Control and Cross Border Transactions – A Pragmatic View on Cooperation, Convergence and What's in Between' University of Oxford Centre for Competition Law and

for international antitrust, in the absence of ITO-type rules, and raises the prospect of conflict between antitrust authorities. Conflicting decisions clearly cause enforcement difficulties for the authorities involved. Nonetheless, the bigger concern is that conflict in multi-jurisdictional antitrust enforcement could hamper the trade liberalisation process and damage trading relationships, ironically the policies that international antitrust was meant to support within the ITO framework. Bilateral engagement seeks to diminish the risk of conflict in international antitrust, and several key principles have developed through cooperation agreements, and more recently by informal case cooperation, that engender trust and mutual understanding between counterpart authorities. In light of the large number of antitrust jurisdictions however, and the increasing economic inter-dependence of market economies, bilateralism is an incomplete solution to problems caused by multi-jurisdictional antitrust enforcement.

1.1.4 Multilateral engagement in the international antitrust dialogue has many clear benefits, such as involving a larger number of jurisdictions in cooperation and convergence efforts, as well as the sharing of best practice, and the involvement of non-governmental organisations (NGOs), practitioners and academics in the process. Nonetheless there are inherent limitations upon the role and future direction of multilateral activities since the failure of the ITO, and in light of the dominance of a number of ‘core’ antitrust jurisdictions in the international antitrust dialogue. Multilateralism also poses potential threats to the sovereignty

Policy Working Paper (L) 11/05. Available at: <http://www.competition-law.ox.ac.uk/competition/portal.php>. See discussion of ‘system friction’ in the context of merger control *infra* at 5.3.

of national/regional antitrust regimes and this issue has constrained the development of multilateral approaches in antitrust. Arguably, the objectives of the international antitrust dialogue are unobtainable in the absence of a more fully developed multilateral framework. This thesis seeks to investigate that argument.

1.1.5 This thesis will explore the above issues in detail and attempt to identify whether there is a de facto primary objective of the international antitrust dialogue, i.e. whether the three faces of international antitrust are working in common towards an identifiable goal. The latter part of this thesis will then focus on merger control in the international sphere, and will assess multi-jurisdictional merger review against the objective(s) of the international antitrust dialogue. The focus is upon jurisdictions/authorities that have been most involved in the international antitrust dialogue, as a comprehensive study is unlikely to be feasible by one person. This thesis also focuses upon international antitrust relations mostly to the exclusion of the intra-EC situation regarding the European Commission and national competition authorities of EC Member States. The *sui generis* nature of the internal EC antitrust regime⁸ would skew conclusions, and the relationship between the EC's antitrust authorities is generally not suitable for comparison with the relationships between other international authorities.

⁸ Comparisons are however possible with other regional blocs such as the West African Economic and Monetary Union (WAEMU/UEMOA) and the Caribbean Community (CARICOM), discussed *infra* at 4.2.10 and 4.2.5 respectively, but do not detract from the unique position of the EC with regard to its internal antitrust framework, discussed *infra* at 2.6 and 4.3.

1.1.6 In essence the second, third and fourth chapters explore the history and development of international antitrust and the relationship between unilateralism, bilateralism and multilateralism with international trade. Chapter 2 focuses upon the antitrust regimes within two key antitrust jurisdictions, namely the US and the European Community,⁹ but does so while charting the development of unilateralism in international antitrust.

Chapter 3 explores the first efforts at bilateral engagement and the reasons for moving away from unilateralism, and engages in a detailed comparative analysis of current bilateral antitrust cooperation agreements. The aim of the comparative analysis is to ascertain the degree of convergence achieved between the agreements, and whether they have common objectives. The chapter also considers the rationale for jurisdictions to negotiate and agree upon bilateral agreements, and this is continued at the beginning of chapter 4.

Chapter 4 principally explores the contribution of multilateralism to the international antitrust dialogue, but initially links this closely with discussion at the end of chapter 3. There are numerous and diverse activities that fall under the ambit of antitrust multilateralism, and these are discussed before hypothesising as to the de facto primary objective of the international antitrust dialogue.

⁹ Note that the terminology adopted will generally refer to the European Community as the antitrust framework is based upon the Treaty of Rome, and also because the EC has legal personality distinct from its Member States, where as the EU is primarily considered to be the political entity (hence why the EU is often the appropriate terminology for discussing the external relations with third countries, *infra* 4.3).

Chapter 5 represents a significant portion of the work undertaken in the thesis, and focuses upon mergers and acquisitions (M&A) to the exclusion of other types of commercial behaviour. The fifth chapter explains the focus upon M&A, and identifies a potential paradox for multi-jurisdictional merger review if the international merger control framework is inconsistent with the primary objective identified at the end of chapter 4. The chapter also briefly considers proposals for reform of the international merger control framework, as a precursor to the final conclusions and recommendations in chapter 6.

Chapter 6 provides a conclusion to the thesis and links recommendations with discussion throughout the thesis. Several conclusions and recommendations are highlighted regarding the bilateral and multilateral approaches to international antitrust, although the key recommendations build upon chapter 5 and focus upon potential reform concerning multi-jurisdictional merger review.

1.2 Methodology

1.2.1 The thesis has relied predominantly upon primary and secondary literary sources, whilst also undertaking some small scale empirical research of a qualitative nature in the latter stages of the research. Early literature reviews identified key sources, such as the seminal International Competition Policy Advisory Committee final report (February 2000), which enabled the formation of a working hypothesis and design for the research. The hypothesis suggested that the international antitrust dialogue (i.e. all of the activities concerning antitrust at the international level)

was an inadequate means of addressing the purpose of international antitrust, and that research should be able to identify suitable recommendations for reform. The hypothesis necessitated a detailed analysis of international antitrust activities, which were readily categorised into three separate approaches: unilateralism; bilateralism; and multilateralism. The analysis, which forms the large bulk of the thesis in chapters 2 – 4, was necessary to test the hypothesis and identify whether there was a primary purpose/objective of international antitrust. Primary sources were used extensively in the course of researching and writing the subject matter of chapters 3 and 4 in particular, and were supported by further reference to secondary sources where possible. Bilateral antitrust cooperation agreements and multilateral agreements are the primary sources for the analytical and comparative discussion in chapters 3 and 4, and texts, articles and other secondary sources provide supporting authority for the analysis. In light of the origins of international antitrust within the ITO, and the developing research design, it was clear that the thesis would have to consider and discuss multi-disciplinary issues such as trade statistics and figures,¹⁰ as well as political and trade relationships between states.¹¹ It is hoped that the thesis represents a more complete and realistic study of international antitrust and potential reforms as a result of these additional sources.

The research design was altered after completing the first substantive chapter (chapter 2), in the realisation that suggesting recommendations for reform may be

¹⁰ See e.g. 2.2.2 and 4.1.1 *infra*.

¹¹ See e.g. 4.2 and 4.3 *infra*.

vague or unsubstantiated without refocusing upon a particular area of antitrust. Therefore the latter part of the thesis focuses upon international merger control. The specific focus in chapter 5 enabled a more detailed study of the extent of international activities than would otherwise have been possible, including an analysis of international cooperation in practice at 5.4 *infra*. After the decision to focus upon a particular area of antitrust in the latter stages of the thesis, merger control was selected in light of the tendency to focus upon cartels in existing literature, and the likely usefulness of further research focused on merger control. The research design facilitated a very clear structure to the thesis, and enabled clearly defined literature searches to take place before writing began on new chapters.

1.2.2 The literature searches that formed the predominant means of research for the thesis used internet databases, search engines, electronic journals, and key websites,¹² as well as more traditional means of identifying relevant sources from references in hard copies of texts, articles and cases. The internet was invaluable in tracking and identifying key electronic materials, particularly international references. Legal databases, such as Westlaw and HeinOnline, facilitated literature searches and article retrieval and Lexis-Nexis has been particularly useful in accessing the full-text of US court judgments.¹³ Generic internet search engines, such as Google were helpful for locating key websites, particularly when undertaking research relevant to chapter 4, and tracking down primary sources of

¹² The key websites accessed in the course of research, particularly those not referenced elsewhere, are noted in the bibliography, *infra*.

¹³ US court judgments are particularly important sources in Chapter 2.

information concerning the trading blocs, such as CARICOM and COMESA. The increasing availability of legislative instruments and further materials on the websites of antitrust authorities has also been helpful to the research and has facilitated a more comprehensive study at times, than would otherwise have been possible. Note that all World Wide Web addresses and hyperlinks provided in this thesis are accurate and operational as at 26 June 2007. Notwithstanding the increasing accessibility of information electronically, the United Nations Yearbooks of International Trade Statistics proved to be the most authoritative and reliable source of global trade figures, which are more accessible in hard copy than via the internet, and were relied upon in chapters 2 and 4. Finding reliable statistics and figures regarding international mergers and acquisitions, discussed at 5.2 *infra*, proved to be more difficult given that many resources are not publicly accessible, and different sources tend to suggest different figures. The Financial Times and Thomson Financial quarterly reports were the most consistent and reliable sources of information regarding M&A activity. The materials already discussed, and indeed the literature reviews in general, were inadequate resources for the analysis of multi-jurisdictional merger reviews in chapter 5. Existing literature in this area fails to provide a clear sense of the extent of cooperation possible between antitrust authorities when conducting concurrent merger reviews. Antitrust authority press releases and speeches by officials provide case examples of close cooperation, but do not fully convey the frequency and commonality of cooperation, neither do they convey the practical difficulties and concerns that arise as a result of close cooperation. In light of the limitations in

the current literature, and the desire to gain more of a practical insight into this area of legal practice, a small empirical research plan was devised to develop a better understanding of the subject matter, by contacting leading antitrust practitioners and officials.

- 1.2.3 The empirical research plan was of a qualitative nature and essentially involved a research trip to Brussels in September 2006 to meet with leading practitioners and officials for informal interviews. There has also been subsequent communication with interviewees by email and telephone when further information was required. The research involved eight interviewees during the Brussels trip, as well as a subsequent telephone discussion/interview with Professor Hawk (Skadden, Arps, Slate, Meagher & Flom, and Fordham Law School). The aim of the research was to acquire a better appreciation of the operation of multi-jurisdictional merger review, and the burden upon merging parties, in order to supplement existing literature in this area. Potential interviewees from private practice were identified on the basis of their known practice area and employer. Leading law firms were identified with assistance from pre-existing contacts with Arnold & Porter LLP, and partners involved in merger control were initially approached by email. All six interviewees from private practice were assured that their anonymity would be protected, although it is possible to state that all interviewees from private practice were either partners, or associates with considerable experience, at one of the four leading antitrust law firms that participated in the research visit. Meetings were also held with European Commission officials from the competition directorate-

general. Initial contact with all interviewees was made by email, outlining the research aims and objectives and querying whether the individual would be willing to participate and was available for a meeting during the Brussels visit. Once interviewees confirmed their willingness to participate, they were sent a questionnaire for guidance on the type of issues likely to arise during the meeting. The questionnaire is included as an appendix to this thesis. The empirical research aims and objectives allowed flexibility in the conduct of the interviews, and while the questionnaire provided a structure for discussion, it was unnecessary to adopt a rigid and formal approach to the interviews, although notes were taken to record the content of the discussion. The empirical research successfully facilitated a fuller understanding of multi-jurisdictional merger review, and undoubtedly influenced the analysis within chapter 5. References to this independent research have been made within chapter 5, where relevant and appropriate.

2

The foundations of ‘international antitrust’: trade liberalisation and extraterritoriality

2.1 Trade liberalisation at a cost

2.1.1 Globalisation and trade liberalisation are two distinct concepts that evolved to a new level during the 20th century, albeit neither originated from this period in time. The late 1940s are regarded as a watershed for international trade with the signing of the General Agreement on Tariffs and Trade (GATT), yet the rationale underlying that Agreement was understood and pursued over 100 years prior to the international consensus and political will that led to the GATT being viable.

The concept of trade liberalisation or free trade was clear as early as 1819, it was a controversial notion in an overwhelmingly colonialist world with power stemming from Western Europe. In an act that has affected world trade ever since, Thomas Stamford Raffles’ foundation of Singapore as a free port in 1819 upset his employers, the East India Company. Despite losing its monopoly in India in 1813, the East India Company refused to adapt to changing times and made various attempts to reverse Raffles’ declaration, being defeated only by the port’s overwhelming success.¹ The success attracted the interest of the British government, which championed the cause of free trade² in spite of French and Portuguese resistance; in the 1820s both countries regarded protectionism as a

¹ W.G. Clarence-Smith, ‘The modern colonial state and global economic integration, 1815-1945’ at p.123, in D. Smith, D. Solinger & S. Topik (Eds), *States and Sovereignty in the Global Economy* (London, Routledge, 1999).

² J. Foreman-Peck, *A History of the World Economy: International Economic Relations Since 1850* (2nd Ed, London, FT Prentice Hall, 1994) at p.115.

way to protect their dwindling empires.³ The benefits of free trade gained greater recognition between the 1850s and late 1870s, even the French were persuaded of the benefits, and used free trade to further their military endeavours during this period.⁴ The situation would reverse however as political support for free trade dwindled during periods of industrialisation. Lower prices and competitive third world producers prompted the US and much of Western Europe to return to tariffs and protectionist policies in the 1880s.⁵ Policies on international trade altered little in the 40 years that followed, with tariffs reaching 40% around 1915. There was little enthusiasm for pursuing free trade, or any significant multilateral initiatives in the aftermath of World War I. On the contrary, fierce protectionist campaigns took place in the late 1920s and early '30s, initially in response to a post-war recession, then partially in response to economic turmoil in the US.⁶ The Second World War followed, and its aftermath created great opportunity for multilateralism.

2.1.2 The existence of a political consensus to enter into a multilateral trade agreement led to the creation of the GATT, the aim being to advance free trade policies and lessen tariffs and other protectionist activities that discriminate against foreign goods and services.⁷ Parallel provisions to prevent commercial entities frustrating the aim of trade liberalisation were notably excluded from the GATT, although

³ *Op. cit.* note 1 at pp.123-124.

⁴ W.G. Clarence-Smith, *op. cit.* note 1 at pp.124-125 and J. Foreman-Peck, *op. cit.* note 2 at p.32. French military endeavours specifically refers to those under Napoleon III, such as the war with Austria in 1859.

⁵ *Op. cit.* note 2 at p.115.

⁶ *Op. cit.* note 1 at pp.129-130.

⁷ See A.D. Mitchell, 'Broadening the Vision of Trade Liberalisation: International Competition Law and the WTO' (2001) 24 *World Comp.* 343, for a discussion of principal aims of trade liberalisation.

efforts to introduce rules of this nature were made in 1948 by different means. The Havana Charter for an International Trade Organisation (ITO) was intended to provide for an international set of antitrust provisions within an institutional structure, which had investigatory and arbitration powers. The antitrust code focused on restrictive trade practices. The ITO is described as having been ‘stillborn’⁸ as the Havana Charter was not ratified. States that had been instrumental in its inception, such as the US, abandoned it thereby causing its failure.

The parallel track lacking from the international stage can be seen within a regional setting by the example of the European Community (EC). The 1957 Treaty of Rome, which laid the foundations of the European Community (ex-EEC) and the internal market, contains a set of provisions intended to remove barriers to trade between Member States (i.e. the provisions on free movement of goods⁹), as well as provisions addressed to ‘undertakings’, i.e. commercial entities.¹⁰ The latter are antitrust provisions and encompass prohibitions against anti-competitive agreements,¹¹ and abuses of a dominant position.¹² There are also state aid provisions,¹³ and provisions creating a merger control regime were

⁸ B. Zanettin, *Cooperation Between Antitrust Agencies at the International Level*, (Oxford and Portland, Hart Publishing, 2002) at p.234.

⁹ Primarily Articles 23 – 25 and 28 – 30 EC Treaty.

¹⁰ See Case C-41/90 *Höfner and Elser v. Macrotron* [1991] ECR I-1979, and Commission Decision in *Polypropylene* [1986] OJ L230/1, for a basic definition of ‘undertaking’ according to EC antitrust law.

¹¹ This is a summarised version of the prohibition laid out in Article 81 EC.

¹² Article 82 EC.

¹³ Articles 87-89 EC.

introduced in 1989.¹⁴ There is no doubt that the original objective of EC antitrust law was primarily that of market integration,¹⁵ i.e. to ensure that commercial activities could not undermine the free movement provisions within the Treaty of Rome. It is clear the parallel sets of provisions complement each other. By comparison, the lack of parallel multilateral antitrust provisions to complement the GATT in the late 1940s can be seen as an impediment to realising the goal of trade liberalisation. It is surely beyond doubt that commercial activities, as well as state-implemented protectionist measures, can frustrate the pursuit of trade liberalisation. As Mitchell highlights:

‘...even if all barriers to international trade were removed, in the absence of complementary competition regulation, some markets would still be closed to new entrants because of anti-competitive conduct. These private barriers would replace the public barriers to market access removed by multilateral trade agreements’.¹⁶

Exclusive distribution, marketing and sales agreements and territorial restrictions exemplify the ability to hinder trade and foreclose markets. The lack of a multilateral framework to control commercial activities, so as to further advance

¹⁴ A European Community Merger Regulation (ECMR) was adopted in 1989, Council Reg. 4064/89/EEC, [1989] O.J. L393/1, corrected version published [1990] O.J. L257/14. The ECMR has been revised and Reg. 4064/89 was replaced by Council Regulation (EC) No 139/2004 *on the control of concentrations between undertakings* [2004] O.J. L24/1, which entered into force on 1st May 2004. While Article 66(7) of the former ECSC Treaty provided for a merger control mechanism with regard to the coal and steel industries, the Treaty of Rome has no provisions on merger control. Whish has described the absence of merger control provisions from the Treaty of Rome as a ‘lacuna’, R. Whish, *Competition Law* (5th Ed, London, LexisNexis Butterworths, 2003) at p. 793. The European Commission and ECJ had attempted to adapt Articles 81 and 82 to deal with anti-competitive mergers and acquisitions (or ‘concentrations’), with some success. Cases 142/84 and 156/84 *BAT and Reynolds v. Commission* [1987] ECR 4487, endorsed the application of Article 81(1) to address anti-competitive effects stemming from the acquisition of certain shareholdings. Case 6/72 *Continental Can v. Commission* [1973] ECR 215 established that Article 82 can apply to prevent a dominant ‘undertaking’ acquiring a competitor, which could substantially diminish competition; regarding such an acquisition as an abuse of that dominant position. The ECMR removed the need to adapt the application of the core prohibitions to deal with M&A activity.

¹⁵ This is particularly evident from the early case law of the European Court of Justice (ECJ), e.g. Case 26/76 *Metro SB-Grossmärkte GmbH & Co KG v. Commission* [1977] ECR 1875 at paragraph 4.

¹⁶ *Op. cit.* note 7 at p.343.

trade liberalisation therefore requires to be filled by alternative means. Notably a GATT decision acknowledged the potentially detrimental impact of commercial behaviour in 1960:

‘...business practices which restrict competition in international trade may hamper the expansion of world trade and economic development in individual countries and thereby frustrate the benefits of tariff reduction and removal of quantitative restrictions, or may otherwise interfere with the objectives of the General Agreement on Tariffs and Trade’.¹⁷

2.1.3 The wider antitrust context within which the ITO failed and the GATT did not include antitrust provisions may help to explain such an apparent vacuum. In 1947 the US was one of few jurisdictions with a comprehensive antitrust regime, certainly no other jurisdiction had the same level of enforcement vigour. Thus it proved difficult to establish the requisite international consensus to implement parallel multilateral antitrust rules alongside the GATT. Other jurisdictions were either unconvinced of the need for such rules, or wished to pursue a variety of objectives through such provisions. The latter was simply unacceptable to the US which tends to view antitrust as having a narrow purpose. The range of views was disparate and entrenched, and agreement proved unattainable.

The US had a mature federal antitrust regime on 30th October 1947 when 22 nations signed a ‘temporary’ agreement on tariffs and international trade, which later became known as the GATT.¹⁸ The US federal antitrust legislation was intended to protect the principle of free trade between the US states, the process of

¹⁷ The 1960 GATT Decision on Arrangements for Consultations on Restrictive Trade Practices, GATT Resolution, BISD 28 (9th Supp, 1961).

¹⁸ For further information regarding the circumstances in which the GATT was signed see J.H. Jackson, *The Jurisprudence of GATT & the WTO*, (Cambridge, Cambridge University Press, 2000) at p.15.

competition, and perhaps primarily the interests of the consumer, all from potentially damaging anti-competitive commercial behaviour. In retrospect it is unsurprising that a clash would occur between domestic US antitrust law, which could curtail commercial behaviour to avoid anti-competitive market effects, and the opening up of US markets to foreign goods and services through the process of trade liberalisation (significantly boosted by the GATT). In the absence of trade liberalisation, the enforcement of US antitrust law would penalise US firms for causing anti-competitive effects within US markets, yet post-GATT there was clearly a greater likelihood of US antitrust enforcement penalising non-US firms. The choice was simply whether to apply a different legal standard to domestic and foreign firms, or enforce US antitrust against non-US firms where appropriate. US antitrust adopted the latter approach, and propelled its enforcement bodies into legal and political disputes and the realms of extraterritoriality.

2.1.4 The US federal antitrust authorities were in a difficult position in international affairs for a long period. The US established federal antitrust laws in the 1890s, sparked controversy and criticism by extraterritorial enforcement in the 1940s, and appeared isolated when advocating antitrust policies in the late 1940s and 1950s, and yet over 100 jurisdictions now have some form of antitrust laws.¹⁹ The question arises as to why the US developed an antitrust regime with a clear enforcement record so long before most other jurisdictions. There are a few

¹⁹ See A.B. Lipsky Jr, 'The global antitrust explosion: safeguarding trade and commerce or runaway regulation?' (2002) Summer/Fall *Fletcher Forum of World Affairs* 59 at p.60. Also R. Whish, *op. cit.* note 14, at p.782, stating that: 'more than 100 countries now have competition law'.

possibilities, yet it is arguable that as a union of 50 states with its own internal market of sorts, the US required a parallel approach, encompassing both internal free trade and antitrust rules, before most other jurisdictions. In 1947 the US was a union of 48 states,²⁰ and the continental US had been an established union for some time. The situation was, however, different when Congress passed the Sherman Act in 1890 with only 42 states, two of which joined in 1889. The need to protect free trade within US borders from both state legislatures and commercial activities was recognised and ensured by the US Constitution²¹ and antitrust laws respectively. There is clearly a parallel approach. Nonetheless, in the 1940s there was a lack of international consensus on the need for a twin-track to trade liberalisation, with the resulting absence of multilateral antitrust provisions.

2.1.5 The difficulty encountered by US antitrust authorities in the 1940s is therefore clear. The international community was quickly embracing trade liberalisation, which could only lead to increasing levels of cross-border trade and greater economic dependency, yet the US was committed to furthering the goals of antitrust, laws that by nature are intertwined with markets and trade. Most jurisdictions at this time had no such laws or policies, and the jurisdictions that

²⁰ Alaska and Hawaii joined in 1959.

²¹ The power of individual States with regard to trade appears to be controlled by: Article I: Section 8, Clause 1; Section 9, Clauses 5 & 6; and importantly Section 10, Clause 2 of the US Constitution. The latter of which states ‘No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress’.

regulated trade and markets either pursued no such policies or did so without effective enforcement or in conjunction with other objectives. As a result of the failure of the ITO, there were no international antitrust provisions that could apply when anti-competitive behaviour stemmed from non-US firms and/or activity. The US therefore applied domestic antitrust legislation against foreign firms that were active, or whose behaviour had effects, in US markets. The extraterritorial approach has had enormous consequences for the development of international antitrust ever since.

2.2 The impact of cross-border trade

2.2.1 The respective goals of US antitrust and international multilateral trade agreements can easily be regarded as differing: one seeks market efficiency and protection of consumer welfare,²² while the other is concerned with trade liberalisation, the prohibition of tariffs and protectionist measures. The differing use of language masks the common underlying aim of increasing consumers' standard of living as well as achieving optimum use of resources. Mitchell concludes that 'free trade is merely a means to the end of greater global economic

²² Although note that the precise policy objectives of US antitrust were far from settled at the time of the passing of the Sherman Act, had Senator Sherman's original draft Bill been passed by Congress with discussion of 'full and free competition' and 'cost to the consumer', the protection of consumer welfare and concern with efficiencies would have been implicit within the Act. As it was the common law language of 'contract...in restraint of trade' and 'monopolize, or attempt to monopolize...trade' ensured the Bill ultimately had a very quick passage into law, yet resultantly blurred the balance to be achieved by the courts between freedom of contract and freedom from market power; the two countervailing propositions of liberty that were advanced by the respective factions within the Senate. See chapter 1 of R.J.R. Peritz, *Competition Policy in America, 1888 – 1992: History, Rhetoric, Law*, (2nd Ed, Oxford, Oxford University Press, 2000) for a fuller discussion. The balance between the two propositions changed several times in light of new legislation in 1914 and policy pursuits during the 1920s and 1930s until the Antitrust Division of the Department of Justice, under Thurman Arnold and President Franklin Roosevelt's New Deal signalled the advancement of consumerism at the heart of antitrust policy.

welfare and efficiency’.²³ Surely both trade liberalisation and consumer welfare strive towards a common result: efficient use of resources and a higher standard of living. Trade liberalisation is a proven method of achieving that result. Indeed, Mitchell has also stated that:

‘Trade liberalisation is based on the theory of comparative advantage ...The rationale is that if each state focuses production on the particular goods and services in which it has a comparative advantage, the global output of goods and services will increase. With trade between states, consumers can access more goods and services and thus increase their standard of living. Efficiency improvements are also likely to result from the increased competition that domestic producers face from foreign goods and services’.²⁴

2.2.2 The US government presumably agreed with the theory of comparative advantage when it signed the GATT, sharing the view that international trade liberalisation would create greater efficiency and raise the standard of living within the US. Furthermore the initial US support for the ITO suggests that the US believed the realisation of these benefits would be furthered by multilateral antitrust rules. Nonetheless, when President Truman decided against submitting the ITO Charter to Congress for ratification in 1950,²⁵ due to dilutions in many of the prohibitions,²⁶ he did so knowing that US antitrust could prevent commercial behaviour from undermining the objectives of trade liberalisation and antitrust in US markets. It was also already clear at this time that the source of the anti-competitive behaviour (i.e. whether domestic or foreign firms were involved) could not inhibit antitrust enforcement, as the US judiciary had already recognised

²³ *Op. cit.* note 7 at p.343.

²⁴ *Op. cit.* note 7 at p.344.

²⁵ J.H. Jackson, *op. cit.* note 18, at p.23, note 37.

²⁶ J. Foreman-Peck, *op. cit.* note 2 at p.242.

the legality of extraterritoriality. The failure of the ITO could therefore be said to have had a minimal impact on the scope of US antitrust at the time.²⁷

The level of world trade was increasing during the same time period, as shown by the following table exhibiting the value of world imports and exports:

Table 2.1²⁸

	World Imports	World Exports
1938	\$23.2 billion	\$20.65 billion
1948	\$58.4 billion (+ 152%)	\$52.70 billion (+ 155%)
1955	\$87.8 billion (+ 50.3%)	\$82.55 billion (+ 56.6%)

These figures suggest that international trade increased considerably in general terms during the late 1940s/early 1950s. Yet, if we are to consider these figures as indicating average increases then the three tables below highlight the US as an increasingly important participant in international trade, experiencing mostly above average increases, particularly in imports.

²⁷ Note that Eleanor Fox suggests: ‘Had US jurists not pioneered the effects doctrine, which is now accepted throughout the world in one form or another, world antitrust would long since have emerged. For more than half a century, availability of the effects doctrine, combined with the near consensus of nations to apply antitrust law non-discriminatorily to foreign as well as domestic firms that harm the domestic market, has taken the pressure off the need for international antitrust’ in E.M. Fox, ‘Can we solve the antitrust problems of globalization by extraterritoriality and cooperation? sufficiency and legitimacy’ (Summer 2003) *The Antitrust Bulletin* 355 at pp.356-357.

²⁸ Figures for Tables 2.1 - 2.4 during 1938, 1948 and 1955 are sourced from the *United Nations Yearbook of International Trade Statistics 1955*, Table A.

Table 2.2

	US Imports	US Exports
1938	\$2.18 billion	\$3.064 billion
1948	\$7.163 billion (+ 229%)	\$12.545 billion (+ 309%)
1955	\$11.401 billion (+ 59%)	\$15.412 billion (+ 23%)

Table 2.3

	UK Imports	UK Exports
1938	\$4.285 billion	\$2.446 billion
1948	\$8.125 billion (+ 89.6%)	\$6.362 billion (+ 160%)
1955	\$10.557 billion (+ 30%)	\$8.135 billion (+ 29.7%)

Table 2.4

	French Imports	French Exports
1938	\$1.331 billion	\$0.880 billion
1948	\$3.442 billion (+ 159%)	\$2.011 billion (+ 129%)
1955	\$4.688 billion (+ 93.6%)	\$4.798 billion (+ 139%)

It is therefore likely that foreign commerce and firms would be having a greater effect upon the US economy and markets, and have greater potential to be the subject of antitrust scrutiny in the years following the end of World War II and the pursuit of trade liberalisation.²⁹ The dangers of trade liberalisation, specifically

²⁹ While the thesis does not suggest increases in world trade are wholly as a result of the pursuit of trade liberalisation, and recognises in particular the influence of the Marshall Plan and the Truman Doctrine, the

regarding the impact of commercial behaviour stemming from foreign firms, were recognised quickly by the American courts.

2.3 The long arm of US antitrust (1): the ‘effects doctrine’

2.3.1 Judge Learned Hand’s ruling in *United States v. Aluminum Co. of America (Alcoa)*³⁰ is the basis for the current US antitrust enforcement strategy as it endorsed the use of the ‘effects doctrine’. *Alcoa* concerned a cartel of aluminium producers based in Switzerland that was limiting production in order to raise prices. The case was a prosecution for violating the Sherman Act against a Canadian company, which had participated in the cartel. Judge Learned Hand stated: ‘it is settled law that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders which the state reprehends’.³¹ Regarding the position as ‘settled law’ was somewhat controversial in light of the Supreme Court decision in *American Banana*.³² *American Banana* concerned the monopolisation of banana production and exports in Costa Rica by the United Fruits Company, in respect of which the Supreme Court held: ‘the acts causing the damage were done outside the jurisdiction of the US and within that of other states. It is surprising to hear it argued that they were governed by the Act of Congress’.³³ Furthermore, Justice Oliver Wendell Holmes stated: ‘the general

point is made that multilateral agreements such as GATT certainly facilitated the post-WWII sharp increases in world trade.

³⁰ 148 F, 2d 416 (2nd Circuit Court of Appeals, 1945).

³¹ *Ibid.* at 443.

³² *American Banana Co. v. United Fruit Co.*, 213 US 347, 29 S. Ct. 511 (1909).

³³ *Ibid.* at 355.

and almost universal rule is that the character of an act as lawful or unlawful must be determined by the law of the country where the act is done.³⁴

The Supreme Court slightly retreated from the strict *American Banana* position on jurisdiction in subsequent cases, such as *United States v. Sisal Sales Corporation*.³⁵ *Sisal Sales* concerned alleged antitrust violations by a company involved in the export of sisal from the Yucatan region to the US. In distinguishing *American Banana* and asserting jurisdiction, Mr. Justice McReynolds held:

‘The circumstances of the present controversy are radically different from those presented in *American Banana*....The Banana Company sued for treble damages under the Sherman Act, basing its claim upon acts done outside the United States and not unlawful by the law of the place...[Here] the conspirators were aided by discriminating legislation [enacted by the Mexican and Yucatan governments], but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States. They are within the jurisdiction of our courts and may be punished for offences against our laws’.³⁶

In spite of the ruling, *Sisal Sales* clearly did not overrule *American Banana*. The fact that the Supreme Court declined to overrule *American Banana* on subsequent occasions is what makes the 2nd Circuit Court of Appeals decision in *Alcoa* all the more notable. When Judge Learned Hand ruled that: ‘both agreements would clearly have been unlawful had they been made within the US; and it follows...that both were unlawful, though made abroad, if they were intended to

³⁴ *Ibid.* at 356.

³⁵ 274 US 268, 47 S. Ct. 592 (1927).

³⁶ *Ibid.* at 275-276, or 593-594.

affect imports and did affect them’,³⁷ there was a clear inconsistency with *American Banana*. Indeed Hawk suggests that:

‘Three distinct periods mark the expansion of Sherman Act international jurisdiction...First from 1909 to 1945 there was a gradual erosion of *American Banana*’s narrow interpretation of the Sherman Act as limited to the territory of the United States. The second period began in 1945 when Learned Hand announced the effects doctrine in *Alcoa*’.³⁸

2.3.2 In spite of the apparent judicial irregularity, the ‘new’ approach to jurisdiction gained greater recognition within the US, exemplified by the Supreme Court decision in *International Shoe Co. v. State of Washington*³⁹ in the same year as *Alcoa*. Clearly, extraterritorial application of domestic law will be controversial as it can be regarded as infringing upon the sovereignty of other states. It is for that reason that jurisdictional rules exist, albeit ill-defined, under international law. In order for any court to assert authority over persons, natural or legal, it must be able to seize jurisdiction on the grounds of either nationality or territory. Under the principle of territorial jurisdiction, the Supreme Court extended the scope of subject-matter jurisdiction with the theory of ‘minimum contacts’ in *International Shoe*. Mr. Chief Justice Stone held:

‘Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant’s person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding on him. *Pennoyer v. Neff*, 95 U.S. 714, 733. But now...due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice”...Since the corporate personality is a fiction,

³⁷ 148 F, 2d 416 (2nd Circuit Court of Appeals, 1945) at 445.

³⁸ B.E. Hawk, ‘The Sherman Act: The Second Century: The International Application of The Sherman Act in its Second Century’ (1990) 59 *Antitrust L.J.* 161.

³⁹ 326 US 310, 66 S. Ct 154 (1945).

although a fiction intended to be acted upon as though it were a fact...it is clear that unlike an individual its “presence” without, as well as within, the state of origin can be manifested only by activities carried on in its behalf by those who are authorised to act for it’.⁴⁰

The judgment had the effect of alleviating potential jurisdictional difficulties under international law for US antitrust suits. *Alcoa* and *International Shoe* jointly signalled a strong judicial abandonment of the position in *American Banana*, which coincided with US foreign policy shifts away from isolationism.⁴¹

The definition of ‘minimum contacts’ was perhaps surprisingly broad, allowing economic and trade relationships in themselves to constitute the minimum contact required to assert jurisdiction. There was no requirement for an established presence of the defendant within the territory of the forum. Indeed for Mr. Chief Justice Stone the question of presence in the state appeared to be the key, yet his assessment of presence was somewhat unconventional: ‘the terms “present” or “presence” are used merely to symbolize those activities of the corporation’s agent within the state which courts will deem to be sufficient to satisfy the demands of due process’.⁴² Once jurisdiction has been established, standard US rules of civil procedure could act to limit the ability to subject a foreign defendant to a particular federal court’s jurisdiction.⁴³ However there are specialised antitrust rules with regard to corporations under § 12 of the Clayton Act, which provides that an action can be brought and process served wherever the

⁴⁰ *Ibid.* at 316, or 158.

⁴¹ See B. Zanettin, *op. cit.* note 8 at p.10.

⁴² *International Shoe Co. v. State of Washington* 326 US 310, 66 S. Ct 154 (1945) at 316-317, or 158.

⁴³ See Federal Rule of Civil Procedure 4 which limits the service of process from a federal district court to persons who have had the requisite minimum contacts with the State itself.

corporation 'is an inhabitant' or wherever 'it may be found or transacts business'.⁴⁴ Hovenkamp observes that this provision has been interpreted widely by some federal courts to enable process to be served 'world wide', and to enable the court to assert jurisdiction provided 'minimum contacts' are found anywhere within the US, and not necessarily within the particular state where the relevant federal court is sitting.⁴⁵ Thus the requirements of due process do not impede upon the extraterritorial application of US antitrust as 'process' may be served 'worldwide'. Note however, that preventing service of process is one method by which states can and have obstructed US extraterritoriality, often implemented as a provision within a so-called 'blocking statute'.⁴⁶ By 1945, with *International Shoe* and *Alcoa*, there was the potential for widespread and unqualified extraterritorial application of US antitrust law.

2.3.3 A process of refining/developing the effects doctrine, perhaps in an effort to assuage some of the concerns regarding extraterritoriality, began four years after *Alcoa* by the lower courts. In *United States v. Timken Roller Bearing Co.*⁴⁷ the District Court for the Northern District of Ohio justified jurisdiction for an antitrust violation prosecution (regarding a European based trade agreement between US and European firms) on the ground that European activities had 'a

⁴⁴ 15 U.S.C. § 22. See H. Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practice* (3rd Ed, St. Paul, Thomson West, 2005) at p.776, and also particularly L.R. Velvel, M.W. Pennak & R.F. Ruyak, 'Litigating in an International Context: Venue and in personam Jurisdiction Involving Alien Corporations' (1981) 50 *Antitrust L.J.* 599 for further discussion.

⁴⁵ H. Hovenkamp, *ibid.* at pp.776 - 777.

⁴⁶ See discussion at 2.7 *infra*.

⁴⁷ 83 F. Supp 284 (Northern District of Ohio, 1949).

direct and influencing effect on [US] trade'.⁴⁸ Notably a 'direct and influencing effect' was not required by Judge Learned Hand in *Alcoa*, when jurisdiction was asserted solely on the basis of effects with intent. The company decided not to argue against jurisdiction when it appealed to the Supreme Court on the finding of a violation of the Sherman Act.⁴⁹ The US Court of Appeals for the Tenth Circuit supplied a more authoritative opinion marking the refinement of the effects doctrine in *Spears Free Clinic*⁵⁰ in 1952. Although the facts of the case concerned an alleged conspiracy within Colorado in order to prevent Spears Hospital gaining a license, with all parties either incorporated or based within Colorado, the effects test was required in order to ascertain whether the 'combination in the form of trust or otherwise, or conspiracy' was in fact 'in restraint of trade or commerce among the several states, or with foreign nations' in order for federal antitrust law to apply. Chief Judge Phillips held that 'the restraint of commerce or the obstruction of commerce must be direct and substantial and not merely incidental or remote'.⁵¹ The Supreme Court then revisited the effects doctrine in *Continental Ore*⁵² in 1962. The case concerned a private treble damages action⁵³ for alleged violation of §1 and §2 of the Sherman Act in the market for production and sale of vanadium (a chemical element used to make alloy steel). The claim was largely

⁴⁸ *Ibid.* at 309.

⁴⁹ See *Timken Roller Bearing Co. v. United States*, 341 US 593, 71 S. Ct. 971 (1951).

⁵⁰ *Spears Free Clinic and Hospital for Poor Children v. Cleere et al.* 197 F.2d 125 (10th Circuit Court of Appeals, 1952) Trade Cas. (CCH) P67, 276.

⁵¹ *Ibid.* at p126. Note that the relevance of the opinion in *Spears Free Clinic* to cataloguing the refinement of the effects doctrine is recognised in R.S. Schlossberg (ed.), *Mergers and Acquisitions: understanding the antitrust issues* (2nd Ed, Chicago, American Bar Association, 2004) in which the case is referred to when discussing the application of US merger control laws to multinational transactions (at p.390).

⁵² *Continental Ore Co. et al. v. Union Carbide & Carbon Corp. et al.* 370 U.S. 690; 82 S. Ct 1404; 8 L.Ed.2d 777 (1962).

⁵³ By virtue of §4 Clayton Act, 15 U.S.C. § 15 (1994).

based upon the elimination of the petitioner's subsidiary company from the Canadian market, allegedly as result of the actions of the respondent's subsidiary company, operating under the control and direction of its parent (Union Carbide).

Mr. Justice White wrote in the Court's opinion:

'Respondents say that *American Banana*...shields them from liability... But in light of later cases in this Court respondents' reliance upon *American Banana* is misplaced. A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries'.⁵⁴

The Supreme Court declined the opportunity to rule on the precise territorial scope of the Sherman Act, and thus failed to clarify the requirements of the effects doctrine.

2.3.4 In addition to ongoing doctrinal refinement, there was intense debate as to whether the notion of international comity should be a factor in determining questions of jurisdiction, a matter previously undecided by the courts. The sensitivity of the debate was heightened in light of hostile international reaction to US extraterritoriality in antitrust cases.⁵⁵ The Ninth Circuit Court of Appeals weighed up these considerations in *Timberlane Lumber Co. v. Bank of America*⁵⁶ in 1976, and while the effects doctrine was endorsed, its application was curbed in light of consideration for international comity. The case concerned a civil suit raised by Timberlane (US firm) against companies it alleged were conspiring to

⁵⁴ *Ibid.* at 704, or 1413.

⁵⁵ See discussion *infra* at 2.7.4.

⁵⁶ 549 F. 2d 597 (9th Cir. 1976).

foreclose the Honduran lumber market, which it wanted to enter in order to export goods to the US. Judge Choy ruled:

‘There is no doubt that American antitrust laws extend over some conduct in other nations. There was language in the first Supreme Court case in point, *American Banana*, casting doubt on the extension of the Sherman Act to acts outside United States territory. But subsequent cases have limited *American Banana* to its particular facts, and the Sherman Act – and with it other antitrust laws – has been applied to extraterritorial conduct...That American law covers some conduct beyond this nation’s borders does not mean that it embraces all, however. Extraterritorial application is understandably a matter of concern for the other countries involved. Those nations have sometimes resented and protested, as excessive intrusions into their own spheres, broad assertions of authority by American courts...Our courts have recognized this concern and have, at times, responded to it, even if not always enough to satisfy all the foreign critics...In any event, it is evident that at some point the interests of the United States are too weak and the foreign harmony incentive for restraint too strong to justify an extraterritorial assertion of jurisdiction’.⁵⁷

Judge Choy’s ruling that US Courts should engage in a balancing exercise, thus weighing up the respective merits of US interests with the respect for international comity, had the potential to become an historic judgment.⁵⁸

In assessing jurisprudence to date Judge Choy then gave a damning verdict: ‘The effects test by itself is incomplete because it fails to consider the other nation’s

⁵⁷ *Ibid.* at 608-609.

⁵⁸ See B.E. Hawk, ‘Litigating in an International Context: Special Defences and Issues, Including Subject Matter Jurisdiction, Act of State Doctrine, Foreign Government Compulsion and Sovereign Immunity’ (1981) 50 *Antitrust L.J.* 559, J.P. Griffin ‘North American Competition Policy: The Impact on Canada of the Extraterritorial Application of the US Antitrust Laws’ (1988) 57 *Antitrust L.J.* 435, and in particular B.E. Hawk, *op. cit.* note 38, where Hawk discusses three distinct periods marking the expansion of Sherman Act international jurisdiction, and suggests ‘Judge Choy ushered in the third period in 1976 when he announced in *Timberlane* that effect on US commerce is a necessary but not sufficient condition for antitrust jurisdiction, and that, in addition, comity requires a balancing of foreign and US interests before a court can exercise antitrust jurisdiction’. Note also that *Timberlane* is cited as a ‘leading contemporaneous lower court case’ supporting the Supreme Court’s rejection of the Respondents arguments in *F. Hoffmann-La Roche Ltd. et al. v. Empagran S.A. et al.* 542 U.S. (2004), 124 S. Ct 2359, 159 L. Ed. 2d 226, p.16 of opinion, discussed further *infra*.

interests...’.⁵⁹ Furthermore he went on to suggest an appropriate test to determine whether to assert jurisdiction:

‘...A tripartite analysis seems to be indicated...the antitrust laws require in the first instance that there be some effect – actual or intended – on American foreign commerce before the federal courts may legitimately exercise subject matter jurisdiction... Second, a greater showing of burden or restraint may be necessary to demonstrate that the effect is sufficiently large to present a cognizable injury to the plaintiffs, and therefore, a civil violation of the antitrust laws. Third, there is the additional question...of whether the interests of, and links to, the United States – including the magnitude of the effect on American foreign commerce – are sufficiently strong vis-à-vis those of other nations, to justify an assertion of extraterritorial authority’.⁶⁰

The first stage of this tripartite test can be regarded as the basic effects doctrine espoused by Judge Learned Hand. The second stage appears to be a development of the ‘direct and influencing effect’ discussed in *Timken Roller Bearing Co.*, and the ‘direct and substantial and not merely incidental and remote’ requirement from *Spears Free Clinic*. The third stage however is a further step on the part of Judge Choy to include comity considerations as part of the effects doctrine.

2.3.5 The notion of international comity gained further recognition in lower courts as a factor in determining jurisdiction, illustrated by following three judgments. In the 1979 *Mannington Mills Inc. v. Congoleum Corporation* case (Third Circuit Court of Appeals),⁶¹ Judge Weis observed: ‘In *Timberlane*...the Court of Appeals for the Ninth Circuit adopted a balancing process in determining whether extraterritorial jurisdiction should be exercised, an approach with which we find

⁵⁹ *Op. cit.* note 56, at 611-612.

⁶⁰ *Op. cit.* note 56, at 613.

⁶¹ 595 F. 2d 1287 (3rd Cir. 1979).

ourselves in substantial agreement'.⁶² Indeed Judge Weis further developed the case law by identifying 10 factors to be considered when balancing whether to assert jurisdiction:

'1 Degree of conflict with foreign law or policy; 2 Nationality of the parties; 3 Relative importance of the alleged violation of conduct here compared to that abroad; 4 Availability of a remedy abroad and the pendency of litigation there; 5 Existence of intent to harm or affect American commerce and its foreseeability; 6 Possible effect upon foreign relations if the court exercises jurisdiction and grants relief; 7 If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; 8 Whether the court can make its order effective; 9 Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; 10 Whether a treaty with the affected nations has addressed the issue'.⁶³

The *Timberlane* approach was then endorsed by Judge Logan in the Court of Appeals for the Tenth Circuit in *Montreal Trading Ltd. v. Amax Inc.*⁶⁴ In this case it was the foreign corporation, Canadian Montreal Trading Ltd., which was seeking to utilise the US federal antitrust laws to claim damages arising from alleged anti-competitive behaviour by Canadian based subsidiaries of US potash producers. Judge Logan commented:

'The principal purposes of the antitrust laws are protection of American consumers and American export and investment opportunities. If American interests are at stake we may impose liability for conduct outside our borders that has consequences within our borders...When the contacts with the United States are few, the effects upon American commerce minimal, and the foreign elements overwhelming, however, we do not accept jurisdiction'.⁶⁵

⁶² *Ibid.* at 1297.

⁶³ *Ibid.* at 1297-1298.

⁶⁴ *Montreal Trading Ltd. v. Amax, Inc., Amax Chemical Corp., Duval Corp., Duval Sales Corp., Ideal Basic Industries, Inc., and International Minerals & Chemicals Corp.*, 661 F.2d 864 (10th Cir. 1981) at 869.

⁶⁵ *Ibid.*

The Court of Appeals for the Fifth Circuit also endorsed this approach in *Industrial Investment Development Corp. v. Mitsui & Co.*⁶⁶ The case involved an action by Industrial Investment (US firm) against Japanese and Indonesian corporations for alleged antitrust violations by conspiring to foreclose the market for harvesting trees in Borneo, Indonesia, and from exporting logs and lumber from Indonesia to the US. Judge Reavley delivered the court's opinion and held: 'A district court should not apply the antitrust laws to foreign conduct or foreign actors if such application would violate principles of comity, conflicts of law, or international law'.⁶⁷ Judge Reavley also noted: 'Several recent court of appeals decisions have proposed a conflict of laws analysis for determining whether the district court should entertain an antitrust claim involving extraterritorial conduct. See *Timberlane Lumber Co. v. Bank of America*... We commend their analysis'.⁶⁸

2.3.6 In spite of compelling judgments in both *Timberlane* and *Mannington Mills* endorsing a balancing exercise as part of a tripartite test before asserting extraterritorial jurisdiction in antitrust cases, there were also some noteworthy US Court of Appeals rulings questioning and even rejecting such an approach during the same time period. The Court of Appeals for the Second Circuit questioned the *Timberlane* tripartite test in *National Bank of Canada v. Interbank Card Association*⁶⁹ and refused to follow the Ninth Circuit Court of Appeals. Griffin

⁶⁶ *Industrial Investment Development Corporation, et al. v. Mitsui & Co., Ltd., et al.*, 671 F.2d 876 (5th Cir. 1982).

⁶⁷ *Ibid.* at 884.

⁶⁸ *Ibid.* at 884, footnote 7.

⁶⁹ *National Bank of Canada v. Interbank Card Association and Bank of Montreal*, 666F.2d 6 (2nd Cir. 1981). For comment on the case see B.E. Hawk, 'Litigating in an International Context: Special Defences

highlights the split that was developing between the federal circuits in response to the Ninth Circuit precedent in *Timberlane*: ‘Subsequently, the Third, Fifth, and Tenth Circuits (referring to *Mannington Mills*, *Mitsui*, and *Montreal Trading* respectively) adopted similar balancing tests, while the D.C. and Seventh Circuits (referring to *Laker Airways*⁷⁰ and *Re: Uranium Antitrust Litigation*⁷¹) questioned their validity’.⁷²

In *Re: Uranium Antitrust Litigation* the Court of Appeals for the Seventh Circuit presided over an action raised by Westinghouse Electric Corporation against 17 US and 12 foreign based uranium producers alleging antitrust violations.⁷³ When nine of the foreign based producers did not appear before the district court, Westinghouse was granted final judgment against the defaulters and sought a preliminary injunction from the court to prevent the removal of assets in excess of \$10,000 from the US without providing 20 days notice. In light of evidence indicating the defendants were preparing to move US assets, the district court initially granted a temporary restraining order, followed by a preliminary injunction granting Westinghouse’s request. Within hours of being served with the temporary restraining order, one of the defaulting defendants transferred approximately \$3.2 million from a US to a Canadian bank account through a subsidiary without notice, and thereafter gave the court notice of several more

and Issues, Including Subject Matter Jurisdiction, Act of State Doctrine, Foreign Government Compulsion and Sovereign Immunity’ (1981) 50 *Antitrust L.J.* 559, and J.P. Griffin, *op. cit.* note 58.

⁷⁰ *Laker Airways Ltd. v. Sabena, Belgian World Airlines, KLM, Royal Dutch Airlines*, 731 F.2d 909 (D.C. Cir. 1982) at 948-949.

⁷¹ *In Re: Uranium Antitrust Litigation Westinghouse Electric Corp. v. Rio Algom Ltd., et al.*, 617 F.2d 1248 (7th Cir. 1980) at 1255.

⁷² J.P. Griffin, ‘*Extraterritoriality in US and EU Antitrust Enforcement*’ (1999) 67 *Antitrust L.J.* 159.

⁷³ For case comment see J.P. Griffin, *op. cit.* note 58.

transfers about to take place. The district court responded by issuing more preliminary injunctions, and the case before the Court of Appeals was mainly to challenge those injunctions. One of the key considerations in the appeal was the district court's grounds for asserting jurisdiction. Australia, Canada, South Africa and the UK submitted amicus curiae briefs to the Court of Appeals questioning that jurisdiction. Writing for the court, Judge Campbell stated: 'We view the jurisdictional issue as two-pronged: (1) does subject matter jurisdiction exist; and (2) if so, should it be exercised?'.⁷⁴ The UK argued that in light of *Timberlane* the *Alcoa* effects test was incomplete, to which Judge Campbell responded:

'This amicus curiae contends the critical discussion of the *Alcoa* effects test has undermined its continuing viability as the standard of extraterritorial jurisdiction of the Sherman Act. We do not read *Timberlane* so broadly. The "jurisdictional rule of reason" espoused in *Timberlane* is that while an effect on American commerce is the necessary ingredient for extraterritorial jurisdiction, considerations of comity and fairness require a further determination as to "whether American authority should be asserted in a given case." The clear thrust of the *Timberlane* Court is that once a district judge has determined that he has jurisdiction, he should consider additional factors to determine whether the exercise of that jurisdiction is appropriate'.⁷⁵

Thus in *Re: Uranium Antitrust Litigation* the court took the view that the tripartite test in *Timberlane* was not intended to be a prerequisite to the court determining whether it had subject matter jurisdiction. On the contrary, Judge Campbell contends the tripartite test merely suggests that once it had been decided that jurisdiction could be asserted on the basis of the *Alcoa* effects test, the court could then consider the second and third stages of the test in order to determine whether subject matter jurisdiction should be asserted in the case. This approach contrasts

⁷⁴ *Op. cit.* note 71 at 1253.

⁷⁵ *Op. cit.* note 71 at 1255.

with that in *Mannington Mills*, *Montreal Trading* and *Mitsui*, and does not logically follow from a literal reading of *Timberlane*. Commenting upon the district court's decision not to consider the *Timberlane* test when ruling that jurisdiction should be asserted, Judge Campbell then noted:

'The amici suggest that the District Court abused its discretion by not considering the factors set out in *Mannington Mills* in reaching this determination. While the considerations recommended in that case certainly provide an adequate framework for such a determination, we can hardly call the failure to employ those precise factors an abuse of discretion'.⁷⁶

While the court was not openly critical of the *Timberlane* approach, it undermined the rationale and momentum that was building up in favour of recognising comity, in a similar fashion to the Second Circuit in *Interbank*. The proponents of the *Timberlane* approach suffered a further setback when the issue arose before the Court of Appeals for the D.C. Circuit.

2.3.7 Similar jurisdictional questions arose before the Court of Appeals for the D.C. Circuit in *Laker Airways*. The well argued judgment in this case and its international implications merits detailed comment. The liquidator for Laker Airways filed a civil antitrust suit against four US and four foreign based airlines, including British Airways, in the D.C. District Court for violation of the Sherman Act. In response, the four non-US defendants sought injunctions before the High Court in the UK to prevent the liquidator from continuing the US antitrust action. Laker's liquidator responded by seeking and obtaining a temporary restraining order from the US district court against the four US companies from initiating

⁷⁶ *Op. cit.* note 71.

similar proceedings in the UK. While the English High Court ruling was pending, Laker commenced secondary actions in the D.C. district court against KLM and Sabena, and also obtained temporary restraining orders preventing Sabena and KLM from initiating any foreign action that could impair the district court's jurisdiction. A direct conflict then developed between the English High Court, the English Court of Appeal and the D.C. district court as the former granted an injunction preventing Laker Airways from taking any further steps to prosecute its US antitrust claim against the two British airlines. The US district court then issued a preliminary injunction against Sabena and KLM barring the two companies from joining the ongoing British litigation. The case before the Court of Appeals for the D.C. Circuit was an appeal by Sabena and KLM against the district court's order for preliminary injunction.⁷⁷ Judge Wilkey, writing for the majority in a 2-1 decision, considered the principles of international law under which a court can claim jurisdiction:

'The prerogative of a nation to control and regulate activities within its boundaries is an essential, definitional element of sovereignty. Every country has a right to dictate laws governing the conduct of its inhabitants. Consequently, the territoriality base of jurisdiction is universally recognized. It is the most pervasive and basic principle underlying the exercise by nations of prescriptive regulatory power. It is the customary basis of the application of law in virtually every country... In the context of remedial legislation, prohibition of effects is usually indivisible from regulation of causes. Consequently, the principles underlying territorial jurisdiction occasionally permit a state to address conduct causing harmful effects across national borders. Territoriality-based jurisdiction thus allows states to regulate the conduct or status of individuals or property physically situated within the territory, even if the effects of the conduct are felt outside the territory. Conversely, conduct outside the territorial

⁷⁷ Note that the facts of the case are far more detailed and complex than the brief summary provided. The case also involved the UK Secretary of State for the Department of Trade and Industry invoking the Protection of Trading Interests Act 1980. The statute protected the injunction granted to British Airways and British Caledonian Airways against Laker Airways.

boundary which has or is intended to have a substantial effect within the territory may also be regulated by the state'.⁷⁸

Judge Wilkey offered an explanation of why there may be concurrent jurisdiction, and thus potential conflict when seizing jurisdiction on the basis of 'effects':

'Just as the locus of the regulated conduct or harm provides a basis of jurisdiction, the identity of the actor may also confer jurisdiction upon a regulating country. The citizenship of an individual or nationality of a corporation has long been a recognized basis which will support the exercise of jurisdiction by a state over persons. Under this head of jurisdiction a state has jurisdiction to prescribe law governing the conduct of its nationals whether the conduct takes place inside or outside the territory of the state. Because two or more states may have legitimate interests in prescribing governing law over a particular controversy, these jurisdictional bases are not mutually exclusive. For example, when the national of one state causes substantial effects in another state, both states may potentially have jurisdiction to prescribe governing law. Thus, under international law, territoriality and nationality often give rise to concurrent jurisdiction'.⁷⁹

While the court accepted that most of the actions giving rise to the private action took place outside the US, the economic consequences of those actions were such as to 'gravely impair significant American interests', not least American consumers within the relevant market. Notably the court was of the view that US interest in the case increased as a result of Laker Airways being in liquidation, as any damages owed to Laker would pass to its creditors, and the principal creditors were American. After confirming the district court's right to issue preliminary injunctions protecting its jurisdiction in the case,⁸⁰ the Court of Appeals then considered the concept of international comity and its role in the case. Judge Wilkey initially gave strong support for the principle of comity:

⁷⁸ *Op. cit.* note 70 at 921-922.

⁷⁹ *Op. cit.* note 70 at 922.

⁸⁰ *Op. cit.* note 70 at 932-933.

‘We approach [the Sabena and KLM claims that the US injunction violates the principles of comity] seriously, recognizing that comity serves our international system like the mortar which cements together a brick house. No one would willingly permit the mortar to crumble or be chipped away for fear of compromising the entire structure’.⁸¹

Nonetheless, the court also highlighted there were limitations to its willingness to apply the principle:

‘No nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum. Thus, from the earliest times, authorities have recognized that the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act’.⁸²

The Court of Appeals concluded that the principles of comity could not prevail in *Laker*, not least because it felt that the British court had not considered the principle. The court did however offer its views on the balancing test espoused by Judge Choy in *Timberlane*:

‘The suggestion has been made that this court should engage in some form of interest balancing, permitting only a “reasonable” assertion of prescriptive jurisdiction to be implemented. However, this approach is unsuitable when courts are forced to choose between a domestic law which is designed to protect domestic interests, and a foreign law which is calculated to thwart the implementation of the domestic law in order to protect foreign interests allegedly threatened by the objectives of the domestic law. Interest balancing in this context is hobbled by two primary problems: (1) there are substantial limitations on the court's ability to conduct a neutral balancing of the competing interests, and (2) the adoption of interest balancing is unlikely to achieve its goal of promoting international comity’.⁸³

Judge Wilkey can also be seen to be fairly sceptical of the balancing test, and scathing in his assessment of its practical use in US law:

⁸¹ *Op. cit.* note 70 at 937.

⁸² *Op. cit.* note 70 at 937.

⁸³ *Op. cit.* note 70 at 948.

‘the usefulness and wisdom of interest balancing to assess the most “reasonable” exercise of prescriptive jurisdiction has not been affirmatively demonstrated. This approach has not gained more than a temporary foothold in domestic law. Courts are increasingly refusing to adopt the approach. Scholarly criticism has intensified. Additionally, there is no evidence that interest balancing represents a rule of international law. Thus, there is no mandatory rule requiring its adoption here...When push comes to shove, the domestic forum is rarely unseated’.⁸⁴

The court further elaborated on its view that such a balancing exercise is unsuitable, and suggested it was inappropriate for domestic courts in general:

‘Despite the real obligation of courts to apply international law and foster comity, domestic courts do not sit as internationally constituted tribunals. Domestic courts are created by national constitutions and statutes to enforce primarily national laws. The courts of most developed countries follow international law only to the extent it is not overridden by national law. Thus, courts inherently find it difficult neutrally to balance competing foreign interests. When there is any doubt, national interests will tend to be favored over foreign interests. This partially explains why there have been few times when courts have found foreign interests to prevail’.⁸⁵

The view of the D.C. circuit is not only inconsistent with *Timberlane* and aligned cases, but also represents a departure from the approach adopted in the Second and Seventh circuits in *Interbank* and *Re: Uranium Antitrust Litigation* respectively. The Second and Seventh circuits appear to accept the competence of the court to conduct a balancing exercise, although question its practicality and held such an exercise was not mandatory. It is notable that the D.C. Court of Appeals decision was divided, and in Judge Starr’s dissent, he opined that ‘principles of comity among the courts of the international community counsel strongly against the injunction in the form issued here’.⁸⁶ After the rulings in the Seventh and D.C. Circuits in particular, and in spite of the majority of federal

⁸⁴ *Op. cit.* note 70 at 950-951.

⁸⁵ *Op. cit.* note 70 at 951.

⁸⁶ *Op. cit.* note 70 at 956 onwards.

circuits adopting some variant of the *Timberlane* approach, there was clearly judicial confusion and conflict in the US on the status of foreign interests in antitrust cases. At the time Griffin said ‘our courts are in a state of disarray on the issue...The best, perhaps most charitable thing that can be said about the current state of the case law, is that it is somewhat confused’.⁸⁷ The issue was clarified in 1993 when the US Supreme Court issued its controversial decision in *Hartford Fire Insurance Co. v. California*.⁸⁸

2.4 The long arm of US antitrust (2): what role for comity?

2.4.1 *Hartford Fire* concerned whether London-based re-insurers could be liable for violating the Sherman Act for refusing to offer insurance to certain groups, in agreement with US competitors. The case is remarkable for two reasons: first, it re-examined the effects doctrine, and confirmed the post-*Alcoa* refinement; and secondly, it ruled on the weight that should be attached to international comity considerations. *Timken Roller Bearing Co.* alluded to a requirement for more than mere effect in order to assert jurisdiction, and this view was endorsed and further developed by lower courts, including *Timberlane*, in the 44 years⁸⁹ before *Hartford Fire*. The US Congress also intervened in the debate with the Foreign Trade Antitrust Improvement Act (FTAIA) of 1982 establishing that, with regard to foreign commerce other than imports, the Sherman Act would only apply if the

⁸⁷ J.P. Griffin, *op. cit.* note 58.

⁸⁸ 509 US 764, 113 S. Ct. 2891 (1993).

⁸⁹ As other cases such as *United States v. Swiss Watchmakers Trade Case*, 1962, ¶ 70600.

foreign conduct ‘has a direct, substantial, and reasonably foreseeable effect’⁹⁰ on US commerce. *Hartford Fire* confirmed the position in common law by stating ‘Although the proposition was perhaps not always free from doubt...it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States’.⁹¹ The Supreme Court also considered the issue of international comity, which the London re-insurers argued should be the basis for the Court declining jurisdiction, and observed: ‘When it enacted the FTAIA, Congress expressed no view on the question whether a court with Sherman Act jurisdiction should ever decline to exercise such jurisdiction on grounds of international comity’.⁹² The majority decision in the case essentially ruled on the facts at hand, but similarly to the Congress and the FTAIA, expressed no view on whether a court should decline jurisdiction on grounds of international comity. The following discussion illustrates the manner by which the majority 5-4 decision, written by Mr. Justice Souter, effectively stunted judicial consideration of international comity:

‘The London re-insurers contend that applying the Act to their conduct would conflict significantly with British law, and the British Government, appearing before us as *amicus curiae*, concurs...They assert that Parliament has established a comprehensive regulatory regime over the London re-insurance market and that the conduct alleged here was perfectly consistent with British law and policy. But this is not to state a conflict...No conflict exists, for these purposes, “where a person subject to regulation by two states can comply with the laws of both.” Restatement (Third) Foreign Relations Law § 403...’

⁹⁰ § 402 of the FTAIA, 15 U.S.C. §6a.

⁹¹ *Op. cit.* note 88, at 796, or 2909.

⁹² *Op. cit.* note 88 at 798, or 2910.

It is noteworthy that many US academics believe the majority misunderstood and misapplied the passage from the influential Restatement of Foreign Relations Law, including the principal author of the relevant provisions.⁹³ Arguably, for the Supreme Court to decide the point contrary to that which the British Government advised as *amicus curiae*, constitutes a conflict of itself, from which comity would suffer. Notwithstanding that view, the Supreme Court continued and held:

‘Since the London re-insurers do not argue that British law requires them to act in some fashion prohibited by the law of the United States, or claim that their compliance with the laws of both countries is otherwise impossible we see no conflict with British law’.⁹⁴

Clearly, if international comity can only be a consideration when the laws of two jurisdictions are irreconcilable, thus preventing companies from complying with both, then instances will be very rare, and courts will seldom take international comity into consideration. Furthermore, the factors such as effect upon foreign relations if jurisdiction is exercised, outlined by Judge Choy in *Timberlane*⁹⁵ and Judge Weis in *Mannington Mills*,⁹⁶ were given no consideration by the majority in *Hartford Fire*. Mr. Justice Scalia delivered a compelling dissenting opinion, however, and stated:

‘The “comity”...is not the comity of the courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere, but rather what might be termed “prescriptive comity”’: the respect sovereign nations afford each other by limiting the reach of their laws. That comity is exercised by legislatures when they enact laws, and courts assume it has been exercised when they come to interpreting the scope of laws their legislatures have enacted...Considering comity in this way is

⁹³ See A.F. Lowenfeld, ‘Conflict, Balancing of Interests and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case’ (1995) 89 *Am. J. Int’l. L.* 42.

⁹⁴ 509 US 764, 113 S. Ct. 2891 (1993) at 798-799, or 2910-2911.

⁹⁵ 549 F. 2d 597 (9th Cir. 1976) at 614.

⁹⁶ 595 F. 2d 1287 (3rd Cir. 1979), discussed above.

just part of determining whether the Sherman Act prohibits the conduct at issue'.⁹⁷

Thus the differing view of the British Government could represent a conflict, and thereby require comity to be considered, in Justice Scalia's opinion.⁹⁸ Notwithstanding Justice Scalia's powerful dissent the 5-4 majority decision operated in a fashion predicted by Hawk three years earlier, such that the: 'Purported balancing of US and foreign interests à la conflict of laws analysis and *Timberlane* will eventually be rejected'.⁹⁹

2.4.2 The real question of when and to what extent comity could be taken into account was not answered by the Supreme Court, although the importance of the ruling is beyond doubt. The approach to considering comity adopted by US courts, while varied, illustrates that comity can be viewed in two basic ways, particularly apparent from the *Re: Uranium Antitrust Litigation* decision, when distinguishing *Timberlane*, and the split in the Supreme Court in *Hartford Fire*. The first approach is to consider comity as a matter of, or element in, determining jurisdiction: i.e. if a court should decline to hear a particular case on the grounds of comity, then the court lacks subject matter jurisdiction under this approach. The tripartite test in *Timberlane* signified this approach, in spite of Judge Campbell suggesting the test was otherwise in *Re: Uranium Antitrust Litigation*. This approach is that endorsed by Justice Scalia in *Hartford Fire*. The second basic approach is to contend that comity is a matter of discretion, normally in the

⁹⁷ *Op. cit.* note 88, at 817-818, or 2920.

⁹⁸ For a critical account of Justice Scalia's dissent in *Hartford Fire*, see H. Hovenkamp, *op. cit.* note 44, at pp.770-771.

⁹⁹ B.E. Hawk, *op. cit.* note 38.

hands of the Judge and thus only a consideration once subject matter jurisdiction has been seized. A consequence of the second approach is that comity is not a matter of law, and hence strictly not a matter for appellate courts to consider. This latter approach was adopted in *Re: Uranium Antitrust Litigation* and importantly appears to have been endorsed by Justice Souter writing for the majority in *Hartford Fire*. The Supreme Court ruling therefore has significant consequences, particularly if coupled with the compelling arguments presented by Judge Wilkey in *Laker Airways* regarding the proper role of the judiciary with regard to comity.¹⁰⁰ In rejecting the argument that the court should decline jurisdiction on account of comity, the majority in *Laker Airways* held: ‘Although, in the interest of amicable relations, we might be tempted to defuse unilaterally the confrontation by jettisoning our jurisdiction, we could not, for this is not our proper judicial role’.¹⁰¹ The question then arises as to whose role it is to consider comity if not the courts. A useful starting point is to consider the distinction between litigation brought by private plaintiffs and that by the US Government.

2.4.3 The 1995 Antitrust Enforcement Guidelines for International Operations issued jointly by the Department of Justice and the Federal Trade Commission detail the extent to which the two antitrust authorities will take account of comity considerations:

‘The Agencies also take full account of comity factors beyond whether there is a conflict with foreign law. In deciding whether or not to challenge an alleged antitrust violation, the Agencies would, as part of a comity analysis, consider whether one country encourages a certain course of

¹⁰⁰ See discussion *supra* at 2.3.7.

¹⁰¹ *Op. cit.* note 70 at 953.

conduct, leaves parties free to choose among different strategies, or prohibits some of those strategies. In addition, the Agencies take into account the effect of their enforcement activities on related enforcement activities of a foreign antitrust authority...The Agencies also will consider whether the objectives sought to be obtained by the assertion of US law would be achieved in a particular instance by foreign enforcement'.¹⁰²

In light of the guidelines and *Hartford Fire* it is apparent that the authorities may undertake a different comity analysis from that of the courts, which is not necessarily a problem as the authorities and courts have different functions: one exercises prosecutorial discretion in the US interest; and the other enforces national and international law. Hence it is plausible that the respective comity analyses are not mutually exclusive and the courts' comity analysis in a government action could take place after that of the antitrust authorities' analysis. Nonetheless the Joint Guidelines challenge whether the courts should undertake their own comity analysis once either agency has already done so:

'In cases where the United States decides to prosecute an antitrust action, such a decision represents a determination by the Executive Branch that the importance of antitrust enforcement outweighs any relevant foreign policy concerns. The Department does not believe that it is the role of the courts to "second-guess the executive branch's judgment as to the proper role of comity concerns under these circumstances"'.¹⁰³

The decision in *Hartford Fire* decreases the likelihood of a US court conflicting with the DOJ or FTC in the manner outlined, i.e. by declining to assert jurisdiction on the basis of comity once either authority has pressed ahead with antitrust litigation, although the purported discretion of the antitrust authorities is

¹⁰² *Joint Antitrust Enforcement Guidelines for International Operations*, issued by the DOJ and FTC (April 1995) at 3.2.

¹⁰³ *Ibid.* at 3.2, latterly quoting *United States v. Baker Hughes, Inc.*, 731 F. Supp 3, 6n.5 (D.D.C. 1990), *aff'd*, 908 F.2d 981 (D.C. Cir. 1990).

nonetheless startling and controversial. Griffin's comment on these matters is particularly insightful:

'The 1995 International Guidelines take the position that courts should not engage in comity analysis in antitrust actions brought by the US Government...Other than a general reference to the separation of powers doctrine, the...International Guidelines cite no precedent for applying one jurisdictional standard to government prosecutions and another to private suits. Nor is there any indication that courts would accept the argument that they are constrained from reviewing prosecutorial decisions on the basis of comity or from taking account of foreign relations considerations...Moreover, there is nothing in the legislative history of the Sherman Act to indicate that the Congress intended different standards to apply to government prosecutions and private suits'.¹⁰⁴

While Griffin questions the competence of the US antitrust authorities to remove comity considerations from the jurisdiction of the courts, a view supported by the American Bar Association,¹⁰⁵ Hovenkamp offers a distinctive view on the area:

'...to the extent the federal antitrust laws represent the public economic policy of the United States, there may be little room for considerations of comity at all. Although the courts have seldom articulated the problem in this way, it is generally consistent with the outcomes'.¹⁰⁶

Considering antitrust as 'public economic policy' may offer some justification for executive, instead of judicial, control over the role of comity. If indeed, the US executive branch does have the exclusive competence to determine the weight of comity considerations, it appears that this would lead to different standards being applied to public and private antitrust actions. Certainly there has been no suggestion that antitrust authorities should also be able to have such a decisive influence in private actions, e.g. by attaching greater weight to an *amicus curiae*

¹⁰⁴ J.P. Griffin, *op. cit.* note 72.

¹⁰⁵ *Ibid.* specifically see note 142.

¹⁰⁶ H. Hovenkamp, *op. cit.* note 44, at pp.766-767.

brief submitted by the authorities.¹⁰⁷ There is also precedent for suggesting that differing antitrust standards can be applied to public and private actions. The Supreme Court has confirmed that different standards apply regarding remedies in *Hoffmann-La Roche v. Empagran*.¹⁰⁸ Mr. Justice Breyer, writing for the court, observed:

‘A Government plaintiff, unlike a private plaintiff, must seek to obtain the relief necessary to protect the public from further anticompetitive conduct and to redress anticompetitive harm. And a Government plaintiff has legal authority broad enough to allow it to carry out this mission. 15 U.S.C. § 25; see also, e.g. *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 334 (1961) (“[I]t is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favour”). Private plaintiffs, by way of contrast, are far less likely to be able to secure broad relief. See *California v. American Stores Co.*, 495 U.S. 271, 295 (1990) (“Our conclusion that a district court has the power to order divestiture in appropriate cases brought [by private plaintiffs] does not, of course, mean that such power should be exercised in every situation in which the Government would be entitled to such relief”).¹⁰⁹

Hence arguments presented by the US government will clearly carry greater weight in antitrust actions than arguments presented by private plaintiffs, although it is unclear whether the double standard regarding remedies implies judicial acceptance of a double standard regarding comity. While the issue of competence to consider comity remains unresolved, the *Hartford Fire* ruling does not support the view that courts are unable or ill-equipped to undertake such an analysis,

¹⁰⁷ In any case the function of an amicus curiae (literally ‘friend of the court’) brief is intended to bring matters not already done so to the court’s attention to help the court. While the brief is intended to influence the court’s decision, the court is certainly not bound by the position of the parties to the brief. See Rule 37 of the Supreme Court of the US and *American Airlines v. Wolens*, 513 US 219 (1995), for further discussion.

¹⁰⁸ *F. Hoffmann-La Roche Ltd. et al. v. Empagran S.A. et al.* 542 U.S. (2004), 124 S. Ct 2359, 159 L. Ed. 2d 226.

¹⁰⁹ *Ibid.* at p.14 of judgment.

irrespective of whether it is a public or private action. The result of such uncertainty only serves to diminish the impact that the principle of comity can have in cases before US courts, it is likely that comity can only have significant influence in US cases with regard to prosecutorial decisions made by the antitrust authorities.

2.4.4 Since *Hartford Fire*, which instigated a lively debate amongst many commentators,¹¹⁰ there have been several further important developments in US antitrust of relevance. From a practical standpoint, the joint DoJ and FTC International Guidelines, as discussed above, stated that the principle of international comity would be a factor when conducting investigations and launching prosecutions for violations of US antitrust laws, and afforded greater weight to the principle of comity than in *Hartford Fire*. Interestingly, the comity factors taken into account by the authorities are listed in a similar manner to that within *Timberlane* and *Mannington Mills*.¹¹¹ However, the Joint Guidelines must be placed in context, noting the prevalence of private enforcement in the US. With the majority of antitrust cases concerning private enforcement, the FTC and DOJ will often be unable to directly influence the civil suits,¹¹² and thus have little impact on much of the development of antitrust jurisprudence.

¹¹⁰ See A. Robertson and M. Demetriou, “‘But that was in another country...’: The Extraterritorial Application of US Antitrust Laws in the US Supreme Court” (1994) 43 *ICLQ* 417; W.S. Dodge, ‘Extraterritoriality and Conflicts of Laws Theory: an Argument for Judicial Unilateralism’ (1998) 39 *Harvard International Law Journal* 101; S.W. Waller, ‘From the Ashes of Hartford Fire: the Unanswered Questions of Comity’ (1999) *Fordham Corporate Law Institute* 33 (paper); and J.P. Griffin, *op. cit.* note 72.

¹¹¹ *Op. cit.* note 102, see the ‘listing’ of factors at 3.2.

¹¹² Their ability to contribute as *amicus curiae* is noted above.

The second development since *Hartford Fire* stems from the Court of Appeals for the First Circuit decision in *United States v. Nippon Paper Industries Co.*¹¹³ The case concerned a criminal prosecution by US authorities against Japanese corporations for violation of the Sherman Act. The violations were in respect of price-fixing activities, all of which were conducted in Japan. The Court held that as criminal and civil liability for breach of the Sherman Act arose as a result of the same language, in the same section of the same statute, and that *Hartford Fire* had already established beyond doubt the extraterritorial application of that section in civil cases, it followed that criminal liability existed on the exact same basis. This decision is notable as a precedent for criminal actions, and has again created international tension due to the disparate approach between jurisdictions as to whether antitrust violations should incur criminal penalties. The final development worthy of note and comment at this stage concerns the 2004 unanimous Supreme Court decision in *Hoffmann-La Roche v. Empagran*.

2.4.5 *Empagran* concerned a private action raised following a US DOJ investigation into the manufacture and distribution of bulk vitamins by domestic and foreign firms. The antitrust investigation targeted participants in an international price-fixing cartel, and Hoffmann-La Roche had been one of the main companies under investigation. Hoffmann-La Roche, and others, negotiated a plea agreement with the US antitrust authorities,¹¹⁴ and many of the cartel conspirators also settled

¹¹³ 109 F. 3d 1 (1st Cir. 1997).

¹¹⁴ On 20th May 1999, Hoffmann-La Roche pleaded guilty to violating Section 1 of the Sherman Act by engaging in illegal collusive practices in the international vitamin industry. The Department of Justice Antitrust Division fined the company \$500 million. Three former senior Hoffmann-La Roche executives

civil suits with US purchasers. The facts of the case explain why Hoffmann-La Roche would not settle out of court, Empagran is a South African company and its dealings with Hoffman-La Roche took place outside the US. Hence Hoffmann-La Roche doubted the jurisdiction of US antitrust, and challenged the ability of Empagran to raise an action in US courts. At issue was whether a foreign plaintiff that sustained harm as a result of a cartel, in violation of Section 1 of the Sherman Act, could sue that cartel within the US. The crucial question was whether there could be jurisdiction even though the harm sustained arose from the effect of the cartel elsewhere, and not from the effect on US trade. Thus, the claim was for damage sustained abroad as result of foreign activity by foreign perpetrators. The case essentially revolves around the interpretation of the FTAIA providing for Sherman Act jurisdiction. While the Act provides a general rule that '[the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations',¹¹⁵ the Act also stipulates an exception when 'such conduct has a direct, substantial and reasonably foreseeable effect'¹¹⁶ on either US domestic or import commerce, or American exporters (i.e. there is a US domestic-injury exception to the rule). Therefore it is unclear whether the claim must arise as a direct result of such an effect within the US, or whether the claim can arise as result of the conduct, albeit not a result of the effect on US trade.

have been charged with the same offence, including Andreas Hauri (Swiss), who agreed to serve a four month jail term in the US, and pay a \$350,000 fine for his participation as Chemical and Vitamin Division Marketing Director. See Antitrust Division Press Release on 6th April 2000.

¹¹⁵ 96 Stat. 1246, 15 U.S.C. §6a.

¹¹⁶ *Ibid.* at §6a(1)(A).

While the D.C. District Court ruled against Empagran and found it lacked jurisdiction,¹¹⁷ the Court of Appeals for the D.C. Circuit overturned that decision in *Empagran S.A. v. Hoffmann-La Roche Ltd.*¹¹⁸ on 17th January 2003. In a majority 2-1 decision the Court of Appeals ruled in favour of Empagran, allowing the case to continue to a full hearing. The ruling on jurisdiction threatened to set a precedent and further extend the extraterritoriality of US antitrust. From a practical stand point the ruling was particularly concerning given the potential for forum shopping, and the incentives to do so due to the existence of treble damages in the US. Indeed the existence of treble damages was likely a factor in Empagran's original decision to sue in US courts. The decision on jurisdiction was the subject of the appeal to the US Supreme Court, and the significance of the case was highlighted by the number of amicus curiae briefs submitted, mostly in support of the petitioners, Hoffmann-La Roche.¹¹⁹

The amicus curiae brief jointly submitted by the UK, Ireland and the Netherlands outlined the main criticism of the Court of Appeals ruling:

[We] are committed to the rule of law as essential to a global trading and investment system and to an international civil society. However, the Governments in general are opposed to assertions of extraterritorial jurisdiction in private antitrust cases where claimants seek to recover from foreign defendants solely for foreign injuries not incurred in the country in which the private suit is filed. Such litigation contravenes basic principles of international law and may impede trade and investment as well as undermine public enforcement by the Governments of their competition

¹¹⁷ *Empagran S.A. v. Hoffmann-La Roche Ltd.*, 2001 WL 761360, D.D.C. June 7, 2001.

¹¹⁸ 315 F. 3d 338 (District of Columbia Circuit, 2003).

¹¹⁹ At least 16 amicus curiae briefs were submitted to the court. Among the parties submitting briefs were: the Government of the United States, Canada, Germany, Japan, a joint brief by the UK, Ireland and the Netherlands, and a joint brief by Harry First and Eleanor M. Fox.

law. It also would interfere with a sovereign nation's right to regulate conduct within its territory'.¹²⁰

The Brief went further and highlighted the dangers of permitting the claim: 'such a rule potentially would permit virtually any significant commercial transaction to be the basis for private United States treble damages claims...This decision would provide substantial encouragement for widespread forum shopping'.¹²¹ In commenting on the attraction of the treble damages system to claimants the Governments then stated:

'Expanding the jurisdiction of this generous United States private claim system could skew enforcement and increase international business risks. It makes United States courts the forum of choice without regard to whose laws are applied, where the injuries occurred or even if there is any connection to the court except the ability to get *in personam* jurisdiction over the defendants. Lord Denning best captured these anomalies when he observed: "As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune."...'.¹²²

Indeed the US Government also submitted a brief supporting the reversal of the Court of Appeals ruling, although it focused on the practical consequences of an affirming Supreme Court judgment stating: 'The United States is concerned that the court of appeals' holding will substantially harm its ability to uncover and break up international cartels and undermine law enforcement relationships between the United States and its trading partners'.¹²³

¹²⁰ No. 03-724, *Hoffmann-La Roche Ltd. v. Empagran S.A.*, Brief of the United Kingdom of Great Britain and Northern Ireland, Ireland and the Kingdom of the Netherlands as amicus curiae in support of the petitioners, at p.2.

¹²¹ *Ibid.* at p.6.

¹²² *Ibid.* at p.14.

¹²³ No. 03-724, *Hoffmann-La Roche Ltd. v. Empagran S.A.*, Brief for the US as amicus curiae supporting petitioners, at p.1.

2.4.6 The Supreme Court passed down a unanimous decision on 14th June 2004¹²⁴ that concurred with many of the amicus curiae briefs, and reversed the Court of Appeals ruling. The Court held that the primary question had two parts:

‘First, does that conduct fall within the FTAIA’s general rule excluding the Sherman Act’s application? That is to say, does the price-fixing activity constitute “conduct involving trade or commerce...with foreign nations”? We conclude that it does. Second, we ask whether the conduct nonetheless falls within a domestic-injury exception to the general rule, an exception that applies (and makes the Sherman Act nonetheless applicable) where the conduct (1) has a “direct, substantial and reasonably foreseeable effect” on domestic commerce, and (2) “such effect gives rise to a [Sherman Act] claim.” §§6a(1)(A), (2). We conclude that the exception does not apply where the plaintiff’s claim rests solely on the independent foreign harm’.¹²⁵

The Supreme Court was influenced by another aid in determining that the domestic-injury exception under the FTAIA did not apply:

‘The rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today’s highly interdependent commercial world. No one denies that America’s antitrust laws, when applied to foreign conduct, can interfere with a foreign nation’s ability independently to regulate its own commercial affairs. But our courts have long held that

¹²⁴ *F. Hoffmann-La Roche Ltd. et al. v. Empagran S.A. et al.*, 542 U.S. (2004), 124 S. Ct 2359, 159 L. Ed. 2d 226, 6 Justices joined Justice Breyer’s opinion, Justice Thomas joined Justice Scalia’s opinion concurring with Justice Breyer, and Justice O’Connor took no part in consideration of the case.

¹²⁵ *F. Hoffmann-La Roche Ltd. et al. v. Empagran S.A. et al.*, 542 U.S. (2004), 124 S. Ct 2359, 159 L. Ed. 2d 226, at pp.1-2 of the judgment. Note that leading US antitrust academic, Professor Eleanor Fox commented prior to the judgment that the Supreme Court ‘should determine that the 1982 statute is inapplicable to the case’ (p.9) as: ‘The statute, which cuts back jurisdiction, excludes conduct involving imports. The vitamin conspiracy involves imports’ (p.9 n.3), (although the DoJ investigation and subsequent US litigation involving the vitamin cartel involved US imports, *Empagran* does not actually deal with imports into the US, which is perhaps the crux of the matter). Fox also suggests ‘the Supreme Court will almost surely decide the question not on the basis of what the statute says but on the basis of what the Court believes is the right outcome’ (p.5). E.M. Fox, ‘Taming Unruly Horses: The Laboratory of Global Antitrust’, Draft Workshop Paper, 24 March 2004. Professor Fox also submitted a joint amicus curiae brief to the US Supreme Court in *Empagran* with First.

application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused'.¹²⁶

The court rejected argument presented by *Empagran* that 'comity does not demand an interpretation of the FTAIA that would exclude independent foreign injury cases *across the board*'¹²⁷ and held:

'We conclude that principles of prescriptive comity counsel against the Court of Appeals' interpretation of the FTAIA. Where foreign anticompetitive conduct plays a significant role and where foreign injury is independent of domestic effects, Congress might have hoped that America's antitrust laws, so fundamental a component of our own economic system, would commend themselves to other nations as well. But, if America's antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat'.¹²⁸

Thus the Supreme Court judgment was fairly robust in reversing the Court of Appeals ruling, something with which the dissenter in *Hartford Fire*, Justice Scalia, concurred. Perhaps the Supreme Court ruling in *Empagran* merely reinforces the status quo post-*Hartford Fire*, nonetheless its true significance lies in the consequences that would have followed had the Court of Appeals ruling been upheld. It is noteworthy that post-*Empagran*, the US Antitrust Modernization Commission (AMC) has recommended that: 'as a general principle, purchases made outside the United States from a seller outside the United States should not be deemed to give rise to the requisite effects under the

¹²⁶ *F. Hoffmann-La Roche Ltd. et al. v. Empagran S.A. et al.*, 542 U.S. (2004), 124 S. Ct 2359, 159 L. Ed. 2d 226, at p.8 of the judgment.

¹²⁷ *Ibid.* at p.11.

¹²⁸ *Ibid.* at p.12.

Foreign Trade Antitrust Improvements Act¹²⁹ to ensure total clarity on the issue. Furthermore, six of the AMC Commissioners recommended an amendment to the FTAIA to reflect its recommendation.¹³⁰ The *Empagran* judgment also illustrates that while US antitrust is unhindered by would be ‘territorial firewalls’,¹³¹ its *raison d’être* is to protect American consumers and commerce,¹³² and actions too far detached from that purpose are unlikely to succeed – surely offering some comfort to foreign governments and their antitrust authorities.

2.5 International mergers and acquisitions in the US

2.5.1 The foregoing discussion of the development of extraterritoriality in US antitrust would be incomplete without some consideration of the law and judicial treatment of mergers and acquisitions in this context. A discussion of US extraterritoriality in merger control will follow, accompanied by a necessary, albeit brief, outline of the US merger control regime. While the latter part of the thesis will focus exclusively upon merger control in the international arena,¹³³ its role in the development of international antitrust has historically been overlooked in favour of focusing upon cartels and unilateral anti-competitive behaviour. There is some justification for such an approach, however, given that cartels in particular are

¹²⁹ Antitrust Modernization Commission Final Report (April 2007), recommendation 42. See discussion at pp.225 – 230, available at: www.amc.gov.

¹³⁰ *Ibid.*

¹³¹ As phrased by Judge Selya in *United States v. Nippon Paper Industries Co.*, 109 F. 3d 1 (1st Cir. 1997) at 8.

¹³² As noted in the US amicus curiae brief at p.6; ‘The focus of the FTAIA, and the fundamental purpose of the Sherman Act, are the protection of American consumers and commerce. To provide antitrust relief to respondents, even though their injuries have no connection to a conspiracy’s effects on United States commerce, would divorce antitrust recovery from the central purposes of the antitrust laws’.

¹³³ *Infra* at chapter 5.

recognised as severely damaging to consumers, economies and notions of fair play. As Whish states:

‘if competition policy is about one thing, it is surely about the condemnation of horizontal price fixing, market sharing and analogous practices: on both a moral and practical level, there is not a great deal of difference between price fixing and theft...pursuit of the hum-drum cartel ought to lie at the heart of any competition authority’s agenda’.¹³⁴

Whish also characterises merger control as ‘an important third component of most, though not all, systems of competition law’¹³⁵ emphasising that the focus for most antitrust regimes is clearly elsewhere. Merger control is also distinguishable from other areas of antitrust in that the benefits to be gained from merger activity are visible and readily accepted,¹³⁶ whereas justifying potentially anti-competitive unilateral or collaborative behaviour can be very difficult. Furthermore, mergers and acquisitions take place in public view¹³⁷ whilst the other types of commercial activity that are subject to antitrust scrutiny, especially cartels, are often more opaque and cause difficulties for the investigating authorities. All of these factors have traditionally accumulated to create a greater focus within national antitrust regimes upon non-merger activity. The non-merger focus within national antitrust regimes has also tended to transfer onto to the international stage. The apparent historical prioritisation of non-merger activity in the US is supported by a number of factors. Notably there is an absence of specific merger control provisions from the Sherman Act. Furthermore the 1914

¹³⁴ *Op. cit.* note 14 at p.454.

¹³⁵ *Op. cit.* note 14 at p.779.

¹³⁶ The benefits of M&A activity for global trade and trade liberalisation policies are discussed in detail *infra* at 5.2.

¹³⁷ While merger negotiations are often secretive and commercially sensitive information is not made public, the actual merging or acquisition of entities are visible transactions.

Clayton Act (dealing with mergers in Section 7) was clearly an ineffective antitrust enforcement tool, until an amendment in 1950,¹³⁸ and perhaps even the further amendment in 1980.¹³⁹ Note the significant period of time before amendments in spite of the FTC recognising the Clayton Act's flaws in 1928.¹⁴⁰ One result of this focus in US antitrust is that more recent merger case law under the Clayton Act has tended to analogise with and adopt established jurisdictional doctrines and precedents developed under §1 and §2 of the Sherman Act.¹⁴¹

2.5.2 US merger control consists of federal statutes that enable M&As to be blocked should a court rule that the requisite legal standard has been satisfied. The principal standard is encompassed in §7 of the Clayton Act.¹⁴² Section 7 prohibits the direct or indirect acquisition by one person of all or any part of the voting securities or assets of another person when 'in any line of commerce or in any activity affecting commerce in any section of the [US], the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly'.¹⁴³ There is, however, no bar to challenging a merger under either §1 or §2 of the Sherman Act. Indeed, the narrow ambit of the original 1914 Clayton Act §7 encouraged the antitrust authorities to resort to the Sherman Act to cover

¹³⁸ The Celler-Kefauver Antimerger Act of 1950, 15 U.S.C. § 18 (1994).

¹³⁹ Act of Sept. 12, 1980, Pub. L. No. 96-349, § 6(a), 94 Stat. 1157 (codified as amended at 15 U.S.C. § 18 (1994)); H.R. Rep. No.871, 96th Cong., 2d Sess. 1980, 1980 U.S.C.C.A.N. 2732, Apr. 11, 1980.

¹⁴⁰ For discussion see *Brown Shoe Co. v. United States*, 370 U.S. 294, 314 and n.25 (1962).

¹⁴¹ See *Brown Shoe Co v. United States*, 370 US at 319 (1962).

¹⁴² 15 U.S.C. § 18 (1994).

¹⁴³ *Ibid.* with an exemption for acquisitions made 'solely for investment'.

certain transactions which the Clayton Act could not.¹⁴⁴ Amendments to §7 between 1950 and 1980 largely obviated the need to resort to the Sherman Act for merger control. This was presumably a welcome development for the antitrust authorities at the time in light of difficulties in proving an unreasonable restraint of trade as a result of the merger, as required under §1 of the Sherman Act.¹⁴⁵ The alternative and equally daunting prospect was that of trying to prove the merger to be ‘a vehicle for monopolization, attempted monopolization, or a conspiracy to monopolize’ as required under §2 of the Sherman Act.¹⁴⁶ Section 5 of the Federal Trade Commission Act (FTC Act) is another important statutory provision in US merger control, which enables the Federal Trade Commission to challenge ‘any unfair method of competition or deceptive act or practice’.¹⁴⁷ Section 5 has been held to grant the FTC authority to challenge any conduct that would constitute a violation of the Sherman Act or the Clayton Act,¹⁴⁸ thus giving the FTC a significant role in US merger control.

2.5.3 While the jurisdictional limits of the Sherman Act have been considered in depth already, there has been no similar consideration of the Clayton Act and FTC Act, and their application to non-US firms and M&A activity. There are two issues that arise: does the merger control standard under §7 of the Clayton Act apply to a

¹⁴⁴ Such as asset acquisitions as they were not covered by the original section 7; which prohibited stock acquisitions only. Given the initial weakness of the original section 7, the case law developing under the Sherman Act may have appeared to offer greater prospect of a successful challenge to the merger.

¹⁴⁵ As noted in R.S. Schlossberg, *op. cit.* note 51 at p.8.

¹⁴⁶ Hovenkamp comments ‘As a result [of the Clayton Acts widened scope] Sherman Act treatment of mergers to monopoly has become all but superfluous’, *op. cit.* note 44 at p.293.

¹⁴⁷ 15 U.S.C. § 45 (1994).

¹⁴⁸ See *FTC v. Motion Picture Adver. Co.*, 344 U.S. 392, 394-95 (1952), *FTC v. Cement Inst.*, 333 U.S. 683, 691 (1947), and discussion in R.S. Schlossberg, *op. cit.* note 51 at pp.9-10.

proposed merger between non-US firms; and can the FTC raise a challenge against such firms under §5 of the FTC Act. Neither issue requires a substantial analysis. The prohibition of a merger or acquisition which would substantially lessen competition or tend to create a monopoly under Section 7 of the Clayton Act, is judged by whether the acquisition would have such a negative effect upon ‘any line of commerce or in any activity affecting commerce in the [US]’.¹⁴⁹ The jurisdictional scope of Section 7 is apparent by referring to Section 1 of the Clayton Act, which states that: “‘Commerce,’ as used herein, means trade or commerce among the several states and with foreign nations...’ and also: ‘The word “person” or “persons” wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any state, or the laws of any foreign country’ [emphasis added].¹⁵⁰ Note that in spite of the apparently wide statutory scope of §7 of the Clayton Act, the American Bar Association suggests: ‘More recently, the courts and federal enforcement agencies have applied the direct, substantial, and reasonably foreseeable standard of the FTAIA to merger challenges under the Clayton Act’.¹⁵¹ It is therefore clear that §7 of the Clayton Act can apply to M&A involving non-US firms. The US Congress clearly intended for merger control under the Clayton Act to be applicable to all mergers and acquisitions capable of effecting a substantial lessening of competition, or monopolisation on US commerce, whether that be on domestic commerce or commerce between the US and other nations. In practice

¹⁴⁹ 15 U.S.C. § 18 (1994).

¹⁵⁰ *Ibid.*

¹⁵¹ R.S. Schlossberg, *op. cit.* note 51, at p.395.

however, it may also be required for the substantial lessening of competition, or monopolisation to be direct, substantial and reasonably foreseeable before the US antitrust authorities seek to intervene in the merger or acquisition.

The remaining issue regarding the scope of §5 of the Federal Trade Commission Act is answered by a closer examination of the detail of the section as contained within § 45 of the antitrust section of the US Code. Section 45(a)(1) states: ‘Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful’,¹⁵² section 45(a)(2) then empowers and directs the FTC to prevent persons, partnerships, or corporations ‘from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce’. The pertinent section is then §45(a)(3) providing that:

‘This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless - (A) such methods of competition have a direct, substantial, and reasonably foreseeable effect [on US domestic or import commerce, or American exporters], and (B) such effect gives rise to a claim under [§§45.(a)(1) and (2)]’.¹⁵³

Thus the territorial scope of the Clayton Act has an almost identical legal standard to that of the FTAIA, confirming that the FTC can challenge mergers involving non-US firms under §5 of the FTC Act. It is therefore clear that the jurisdictional scope of the Clayton Act and the FTC Act, and thus US merger control is the same as that of the Sherman Act.

¹⁵² 15 U.S.C. § 45 (a)(1) (1994).

¹⁵³ 15 U.S.C. § 45(a)(3) (1994).

2.5.4 Interpretations of the Clayton and FTC Acts clearly mirror the law developed under the Sherman Act and the FTAIA, yet one further element requires consideration to gain a fuller picture of the jurisdictional scope of US merger control. The most visible element of US merger control is the pre-merger notification regime which is established in the US by virtue of §7A of the Clayton Act, introduced by the Hart-Scott-Rodino Antitrust Improvement Act of 1976 (HSR Act). The HSR Act¹⁵⁴ facilitates an *ex ante* system of merger control¹⁵⁵ by requiring that parties to certain mergers and acquisitions notify the FTC and the Antitrust Division of the Department of Justice with certain information. It also obliges the parties to suspend consummation of the reportable transaction until the expiry of specified waiting periods.¹⁵⁶ Thus the HSR Act maintained the legal standard embedded in §7 of the Clayton Act, and its purpose is to facilitate efficient and effective merger control. US antitrust authorities are provided with sufficient information and time to determine whether to challenge a proposed merger or acquisition prior to its consummation, by virtue of the notification mechanism. Indeed Miller and Baker have noted the limited impact of the HSR Act upon the substantive merger control rules:

‘the HSR Act does not preclude the government agencies from challenging a reportable merger even after statutory waiting periods have expired and the merger has been consummated without objection by the Government. Moreover, the HSR Act does not preclude a government challenge to a non-reportable merger’.¹⁵⁷

¹⁵⁴ 15 U.S.C. § 18a (1994).

¹⁵⁵ Note that most merger control regimes adopt an *ex ante* review mechanism, see discussion *infra* at 5.1.2.

¹⁵⁶ The implementing rules are found at 16 C.F.R. Parts 801-803.

¹⁵⁷ W.T. Miller and D.I. Baker, ‘Chapter 64: United States of America’ at p.64-48, 64.090 in J.W. Rowley & D.I. Baker (Eds), *International Mergers - The Antitrust Process* (3rd ed, Sweet & Maxwell, 2001).

2.5.5 While the substantive rules are largely unaffected by the HSR Act, its significance to the US merger control regime is beyond doubt. The parties to a merger or acquisition whereby either ‘the acquiring person, or the person whose voting securities or assets are being acquired, is engaged in commerce or in any activity affecting commerce’¹⁵⁸ must file pre-merger notification if the transaction results in the acquirer holding in excess of \$239.2 million of the voting securities and assets of the acquired person.¹⁵⁹ There are also secondary notification thresholds.¹⁶⁰ Merging parties that satisfy the notification thresholds must provide the requisite information to both the FTC and DOJ, which triggers a standard 30-day waiting period before the acquisition may take place, and during which time the authorities will conduct a first phase review.¹⁶¹ The 30-day waiting period can be terminated early by request of the parties, and with the consent of the antitrust authorities should they determine within that period that the reportable transaction has no antitrust concerns.¹⁶² The waiting period can also be extended by the antitrust authorities for a further 30 days¹⁶³ by issuing a ‘second request’ for documents and information, which marks the beginning of the second phase of merger review.¹⁶⁴

¹⁵⁸ 15 U.S.C. § 18a(a)(1).

¹⁵⁹ 15 U.S.C. § 18a(a)(2)(A). See the FTC Notice on Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, Federal Register, Vol.70 No.13, 22 January 2007 at pp.2692 – 2693.

¹⁶⁰ See 15 U.S.C. § 18a(a)(2)(B).

¹⁶¹ 15 U.S.C. § 18a(b), note that for cash tender offers the waiting period is only 15 days.

¹⁶² 15 U.S.C. § 18a(b)(2).

¹⁶³ 15 U.S.C. § 18a(e)(2), although the extension for a cash tender offer is only 10 days.

¹⁶⁴ There is a fuller discussion of the different stages of the merger review process, as well as further discussion of the US second request *infra* at 5.5 and 5.6.

The second request ‘acts as both a subpoena for documents and a set of interrogatories, seeking (amongst other things) sales and capacity data, information about potential entrants, documents about pricing, costs, competition, and strategic plans and analyses’,¹⁶⁵ and is a necessary step before the FTC or DOJ can decide whether to seek a preliminary injunction against the proposed transaction. While second requests have been noted to be ‘extraordinarily burdensome’,¹⁶⁶ the whole system of pre-merger notification clearly imposes a significant burden upon parties to reportable transactions,¹⁶⁷ irrespective of whether they are incorporated or otherwise based within the US. The acquiring party in all such transactions also incurs sizable filing costs that are adjusted annually: \$45,000 for transactions with a value between \$59.8 million and \$119.6 million; \$125,000 for transactions between \$119.6 million and \$597.9 million; and \$280,000 if the value of the transaction is \$597.9 million or greater.¹⁶⁸ It is clear from examining US merger control laws that the antitrust authorities have a broad jurisdiction over non-US companies, not only by virtue of the wording of section 7 of the Clayton Act and section 5 of the FTC Act but also due to the operation of the HSR pre-merger notification system. It is also clear that the *ex ante* system can impose a significant notification burden upon non-US firms. From a practical standpoint, the broad legal jurisdiction conferred upon US antitrust authorities heightens the benefit to be gained from considering the

¹⁶⁵ N.R. Koberstein and J.J. Hegarty, ‘US Antitrust Law: Enforcement of Laws Governing Mergers and Acquisitions’ [2003] 2 *Comp Law J.* 361 at 366.

¹⁶⁶ *Ibid.*

¹⁶⁷ The burden of multi-jurisdictional merger review is a key issue that is considered *infra* in chapter 5, particularly see 5.5 and 5.6.

¹⁶⁸ § 605(b) of title VI of Public Law 101-162 (15 U.S.C. 18a note). Also see the updated filing fee information, published in the FTC Notice, *op. cit.* note 159.

exercise of discretion by the authorities, in order to appreciate the scope of US merger control.

2.5.6 The American Bar Association suggests that ‘the Division [DOJ] has vigorously enforced compliance with the HSR Act notification requirements by foreign firms’¹⁶⁹ and provides notable examples. The joint FTC and DOJ International Guidelines also confirm that US antitrust authorities will assert jurisdiction over non-US firms when applying the merger control laws.¹⁷⁰ In spite of having jurisdiction however, the US authorities have indicated a willingness to take comity considerations into account when deciding whether or not to challenge a proposed merger or acquisition. The ABA suggests that:

‘The Division followed principles of comity in deciding not to challenge an acquisition by John Deere & Co. of North American agricultural equipment operations of the Canadian company, Versatile Corporation. The parties contended that the acquisition should be permitted to proceed because Versatile qualified as a “failing firm” under US antitrust law and would be forced to shut down its Canadian agricultural equipment operations if the acquisition were blocked. The Canadian competition authorities accepted this argument, while the Division, at least initially, did not. After extensive discussions between Canadian and Justice Department competition officials, however the Justice Department decided to defer to the “substantial Canadian interests” in the matter and did not challenge the transaction’.¹⁷¹

Comity considerations may also influence decisions beyond whether or not to challenge a proposed transaction, and certain cases might suggest that comity has influenced whether the antitrust authorities seek to prohibit a transaction outright, or seek to impose a remedy upon the parties. In spite of the ABA citing examples

¹⁶⁹ R.S. Schlossberg, *op. cit.* note 51 at pp.402 – 403.

¹⁷⁰ *Op. cit.* note 102, at 3.14.

¹⁷¹ R.S. Schlossberg, *op. cit.* note 51, at p.406.

of cases where comity has had an impact,¹⁷² it is difficult to distinguish between cases where the application of comity altered the outcome of a merger review, and those cases where the review was conducted in cooperation and coordination with international counterparts. It may be there is no difference between the two, yet as antitrust authority cooperation is becoming more prevalent in multi-jurisdictional merger review it would be inaccurate to suggest that every case of cooperation is an example of comity considerations altering the outcome. Indeed it may even be argued that the *John Deere* case cited by the ABA is an example of where the DOJ benefited from cooperation with international counterparts, to build a better understanding of the case. The DOJ may have been convinced by the Canadian argument, rather than deciding against enforcement due to comity considerations. In spite of the different possible interpretations of the DOJ action in *John Deere* and other cases, it is clear that the US antitrust authorities, acting as the executive branch of the US government, have stated a willingness to take comity considerations into account throughout the merger control process in relevant cases.

After having considered the development of US extraterritoriality, which likely represents the first semblance of ‘international antitrust’, the further development of antitrust in the international sphere can be ascertained by examining another principal antitrust jurisdiction: the European Community.

¹⁷² R.S. Schlossberg, op. cit. note 51, at pp. 407 – 409.

2.6 EC competition law

2.6.1 When extraterritoriality received judicial recognition in US antitrust in the 1940s, the US was probably the only jurisdiction with a comprehensive antitrust regime in place, and already had over 40 years of policy-making and enforcement experience. It was during the period of judicial refinement of the effects doctrine in the US, following the end of the Second World War, that the foundations of antitrust in Europe were being laid. The term antitrust, however, that attached to the laws arising from the Sherman Bill debates and the wider effort combating US industrial might in the late 19th Century, was inappropriate for the provisions, loosely termed counterpart laws, that were taking shape in Europe. Amongst the first of these ‘counterpart’ laws to formulate in Europe were within the 1951 Treaty of Paris establishing the European Coal and Steel Community (ECSC) between Belgium, France, (West) Germany, Italy, Luxembourg and The Netherlands. The ECSC was created with the task: ‘to contribute, in harmony with the general economy of the Member States and through the establishment of a Common Market...to economic expansion, growth of employment and a rising standard of living in the Member States’.¹⁷³ In furtherance of the objective for a common coal and steel market, was the requirement in Article 4(d) of the Treaty of Paris to abolish and prohibit restrictive practices: ‘which tend toward the sharing or exploiting of markets’, as well as the requirement in Article 5 to: ‘ensure the establishment, maintenance and observance of normal competitive conditions’. In order to satisfy these requirements the Treaty included provisions to maintain competitive conditions in relevant markets in Articles 65 and 66.

¹⁷³ Articles 1 and 2 of the Treaty of Paris.

Articles 65 and 66 can therefore be regarded as amongst the first European ‘counterparts’ to Sections 1 and 2 of the Sherman Act. Nonetheless it was clear that the prohibitions within Article 65 and 66 were very different from those of the Sherman Act, both in terms of wording and intended purpose. The ECSC provisions were primarily seeking to maintain ‘normal competitive conditions’, and thus they were therefore far more appropriately labelled ‘competition laws’, rather than antitrust as in the US.¹⁷⁴ For reasons of convenience and consistency however, this thesis generally adopts the term ‘antitrust’ to refer to laws and policies that may be labelled ‘competition laws’ within their own jurisdiction.

2.6.2 The antitrust provisions included in the 1957 Treaty of Rome were only loosely based upon those in the ECSC Treaty, and arguably brought European antitrust closer to that of US antitrust, particularly by refocusing the second core provision (Article 82) on conduct that abused positions of market power. In the ECSC Treaty, the second core provision (Article 66) focused on concentrations, i.e. mergers, within relevant markets. The EC antitrust provisions are necessary to fulfil the objective laid out in Article 3(1)(g) EC Treaty, which provides that the EC shall include ‘a system ensuring that competition in the internal market is not distorted’. EC antitrust provisions were unenforceable until the Council adopted Regulation 17/62,¹⁷⁵ which provided an enforcement framework and granted necessary investigatory and decision-making powers to the European

¹⁷⁴ There was, however, undoubtedly US antitrust influence on the drafting of Articles 65 and 66 of the ECSC Treaty, not least as the drafter was a US antitrust lawyer, Robert Bowie. See D.G. Goyder, *EC Competition Law* (3rd Ed, Oxford, Oxford University Press, 1998) at p23, note 10 referring to F. Duchêne, *Jean Monnet, the First Statesman of Interdependence*, (Norton, 1994) at p.213.

¹⁷⁵ Regulation No 17: *First Regulation implementing Articles [81 and 82] of the Treaty* [1962] O.J. 13/204.

Commission. The Commission is undoubtedly the principal EC antitrust authority and is commonly regarded as a ‘mature’ authority alongside the US DOJ, FTC and other international counterparts. Regulation 17/62 had provided for a centralised enforcement mechanism for Articles 81 and 82, but has since been replaced by Regulation 1/2003,¹⁷⁶ which entered into force on 1st May 2004 and involved national competition authorities (NCAs) in the enforcement of Articles 81 and 82. Note that the thesis tends to focus upon international antitrust, to the exclusion of the uniquely intra-EC situation.

2.6.3 The main EC antitrust provisions, namely Articles 81 and 82 of the Treaty of Rome, are often compared with §1 and §2 of the Sherman Act,¹⁷⁷ which primarily target coordinated and unilateral anti-competitive behaviour respectively. Both jurisdictions also contain distinct provisions for merger control. The core provisions establishing US merger control stem from the Clayton Act, which was enacted 24 years after the Sherman Act. The EC also has distinct provisions for merger control, initially by virtue of Regulation 4064/89,¹⁷⁸ which has been replaced by Regulation 139/2004.¹⁷⁹ The Treaty of Rome, unlike the Treaty of Paris, does not include explicit rules providing for merger control. In spite of some *prima facie* similarities between the US and EC antitrust regimes however, there are notable policy and procedural differences between the jurisdictions. A

¹⁷⁶ Council Regulation 1/2003 *on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty* [2003] O.J. 1/1.

¹⁷⁷ 15 U.S.C. §1 & §2.

¹⁷⁸ Council Regulation (EEC) No 4064/89 *of 21 December 1989 on the control of concentrations between undertakings* [1989] O.J. L395/1, corrected version in [1990] O.J. L257/13.

¹⁷⁹ Council Regulation (EC) No 139/2004 *of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)* [2004] O.J. L24/1.

particular source of tension between the jurisdictions, and indeed between the US and many other jurisdictions, appears to have been the appropriate objectives for an antitrust regime. While a full assessment of the respective policies and procedures is unnecessary and better left to other researchers and projects, a brief consideration of the policy differences is useful. A short discussion of possible divergences between the US and EC enables a better appreciation of the tensions and conflict that can arise in international antitrust, particularly in light of the increasing use of extraterritoriality, discussed *infra*.

2.6.4 The primary motivational factor for the US congress instigating antitrust legislation in 1890 appears to have been the growing power and market strength of US railway trusts in the late 19th century. Bork highlights Senator Sherman's discussion regarding the legality of the predatory pricing strategies of the Standard Oil Company, and of cartel agreement and monopolistic horizontal mergers more generally, during the passage of the Sherman Act.¹⁸⁰ The Sherman Act was likely a reactive attempt to restore free trade when anti-competitive activity was damaging the general consumer interest. The inclusion of antitrust

¹⁸⁰ R.H. Bork, *The Antitrust Paradox: A Policy at War With Itself* (New York, Free Press, 1993) at p.20, Senator Sherman's proposition appeared to be that the Sherman Act would merely be a codification of the existing common law within the US at that time. Yet Bork suggests a lot of the cases at the time suggests the Sherman Act in fact did not accurately reflect the common law position. R.J.R. Peritz, *Competition Policy in America, 1888 – 1992: History, Rhetoric, Law*, (2nd Ed, Oxford, Oxford University Press, 2000) appears to be less sceptical of Senator Sherman highlighting the Act's historical context and common law language in chapter 1 (although Sherman's draft bill did not contain much of the common law language present in the final Act, Peritz states that 'we now take for granted that there are, or should be, no significant differences between the two versions' at p.14).

provisions within the Treaty of Rome was not, however, in response to damaging anti-competitive activity ongoing in the late 1950s,¹⁸¹ nor was it a direct attempt to protect consumer welfare. The rationale behind including antitrust provisions in the Treaty of Rome, as well as outlining the objective in Article 3(1)(g), was clearly to facilitate and further market integration, but also more generally to further all the goals of the European Community. These wider goals and objectives of EC antitrust appear to be a source of divergence with US antitrust authorities, with US commentators occasionally suggesting EC law strays into protecting competitors instead of the process of competition.¹⁸² As the EU represents a political aspiration of harmonisation across many spheres of society, the policies can reflect more than that of ‘pure competition’. A US argument would likely suggest that antitrust regimes should operate independently from ‘non-competition’ policies and objectives. Nonetheless it is clear that ‘non-competition’ objectives have always influenced the application of EC antitrust,¹⁸³ although there is strong evidence that this influence has been in gradual decline for some years. It is likely that there has been significant convergence between the two jurisdictions in recent years as the European commission affords greater priority to economic theory and analysis when implementing EC antitrust law.

¹⁸¹ Although it is arguable that the competition provisions within the Treaty of Paris, and indeed the ECSC itself, were part of a reaction to the belief that anti-competitive activities had aided Hitler’s power base in pre-World War II Germany, see e.g. P.J. Slot, ‘A view from the mountain: 40 years of developments in EC competition law’ (2004) 41 *CML Rev* 443 at p.445, and generally chapter 3 in D.G. Goyder, *EC Competition Law* (3rd Ed, Oxford, Oxford University Press, 1998).

¹⁸² See e.g. E.M. Fox, ‘We Protect Competition, You Protect Competitors’ (2003) 26 *World Comp.* 149, and W.J. Kolasky, ‘What is competition? A comparison of US and European perspectives’ (2004) Spring-Summer *The Antitrust Bulletin* 29.

¹⁸³ See discussion in J. Galloway, ‘The pursuit of national champions: the intersection of competition law and industrial policy’ (2007) 28 *ECLR* 172; and J. Tunney, ‘Is the emerging legal concept of culture the cuckoo’s egg in the EU competition law nest?’ (2001) 22 *ECLR* 173.

The former Competition Commissioner, Mario Monti highlighted the convergence by stating:

‘We can confidently say that we share the same goals and pursue the same results on both sides of the Atlantic: namely, to ensure effective competition between enterprises, by conducting a competition policy which is based on sound economics and which has the protection of consumers as its primary concern’.¹⁸⁴

Nonetheless, the view that the protection of consumers represents a *primary* concern for both authorities ironically highlights a potential point of continuing divergence in policy. Many years of US policy statements and speeches help confirm this point, e.g. Deputy Assistant Attorney General Kolasky’s speech stating:

‘Misguided competition policy, designed to maintain fragmented markets or protect small business, retards growth and undermines faith in free markets. We [that is the US and other antitrust authorities] need to agree, therefore that the sole objective of competition policy is consumer welfare’.¹⁸⁵

For the US, there can be no other legitimate goal for antitrust than consumer welfare, hence this may always remain a point of divergence between both jurisdictions and indeed between the US and many others also. There is therefore clear potential for conflict in international antitrust stemming from policy divergence, in addition to potential conflicts stemming from procedural or substantive divergence.

2.6.5 To further understand the development of ‘international antitrust’ it is important to consider the approach of the European Commission and EC judiciary (the

¹⁸⁴ Speech at the ABA General Counsel Round Table, 14th November 2001, entitled ‘*Antitrust in the US and Europe: a History of Convergence*’.

¹⁸⁵ Before the American Bar Association Fall Forum in Washington DC on 7th November 2002.

European Court of Justice, ECJ, and Court of First Instance, CFI) towards non-EC firms when enforcing EC antitrust laws. It is important to consider whether the European Commission has a similar approach to non-domiciliary antitrust violations to that of the US antitrust authorities. Additionally, it is important to investigate whether EC law has adopted some form of the US effects doctrine in order to protect EC markets from anti-competitive behaviour stemming from non-EC firms.

Given that Germany is one of the founding EC Member States, it is useful to note that Section 130, paragraph 2 of the German Act Against Restraints of Competition provides: ‘This Act shall apply to all restraints of competition having an effect within the area of application of this Act, also if they were caused outside the area of application of this Act’. The provision has been in place since the Act was passed in 1958, and was probably foreseen while the Act was in draft form since 1952. Nonetheless, perhaps surprisingly, there is no similar provision in the EC Treaty and hence there is little guidance on the intended territorial scope of Articles 81 and 82. In contrast to the German position on territorial jurisdiction, the UK government, prior to being an EU Member State, submitted an aide-mémoire to the European Commission¹⁸⁶ following the Commission decision in *Dyestuffs*.¹⁸⁷ The aide-mémoire criticised the extraterritorial reach of EC antitrust law, and laid out the criteria, according to the UK government, by which authorities should be able to seize jurisdiction in antitrust. The UK asserted that

¹⁸⁶ The text of which is set out in I. Brownlie, *Principles of Public International Law* (5th Ed, Oxford, Oxford University Press, 1998) at p.317.

¹⁸⁷ *Re the Cartel in Aniline Dyes* [1969] O.J. L195/11.

jurisdiction must be based on the territoriality or nationality principle under international law, a point to which all jurisdictions would likely agree. Divergence can arise however, in the interpretation of the territoriality principle. The UK government also provided its view of the correct interpretation of the territoriality principle in order for there to be jurisdiction. The UK argued that offenders must have carried on the anti-competitive activity, in whole or part, within the seizing territory. Hence the UK government believed seizing jurisdiction when the anti-competitive activity was conducted beyond the territorial borders of the EC was an *ultra vires* act by the Commission and also argued that the effects doctrine, or variations, had no place in EC law. It is likely that the UK action was prompted by the Commission's decision to fine ICI, given ICI's status as a company incorporated under UK law and based within the UK.

ICI appealed against the Commission decision to the ECJ, arguing on the same rationale as that of the aide-mémoire. In *ICI v. Commission*¹⁸⁸ (the 'Dyestuffs' case) the Commission primarily argued for the express recognition and application of the effects doctrine under Community law, although it was their secondary argument that led to the dismissal of the appeal. The case concerned an alleged cartel operating in the market for aniline dyes. None of the alleged conspirators were based within the EC and all offending activity originated from outside the EC's borders. The Commission's second argument focused on the relationship between ICI and its Belgian subsidiary company, which ICI had been directing on how to act. The Commission successfully argued that the ECJ should

¹⁸⁸ Case 48/69, [1972] ECR 619.

ignore the separate legal personality accorded to ICI and its subsidiary, as the subsidiary was under the control and direction of ICI. Furthermore ICI should be regarded as operating within the Common Market through its subsidiary, and on that basis jurisdiction could be seized. In spite of Advocate General Mayras advising the Court to recognise the effects doctrine, the ECJ endorsed the Commission's argument linking a parent to its subsidiary in order to seize jurisdiction.¹⁸⁹ This has since become known as the single economic entity doctrine.

2.6.6 While the single economic entity doctrine enabled the ECJ to circumvent the issue of the effects doctrine in *Dyestuffs*, it merely delayed the need to rule on its possible existence in EC law. In *Dyestuffs* Advocate General Mayras recommended that the Commission decision should be upheld on the basis of the effects doctrine which was controversial as there had not been any previous express or implicit recognition of the doctrine's existence in EC law. The Advocate General laid out three conditions that if satisfied, should entitle the authorities to assert jurisdiction. In the context of Article 81, if the agreement or concerted practice: created a direct and immediate restriction of competition in the jurisdiction; if that effect was reasonably foreseeable; and if the effect produced in the jurisdiction was substantial, then jurisdiction could be seized.¹⁹⁰ Advocate General Mayras foresaw a limitation upon the use of the effects doctrine however, as he did not believe 'enforcement jurisdiction' could be seized by the

¹⁸⁹ *Ibid.* at paragraphs 132 – 140.

¹⁹⁰ *Op. cit.* note 188.

Commission or EC Courts. It was thought that enforcement jurisdiction would infringe the territorial sovereignty of the state in which the offender was either based or carrying out their activities, and thus the Advocate General doubted the ability to enforce the penalties imposed for infringing EC antitrust law, against non-EC firms. It took a further 16 years before the question of the effects doctrine again arose before the ECJ.

2.6.7 The *Wood Pulp*¹⁹¹ case concerned a cartel of 41 producers and two trade associations apparently price fixing in the wood pulp industry, all firms had their registered offices outside the European Community. The European Commission relied upon Advocate General Mayras' opinion in *Dyestuffs* and asserted jurisdiction on the basis that the price fixing created a direct and immediate restriction of competition within the EC. Additionally that effect was reasonably foreseeable to the wood pulp producers, and the effect within the Community could be regarded as substantial. This direct, reasonably foreseeable and substantial test espoused by Advocate General Mayras is the same as that in the US FTAIA, discussed *supra*. The Commission decision fined 36 of the wood pulp producers for breach of Article 81(1) EC Treaty, and many of the firms appealed the decision to the ECJ on two grounds. The first ground was on the basis that the Commission had no jurisdiction to impose penalties in the case, and the second ground was regarding the substance of the Commission decision and definition of concerted practice. Initially the ECJ heard the appeal on the first ground and the

¹⁹¹ Commission Decision *Wood Pulp* [1985] O.J. L85/1.

resulting decision is known as *Wood Pulp I*,¹⁹² and the decision on the second ground of appeal is known as *Wood Pulp II*.¹⁹³

In *Wood Pulp I*, as in *Dyestuffs*, the Advocate General advised the Court that the Community was entitled to and should seize jurisdiction on the basis of the effects doctrine. AG Darmon reviewed relevant international and US law on the subject and concluded the EC would be better served by the express recognition of the effects doctrine. The ECJ decided against using the phrase ‘effects doctrine’ in its ruling, although gave some form of endorsement of extraterritoriality. The ECJ ruled:

‘If the applicability of prohibitions...were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. The decisive factor is therefore the place where it is implemented. The producers in this case implemented their pricing agreement within the Common Market. It is immaterial in that respect whether or not they had recourse to subsidiaries, agents, sub-agents, or branches within the Community in order to make their contacts with purchasers within the Community. Accordingly the [EC’s] jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognised in public international law.’¹⁹⁴

It is therefore clear that the ECJ has developed the theory of ‘implementation’ to enable the extraterritorial application of EC antitrust laws. It is debatable whether this theory significantly differs from the effects doctrine. Some academics¹⁹⁵ have suggested that ‘implementation’ could not extend to cases involving refusal to supply as the suppliers, based outside the EC, would have no positive effect

¹⁹² Cases 89, 104, 114, 116, 117 and 125-129/85, *A. Ahlström Oy v. Commission* [1988] ECR 5193.

¹⁹³ Cases 89, 104, 114, 116, 117 and 125-129/85, *A. Ahlström Oy v. Commission* [1993] ECR I-1307.

¹⁹⁴ *Op. cit.* note 192 at paragraphs 16 – 18.

¹⁹⁵ See for example: W. Van Gerven, ‘EC Jurisdiction in Antitrust Matters: The Wood Pulp Judgment’ [1989] *Fordham Corporate Law Institute* 451 (paper), at 471.

within the internal market by refusing to supply an undertaking within the EC. The effects doctrine, by comparison, appears capable of applying to positive and negative effects within the seizing jurisdiction.

2.6.8 The question of extraterritoriality must also be briefly considered within the context of EC merger control. The relevant provisions are encompassed within the revised ECMR.¹⁹⁶ Similarly to Article 81 and 82 of the Treaty of Rome, the ECMR makes no explicit provision as to its territorial reach, although it establishes an *ex ante* review mechanism comparable in principle to the US Hart-Scott-Rodino Act. The ECMR requires merging parties to submit pre-merger notification to the European Commission in the event that the proposed ‘concentration’, or transaction, has a ‘Community dimension’. The legal test of ‘Community dimension’ is satisfied, and hence notification is required, if turnover thresholds are met. The principle threshold is satisfied if the aggregate worldwide turnover of merging parties is more than €5,000 million, and the aggregate Community-wide turnover of each firm is more than €250 million.¹⁹⁷ There are, however, further exceptions to the thresholds as well as a secondary test.¹⁹⁸ Recital 10 of the ECMR provides some further guidance on the extraterritorial applicability of EC merger control by stating:

‘...where the aggregate turnover of the undertakings concerned exceeds given thresholds; that is the case irrespective of whether or not the undertakings effecting the concentration have their seat or their principal

¹⁹⁶ *Op. cit.* note 14. For a comprehensive discussion of the EC merger control regime see M. Furse, *The Law of Merger Control in the EC and the UK* (Oxford, Hart Publishing, 2007).

¹⁹⁷ Article 1(2) Regulation 139/2004, *op. cit.* note 14.

¹⁹⁸ Article 1(2) and (3) of Regulation 139/2004, *op. cit.* note 14.

fields of activity in the Community, provided they have substantial operations there’.

In practical terms, it is clear that the ‘Community dimension’ test provides the Commission with broad jurisdiction to investigate and render decisions with regard to all types of proposed concentrations, irrespective of their national base of operations. EC merger control prohibits the consummation of the merger during the period of review,¹⁹⁹ and has a comparable two phase review period to that of US antitrust. International convergence on the differing stages of merger control is considered in detail *infra* at 5.5.

2.6.9 The interaction of domestic merger control regimes on the international stage is a particularly interesting area of international antitrust for several reasons. Firstly perhaps due to the large sums involved, there is often media coverage and unusually high public awareness of the commercial behaviour that is subject to antitrust scrutiny. Secondly, international mergers have the potential to involve a ‘national champion’ dimension, which can complicate the legal and economic process and assessment with public interest considerations and political intervention.²⁰⁰ If undertakings become regarded as national representatives on the international stage, it creates tension and scepticism between antitrust authorities as to the rationale underlying clearance or prohibition decisions. Clearly the international merger control framework, i.e. the interaction of domestic merger control regimes, creates a great potential for conflict between

¹⁹⁹ *Op. cit.* note 14 at Article 7.

²⁰⁰ For a discussion of the interaction between merger control and industrial policy see J. Galloway, *op. cit.* note 183.

authorities, perhaps due to the juxtaposition of international markets and national interests.

It is these considerations that led to the notoriety of many Commission decisions such as the conditional clearance of the Boeing/McDonnell Douglas merger,²⁰¹ the prohibition decision and subsequent court case involving the proposed Gencor/Lonrho merger,²⁰² and the controversial prohibition of the merger between General Electric and Honeywell.²⁰³ While some of these cases will be considered in further detail at later stages of this thesis, it is the decision of the Court of First Instance in *Gencor*²⁰⁴ that completes the discussion of extraterritoriality in EC antitrust.

2.6.10 *Gencor* concerned a proposed merger between the platinum and rhodium mining interests of Gencor and Lonrho Platinum Division (LPD) in South Africa. Both Gencor and LPD were incorporated companies under South African law, although LPD was a subsidiary of Lonrho, a UK incorporated company. These companies already had significant market shares in the platinum metals market, and would effectively form a duopoly with the market leader, Anglo-American, post-merger. The South African antitrust authorities cleared the transaction and stated a preference for a post-merger duopoly, to the pre-merger situation of single-firm

²⁰¹ [1997] O.J. L336/16.

²⁰² Case IV/M 619, [1997] O.J. L11/30, [1999] 4 CMLR 1076 and subsequently Case T-102/96 *Gencor Ltd. v. European Commission* [1999] ECR II-753.

²⁰³ Commission Decision in *GE/Honeywell*, Case No COMP/M.2220 [2004] O.J. L48/1, and the Court of First Instance rulings on 14 December 2005 in Cases T-209/01 *Honeywell v. Commission* [2005] ECR II-5527 and T-210/01 *General Electric v. Commission* [2005] ECR II-5575.

²⁰⁴ *Op. cit.* note 202.

dominance, i.e. Anglo-American was dominant. The European Commission then reviewed the proposed concentration and ruled that the resultant duopoly would have a negative and anti-competitive impact upon sales within the EC, and that the concentration would lead to the strengthening of a collective dominant position and it was thus incompatible with the common market. The Commission prohibited the merger. On appeal before the CFI, Gencor argued that: i) the Commission had no jurisdiction under the ECMR as the activities involved took place in South Africa, and thus did not meet the ‘substantial operations’ requirement outlined in Recital [10]; also that ii) if the Commission could seize jurisdiction under the ECMR, then that should be declared unlawful due to its incompatibility with the territoriality principle under public international law. The Court was unconvinced by Gencor’s assertions.²⁰⁵ The CFI upheld the Commission prohibition, and unexpectedly addressed the question of extraterritoriality directly, in spite of the possibility of asserting jurisdiction on the basis of LPD being a subsidiary of Lonrho, which was based within the Community. In general terms, the CFI held that the Article 1 Community dimension test was sufficient to assert jurisdiction, and stated that by satisfying the turnover thresholds due to sales within the EC, the merging parties satisfied the ‘substantial operations’ requirement of Recital 11 of Regulation 4064/89 (now Recital 10 of Reg. 139/2004). Additionally, the sales formed the basis for finding that the ‘implementation’ test established by the ECJ in *Wood Pulp I*,²⁰⁶ had been

²⁰⁵ *Op. cit.* note 202 at paragraphs 78-111 for the detailed reasoning for rejecting both grounds of annulment of the Commission decision.

²⁰⁶ *Op. cit.* note 192.

satisfied in this case. In responding to Gencor's plea regarding compatibility with the territoriality principle under public international law, the CFI held:

'Application of the Regulation is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect within the [EC]...It is therefore necessary to verify whether the three criteria of immediate, substantial and foreseeable effect are satisfied in this case'.²⁰⁷

The CFI concluded that the tripartite criteria was satisfied, and declared the application of the ECMR to be consistent with principles of public international law.²⁰⁸ The ruling again highlights similarities between the EC implementation doctrine and the US effects doctrine, particularly the test within the FTAIA. Clearly, the EC and US both recognise the legitimacy of extraterritoriality in antitrust as a means of protecting domestic markets from anti-competitive behaviour, and ensure that the globalisation of trade cannot circumvent the application of domestic antitrust laws.²⁰⁹

2.7 Combating effects

2.7.1 The general notion of extraterritoriality in antitrust has always tended to receive criticism with claims that there can be no basis for jurisdiction under international law. Such claims have consistently been dismissed by the US judiciary since the Supreme Court decision in *International Shoe*²¹⁰ in 1945, which facilitated the

²⁰⁷ *Op. cit.* note 202 at paragraphs 90 and 92.

²⁰⁸ *Op. cit.* note 202, at paragraph 101.

²⁰⁹ For further discussion of the Gencor judgment see: G.P. Elliot, 'Case Comment: The Gencor Judgment: Collective Dominance, Remedies and Extraterritoriality under the Merger Regulation' (1999) 24 *EL Rev* 638, and E.M. Fox, 'The Merger Regulation and its Territorial Reach' (1999) 20 *ECLR* 334.

²¹⁰ *Op. cit.* note 39.

development of the effects doctrine along with the *Alcoa*²¹¹ case in the same year. Nonetheless, the legality of extraterritoriality under international law is not as beyond doubt as the US court rulings suggest. It becomes necessary to draw a distinction between jurisdiction to prescribe and jurisdiction to enforce (the latter was highlighted as problematic by AG Mayras in *Dyestuffs*), and while the notion of extraterritoriality can encompass both types, its legality under international law can depend upon which type of jurisdiction is being exercised. The reason for the distinction is that a state's ability to assert jurisdiction has restrictions imposed by international law, and in exercising enforcement jurisdiction there can often be a disregard of these restrictions. The Permanent Court of International Justice (PCIJ) discussed the restrictions upon a state when exercising jurisdiction in its judgment in the case of the *S.S. 'Lotus'* in 1927:

'the first and foremost restriction imposed by international law upon a state is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another state. In this sense jurisdiction is certainly territorial; it cannot be exercised by a state outside its territory except by virtue of a permissive rule derived from international custom or from a convention. It does not, however, follow that international law prohibits a state from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law...this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every state remains free to adopt the principles which it regards as best and most suitable...In these circumstances all that can be required of a state is that it should not overstep the limits which international law places upon

²¹¹ *Op. cit.* note 30.

its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty'.²¹²

The judgment clearly allows for the possibility of a judicial decision seizing jurisdiction on the basis of effects within a territory emanating from outside, under international law. Although it is less certain whether the judgment allows for the enforcement of such a decision against persons and/or property based outside the territory, i.e. enforcement jurisdiction, it may be that attempting to assert enforcement jurisdiction would be to ignore the limitations upon a state's jurisdiction as envisaged by the PCIJ.²¹³

2.7.2 In the absence of authoritative comment to the contrary, focus again shifts to the PCIJ judgment, which suggests enforcement jurisdiction can only be exercised on the basis of the territoriality principle. The US would presumably argue that the effects doctrine is based upon the territoriality principle, and hence when enforcing judgments rendered by virtue of that principle, there is no conflict with international law. The problem however, is not how the US regards application of the effects doctrine, but how other states regard the extraterritorial application of US domestic law, again requiring the distinction between prescriptive and enforcement jurisdiction. The exercise of extraterritorial prescriptive jurisdiction by the US was certainly criticised by many and met with hostile *amicus curiae*

²¹² The *Lotus Case*, Publications of the Permanent Court of International Justice, 7th November 1927, Series A, No 10, *Government of the French Republic v. Government of the Turkish Republic*

²¹³ The author is aware that many academics dispute the PCIJ judgment that international law places limits upon a state's jurisdiction and instead assert that it is international law that confers jurisdiction upon states. For the purposes of this research the more authoritative position has been adopted while the merits of the alternative argument are acknowledged. For further discussion see: C.J. Olmstead (Ed), *Extra-territorial Application of Laws and Responses Thereto*, (ESC Publications, 1984), chapter 3 by Professor Weil at p.32 onwards.

briefs, yet it was only when the US tried to exercise extraterritorial enforcement jurisdiction that there was a fierce defensive reaction by many states, causing legislative responses, known as blocking statutes.

2.7.3 Extraterritorial assertions of enforcement jurisdiction are obviously couched in different terminology. Zanettin provides clear examples: the discovery of information; notification and service of process; and enforcement of sanctions and remedies²¹⁴ are all well established facets of the domestic legal process, but which can nonetheless cause international disputes when involving a foreign subject. These activities, the first and third in particular, are distinct from extraterritorial assertions of prescriptive jurisdiction in the sense that while the latter may in principle infringe the sovereignty of a foreign state, no physical act encroaches upon the territory of another. The three facets above can, however, represent assertions of jurisdiction by one state within the territory of another, and thus the potential for diplomatic confrontation. The discovery of information is clearly an essential stage in investigations by any state body, and particularly important for antitrust authorities given the need to gather information on commercial activities and market effects. The US courts allow for formal requests for information to be served on firms since *Alcoa*. It is important to note that such requests are made by virtue of a court ruling in the investigative state, and without any formal or implied recognition in the state where the information is located. Such formal requests, when served on foreign firms that are the subject of antitrust

²¹⁴ *Op. cit.* note 8 at pp.42-49 where Zanettin discusses the problems of these stages in a case with an international dimension.

investigations, have resulted in many states passing blocking legislation in order to prevent the firms being compelled to disclose information by the US judiciary.

2.7.4 The first blocking statute was likely passed in Canada. The Business Records Protection Act was passed by the Province of Ontario in 1947, and was in response to a US court ruling.²¹⁵ The US court ordered Canadian newsprint companies to produce documents in compliance with grand jury subpoenas, which were issued in a US antitrust investigation into the Canadian paper industry. The defensive nature, i.e. protection of territory and sovereignty, of the 1947 Act is clear from the following extract:

‘No person shall, pursuant to or under or in a manner consistent with compliance with any requirement, order, direction or subpoena of any legislative, administrative or judicial authority in any jurisdiction outside Ontario, take or cause to be taken, send or cause to be sent or remove or cause to be removed from a point in Ontario to a point outside Ontario, any account, balance sheet, profit and loss statement or inventory or any resume or digest thereof or any other record, statement, report, or material in any way relating to any business carried on in Ontario...’²¹⁶

The Act provided for exceptions to the general prohibition in s.1, although these were of a strict nature and did not detract from the strong protection for business in Ontario from US court rulings. The rationale behind the legislation was clear when Premier Drew of Ontario highlighted concerns regarding the implication that the US government has the: ‘...right...to invade the territorial integrity of Canada without application to the Canadian Government, to any Canadian Court, or to any established channel of international representation in regard to

²¹⁵ *In Re: Grand Jury Subpoena Duces Tecum Addressed to Canadian International Paper Company*, 73 F. Supp. 1013 (1947).

²¹⁶ Extract sourced from A.V. Lowe, *Extraterritorial Jurisdiction; an annotated collection of legal materials*, (Grotius Publications, 1983) at p.101.

international business'.²¹⁷ Although the 1947 Act may have been the first statute passed to prevent foreign discovery, it was certainly not the last. Subsequent legislative measures included: the Dutch Article 39 of the Economic Competition Act in 1956; the Quebecoise Business Concerns Records Act 1964; the Australian Foreign Proceedings (Prohibition of Certain Evidence) Act 1976; the South African Protection of Business Act 1978; the New Zealand Evidence Amendment Act 1980; the Philippines Presidential Decree No.1718 of 1980;²¹⁸ and the UK Protection of Trading Interests Act 1980. The magnitude of international unrest at US extraterritorial assertions of enforcement jurisdiction during this period is clear.

2.7.5 The third facet of the legal process mentioned, enforcement of sanctions and remedies, in international cases also produced retaliatory measures. The particularly controversial aspect of enforcement in this context is not the judgment itself but the sanction, i.e. fines or awards of damages against the foreign firm. The controversy is heightened due to the existence of treble damages in US antitrust, which is of course of a punitive nature. The response by certain states to assertions of enforcement jurisdiction by the US in this context, i.e. awards of multiple damages against non-US firms, represented a deepening of the extraterritorial jurisdiction dispute. Certain blocking statutes, notably s.6 of the

²¹⁷ Quoted in April, 'Blocking Statutes as a Response to the Extra-territorial Application of Law', in C.J. Olmstead, *op. cit.* note 213, at p.225.

²¹⁸ See A.V. Lowe, *op. cit.* note 216, at pp.79-225 for further details.

UK Protection of Trading Interests Act 1980,²¹⁹ provided for the recovery of awards of multiple damages by a foreign court against a company incorporated in the legislating state. These ‘clawback’ provisions drew an unusually high level of criticism from the US Government and US legal scholars commenting that the provisions enabled ‘clawback’ without an assessment of the jurisdictional basis upon which the ruling awarding multiple damages was based.²²⁰ That particular point does not appear to have been adequately rebutted, although the 1980s ushered in a period of less controversy and greater cooperation in international antitrust, and the blocking statutes quickly diminished in importance.

2.8 Flawed unilateralism

2.8.1 The number and scale of the diplomatic disputes as a result of US extraterritoriality can be easily under-estimated, indeed a US antitrust enforcement official once noted that: ‘there have been five diplomatic protests of US antitrust cases for every instance of express diplomatic support, and three blocking statutes for every co-operation agreement’.²²¹ On reflection the hostile foreign reaction to US extraterritoriality did not accomplish a great deal. Neither the 1947 Ontario blocking statute nor later legislation can be said to have altered the direction of US antitrust, nor the development of the effects doctrine to a

²¹⁹ For discussion see A.V. Lowe, ‘Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act’ (1980) 75 *Am J. Int’l L.* 257, and L. Collins, ‘Blocking and Clawback Statutes: The UK Approach’ (1986) *Bus. L.* Part 1 at 372, Part 2 at 452.

²²⁰ See e.g. April, *op. cit.* note 217.

²²¹ See J.P. Griffin, ‘Foreign Governmental Reactions to US Assertions of Extraterritorial Jurisdiction’ (1998) 19 *ECLR* 64, and further J. Davidow, ‘Extraterritorial Antitrust and the Concept of Comity’ (1981) 15 *J World Trade Law* 500 at 502.

significant extent. Referring to 2.3.5 - 2.4.4 *supra*, while the *Timberlane*²²² and *Mannington Mills*²²³ cases adopted a balancing approach taking international comity concerns into consideration, the Supreme Court decision in *Hartford Fire*²²⁴ reversed this approach and exemplified two points. Firstly, comity concerns do not have a significant bearing upon the outcome of US antitrust cases, and secondly the US government and antitrust authorities are somewhat limited in their ability to alter the development of the effects doctrine by the judiciary.²²⁵ Therefore, even if the US government took account of foreign, and indeed some domestic, criticism, it would require legislation to alter the extraterritorial effect of antitrust given the prevalence of private enforcement in the US. By the 1970s it was obvious that in order to alter the unilateralist antitrust approach adopted by the US since the mid-1940s, another factor with the potential to harm US interests would have to emerge.

For a long period the US was the sole jurisdiction adopting extraterritoriality in antitrust enforcement, as other states either had no antitrust regime or did not adopt an extraterritorial approach. Thus, US firms were not subject to foreign antitrust enforcement. The US authorities were the only authorities subjecting international markets to antitrust scrutiny and could ignore foreign protests as no other state presented a challenge to US interests. However, once other states

²²² *Op. cit.* note 56.

²²³ *Op. cit.* note 61.

²²⁴ *Op. cit.* note 88.

²²⁵ The Joint US antitrust authority guidelines, *op. cit.* note 102, indicate that the US authorities take comity concerns into consideration while investigating antitrust cases, yet those guidelines have no influence in private litigation, which often involves foreign litigants.

adopted antitrust laws and altered their position to apply those laws with extraterritorial effect, US firms became subject to both US and foreign antitrust laws. Multiple antitrust authorities created the clear potential for ‘regulatory overlap’ and surely represented a threat to US interests. Arguably it is the growth of antitrust, and the increasing acceptance of extraterritoriality that forced the US to abandon its unilateralist approach to antitrust.

2.8.2 Trade liberalisation pursued through the GATT, and linked increases in the globalisation of trade effectively brought about the circumstances whereby states other than the US had to reconsider their view on the legality of extraterritorial application of antitrust law. In light of rises in cross-border trade since the late 1940s, certain states probably feared for the effectiveness of their enforcement regimes and the sovereignty of their territorial borders by the 1970s. World Trade import values rose from \$63.275 billion in 1948 to \$286.9 billion just 20 years later, and doubled to \$591.244 billion a mere five years after that in 1973.²²⁶ Rises in cross-border trade, coupled with increasing foreign investment, lead to greater economic dependency and integration in the industrialised world. These consequences highlight the practical limitations of antitrust when jurisdiction was strictly limited to territory. As Yergin and Stanislaw state: ‘Borders – fundamental to the exercise of national power – are eroded as markets are integrated’.²²⁷ Hence in order to effectively scrutinise cross-border trade, the antitrust authorities could

²²⁶ Trading figures sourced from the *1976 United Nations Yearbook of International Trade Statistics Volume 1*, Special Table A

²²⁷ D. Yergin and J. Stanislaw, ‘The Commanding Heights: The Battle Between Government and the Marketplace that is Remaking the Modern World’ in F.J. Lechner and J. Boli (Eds), *The Globalization Reader* (Oxford, Blackwell Publishers, 2000) at p.220.

no longer be strictly confined to national borders since the commercial behaviour was not. The subsequent recognition and use of extraterritoriality by antitrust authorities such as the European Commission was significant as it ended the 'monopoly' the US had held whilst presiding over international antitrust for decades.

2.8.3 The US perhaps initially welcomed some foreign acceptance of extraterritoriality in the 1970s, although this may have diminished with the realisation that foreign application of extraterritoriality in antitrust cases resulted in foreign jurisdiction over US firms. The US cannot criticise the means of asserting jurisdiction by extraterritoriality, and thus cannot prevent its firms and interests being subject to investigation by foreign antitrust authorities for the first time. In terms of the development of international antitrust, the concern was not the damage to US interests, but it was the potential and increasing likelihood of 'regulatory overlap' in international antitrust. Furthermore in the absence of a multilateral framework there was no mechanism to resolve any resulting conflict between the extraterritorial applications of domestic antitrust law. In this context it is readily apparent that a unilateral approach to antitrust is flawed and destined to fail, or at least result in ongoing conflicts between jurisdictions. Regulation of a global market can be neither effective nor efficient when pursued unilaterally, and Evenett, Lehmann and Steil have succinctly commented: 'As markets integrate

across national borders, the logic of purely national antitrust policy breaks down'.²²⁸

²²⁸ S.J. Evenett, A. Lehmann & B. Steil, (Eds), *Antitrust Goes Global: What future for transatlantic cooperation?* (Washington D.C., Brookings Institution Press, 2000) at p.13.

Increasing the risk of conflict and the advent of bilateral agreements

3.1 The growth of antitrust

3.1.1 It can be convincingly argued that the increased acceptance of extraterritoriality as a necessary tool for effective antitrust enforcement is a corollary to the increasing globalisation of trade. Antitrust authorities are willing to apply their rules with extraterritorial effect due to an awareness that commercial behaviour (including that with anti-competitive effects) taking place beyond their jurisdiction's territorial borders can be implemented and have effects upon markets and commerce in the jurisdiction. Perhaps reinforcing the willingness of antitrust authorities to intervene in de facto external activity are the clearly visible 'ripples' felt as a result of the integration of market economies. The ability of activity in one jurisdiction to adversely impact upon a geographically distant and detached jurisdiction is no longer a disputed and unfamiliar concept. The endorsement of extraterritoriality as a tool for antitrust enforcement can be characterised as a pragmatic development in light of the globalisation of trade and the visible ripple effects stemming from integration of market economies. Indeed Zanettin exemplifies this point when discussing the Canadian view of extraterritoriality, noting that it became obvious to antitrust officials 'that the refusal of the effects doctrine was no longer consistent with economic realities'.¹ There is also evidence² suggesting that globalisation of trade and market integration have been

¹ B. Zanettin, *Cooperation Between Antitrust Agencies at the International Level*, (Oxford and Portland, Hart Publishing, 2002) at p.23.

² Much of which is outlined in discussion of empirical analyses below, analyses that are supported by comparative study of the increasing 'globalisation of trade' (measured in this thesis by monetary values of

and remain important factors when a jurisdiction, previously without antitrust, decides to adopt rules of such a nature, i.e. both have contributed to the increasing acceptance as to the need for antitrust.

3.1.2 Following an extensive empirical analysis, Palim comments that the shift from centrally managed economies to market based economies was ‘by far the most cited reason for the growth in competition law around the world’.³ This explanation is certainly pertinent when considering the adoption of antitrust rules in Eastern Europe in the 1990s, following the collapse of the USSR. The explanation does not however, offer a complete picture of the growth of antitrust beginning with the end of the Second World War onwards. Palim cites the international study by Corwin Edwards, ‘Control of Cartels and Monopolies: An International Comparison’, in 1967 as the ‘classic’ study of antitrust, where Edwards found that there were 24 jurisdictions in 1964 that made a ‘serious attempt to control restrictive practices by law’.⁴ Strangely Edwards did not include the (then) European Economic Community in his research. In a later article, according to Palim, Edwards concluded that from 1964 to 1973, only India, Pakistan and Luxembourg had joined the 24 jurisdictions with antitrust

national and global imports and exports) and the increasing use of antitrust (both in terms of the number of regimes and also its increasing application/enforcement in jurisdictions with antitrust).

³ M.R.A. Palim, ‘The worldwide growth of competition law: an empirical analysis’ (1998) 43 *Antitrust Bulletin* 105 at p.112.

⁴ Extract from C.D. Edwards, ‘Control of Cartels and Monopolies: An International Comparison’ (1967), cited in M.R.A. Palim, *ibid.* The 24 countries with antitrust in 1964 were: Argentina, Australia, Austria, Belgium, Brazil, Canada, Colombia, Denmark, Finland, France, Germany, Ireland, Israel, Japan, Mexico, the Netherlands, New Zealand, Norway, Spain, Sweden, Switzerland, South Africa, the UK, and the US.

rules.⁵ Information provided to the Global Competition Forum suggests that Lebanon made a prima facie attempt to regulate monopolies and protect against excessive prices in 1967,⁶ and it may be that there was insufficient substance in the provisions for Edwards to include Lebanon in his second study. There was a steady increase in the number of antitrust regimes between Edwards' second study and the rapid growth of the 1990s discussed by Palim. Chile established rules for the defence of free competition with Decree Law No.211 of 1973, South Korea enacted the Price Stability and Fair Trade Act in 1975, and Greece passed legislation controlling monopolies and protecting free competition in 1977. El Salvador promulgated Article 110 of its Constitution prohibiting monopolistic practices in order to guarantee free enterprise and protect consumers by Decree No.38 in 1983. The Philippines included prohibitions upon certain monopolies and combinations in restraint of trade by virtue of s.19 of Article XII of its 1987 Constitution, although Palim suggests that the Philippines had antitrust provisions as early as 1956,⁷ conflicting with Edwards. Sri Lanka established a Fair Trading Commission, also in 1987. Cyprus adopted The Protection of Competition Law No. 207 in 1989.⁸ Including the (then) EEC, these jurisdictions raised the number of antitrust regimes to at least 35. In addition, Palim points out that Guatemala adopted antitrust rules in 1970, Thailand in 1979, Portugal in 1983, Kenya in

⁵ Edwards, 'The Future of Competition Policy: A World View', (1974) 14 *Cal Man Rev* 112, cited in M.R.A. Palim, *op. cit.* note 3.

⁶ Law No. 31 for the year 1967 granting the Government authority to combat high prices and monopolies by Promulgating Decrees, followed by Promulgating Decree No.32 of 1967 on anti-monopoly and high prices. See the Global Competition Forum website: www.globalcompetitionforum.org, which was created and is maintained by the International Bar Association.

⁷ M.R.A. Palim, *op. cit.* note 3 at p.109, footnote 15.

⁸ Information on this sporadic growth of antitrust through the 1970s and 80s has been primarily sourced from the Global Competition Forum website, *op. cit.* note 6.

1988 and Gabon in 1989.⁹ This would suggest that there were at least 40 antitrust regimes in existence before the antitrust explosion in the 1990s.

3.1.3 The 1990s antitrust explosion is demonstrated by the number of regimes exceeding 70 by the end of 1996,¹⁰ an increase of 84% in the 7 years from 1989 to 1996 and remarkable given that the increase in the previous 25 years was 58%. Current estimates suggest that the number of antitrust regimes now exceeds 100.¹¹ Not every antitrust regime includes provisions for merger control, although the number with merger control is still high at around 80 jurisdictions, discussed *infra* at chapter 5.¹² The significant number of antitrust authorities, creates a similarly significant ‘regulatory’ problem. The modern nature of the commercial activity that can concern antitrust authorities is borderless, particularly since the gradual breaking down of trade barriers through the GATT and then the WTO. Additionally, with the increasing acceptance of extraterritoriality and greater number of antitrust regimes, there is clear potential for overlap of enforcement activities. Merger control is a particularly sensitive area of overlap, where there is potential for conflicting decisions and significant burdens upon merging firms as a result of multi-jurisdictional merger review. In light of industrial policy

⁹ *Op. cit.* note 3.

¹⁰ See M.R.A. Palim, *op. cit.* note 3, and information of the Global Competition Forum website, *op. cit.* note 6.

¹¹ A.B. Lipsky Jr, ‘The global antitrust explosion: safeguarding trade and commerce or runaway regulation?’ (2002) Summer/Fall *Fletcher Forum of World Affairs* 59 at p.60. Also, R. Whish, *Competition Law*, (5th Ed, London, LexisNexis Butterworths, 2003) at p.782.

¹² R. Whish, *ibid.* at p.782, referring to J.W. Rowley and A.N. Campbell, ‘Multi-jurisdictional Merger Review – Is It Time for a Common Form Filing Treaty?’ in *Policy Directions for Global Merger Review* (Global Competition Review, 1999). Also, see speech by D.P. Majoras, former Deputy Assistant Attorney General, Antitrust Division, US DOJ, to the BIICL 2nd Annual Merger Control Conference, 2nd December 2003, London.

implications that can often stem from M&A, there can be additional political and trade-related dimensions to merger review, which can further complicate the matter. The international enforcement overlap in all areas of antitrust, which potentially increases in size and significance with each new antitrust regime, has a direct bearing on the effectiveness, efficiency and logic of adopting a unilateral approach to antitrust enforcement by any authority. As stated by the former European Commissioner for Competition, Karl van Miert: ‘...owing to the progressive disappearance of borders, behaviour of companies which may be contrary to the competition rules can affect several countries at the same time; this could lead to conflicts between competition authorities on the remedies to be adopted...’.¹³ In the current transnational world of trade, with the increasing number of antitrust authorities causing a greater likelihood of conflicting or even irreconcilable decisions, unilateral enforcement is flawed in cases with an international dimension.

3.2 Problematic divergence

3.2.1 Before progressing to outline and comment upon the tentative moves away from unilateralism in antitrust, which *inter alia*, aim to lessen the risk of conflict between antitrust authorities, one further factor must be discussed that heightens that risk. There is a varying degree of divergence between many jurisdictions regarding the purpose, scope and importance of antitrust law. The divergence can sometimes be reflected within terminology, while the thesis adopts ‘antitrust’ as a

¹³ *Competition Policy in the New Trade Order*, (European Commission Report, 1995) at p.4.

generic term, many jurisdictions will use other terms such as ‘competition law’, ‘fair trading law’, ‘laws against restrictive practices’, or even ‘laws against unfair competition’. The differing terminology may or may not also reflect more substantive differences. It is unnecessary to assess the reasons and extent of differences between the terms and any related substantive difference between jurisdictions. This section will, however, consider the implications of underlying divergence between jurisdictions for efforts to minimise the risk of conflict in international antitrust. It appears clear that underlying divergence can exist at three distinct levels: policy; procedural; and/or substantive.¹⁴

3.2.2 Any policy divergence between antitrust regimes can have obvious implications for hopes of avoiding conflict within particular cases. Policy objectives are relevant factors at the initial legislative design and development stage within jurisdictions and they are more subtly relevant at the enforcement stage, the latter taking both legislative interpretation and enforcement discretion into consideration. At the legislative development stage, essentially when a government is considering the structure of the antitrust regime and powers of the antitrust authority, there would ordinarily be a clear rationale for the adoption of antitrust rules¹⁵ and their desired effect would be clear. At the later enforcement stage, policies can manifest themselves in decisions taken when implementing

¹⁴ Discussion regarding multilateral initiatives in international antitrust in general, and merger control in particular *infra* at chapters 4 and 5 respectively, highlights the extent of current convergence efforts with regards to each of these three levels.

¹⁵ As an example of potential policy divergence, the reasons for adopting antitrust rules likely differs between developed and developing countries, and different reasons underlie the implementation of antitrust rules within the EC and US. Indeed, it may be that each jurisdiction has distinct reasons, perhaps even subtle differences, for adopting an antitrust regime.

antitrust rules and/or in the interpretation of those rules.¹⁶ Policy at this stage can affect the importance attached to antitrust within a particular jurisdiction, demonstrated by such factors as the resources made available to the antitrust authority, and the jurisdictional enforcement activity. Additionally, policy objectives undoubtedly impact upon the exercise of discretion¹⁷ by antitrust authorities. The potential impact of policy objectives upon enforcement strategies and decisions in individual cases makes avoiding conflict in international antitrust a complex and ongoing issue. Policies and priorities can alter over a relatively short period of time, e.g. when a new minister or government takes office,¹⁸ and it is not always easy to identify or confirm when a policy shift takes place.

Procedural divergence can stem from the structure of the antitrust regime, e.g. whether a one or two phase merger review process is adopted, or the procedural rules and guidance adopted by the antitrust authority. Procedural divergence between antitrust regimes is arguably less likely to lead to direct conflict between authorities than policy or substantive differences. Procedural divergence could nonetheless result in a greater burden upon the firms that are subject to multi-

¹⁶ Policy can be a consideration in judicial, as well as administrative, antitrust decisions, as demonstrated in the EC by the teleological approach adopted by the Court of Justice. The ECJ has often been said to be giving effect to the wider goals of the EU when interpreting the EC competition provisions, e.g. see discussion in J. Galloway, 'The pursuit of national champions: the intersection of competition law and industrial policy' (2007) 28 *ECLR* 172.

¹⁷ For detailed analysis of the use of discretion in antitrust, see chapter 4 in M.M. Dabbah, *The Internationalisation of Antitrust Policy* (Cambridge, Cambridge University Press, 2003).

¹⁸ As an example: a change of leadership within an independent antitrust authority could bring about a change of priorities and set a new enforcement strategy, and equally, a change of government can impact upon the doctrinal approach and enforcement strategies of an antitrust authority. For a discussion of the lessening impact of political change upon US antitrust enforcement by the US DOJ and FTC, see J.B. Baker, 'Competition policy as a political bargain', (2006) 73 *Antitrust L.J.* 483, and R. Pitofsky, 'Past, present and future antitrust enforcement at the Federal Trade Commission' (2005) 72 *University of Chicago Law Review* 209.

jurisdictional antitrust enforcement, and also diminish the ability of antitrust authorities to engage in effective cooperation. As will be discussed *infra* at chapters 4 and 5, there have been significant multilateral efforts to achieve greater procedural convergence in international antitrust.

Any points of divergence existing at the substantive level are perhaps the most challenging for a number of reasons. Substantive divergence can be the result of differing legislation, binding rules or case-law regarding legal standards, the investigatory powers, or the penalties for infringement. Substantive divergence is inherently more difficult to remedy as legislative changes would likely be required. To achieve greater substantive convergence between antitrust jurisdictions, political will is required as well as engagement in lengthy legislative processes. The prospect of consultation procedures and inevitable lobbying ensure that any substantive divergence existing between jurisdictions is difficult to reconcile, particularly if legal traditions are taken into consideration.¹⁹ Given that divergence can exist at any or all of these levels, at varying degrees, between the world's many antitrust regimes, the likelihood of conflict in international antitrust is increased. It is necessary to consider the initiatives that have tried to diminish or manage the risk, and this moves the thesis to consider the 'second face' of international antitrust, bilateralism in the context of cooperation agreements.²⁰ In

¹⁹ Legal traditions can have a bearing upon, inter alia, whether decision-making is judicial or administrative, whether regulators are independent of government, whether sanctions for breach of antitrust rules include those of a penal and criminal nature, and whether there can be individual liability. Such factors can lead to divergence and are not easily reconcilable given that legal traditions are often associated with the very culture of a state and far more deep-rooted than policy choices.

²⁰ Note that bilateralism in the context of enforcement cooperation will be considered in relation to merger review *infra* at 5.4.

order to appreciate the impact of bilateral agreements upon international antitrust as a whole, and not merely the impact on the relationship between the jurisdictions involved, it is necessary to undertake a detailed comparative assessment of the principal agreements in place. A detailed comparative assessment is also necessary to investigate why such agreements tend to take place at a bilateral and not multilateral level.

3.3 From unilateralism to bilateralism: the advent of antitrust cooperation agreements

- 3.3.1 ‘As business concerns have increasingly pursued foreign trade and investment opportunities, antitrust compliance issues have arisen which transcend national borders and have led antitrust authorities in the affected jurisdictions to communicate, cooperate, and coordinate their efforts to achieve compatible enforcement results’.²¹

The rationale for communicating, co-operating and co-ordinating to ensure compatible results, is the realisation that in the globalised context of commercial activity, reaching incompatible or irreconcilable decisions is an ineffective method of antitrust enforcement.²² The widespread recognition of the need for cooperation mechanisms between antitrust authorities is normally reflected within some form of agreement between either states or the antitrust authorities themselves. The historical model for bilateral agreements is peculiarly a multilateral instrument. In 1967, two decades after the failure of the Havana Charter and the ITO, members of the Organisation for Economic Cooperation and Development (OECD) reached agreement on a ‘Recommendation’ prescribing

²¹ J.J. Parisi, ‘Enforcement Cooperation Among Antitrust Authorities’ (1999) 20 *ECLR* 133 at p.133.

²² See discussion *supra* in chapter 2, particularly 2.8

basic principles of cooperation between member countries on restrictive business practices affecting international trade.²³ OECD Recommendations adopted by its governing Council are effectively non-binding instruments that are subject to member countries' domestic law.²⁴ The principles within the 1967 Recommendation on antitrust cooperation were expanded in 1973,²⁵ consolidated in 1979,²⁶ and further developed in 1986²⁷ and 1995.²⁸ Additionally, there is a 1998 Recommendation dealing exclusively with cartel activity,²⁹ a 2005 Recommendation concerning merger review,³⁰ and other specialised Recommendations.³¹

3.3.2 The consolidated 1995 Recommendation outlines the features of modern cooperation between antitrust authorities and advances many key principles, which are also implemented in most bilateral cooperation agreements. The fundamental and most basic requirement in the 1995 Recommendation is that

²³ OECD: Council Recommendation Concerning Cooperation between Member Countries on Restrictive Business Practices Affecting International Trade, 5th October 1967, reprinted in A.V. Lowe, *Extraterritorial Jurisdiction; an annotated collection of legal materials*, (Grotius Publications, 1983) at p.243.

²⁴ See OECD competition homepage:

http://www.oecd.org/topic/0,2686,en_2649_37463_1_1_1_1_37463,00.html.

²⁵ OECD: Council Recommendation Concerning Consultation and Conciliation Procedure on Restrictive Business Practices Affecting International Trade, 3rd July 1973, reprinted in A.V. Lowe, *Extraterritorial Jurisdiction; an annotated collection of legal materials*, (Grotius Publications, 1983) at p.244.

²⁶ OECD: Council Recommendation Concerning Cooperation between Member Countries on Restrictive Business Practices Affecting International Trade, 25th September 1979, C(79)154/Final.

²⁷ OECD: Council Recommendation Concerning Cooperation between Member Countries on Restrictive Business Practices Affecting International Trade, C(86)44/Final.

²⁸ OECD: Council Recommendation Concerning Cooperation between Member Countries on Anticompetitive Practices Affecting International Trade, 27th July 1995, C(95)130/Final.

²⁹ OECD: Council Recommendation Concerning Effective Action Against Hard Core Cartels, 25th March 1998, C(98)35/Final.

³⁰ OECD Recommendation of the Council on Merger Review, 25 March 2005 – C(2005)34, discussed in more detail *infra* at 5.5.

³¹ All current OECD Recommendations are available at:

http://www.oecd.org/document/59/0,2340,en_2649_37463_4599739_1_1_1_37463,00.html.

OECD member countries should notify counterparts when initiating an antitrust investigation or proceeding that could affect the ‘important interests’ of other member countries, and with such notice to enable the affected country to comment on the investigation.³² It is highlighted however, that notification will not restrict the freedom of the investigating country to make the final decision in the case, i.e. notification does not impact upon the sovereignty of the jurisdictions involved. Notification has become a fundamental principle in international antitrust, and is designed to avoid much of the hostility to extraterritorial antitrust enforcement encountered in the 1950s through to 1980s.³³ The assumption appears to be that information sharing regarding ongoing proceedings and opportunities for affected jurisdictions to comment would make any conflict more amicable. Notification can therefore be regarded as an expression of the traditional principle of comity.³⁴ Other principles such as coordination of enforcement activity and exchange of information are also specified in the 1995 Recommendation. The former urges coordination when two or more Member countries proceed against an anti-competitive practice in international trade, insofar as it is appropriate and practicable.³⁵ The latter principle encourages the sharing of information relevant to concurrent investigations, subject to the significant caveat that legitimate interests must be protected, as well as safeguarding confidentiality.³⁶ In practice, domestic legislation and the

³² OECD 1995 Recommendation, *op. cit.* note 28, at Section A, Article 1.

³³ Discussed *supra* at 2.4 and 2.7.

³⁴ See B. Zanettin, *op. cit.* note 1 at p.54.

³⁵ OECD 1995 Recommendation, *op. cit.* note 28, at Section A, Article 2.

³⁶ OECD 1995 Recommendation, *op. cit.* note 28, at Section A, Article 3.

requirement of consent to disclose commercially sensitive information³⁷ are the two main barriers to the exchange of information in relevant situations. There are many other situations however, where antitrust authorities can assist counterparts by locating and obtaining information from each others' territory.

The second section within the 1995 Recommendation outlines further principles on consultation and conciliation during international antitrust investigations. Member countries whose important interests could be affected by the antitrust investigation of a counterpart are encouraged to submit their views on the situation to the investigating country (the 'addressed country') or possibly request a consultation to discuss the case. Furthermore, addressed countries are urged to give 'full and sympathetic consideration' to any views expressed by the requesting country. Protection of important interests, outlined in Article 4 of the Recommendation, is the first situation that can justify submitting views to or requesting consultation with the addressed country. A second situation is outlined in Article 5 whereby Member countries can consult in order to remedy anti-competitive practices by firms situated in other Member countries. Article 5 recommends that if the addressed country accepts that firms situated in its territory are engaged in anti-competitive practices, harmful to the interests of the requesting country, then it should attempt to remedy the anti-competitive effect, if possible to do so. This recommendation is known as positive comity.

³⁷ See discussion *infra* at 5.4.1 and 5.4.2 regarding confidentiality waivers in multi-jurisdictional merger review.

The remaining part of the 1995 Recommendation encourages cooperation and coordination to reach compatible and mutually acceptable results in particular cases,³⁸ and suggests Member countries should use ‘the good offices of the Competition Law and policy Committee’ of the OECD to facilitate conciliation if they cannot agree a solution.³⁹ If Member countries are able to agree a solution to an international antitrust problem, Article 7 urges that the Members involved inform the Competition Law and Policy Committee of the OECD of the problem and how a solution was found, presumably this is an attempt at a sharing of best practices. There is little information to suggest that either of these provisions are used in practice.

3.3.3 The OECD Recommendation was not the first initiative aimed at avoiding bilateral antitrust disputes. The US and Canada had already committed themselves to trying to avoid, or at least minimise, disagreements with the Fulton-Rogers understanding of 1959.⁴⁰ The understanding sought to establish a channel of communication for notification and consultation mechanisms, but it cannot be accurately described as enabling enforcement cooperation,⁴¹ although it clearly laid the foundation for the landmark 1967 OECD Recommendation. A bizarre characteristic of international antitrust, that will be considered further towards the end of the chapter, is the prevalence of bilateral cooperation agreements in spite

³⁸ OECD 1995 Recommendation, *op. cit.* note 28, at Section B, Article 6.

³⁹ OECD 1995 Recommendation, *op. cit.* note 28, at Section B, Article 8.

⁴⁰ See B. Zanettin, *op. cit.* note 1, at p.53, footnote 3. Also see L. Fullerton and C.C. Mazard, ‘International Antitrust Cooperation Agreements’ (2001) 24 *World Comp.* 405 at 415 for further discussion of the 1959 understanding.

⁴¹ See Remarks by C.S. Stark, former Chief, Foreign Commerce Section, Antitrust Division, US Department of Justice, ‘Improving Bilateral Antitrust Cooperation’, Washington, D.C., 23 June 2000.

of the existence of the OECD Recommendation. Furthermore, while some OECD Member countries have concluded agreements with non-Member countries, which is pragmatic given that the 1995 Recommendation would be inapplicable, the vast majority of bilateral antitrust agreements are between existing Member countries. The US, Canada and increasingly Japan and Australia are OECD countries that also actively pursue antitrust cooperation agreements.

3.4 Negotiating and implementing bilateral cooperation agreements

3.4.1 The rationale for negotiating and entering into bilateral cooperation agreements, notwithstanding the existence of multilateral agreements like the OECD Recommendation, is twofold. Firstly, bilateral agreements merely re-iterating the OECD Recommendation have the effect of emphasising the bilateral relationship and diminishing the importance of the multilateral Recommendation, which may advance policies adopted by a particular government. Indeed, a preference for bilateral, as opposed to multilateral relations, may be a strong political view held by a government unwilling to cede, or give the impression of ceding any sovereign powers to a multilateral body. Secondly, and more importantly, bilateral agreements can be tailored to suit the specific bilateral relationship existing between the signatory states, and thereby facilitate the optimal level of cooperation achievable. Hence, in theory bilateral agreements should offer the best chance of avoiding conflict between certain states, as compared with a multilateral agreement which entails compromise by pursuing a common accord

between all signatory states. It is this rationale that in effect presents a key justification for the uptake of bilateral cooperation agreements in antitrust in spite of the potential for more advanced multilateral cooperation agreements. This can be seen as controversial as multilateral agreements could provide greater legal certainty to international firms that are subject to antitrust investigation, and reduce the risk of their ‘over-punishment’,⁴² whilst also combating the risk of conflict between antitrust authorities more efficiently. It is the increasing prevalence of bilateral cooperation agreements that has effectively relegated the status of the OECD Recommendation, from a potential multilateral antitrust cooperation agreement, to a model for bilateral agreements between Member countries.

3.4.2 Bilateral cooperation agreements are often reached upon conclusion of a lengthy negotiation process and it can be argued that they are more formal than the non-binding OECD Recommendation and that this element ensures greater reliance can be placed upon the agreement by the parties. Charles S. Stark provided an insight into bilateral agreements when he suggested:

‘...there is no single template for antitrust cooperation. Each of [the US] bilateral relationships has developed along a unique path, sometimes in ways neither party would have predicted. Each jurisdiction has its own laws, procedures, priorities, and legal cultures, and these and other factors take cooperation in different directions. [The US] objective is always to

⁴² See C. Canenbley and M. Rosenthal, ‘Cooperation Between Antitrust Authorities In – and Outside the EU: What Does It Mean for Multinational Corporations?: Part 2’ (2005) 26 *ECLR* 178 at p.186: ‘Neither the principles of international law, nor the cooperation agreements entered into by sovereign states have necessarily improved convergence in the application of competition law by different antitrust authorities’. Furthermore at p.183: ‘The risk of over-punishment is omnipresent in an increasingly global business environment triggering multiple prosecutions in all those jurisdictions where the allegedly anti-competitive behaviour had an effect’.

work with our partners as effectively as we can to accomplish our basic shared mission – sound and effective antitrust enforcement’.⁴³

Stark’s comments clearly support the view that bilateral agreements are tailor-made to the specific relationship involved, and the detailed comparison undertaken below will test the veracity of his assertion. An initial assessment reveals that bilateral agreements tend to be between significant trading partners and tend to be limited to a relatively small number of jurisdictions, many of whom are OECD Member countries. Not all of the principal jurisdictions, which account for most of the agreements, have an agreement with each other, e.g. Australia does not have a bilateral cooperation agreement with the EC, but has two agreements with the US, and a tripartite arrangement with New Zealand and Canada.⁴⁴ While the absence of such an agreement could be described as an anomaly, it could also be symptomatic of the characteristics of bilateral agreements as outlined by Stark, namely that they are peculiar to each bilateral relationship. Zanettin provides an excellent example of just such a peculiarity by citing the cooperation agreement between the EC and Canada, where it apparently took 4 years to draft and agree due to ‘linguistic obstacles’.⁴⁵

3.4.3 The negotiation and adoption of a bilateral agreement can also be influenced by the historical relationship between the two contracting states, demonstrated by the agreement between the US and Canada. The geographic and economic proximity of the US and Canada necessitated the development of what was probably the first

⁴³ *Op. cit.* note 41.

⁴⁴ Discussed further *infra*.

⁴⁵ See B. Zanettin, *op. cit.* note 1, at p.68 and note 61.

bilateral antitrust relationship. Canada was one of the first states to be effected by US extraterritoriality, and was the first jurisdiction to enact a blocking statute in response.⁴⁶ The Fulton-Rogers understanding of 1959 is discussed above, yet that was merely an initial attempt to defuse the heated antitrust disputes that arose between the US and Canada at that time. The Mitchell-Basford understanding of 1969 followed, although the Canadian adoption of a new Competition Act in 1986 was a significant development in the bilateral relationship at the time.⁴⁷ A Mutual Legal Assistance Agreement between the two states was adopted in 1990, and a comprehensive bilateral antitrust cooperation agreement followed in 1995. In light of the development of the US – Canadian antitrust relationship it would be difficult to argue that the antitrust agreements are based on anything but the specific bilateral relationship involved, historically stemming from a Canadian defensive reaction to US extraterritoriality. In contrast, the 1976 bilateral antitrust cooperation agreement between the US and Germany did not arise from historical conflict, but was possible due to the strong degree of convergence between the two antitrust regimes. These agreements are mere examples in illustrating the historical ties that can underlie a bilateral antitrust agreement,⁴⁸ although it is far from clear that differing reasons for adopting a bilateral agreement, result in different provisions within the principal agreements themselves.

⁴⁶ See discussion *supra* at 2.7.4.

⁴⁷ See speech by Charles S. Stark, *op. cit.* note 41.

⁴⁸ Such as the Agreement between the Government of the Federal Republic of Germany and the Government of the French Republic Concerning Cooperation on Restrictive Practices, 28th May 1984.

3.5 The principal agreements⁴⁹

3.5.1 There are two distinct types of antitrust cooperation that arguably may fall under the general category of bilateral antitrust agreement. The first is simply to be described as a bilateral antitrust agreement, which is a formal state-to-state cooperation agreement negotiated and adopted by governments. The second type is known as an agency-to-agency arrangement, which is concluded between antitrust authorities. Arguably the latter type should not be included under consideration of bilateral antitrust agreements, not only because of the intent to distinguish them from the former by using different terminology, but also as it is questionable whether they are binding upon the contracting authorities due to their more informal nature. Agency-to-agency arrangements may also be regarded as a precursor to negotiation of a full state-to-state cooperation agreement as they are normally shorter in length and far less detailed. While the current agency-to-agency arrangements will be briefly discussed in this chapter, the focus will be on the principal state-to-state bilateral antitrust cooperation agreements that are currently in force.

3.5.2 Perhaps the salient indicator of the apparent peculiarity of bilateral agreements, as discussed above, is their sporadic adoption by states. Examining when the states most active in this area entered into the agreements demonstrates the point. The

⁴⁹ Tables of the principle agreements, with hyperlinks, are provided at the end of this chapter. Table 3.1 provides a note of the state-to-state agreements that have been mentioned, and table 3.2 provides a note of the agency-to-agency arrangements that have also been mentioned. Also note that an earlier version of the remainder of the chapter (minus the tables) has appeared as a published article in J. Galloway, 'Moving Towards a Template for Bilateral Antitrust Agreements' (2005) 28 *World Comp.* 589.

US currently has bilateral antitrust cooperation agreements with 8 jurisdictions:⁵⁰ a cooperation agreement with Australia in 1982 and an advanced IAEEA agreement in 1999⁵¹ also with Australia, which can also be described as a Mutual Legal Assistance Treaty ('MLAT') allowing for, *inter alia*, obtaining of evidence and sharing of information in criminal law enforcement.⁵² The US also entered into a bilateral antitrust cooperation agreement with Germany in 1976 and Canada in 1995, a landmark agreement was reached with the European Commission in 1991 and a more advanced agreement on positive comity adopted in 1998. In a relative flurry of activity the US then concluded bilateral antitrust cooperation agreements with Brazil, Israel and Japan in 1999 and Mexico in 2000. The distinction between state-to-state agreements and agency-to-agency arrangements becomes relevant when considering both Australia and Canada. Australia currently has state-to-state agreements with the US and with New Zealand.⁵³ However the Australian Competition and Consumer Commission (ACCC) has also entered into 6 agency-to-agency arrangements, tripartite arrangements with: New Zealand and the United Kingdom (2003);⁵⁴ New Zealand and Canada

⁵⁰ All US antitrust cooperation agreements are available at:

http://www.usdoj.gov/atr/public/international/int_arrangements.htm.

⁵¹ The US – Australian Mutual Antitrust Enforcement Assistance Agreement of 1999.

⁵² An IAEEA agreement is facilitated by the US International Antitrust Enforcement Assistance Act of 1994, Public Law 103-438, 108 Stat. 4597, and codified at 15 USC §§6201-6212 (1994).

⁵³ Cooperation and Coordination Agreement between the Australian Trade Practice Commission and New Zealand Commerce Commission regarding competition and consumer laws entered into in July 1994. For a fuller discussion of the Australian – New Zealand bilateral commercial relationship see discussion *infra* at 5.4.5.

⁵⁴ Cooperation Arrangement between the Australian Competition and Consumer Commission, the Commerce Commission in New Zealand and Her Majesty's Secretary of State for Trade and Industry and the Office of Fair Trading in the United Kingdom Regarding the Application of their Competition and Consumer Laws.

(2000);⁵⁵ and New Zealand and Taiwan (2002).⁵⁶ The ACCC also has bilateral arrangements with: Fiji (2002);⁵⁷ Korea (2002);⁵⁸ and Taiwan (1996);⁵⁹ and is currently in negotiations with the Japanese FTC.⁶⁰ While the Australian tripartite arrangements are de facto not bilateral, they are included due to their shared purpose and similar content to bilateral arrangements, additionally the antitrust harmonisation achieved between the Australian and New Zealand regimes makes the tripartite arrangements unique in nature.⁶¹ Canada has the aforementioned state-to-state agreement with the US and an agency-to-agency arrangement with Australia and New Zealand, but also has state-to-state agreements with the EC (1999), Mexico (2001), and Japan (2005). In addition, Canada has agency-to-agency arrangements with Chile (2001),⁶² the United Kingdom (2003),⁶³ and more recently Korea.⁶⁴ Japan⁶⁵ has the aforementioned bilateral agreements with

⁵⁵ Cooperation Arrangement between the Australian Competition and Consumer Commission, the Commerce Commission in New Zealand and the Commissioner of Competition (Canada) Regarding the Application of their Competition and Consumer Laws.

⁵⁶ Cooperation Arrangement between the Australian Competition and Consumer Commission, the Commerce Commission in New Zealand and the Taiwan Fair Trade Commission (TFTC) Regarding the Application of their Competition and Fair Trading Laws.

⁵⁷ Cooperation Arrangement between the Australian Competition and Consumer Commission and the Commerce Commission of the Fiji Islands Regarding the Application of their Competition and Consumer Laws.

⁵⁸ Cooperation Arrangement between the Australian Competition and Consumer Commission and the Korea Fair Trade Commission (KFTC) Regarding the Application of their Competition and Consumer Laws.

⁵⁹ Cooperation Arrangement between the Australian Commerce and Industry Office and the Taipei Economic and Cultural Office Regarding the Application of their Competition and Fair Trading Laws.

⁶⁰ See the ACCC press release of 14 May 2003, 'ACCC and Japan Fair Trade Commission commence discussions on closer cooperation in competition issues' (MR 098/03).

⁶¹ See discussion *infra* at 5.4.5.

⁶² Memorandum of Understanding Between the Commissioner of Competition (Canada) and the Fiscal Nacional Economico (Chile) Regarding the Application of their Competition Laws.

⁶³ Cooperation Arrangement Between the Commissioner of Competition (Canada) and Her Majesty's Secretary of State for Trade and Industry and the Office of Fair Trading in the United Kingdom Regarding the Application of their Competition and Consumer Laws.

⁶⁴ Cooperation Arrangement between the Fair Trade Commission of the Government of the Republic of Korea and the Commissioner of Competition, Competition Bureau of the Government of Canada regarding the application of their competition and consumer laws.

the US and Canada, and is in negotiations with Australia, it also concluded an agreement with the EC in 2003 and included a competition chapter in a bilateral agreement with Singapore,⁶⁶ and a competition agreement with Mexico in 2004 under the auspices of a wider economic agreement.⁶⁷ The EC has bilateral antitrust cooperation agreements with the US, Canada and Japan. France also entered into an arrangement with Taiwan in January 2004.⁶⁸ Given the evidence of the sporadic adoption of bilateral antitrust agreements, and the often peculiar relationships involved that impact upon the negotiation of the agreements, bilateral agreements are prima facie unique to the relationship involved, and would not appear able to operate on a multilateral level.⁶⁹ This impression could, however, be misleading.

⁶⁵ Note that only the principal antitrust agreements entered into by Japan, or the Japanese Fair Trade Commission (JFTC) are mentioned; for a full list of the Japanese antitrust agreements, and access to the text, see <http://www.jftc.go.jp/e-page/internationalrelations/index.html>.

⁶⁶ Chapter 5: Competition (Articles 15-25) of the Implementing Agreement Between the Government of Japan and the Government of the Republic of Singapore Pursuant to Article 7 of the Agreement Between Japan and the Republic of Singapore for a New-Age Economic Partnership. Note that under Article 22 the main provisions of chapter 5, i.e. the bilateral antitrust cooperation agreement, are effectively limited to the telecommunication, electricity and gas markets pending future adoption of more extensive antitrust legislation. Japan has recently concluded similar agreements with Mexico (2005), Malaysia (2006), the Philippines (2006), Thailand (2007), and Chile (2007), although these will not be considered further in this thesis given their limited status, these agreements can be accessed at: <http://www.jftc.go.jp/e-page/internationalrelations/index.html>.

⁶⁷ Implementing agreement between the Government of Japan and the Government of the United Mexican States pursuant to Article 132 of the agreement between Japan and the United Mexican States for the strengthening of the economic partnership.

⁶⁸ Cooperation Arrangement between the Taiwanese Fair Trade Commission and the French Competition Council Regarding the Application of their Competition Rules ('Arrangement'), signed on 5th January 2004.

⁶⁹ Note that there are several other bilateral antitrust cooperation agreements/arrangements in existence, and several pending, such as those entered into by the Korean FTC with the Mexican FCC (2004), and the Turkish competition authority (2005). Nonetheless the intent is to focus upon the principal agreements, and undertake a sufficiently robust comparison of key agreements to draw conclusions that likely apply to all, thus it is unnecessary (and unrealistic) to comment upon all agreements in detail.

3.6 Misleading impressions?

3.6.1 The impression that bilateral antitrust cooperation agreements differ significantly from each other, and have minimal similarities with the 1995 OECD Recommendation is misleading as it fails to take into account the extensive convergence that has been achieved between bilateral agreements in matters of policy, procedure and substance. When comparing two of the earlier bilateral antitrust cooperation agreements, the US-Germany agreement in 1976 and the US-Australia agreement in 1982, there are some clear procedural and substantive differences. The US-Germany Agreement, for example, lacks coherence and clarity by dealing with issues of confidentiality and primacy of existing laws in more than one article. On the contrary, the US-Australia agreement, some 6 years later, has clearly identifiable and distinct Articles thereby highlighting objectives to be pursued. Even on matters of procedure, both agreements differ as to whether there is provision for dealing with the cost of cooperation.⁷⁰ Similarly the US-Australia agreement considers private antitrust suits in US Courts in Article 6 (the substance of which may be considered a very early form of positive comity), which is not dealt with by the US-Germany agreement. While there are clear differences, one could argue even at this early stage in the evolution of bilateral antitrust agreements that shared principles are apparent from the content of the two agreements. Both enshrine the primacy accorded to the signatory states' respective laws, particularly with regard to domestic rules on confidentiality of

⁷⁰ See Article 7 of the US-Germany agreement, although note that Article XII of the 1999 Australia-US Mutual Antitrust Enforcement Assistance Agreement lays down similar provisions on costs.

information.⁷¹ Both also establish a basic principle that one state (the requesting state) can submit a request to have its views considered when the other state (the requested state) is conducting an antitrust investigation that may affect the interests of the requesting state.⁷² Additionally both agreements require the parties to consult upon a specific issue at the request of one state⁷³ and include rather vague provisions requiring a state to notify the other when it is conducting an antitrust investigation, or is contemplating a policy change that may impact upon the ‘important interests’ of the notified state.⁷⁴ A basic tenet of the agreements is the commitment to seek to avoid conflict in their antitrust relations.⁷⁵ Notwithstanding the shared principles, the 1976 and 1982 agreements are undoubtedly different, perhaps reflecting not only the 6 year gap but also the differing bilateral relationships that the US had at that time. These early differences are not, however, good indicators of the convergence achieved between the more recent bilateral agreements. The 1991 EC-US agreement was significant not only as it facilitated cooperation and convergence between two very large trading partners, as well as important antitrust enforcement authorities, but also as a result of its perceived success in lessening the risk of conflict between the two parties.

⁷¹ 1976 agreement: Article 3(1); Article 5 and Article 6(1). 1982 agreement: Article 3.

⁷² 1976 agreement: Articles 2(3) and (4). 1982 agreement: Article 2.

⁷³ 1976 agreement: Article 2(5). 1982 agreement: Article 2.

⁷⁴ 1976 agreement: Article 4(2). 1982 agreement: Article 1.

⁷⁵ Although the US-Germany agreement approaches this objective in Article 4(1) by pledging so far as is possible not to inhibit or interfere with antitrust investigations or procedures conducted by the other state. The US-Australia agreement embodies the avoidance of conflict principle in Articles 2(5) and (6).

3.6.2 The 1991 bilateral antitrust cooperation agreement between the EC Commission and the US contains 11 Articles that essentially clarify and expand upon principles contained in the 1976 and 1982 agreements discussed above. The agreement signified an advance in bilateral cooperation as it expanded upon principles espoused in the 1986 OECD Recommendation, and helped facilitate the revised 1995 Recommendation. While pioneering, the agreement was also, perhaps resultantly, controversial and required a joint European Council and Commission decision in 1995 to confirm its legal applicability.⁷⁶ Since 1991, bilateral antitrust cooperation agreements tend to adopt similar formats, with roughly the same length and, as will be demonstrated, are also similar in terms of content. The twelve state-to-state bilateral antitrust cooperation agreements entered into since 1991 by the EC, the US,⁷⁷ Canada and Japan have shared concepts and principles, each of which will be explored in detail in order to ascertain the extent of convergence achieved, and whether the agreements truly reflect differing bilateral relations. The Cooperation and Coordination Agreement with regard to competition and consumer laws entered into by Australia and New Zealand is not included in the following analysis as the attempt to harmonise their respective business laws,⁷⁸ including competition law, has removed the ability to draw conclusions relevant to international antitrust from that particular agreement

⁷⁶ 10th April 1995 (95/145/EC, ECSC). (1995) OJ L95 of 27th April 1995. The joint decision was necessary following the judgment of the European Court of Justice in Case C-327/91 *French Republic v. Commission* [1994] ECR I-3641, where the Court annulled the act by which the Commission concluded the agreement with the US following a challenge by France alleging that the Commission had no legal authority to conclude such an agreement.

⁷⁷ As the Mutual Antitrust Enforcement Assistance Treaty between Australia and the US is a specialist agreement enabling the acquisition and exchange of antitrust evidence it is not considered amongst the other general bilateral antitrust cooperation agreements.

⁷⁸ See Memorandum of Understanding between the Government of Australia and the Government of New Zealand on Harmonisation of Business Law, which is discussed in more detail *infra* at 5.4.5.

in this article. The focus is upon core antitrust cooperation agreements, and discussion of MLATs is therefore also excluded. The twelve state-to-state bilateral antitrust agreements each have between 11 and 13 Articles,⁷⁹ of which the first Article always consists of purpose and definitions provisions and the last Article always details the entry into force and termination provisions.

3.7 Key principles

3.7.1 Notification

With the exception of the Japan-Singapore agreement, the second Article of each agreement outlines the general principle of notification in similar albeit more detailed terms to those provisions contained in Article I of the 1982 US-Australia bilateral agreement.⁸⁰ In all but the US-Brazil agreement, Article II:1 provides that parties shall notify each other of enforcement activities that may affect the other party's important interests. The second paragraph then lists either five⁸¹ or six sets of circumstances that would ordinarily constitute an enforcement activity triggering notification. The eleven agreements appear to have adopted a common format whereby a vague general rule is provided, which is then supplemented by specific examples applying that rule.⁸² The 1999 US-Brazil agreement is not significantly different. Article II:2 also lists circumstances in six sub-paragraphs

⁷⁹ The antitrust cooperation articles within the Japan-Singapore agreement are Articles 15-25, as such the antitrust agreement is 11 articles in length.

⁸⁰ Note that in the Japan-Singapore bilateral agreement, the provisions concerning notification are contained in the third article of Chapter 5: Competition, this is Article 17 of the overall agreement. For reasons of efficacy, references to Article II in general terms will unless otherwise stated also be referring to Article 17 in the Japan-Singapore agreement.

⁸¹ The 1991 EC-US agreement is the exception within the ten agreements in that Article II, paragraph 2 only has 5 sub-paragraphs, the sixth paragraph in the nine other agreements are not the same, there are two variations discussed in body of text.

⁸² In principle, similar to the format within Articles 81(1) and 82 EC Treaty.

that would amount to enforcement activities triggering notification, yet there is no general provision regarding notification when important interests are affected. Given that notification will ordinarily arise out of a situation described within Article II:2, this difference is likely to be of minor significance.

There is very little substantive difference between the activities triggering notification listed in Article II:2 of the agreements. The following types of enforcement activities are included, near verbatim, in all agreements: a) those relevant to enforcement activities of the other party; b) involve anti-competitive activities, other than mergers and acquisitions, carried out significant part in the other party's territory; c) involve a merger or acquisition which one or more of the parties to the transaction, or a company controlling one or more of the parties to the transaction, is a company incorporated or organised under the laws of the other party or of one of its provinces, states or Member States; d) involve conduct believed to have been required, encouraged or approved by the other party; and e) involve remedies that would, in significant respect, require or prohibit conduct in the other party's territory.

The five bilateral agreements entered into by Japan, also provide for notification when activities 'are conducted against a national or nationals of the other party, or against a company or companies incorporated or organised under the applicable laws and regulations within the territory of the other party'.⁸³ Another trigger

⁸³ The Canada – Japan agreement has an abbreviated version of the quote.

included in six of the agreements⁸⁴ arises when one party is seeking information located in the territory of the other.

The remaining provisions within Article II essentially outline the practicalities of notification, with several of the twelve detailing the exact moment notification is required in given circumstances.⁸⁵ All twelve agreements require notification to be given as promptly as possible once triggered, and all but the US-Brazil agreement require prompt notification once a competition authority becomes aware its activities may affect the important interests of the other party. In addition the notification must be sufficiently detailed in order for the notified party to conduct an impact assessment of the notifying party's enforcement activities. Five of the agreements also acknowledge that antitrust officials of one party may visit the territory of the other in the course of investigations, provided advance notice has been given. Given the differing structures and legal powers of the antitrust regimes and authorities pertinent to these twelve agreements it is unsurprising that different notification triggers are listed,⁸⁶ yet the principle and

⁸⁴ Included in the following agreements: Canada-Mexico; EC-Canada; US-Brazil; US-Canada; US-Israel; and US-Mexico.

⁸⁵ For example in the 1991 EC-US agreement, Article II:3 specifies when notification should be made with respect to mergers and acquisitions that are legally required to be submitted. Sub-paragraph (a) lists times at which the US antitrust authorities must notify the EC, e.g. when additional information on the proposed merger is required pursuant to 15 U.S.C. §18a(e). Similarly sub-paragraph (b) list times at which the European Commission must notify US authorities, e.g. when notice of the transaction is published in the Official Journal of the European Communities.

⁸⁶ Note the US-Japan agreement for example where Article II:6 contains a requirement to notify when one party initiates a survey which that party considers may affect the important interests of the other party, hence covering the ability of the Japanese Fair Trade Commission to conduct market surveys. Furthermore Article II:7 requires notification when the antitrust authority of one party publicly participates in an administrative, regulatory or judicial proceeding in its country, albeit not initiated by that authority, if the authority considers that the issue may affect the important interests of the other party, this provision would cover the ability of the US DOJ to submit amicus curiae brief for consideration to a US Court in an antitrust litigation brought by private parties.

general format of notification provisions are the same within all of the agreements discussed.

3.7.2 Enforcement cooperation and coordination

Beyond notification, the manner in which further principles contained in many of the bilateral agreements does vary, yet there remain strong similarities between all of the agreements, and sub-groupings of the agreements appear to exist within which there is something approaching procedural and substantive harmonisation. Provisions outlining the principle of enforcement cooperation and coordination are contained in eleven of the twelve agreements. Chapter 5 of the Japan-Singapore agreement does not contain any description of the principle, although this is due to the early stage of development of Singapore's antitrust regime.⁸⁷ The Japan-Singapore agreement does, however, provide in Article 23 for adopting future provisions furthering cooperation with regard to: a) coordination of enforcement activities; b) positive comity; and c) comity. With regard to the remaining eleven bilateral agreements, the 1991 EC-US and 1999 EC-Canada agreements embody the coordination principle in Article IV, while the Canada-Japan, Canada-Mexico, EC-Japan, Japan-Mexico, US-Brazil, US-Canada, US-Israel, US-Japan, and US-Mexico agreements all embody a cooperation principle in Article III and a coordination principle in Article IV. Considering the eleven bilateral agreements that give effect to enforcement cooperation and coordination principles, three distinct modes of implementation are identifiable.

⁸⁷ Which is reflected in the Article 22 provisions limiting the agreement to the telecommunications, electricity and gas markets.

The first and most basic mode is that adopted in the 1991 EC-US and 1999 EC-Canada agreements whereby Article IV:1 commits each party's competition authority to providing assistance to the other in their enforcement activities, subject to compatibility with each party's laws and important interests. The EC-US agreement also limits assistance to being within each party's 'reasonably available resources'. Article IV:2 of the EC-US and EC-Canada agreements espouse the principle of coordination of the parties' enforcement activities when cases are related. Both agreements also detail the same factors to be taken into account when deciding whether to coordinate enforcement activities. The remaining provisions of Article IV in both agreements aim to ensure that coordinated enforcement activities will be consistent with the enforcement objectives of each party. In addition either party can decide to limit or terminate coordinated enforcement activities and pursue the investigation independently. The EC-US and EC-Canada agreements complement the Article IV principle of coordination with cooperation provisions within separate articles: within Article III and Article VII respectively, the content of both articles is very similar and both are entitled 'Exchange of Information'. They both provide that 'the parties agree that it is in their common interest to share information' which will 'facilitate the effective application of their respective competition laws' and 'promote better understanding' of each others enforcement activities in their first paragraph. The articles also stipulate that parties will provide each other with information in their possession that is relevant to enforcement activities by the other party. The EC-

Canada agreement also provides in Article VII:3 for one party (upon the request of the other) to ascertain whether natural or legal persons involved in the action will consent to the sharing of confidential information between authorities in the event of concurrent action.

The second mode implementing the enforcement cooperation and coordination principles is that adopted by Japan in agreements with the US, Canada, the EC and Mexico (the 'Japan agreements'). The substance of the two articles in all agreements approaches verbatim. Article 3:1 endorses the cooperation principle also contained in Article IV:1 of both the EC-US and EC-Canada agreements outlined above. This provides that 'the competition authority of each party shall render assistance to the competition authority of the other party in its enforcement activities to the extent consistent with the laws and regulations' of the party rendering assistance and the 'important interests' of that party, and 'within its reasonably available resources'. Article III:2 of the Japan agreements then outlines three specific acts of cooperation. The fourth article is also very similar to Article IV:2 and 3 of the EC-US and EC-Canada agreements. Article IV:1 implements the general principle that the parties' competition authorities will consider co-ordinating their enforcement activities when they are related, the second paragraph then lists specific factors to be taken into account in deciding whether to coordinate, these are very similar as Article IV:2 of the EC-Canada agreement. The fourth article of the Japan agreements also states that when the parties' competition authorities are coordinating their activities, each authority

will consider the enforcement objectives of the other competition authority. Furthermore these paragraphs give effect to the same provision embedded in Article VII:3 of the EC-Canada agreement such that one party (upon the request of the other) must ascertain whether natural or legal persons involved, will consent to the sharing of confidential information between authorities in the event of concurrent action. The final element regarding enforcement cooperation and coordination within these agreements is contained in Article IV:5, which provides for a party to terminate coordinated activities following notification to the other, similar to terms in Article IV of the EC-US and EC-Canada agreements. It will be interesting to note whether the negotiations entered into by Japan with Australia (initiated in 2003) result in the implementation of enforcement cooperation and coordination principles in the same manner, and if so whether there is any explanation for the prolonged negotiation of the agreement.

The third mode implementing enforcement cooperation and coordination principles is that adopted by the US in its bilateral agreements with Canada in 1995, Brazil and Israel in 1999 and Mexico in 2000. The 2001 Canada-Mexico agreement has also adopted this mode. Essentially the third mode adopts a cooperation principle in Article III: Enforcement Cooperation, and the coordination principle in a further article entitled Coordination with Regard to Related Matters, ordinarily in Article IV, with the exception of the US-Brazil agreement where it is in Article V. While the US-Brazil bilateral agreement is conceptually identical to the other four in this category, it lacks the detail of the

others, perhaps as a result of the developing stage of the Brazilian antitrust regime. Discussion will therefore focus on the US-Canada, US-Israel, US-Mexico and Canada-Mexico agreements. The four agreements all contain four paragraphs in Article III and five paragraphs in Article IV,⁸⁸ the content of which is verbatim in both Articles throughout the four agreements. Article III:1 contains two elements, firstly that:

‘the parties acknowledge it is in their common interest to cooperate in the detection of anti-competitive activities and the enforcement of their competition laws to the extent compatible with their respective laws and important interests, and according to their reasonably available resources’.⁸⁹

The second element mirrors provisions in Article III of the 1991 EC-US agreement and Article VII of the EC-Canada agreement regarding the sharing of information, acknowledging that this would be in the parties’ common interest in order to facilitate effective competition law enforcement and promote better understanding of each other’s enforcement policies and activities. Article III:2 allows for further arrangements to be adopted in the future in order to enhance cooperation. Article III:3 consists of four specific acts of cooperation, three of which are the same as in Article 3:2 of the Japanese bilateral agreements. The four agreements have achieved similar convergence with regards to the principle of coordination in Article IV. While the US-Brazil agreement again contains a fairly limited endorsement of the principle of coordination in Article V, the US-Canada, US-Israel, US-Mexico and Canada-Mexico bilateral agreements implement this

⁸⁸ The US-Brazil agreement contains 2 paragraphs in both Article III: Enforcement Cooperation and Article V: Coordination with Regard to Related Matters.

⁸⁹ The US-Brazil agreement has contains this first element, but has no further provisions on the sharing of information.

principle in Article IV in similar terms to Article IV:2 and 3 of the EC-US and EC-Canada agreements, and with minor and inconsequential differences to Article IV of the Japan-US agreement discussed above. Having considered in some detail the various modes adopted in order to implement the principles of cooperation and coordination, it is apparent that an overwhelming degree of convergence has been achieved between various signatory states of bilateral antitrust agreements with regard to these principles.

3.7.3 Positive comity

The OECD has defined the term positive comity as:

‘the principle that a country should (1) give full and sympathetic consideration to another country’s request that it opens or expands a law enforcement proceeding in order to remedy conduct in its territory that is substantially and adversely affecting another country’s interests and, (2) take whatever remedial action it deems appropriate on a voluntary basis and in considering its legitimate interests’.⁹⁰

Positive comity has evoked a great deal of debate and discussion yet its consideration here is strictly confined to the manner of its implementation in the twelve bilateral antitrust cooperation agreements highlighted. With the exception of the Japan-Singapore agreement where the future adoption of positive comity provisions is envisaged by Article 23:2(b), the eleven remaining bilateral antitrust cooperation agreements since 1991 all include provisions implementing the principle of positive comity. The fifth article in the Japanese agreements, as well as the EC-US, EC-Canada, US-Canada, US-Israel, US-Mexico and Canada-

⁹⁰ Report on Positive Comity-Making International Markets More Efficient Through ‘Positive Comity’ in Competition Law Enforcement, OECD Competition Law and Policy Committee, May 1999 (DAFFE/CLP(99)19). Referenced by B. Zanettin, *op. cit.* note 1, at p.183.

Mexico agreements, and Article IV of the US-Brazil agreement all implement the principle of positive comity in very similar terms. While the articles within the Japanese agreements are untitled,⁹¹ Article V of the US-Israel and Canada-Mexico agreements are entitled simply 'Positive comity', whereas Article V of the EC-US, EC-Canada, US-Canada and US-Mexico agreements as well as Article IV of the US-Brazil agreement are all entitled 'Cooperation Regarding Anticompetitive Practices in the Territory of One Party that may Adversely Affect the Interests of the Other Party'. Article V:2 outlines the core provision of positive comity stating that if a party's important interests are being affected by anti-competitive activities taking place within the other party's territory, the affected party can notify and request the other party's antitrust authorities to initiate appropriate enforcement activities. The notification must be as detailed as possible with regard to both the anti-competitive activity and its alleged effect on the party's important interests. Article V:3 then provides for responses to positive comity requests, essentially permitting the notified party to refuse to initiate or expand enforcement activities, but it should only do so after considering the request and after discussions between the parties. The notified party should advise the other of its decision, and if enforcement activities are initiated or expanded it should also advise the notifying party of the outcome of the enforcement activities, and of significant interim developments. Article V:4 contains the provisos that these provisions do not impact upon the parties' discretion to engage in concurrent enforcement activities.

⁹¹ With the exception of the Japan-Mexico agreement which is entitled 'Cooperation regarding anticompetitive activities in the territory of the country of one party that adversely affects the interests of the other party'.

These provisions are exactly the same as those contained in Article V of the US-Canada, US-Israel, US-Mexico and Canada-Mexico bilateral antitrust agreements, with the exception that the US-Israel agreement has condensed the provisions into three paragraphs (from four), and that the reference to discussion between the parties in Article V:3 of the EC-US agreement is excluded from these four agreements. The EC-Canada agreement is also very similar to these four agreements, with two minor amendments in Article V:3 such that the notified/requested party ‘shall accord full and sympathetic consideration to the request’⁹² and that the notified party must provide reasons as well as informing the other party of its decision. Similarly, Article IV of the US-Brazil agreement is substantively very similar to Article V of the US-Canada, US-Israel, US-Mexico and Canada-Mexico agreements, although a positive comity request under Article IV:2 can only take place ‘after prior consultation with the other party’. The one other difference is the inclusion in Article IV:1 of a peculiarly general provision that ‘the parties agree that it is in their common interest to secure the efficient operation of their markets by enforcing their respective competition laws in order to protect their markets from anti-competitive practices’.⁹³ The inclusion of this general provision is probably a further indicator of the developing nature of the Brazilian antitrust regime. Furthermore the inclusion of this general provision is reflective of the second model of positive comity suggested by Zanettin: whereby

⁹² Substituting a careful consideration of the request.

⁹³ Article IV of the US-Brazil agreement again reflects the omission in this particular bilateral antitrust agreement, discussed earlier, regarding a party’s important interests, Article IV:1 simply discusses the affect on the interest of the parties, while the other agreements discuss the affect on the parties’ important interests.

there is a requirement for a foreign state to increase the enforcement of its antitrust law at a general level, described as ‘positive comity between unequal partners’.⁹⁴

Finally the fifth article of the Japanese agreements is very similar to those already discussed, with minor differences in terminology and structure that do not alter the substantive convergence achieved. The core provision on positive comity is included within Article 5:1 of the agreements.⁹⁵ In nearly all respects the Japan-EC bilateral agreement is identical to the US-Canada, US-Israel, US-Mexico and Canada-Mexico agreements, although Article V of the Japan-US, Japan-Canada, and Japan-Mexico agreements does, however, omit provisions ordinarily contained in the fourth paragraph. Thus, there are no provisions securing the ability of the parties to engage in concurrent enforcement action. Nonetheless it would be bizarre and highly contentious to suggest that positive comity requests, once made under this agreement affect the parties’ ability to initiate their own investigations, therefore this omission is likely to be inconsequential.

In conclusion, bilateral antitrust cooperation agreements that implement the principle of positive comity have achieved a very high level of substantive convergence, with minor variations for agreements between ‘unequal partners’ and some linguistic variations within the Japanese bilateral agreements. Indeed, many agreements have achieved fully harmonised positive comity provisions.

⁹⁴ See B. Zanettin, *op. cit.* note 1 at pp.191, 196-199.

⁹⁵ While it is ordinarily contained within the second paragraph of the positive comity article of the other agreements.

3.7.4 Avoidance of conflict

The principle that states should seek to avoid conflict in international antitrust by taking each others' interests into consideration is perhaps the primary objective of concluding bilateral antitrust cooperation agreements, and embodies the concept of comity in public international law.⁹⁶ The only bilateral antitrust agreement since 1991 not to include provisions on the avoidance of conflict is the Japan-Singapore agreement where Article 23:2(c) allows for such provisions to be adopted in the future. The eleven other bilateral agreements all embody the avoidance of conflict principle within their sixth article. Article VI of the 1991 EC-US agreement, entitled 'Avoidance of Conflicts Over Enforcement Activities', contains an unusual preamble outlining the general principle, then three sections detailing specific factors, inspired by efforts to avoid conflict, that should be taken into consideration. The preamble commits each party to taking into account the important interests of the other party at all stages of enforcement activity, subject to compatibility with their laws and important interests. When considering each others' important interests, the parties must also take into account specified factors outlined in three sections. Firstly, as an aid to defining 'important interests' it is recognised in Article VI:1 that 'such interests would normally be reflected in antecedent laws, decisions or statements of policy by its competent authorities'. Secondly, while it is accepted that a party's important interests can be affected at any stage of enforcement activity, in Article VI:2 the

⁹⁶ Indeed Zanettin regards avoidance of conflict provisions as a product of negative comity, discussed in B. Zanettin, *op. cit.* note 1, at p.75.

parties recognise that prohibitive or otherwise negative decisions by one party carry greater potential for affecting the other party's important interests than merely investigative actions. Article VI:3 contains a non-exhaustive list of factors to be considered when it appears that one party's enforcement activities may adversely affect the other's important interests in order to achieve a correct balance between the competing interests, and to determine what weight to attach to comity concerns during enforcement activities.

The Japanese agreements, which are identical in substance and format, have perhaps achieved the greatest degree of convergence with the EC-US agreement regarding avoidance of conflict, the sixth article of the Japanese agreements also contain three sections, and the third is very similar to Article VI:3 of the EC-US agreement. The first section commits the parties to giving 'careful consideration to the important interests of the other party throughout all phases of its enforcement activities'. The second section provides for each party to 'endeavour to provide timely notice of significant developments of such enforcement activities' when activities are affecting the others' important interests. This is not included in Article VI of the EC-US agreement. One further difference between the Japanese and EC-US agreements is the wording and number of factors listed in the third section of the sixth article although this is of little significance.

Article VI of the EC-Canada agreement entitled 'Avoidance of conflict' contains two sections with the second listing factors to be considered when one party's

enforcement activities appear to adversely affect the other party's important interests. The first section is materially identical to the preamble within Article VI of the EC-US agreement and Article VI:1 of the Japanese agreements. The EC-Canada agreement states that the impact of enforcement activities upon reasonable expectations should be a factor when considering the weight to attach to comity concerns, as in the EC-US agreement. The significance of the anti-competitive activities upon the parties' important interests is also noted, as within the EC-US and Japanese agreements, although the foreseeability of the effects of the anti-competitive activity is also included within the EC-Canada agreement. While the Japanese agreements stipulate in Article VI:3 that the extent to which anti-competitive activities substantially lessen competition within the respective parties territory is a factor, there is no equivalent in the EC-Canada agreement, although the latter agreement notes 'the need to minimise the negative effects on the other party's important interests, in particular when implementing remedies to address anti-competitive effects within the party's territory'. The remainder of the ten factors included in Article VI:2 of the EC-Canada agreements are substantively identical to those included in the Japanese agreements. The five remaining bilateral agreements implement the principle of avoidance of conflict in two distinct forms.

The US-Brazil agreement is again distinctive, with a characteristically vague and under-developed provision contained in Article VI:1 outlining the general principle. The US-Brazil agreement does not contain a list of factors for

consideration when one party's activities affect the other's important interests. The US-Canada, US-Israel, US-Mexico and Canada-Mexico bilateral agreements are all identical in implementing the avoidance of conflict principle via the five sections of Article VI. The first section contains the general principle, while the second section is very similar to the Japanese agreements in that the parties are committed to providing timely notice of developments in enforcement activities that are of significance to the other's important interests. Article VI:3 of the four agreements is identical to that contained in Article VI:1 of the EC-US agreement, thus recognising that a party's important interests are normally reflected in antecedent laws, decisions or statements of policy by its competition authority. Article VI:4 bears a strong similarity with provisions contained in Article VI:2 of the EC-US agreement by acknowledging that the potential for adversely affecting the other party's important interests is greater at the stage at which conduct is prohibited or penalised. Article VI:5 of the four agreements contains the list of factors to be considered when determining the weight to attach to the other party's important interests. The list is substantively identical to that within Article VI:2 of the EC-Canada bilateral agreement. With the exception of the Japan-Singapore and US-Brazil agreements, it is noteworthy that there is a very close degree of substantive convergence between the post-1991 bilateral agreements regarding avoidance of conflict.

3.7.5 Consultations

Another basic principle contained within bilateral antitrust cooperation agreements is that parties may request consultations in order to address any matters relating to the agreement. Ordinarily these consultations will be at the diplomatic level according them more symbolic importance than informal discussions. The seventh article of the EC-US, Japanese-EC, Japan-Canada, Japan-US and US-Israel agreements, as well as Article VIII in the US-Canada, US-Mexico and Canada-Mexico agreements, Article VI:2 of the US-Brazil agreement, Article III of the EC-Canada agreement, Article 9 of the Japan-Mexico agreement and Article 24 in the Japan-Singapore bilateral agreement all implement a basic principle of consultation. The detail of the provisions does however, vary between the agreements. Article 24 of the Japan-Singapore bilateral agreement contains the simplest form providing for the parties to hold consultations as necessary on any matter arising in connection with the competition chapter of the agreement.

The seventh article of the Japan-US, Japan-Canada and Japan-EC agreements contain the same provision regarding consultations through the diplomatic channel, but Article VII:2 of the Japan-Canada agreement provides for cooperation between the antitrust authorities themselves, and Article VII:3 requires that consultation requests be made in writing with reasons provided. Article 9 of the Japan-Mexico agreement also provides for cooperation between

the antitrust authorities after the submission of a written request, but does not mention the diplomatic channel. The US-Brazil agreement makes no mention of the diplomatic channel, but does build upon the Japan-Singapore agreement by stating that the requesting party:

‘shall indicate the reasons for the request and whether any procedural time limits or other constraints require that consultations be expedited. Each party shall consult promptly when so requested with a view to reaching a conclusion that is consistent with the purpose of the agreement’.⁹⁷

The EC-US and EC-Canada agreements implement the principle of consultation in a very similar way. Article VII:1 of the EC-US agreement also states that: ‘These consultations shall take place at the appropriate level, which may include consultations between the heads of the competition authorities concerned’. The second sections of these Articles in the EC-US and EC-Canada agreements are very similar, but also state that the parties should be prepared to explain the impact that the pursuit of the principles contained within the agreement has had on the consultations taking place.

Article VIII of the US-Canada, US-Mexico and Canada-Mexico agreements and Article VII of the US-Israel agreement all contain identical provisions on consultations within three sections. The first section, similar to above, provides that either party may request consultations on any matter relating to the agreements, also indicating the reasons for the request and whether any factors need the consultations expedited. Also included is the requirement that each party shall consult promptly upon receiving a request and endeavour to achieve results

⁹⁷ Article VI:2.

in line with the agreements' principles. The second section mirrors a provision contained in Article VII:1 of the EC-US agreement, simply stating 'Consultations under this Article shall take place at the appropriate level as determined by each party'. The third section in all requires that each party must provide the other with as much information as is possible in order to facilitate the broadest discussion in consultations. Similar to Article VII:2 of the EC-US agreement and III:2 of the EC-Canada agreement, the third section also provides that each party shall carefully consider the representations of the other in light of the principles within the agreements and that each party should be prepared to explain the specific results of its application of those principles to the matter subject to consultation. While there is no significant divergence between the twelve bilateral agreements regarding the principle of consultation, the detail varies to such a degree that parties requesting consultations under the EC-US, US-Canada, EC-Canada, US-Mexico, Canada-Mexico and US-Israel agreements are entitled to demand certain information, such as the impact of cooperation principles upon the other party's activities, which parties to the US-Brazil and Japanese agreements are not.

3.7.6 Technical assistance

Five of the twelve bilateral agreements contain an additional provision on technical assistance. This principle is arguably one of the most important for the future of international antitrust given the vast number of states with developing

antitrust regimes and enforcement authorities.⁹⁸ Provisions implementing this principle are designed to enable more developed antitrust authorities to support other authorities in their development without imposing standards and procedures.⁹⁹ Article VII of the US-Brazil, US-Mexico, Canada-Mexico and Japan-Mexico agreements as well as Article 19 of the Japan-Singapore bilateral agreement have been included with the aim of providing assistance to the party with a developing antitrust authority: Brazil, Mexico and Singapore in the respective agreements. The Japan-Singapore agreement contains the simplest form of wording allowing for the parties to render technical assistance to each other for ‘the effective management and adoption of laws and regulations controlling anti-competitive activities’. Article VII of the US-Brazil, US-Mexico, Canada-Mexico and Japan-Mexico agreements are substantively the same, initially acknowledging that technical cooperation activities/initiatives is in the parties’ common interest, then outlining examples of such activities/initiatives. It is explicit within these articles that assistance is subject to the reasonably available resources of the competition authorities involved. The four agreements list ‘exchanges of competition agency personnel for training purposes’ and ‘participation of competition agency personnel as lecturers or consultants at training courses on competition law and policy organised or supported by each other’s competition authority’ as types of assistance.

⁹⁸ For some discussion on the importance currently attached to technical assistance within bilateral agreements see I. Maher, ‘Competition Law in the International Domain: Networks as a New Form of Governance’, (2002) 29 *Journal of Law and Society* 111.

⁹⁹ For a discussion of the needs of authorities in states with developing antitrust regimes, and how far developed antitrust authorities are going to meeting such needs see T. Serebrisky, ‘What Do We Know about Competition Agencies in Emerging and Transition Countries? Evidence on Workload, Personnel, Priority Sectors and Training Needs’ (2004) 27 *World Comp.* 651.

3.7.7 Periodic meetings

There is provision for periodic meetings to take place between the parties to the agreement within eleven of the twelve bilateral agreements. The Japan-Mexico agreement does not contain a specific provision to this effect. The US-Brazil and Japan-Singapore bilateral agreements contain simplified forms of the provisions contained within the other eight agreements. Article VIII of the US-Brazil agreement provides for a periodical meeting of officials of the parties' competition authorities to 'exchange information on their current enforcement efforts and priorities in relation to their competition laws'. Article 23:1 of the Japan-Singapore agreement provides for the parties to meet within three years of the agreement entering into force to review the extent of cooperation pursuant to the agreement. The remaining nine bilateral agreements provide for either 'periodical',¹⁰⁰ 'annual',¹⁰¹ or 'semi-annual',¹⁰² meetings of competition authority officials in order to:

- (a) exchange information on their current enforcement efforts and priorities in relation to the competition laws of each country;
- (b) exchange information on economic sectors of common interest;
- (c) discuss policy changes that they are considering; and
- (d) discuss other matters of mutual interest relating to the application of the competition laws of each country'.¹⁰³

¹⁰⁰ Article VIII entitled 'Interagency Meetings' within the US-Israel agreement and Article IX entitled 'Periodic meetings' within both the US-Mexico and Canada-Mexico agreements.

¹⁰¹ Article 8:2 within the Japan-EC bilateral agreement and Article VIII:2 within the Japan-US agreement.

¹⁰² Article VIII of the Japan-Canada agreement, Article III:2 within the 1991 EC-US bilateral agreement, as well as Article IX of the US-Canada agreement and Article VIII of the EC-Canada agreement.

¹⁰³ The wording is the same in all the agreements with the minor exception that deceptive marketing laws are also included in (a) and (d) of Article IX of the US-Canada bilateral agreement due to the inclusion of cooperation with regard to deceptive marketing laws within that particular bilateral antitrust agreement, within Article VII.

Article VIII also contains an interesting provision for meetings to ‘discuss developments relating to bilateral or multilateral fora involving the parties that may be relevant to the cooperative relationship between the competition authorities of the parties’. Article VIII:2 of the EC-Canada agreement also provides that a report on these semi-annual meetings be made available to the Joint Cooperation Committee under the Framework Agreement for Commercial and Economic Cooperation between the EC and Canada. This is clearly a peculiarity and does not diminish the harmonisation achieved between the nine agreements on this matter.

3.7.8 Confidentiality

One of the principal difficulties in international antitrust cooperation is dealing with issues raised by national legislation protecting confidentiality of information. Much of the information collected by antitrust authorities can be commercially sensitive and so in order to protect the delicate balance between market intervention and encouraging competition, the information must remain confidential, a tricky exercise when entering into information exchanges in international antitrust.¹⁰⁴ All of the twelve bilateral agreements discussed enshrine the principle of confidentiality of information within a specific article. The simplest formulations of this principle are found in the identical provisions of the EC-US, US-Brazil and US-Mexico agreements, Article VIII, IX and X respectively. These articles contain two sections that are also included, in Article

¹⁰⁴ See C. Canenbley and M. Rosenthal, *op. cit.* note 42, for some discussion of the exchange of information amongst antitrust authorities outside the EC.

IX of the US-Israel agreement and Japan-Canada agreement, and Article X of the US-Canada, EC-Canada, Canada-Mexico and Japan-Mexico agreements, the latter six agreements also contain a further four sections with greater detail on the protection of confidentiality during and after exchanges of information.¹⁰⁵

The first section outlines the general principle that ‘neither party is required to communicate information to the other party if such communication is prohibited by the laws of the party possessing the information or would be incompatible with that party’s important interests’. The second section provides that:

‘Unless otherwise agreed by the parties, each party shall, to the fullest extent possible, maintain the confidentiality of any information communicated to it in confidence by the other party under this Agreement. Each party shall oppose, to the fullest extent possible consistent with that party’s laws, any application by a third party for disclosure of such confidential information’.

These provisions implement what has become the core principle of confidentiality within the bilateral agreements, while reflecting standards and rules ordinarily required by the parties. The third section within both Article X of the US-Canada and Canada-Mexico agreements and Article IX of the US-Israel agreement allows for assurances to be sought and agreed upon prior to any information exchanges.

If a party requests assurances on the confidentiality of the information to be

¹⁰⁵ The US-Canada agreement contains eight sections within Article X relating to confidentiality of information, however Article X:7 and 8 relate to Article VII of the agreement with regard to cooperation on enforcement of deceptive marketing practices laws, as such only Article X:1-6 are relevant for antitrust purposes.

provided or regarding the purpose to which it would be put then the receiving party must provide such assurances. The sixth section of Article X of the EC-Canada agreement contains a similar provision allowing a party to require that information provided under the agreement be used subject to conditions. The US-Canada and Canada-Mexico agreements provide that the 'notified party may not, without the consent of the other party, communicate to its state or provincial authorities information received from the other party pursuant to notifications or consultations under this Agreement'. This provision is likely to be irrelevant for most of the other bilateral agreements.

The US-Canada and US-Israel agreements include another, rather detailed, provision under the fourth section allowing the notified/receiving party to contact and consult the subject of the enforcement activities, once the notifying party has made that person aware he/she is subject to a notification. The exclusion of this provision from the Canada-Mexico and other bilateral agreements is likely to be explained by the many antitrust regimes whose substantive rules and competence do not extend to natural persons, notably unlike the US. As with provisions within the fourth section of the US-Canada, US-Israel and Canada-Mexico agreements, the EC-Canada agreement also contains provisions outlining confidentiality requirements for information exchanges with internal authorities. Article X:3 expressly permits the European Commission, after notice to the Canadian Commissioner of Competition, to inform any Member States' competition authorities that it has received a notification, when the Member States' important

interests are affected. Furthermore specific provision is made for the unique status and allocation of competences among competition law authorities within the EC by permitting the European Commission to inform Member States' competition authorities of any enforcement cooperation with the Canadian Commissioner of Competition. The Commission must first consult with the Commissioner and information to the national competition authorities may be limited by the Commission's obligation to respect a request from the Canadian Commissioner not to disclose information he has provided, when non-disclosure is necessary to ensure confidentiality.

The fifth section of the 'confidentiality articles' within the US-Canada, US-Israel and Canada-Mexico agreements reiterates the ban on communicating confidential information to third parties, unless consent has been given. The 'confidentiality article' within the EC-Canada agreement also makes reference to third parties but within a different context. Article X:4 provides that the parties' competition authorities 'shall consult one other and give due consideration to their respective important interests' before taking any action which may result in a legal obligation to make available to a third party information provided in confidence under the agreement.¹⁰⁶ The final, sixth section within the 'confidentiality articles' of the US-Canada,¹⁰⁷ US-Israel and Canada-Mexico agreements provides that confidential information communicated from one party to the other can only be

¹⁰⁶ This is likely to be relevant within the EC given the rights of access to file that subjects of antitrust investigations have.

¹⁰⁷ Article X: 7 and 8 relate to confidentiality during enforcement cooperation on deceptive marketing practices.

used for competition law enforcement purposes unless consent has been received for another purpose. Article X:5 of the EC-Canada agreement and Article IX:7 of the Japan-Canada agreement contain similar provisions.

Article 9:1 of the Japan-EC agreement and Article X:1 of the Japan-Canada agreement mirror the first section of the seven agreements already discussed in that neither party is required to communicate information if that is prohibited by the parties' laws or contrary to their important interests, Article IX:5 of the Japan-US agreement, Article 10:6 of the Japan-Mexico agreement and Article 20:4 of the Japan-Singapore agreement contain identical provisions. Article 9:2(a) of the Japan-EC agreement is similar to the first section of Article IX in the Japan-US agreement, both state that confidential information communicated from one party to another will only be used for competition law enforcement purposes. Article 9:2(b) then differs from 1(b) of Article IX in the Japan-US agreement. While the latter provision prevents the receiving competition authority from communicating confidential information to a third party or other authority without consent, the former provision within the Japan-EC agreement makes no direct mention of a 'third party' but states 'when a party communicates information in confidence under this Agreement, the receiving party shall, consistent with the laws and regulations, maintain its confidentiality'. Article 20:1 of the Japan-Singapore agreement provides a simplified form of Article IX:1 of the Japan-US Agreement. Article 9:3 of the Japan-EC agreement contains a clause similar to that within Article X of the EC-Canada agreement and other agreements described above,

permitting the party providing information to specify terms and conditions for the use of the information. Supporting the third section, Article 9:4 then permits either party to limit information provided when the receiving party cannot: i) guarantee its confidentiality; ii) guarantee that the terms and conditions attached would be complied with; or iii) agree to limit the uses to which the information would be put. Article IX:4 of the Japan-US agreement and Article 20:3 of the Japan-Singapore agreement provide for information exchanges to be limited when confidentiality and use restrictions cannot be guaranteed. One other element to the confidentiality provisions within the Japan-US, Japan-Canada, Japan-Mexico and Japan-EC agreements is that information sharing with relevant enforcement authorities for the purpose of competition law enforcement is permitted. Unique to several of the Japanese agreements are further provisions regarding the use of confidential information, communicated under the agreement, in criminal proceedings.¹⁰⁸

3.7.9 Existing laws

Ten of the twelve bilateral agreements examined proclaim the primacy of domestic legislation over provisions within the agreement within a single article, in spite of there being many such provisions throughout other articles as well. The Japan-Singapore and Japan-Mexico agreements are the exception, which have no specific article but nonetheless incorporate the principle of primacy of national law in separate articles. Article IX of the EC-US and US-Canada agreements,

¹⁰⁸ Article X of the Japan-US agreement, Article X:7(a) of the Japan-Canada agreement, Article 10:1(d) of the Japan-Mexico and Article 21 of the Japan-Singapore agreement.

Article X of the US-Brazil and US-Israel agreements, and Article XI of the EC-Canada, Canada-Mexico and US-Mexico agreements all implement the principle of primacy of national law with identical wording, stating that nothing in the agreement shall require a party to take any action, or refrain from taking any action, that is inconsistent with its existing laws. The remaining Japan-US, Japan-Canada and Japan-EC agreements implement this principle within Articles XI, 10 and X respectively in a similar yet more protracted form. All twelve agreements clearly stipulate that they cannot operate so as to affect rights or obligations arising out of domestic rules or legislation. This is significant in terms of the type of convergence that can be achieved through concluding bilateral agreements and is discussed further below.

3.7.10 Communications under the agreement

Each of the twelve bilateral agreements detail how parties should communicate with each other under the agreement. Article IX of the EC-Canada and Japan-Canada agreements, Article X of the EC-US agreement, Article XI of the US-Israel and US-Brazil agreements, Article 11 of the Japan-EC and Japan-Mexico agreements, Article XII of the US-Canada, US-Mexico, Canada-Mexico and Japan-US agreements, and Article 25 of the Japan-Singapore agreement all provide that communications under the agreements may be carried out directly between the parties' competition authorities. However, one proviso is that notifications under the agreements and, where relevant, positive comity and consultation requests must be promptly confirmed in writing through the

diplomatic channel. On this matter the twelve agreements have achieved a large degree of procedural harmonisation

3.7.11 Modern state-to-state bilateral antitrust agreements

A modern state-to-state bilateral antitrust cooperation agreement can be characterised by the inclusion of most, if not all, of the principles considered above, but also by its formal status. This status is exhibited by various factors: the lengthy negotiation period; governments are the actual signatories to the agreement and not the competition authority; the use of the diplomatic channel for certain communications; and significantly by the provisions within each agreement for termination after written notice by one of the parties. While in force these agreements amount to legally binding instruments under international law, albeit constrained by agreed parameters, notably to the extent consistent with the parties' domestic laws and regulations. The agreements may also lay the foundation for further agreements that facilitate more advanced cooperation in specific areas of antitrust. For example, the 1991 EC-US agreement facilitated the advanced 1998 agreement between the same parties on positive comity, building upon Article V in the original agreement. The 1998 agreement did not however, replace the 1991 agreement, it was merely a supplement to aid cooperation in particular areas of antitrust enforcement, notably stating in Article II:4(a) that the ECMR is excluded from its application. Similarly, merger control provisions

under US antitrust are also excluded.¹⁰⁹ Furthermore, MLATs or US IAEEA agreements can complement the basic bilateral cooperation agreement by, *inter alia*, enabling greater sharing of confidential information in relevant situations.¹¹⁰ While state-to-state bilateral agreements arguably constitute the primary basis for international antitrust cooperation, there are also several agency-to-agency bilateral agreements in existence.¹¹¹

3.8 Agency-to-agency bilateral arrangements

3.8.1 There are at least eleven antitrust cooperation arrangements currently in force between antitrust authorities themselves. These will be referred to as agency-to-agency arrangements. It is unnecessary to enter into a detailed comparison of each arrangement. The sole objective of discussion regarding these arrangements is to determine whether their provisions are consistent with the principles implemented within the state-to-state bilateral agreements. For reasons discussed above, tripartite arrangements are included in this determination. It is instantly notable that Australia has a prominent role within this area of international antitrust as its antitrust authorities are signatories to six of the eleven antitrust arrangements. The

¹⁰⁹ Excluding application of the Clayton Act (15 U.S.C. §§12-27) provisions which relate to investigations under Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §18a, i.e. merger investigations.

¹¹⁰ Note that the Mutual Antitrust Enforcement Assistance Treaty between Australia and the US could be regarded as a specialist agreement with regard to the acquisition and exchange of antitrust evidence and does not contain the basic principles that are contained within the 1982 agreement, discussed above. Note that the recent Australia-US Free Trade Agreement (AUSFTA) also contains provisions on antitrust notably Article 14.2: Competition Law and Anti-competitive Business Conduct and 14.4: State Enterprises and Related Matters.

¹¹¹ Note that agency-to-agency arrangements are often considered as an antecedent to a more formal state-to-state agreement.

Australian Competition and Consumer Commission (ACCC) has entered into arrangements with the New Zealand Commerce Commission (NZCC) and the Commissioner of Competition (Canada) in 2000, the Commerce Commission of the Fiji Islands, the NZCC and the Taiwan Fair Trade Commission (TFTC), and the Fair Trade Commission of Korea in 2002, and with the NZCC and the Secretary of State for the Department of Trade and Industry and the Office of Fair Trading (UK) in 2003. Additionally the arrangement between the Australian Commerce and Industry Office and the Taipei Economic and Cultural Office (Taiwan) entered into in 1996 remains in force. Three further arrangements have been entered into by the Commissioner of Competition (Canada): with the Fiscal Nacional Economico (Chile) in 2001; the Secretary of State for the DTI and the OFT (UK) in 2003; and the Korean Fair Trade Commission in 2006. The remaining two arrangements are between the French Competition Council and the Taiwanese Fair Trade Commission and between the Korean Fair Trade Commission and the Mexican Federal Competition Commission, both in 2004.

3.8.2 There are two distinct formats adopted by the eleven arrangements, the format adopted by the Australia-NZ-Canada, Canada-Chile, Canada-Korea, Canada-UK, Australia-NZ-Taiwan, Australia-NZ-UK, France-Taiwan and Korea-Mexico arrangements have similar terms and provisions to the state-to-state bilateral agreements. The Australia-Taiwan, Australia-Fiji, and Australia-Korea arrangements, however, adopt a rather distinctive format, similar to the 1994 Australia-New Zealand bilateral agreement. With the exception of the France-

Taiwan and Korea-Mexico arrangements, the first group of arrangements contain provisions on 'Purpose and Definitions', 'Notification', 'Enforcement Cooperation and Coordination', and 'Avoidance of Conflict' in the first four articles. The Australia-NZ-Taiwan and Australia-NZ-UK arrangements also include further provisions on 'Exchange of Information', and similar provisions on periodical meetings, confidentiality of information, primacy of existing laws, communications under the arrangement and unilateral termination of the arrangement. The France-Taiwan arrangement is very similar to the arrangements discussed above and has provisions on 'Purpose and Definitions' and 'Notification' in the first two articles, as well as an article on 'Exchange of Information' similar to the Australia-NZ-Taiwan and Australia-NZ-UK arrangements but does not have specific provisions on 'Enforcement Cooperation and Coordination' and 'Avoidance of Conflict' as outlined for the other arrangements. Instead there is one article on 'Consultations' as well as similar provisions on periodical meetings, confidentiality, communications, existing laws and termination. The Korea-Mexico arrangement has separate provisions on cooperation and coordination, as well as provisions on positive comity and technical cooperation in very similar terms to that of the formal agreements. The provisions in these eight arrangements are entirely consistent with the concepts and principles implemented within the state-to-state bilateral agreements discussed above.

3.8.3 The second format adopted within the Australia-Taiwan, Australia-Fiji and Australia-Korea arrangements all contain provisions on ‘Purpose’, ‘Definitions’, ‘Scope of Cooperation’, ‘Confidentiality’, ‘Procedure for Assistance’, and ‘Termination and Review’. The Australia-Taiwan and Australia-Korea arrangements contain detailed additional provisions on technical assistance, while the Australia-Taiwan and Australia-Fiji arrangements implement the principle of avoidance of conflict. It is clear that the principles of notification, enforcement cooperation, comity, and primacy of existing domestic law actually underlie many of the provisions contained within these three arrangements. Notwithstanding that many of the Australian arrangements and the Australia-New Zealand agreement adopt a peculiar format, it would be difficult to substantiate any suggestion that this is as result of differing bilateral relationships, and it appears more likely that it is simply an Australian peculiarity. It is clear that the substance of the three arrangements and solitary agreement is consistent with concepts and principles implemented within the ten agreements examined above.¹¹² One very notable and distinctive element within two of the three tripartite arrangements, Australia-NZ-Taiwan and Australia-NZ-UK, however, is that the final provision allows for other competition authorities to join the arrangement ‘on terms to be decided between it and the Participants to the Arrangement at the time of the application to join. The Participants may develop, as they consider appropriate, procedures to

¹¹² It is, however, conceded that certain peculiarities do exist within the Australia-New Zealand bilateral agreement, notably the provisions on facilitating joint publications or co-operative ventures in the area of education and compliance education within section 9, yet even this peculiarity does not amount to a divergence from principles implemented within other bilateral agreements, and in substantive terms the 1994 agreement is consistent with the standard that appears to have developed amongst other agreements. Indeed the only significant difference is the format adopted which may be a result of the endeavour to harmonise the business laws of the two states, yet is more likely to be attributable to a peculiar Australian approach to formatting its international antitrust cooperation agreements.

deal with such new Participants'. This innovation is the sole distinguishing factor for these two arrangements from concepts and principles implemented within general bilateral antitrust cooperation agreements. Unfortunately, and similar to the conciliation provisions under the OECD Recommendation, this innovation which could have significance for the development of international antitrust cooperation, has remained idle.

3.9 Conclusion

3.9.1 The proliferation of bilateral antitrust cooperation agreements, in whatever form, certainly has clear potential to diminish the risk of conflict between the enforcement activities of antitrust authorities on the international stage. There are many factors in the latter half of the 20th century that heightened the risk of conflict, including: the globalisation of trade; the integration of market economies; the growth of antitrust across the globe; and the increasing readiness to use extraterritoriality as an enforcement tool. The 'second face' of international antitrust, bilateralism, has an important role in ensuring that international antitrust enforcement can be both effective and efficient, and operate to reduce the burden of multi-jurisdictional enforcement for the firms involved. Nonetheless, in light of the significant degree of convergence between the agreements discussed, it is questionable whether bilateral antitrust agreements do actually reflect peculiarities in the bilateral relationship of the signatory states. It is certainly arguable that the proliferation of bilateral antitrust cooperation agreements has had a detrimental

impact upon efforts to establish a multilateral framework for international antitrust.¹¹³ A lingering question however, is why the success of bilateral agreements has been at the expense of a multilateral framework, and/or whether a multilateral framework is necessary in international antitrust. While proposals such as concluding a WTO agreement on competition policy¹¹⁴ go beyond provisions within current bilateral agreements, the main innovations are likely to centre around capacity building and sharing of best practices, and not the adoption of an international code or creation of an international antitrust authority that would represent a stark policy shift from cooperation to harmonisation.¹¹⁵ Nonetheless it is clear from the movements from unilateralism to bilateralism, that there is ambiguity in international antitrust as to what the objective of the international antitrust dialogue actually is. The assessment of bilateral agreements, and the significance of the convergence achieved can only be judged against a set objective, which is currently unclear. This is an issue that will be considered in greater depth at the end of chapter 4.

3.9.2 What is clear at this stage is that the twelve principal state-to-state bilateral agreements entered into since 1991, as well as the current agency-to-agency arrangements, suggest that a remarkable degree of convergence has already been achieved between these agreements. Antitrust officials tend to convey the view

¹¹³ See similar comments by Eleanor Fox, *supra* chapter 2 at note 27, arguing that a multilateral antitrust agreement would be more likely had it not been for the US effects doctrine.

¹¹⁴ See J. Drexler, 'International Competition Policy after Cancun: Placing a Singapore Issue on the WTO Development Agenda', (2004) 27 *World Comp.* 419.

¹¹⁵ For an accurate account of proposals regarding a WTO agreement that dispels many of the myths, see F. Jenny, 'Competition Law and Policy: Global Governance Issues', (2003) 26 *World Comp.* 609.

that bilateral agreements are peculiar to each bilateral relationship,¹¹⁶ a view that suggests a comparison of the current agreements would identify significant differences. Strikingly, many of the key principles outlined above are implemented in very similar terms across a wide spectrum of bilateral agreements, including the US and EC agreements, but also exhibited within the Australian ‘arrangements’ and the Japan-Singapore agreement. Nonetheless it is clear that some differences do exist between the principal agreements, as within several of the Japanese agreements regarding limiting the use of confidential information in criminal investigations, and the provisions within five agreements for technical assistance, also the generality of the provisions within the US-Brazil agreement. While certain provisions are undoubtedly a consequence of a peculiarity within a party’s antitrust regime, any significant differences between the agreements are likely to be either of a procedural (i.e. differing procedures within the parties’ respective regimes result in differences between the agreements, e.g. notification triggers) as opposed to a substantive nature, or as a result of the developing nature of one of the parties’ antitrust regimes, and not as a result of any underlying divergence. Indeed, it is arguable that differences between agreements are not attributable to differing bilateral relationships between the parties, but simply as a result of internal peculiarities or the ongoing development of the antitrust regime of one of the parties. It is suggested therefore that a template has inadvertently come into being for bilateral antitrust cooperation agreements irrespective of the peculiarities of any particular bilateral relationship. The bilateral relationship existing between states clearly does, however, have a bearing on at least one very

¹¹⁶ See the quote by Charles S. Clark, *supra* at 3.4.2.

important factor: the negotiation and conclusion of the bilateral agreement. Even if the actual content of the agreement does not vary according to the relationship, the political will to enter into the agreement inevitably does, and this is a factor that is further explored at the beginning of chapter 4.

Table 3.1: state-to-state bilateral antitrust cooperation agreements

Parties	Year	Electronic access point
US – Germany	1976	US DOJ website: http://www.usdoj.gov/atr/public/international/int_arrangements.htm
US – Australia	1982	US DOJ website, as above.
US – Canada (MLAT)	1990	Electronic access no longer available.
US – EC	1991	US DOJ website, as above.
US – Canada	1995	US DOJ website, as above.
US – EC (positive comity)	1998	US DOJ website, as above.
EC – Canada	1999	EC DG COMP website at: http://ec.europa.eu/comm/competition/international/bilateral/canada.html
US – Australia (MLAT)	1999	US DOJ website, as above.
US – Brazil	1999	US DOJ website, as above.
US – Israel	1999	US DOJ website, as above.
US – Japan	1999	US DOJ website, as above.
US – Mexico	2000	US DOJ website, as above.
Canada – Mexico	2001	CCB website: http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1594&lg=e
Japan – Singapore	2002	JFTC website: http://www.jftc.go.jp/e-page/internationalrelations/index.html

EC – Japan	2003	EC DG COMP website: http://ec.europa.eu/comm/competition/international/bilateral/japan.html
Canada – Japan	2005	CCB website: http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2012&lg=e

Table 3.2: agency-to-agency antitrust cooperation arrangements

Parties	Year	Electronic access point
Australia – Taiwan	1996	ACCC website: http://www.accc.gov.au/content/index.phtml/itemId/564911/fromItemId/255435
Australia – NZ – Canada	2000	CCB website: http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1595&lg=e
Canada – Chile	2001	CCB website: http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1599&lg=e
Australia – Fiji	2002	ACCC website, as above.
Australia – Korea	2002	ACCC website, as above.
Australia – NZ – Taiwan	2002	ACCC website, as above.
Australia – NZ – UK	2003	ACCC website, as above.
Canada – UK	2003	CCB website: http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1596&lg=e
France – Taiwan	2004	Taiwanese FTC website: http://www.ftc.gov.tw/EnglishWeb/English.html
Canada – Korea	2006	CCB website: http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2075&lg=e

Completing the landscape of international antitrust: regional agreements and multilateral initiatives

4.1 The prerequisite of trade?

4.1.1 In light of the comparative analysis in chapter 3 concerning current bilateral cooperation agreements, and the conclusion that an extensive degree of convergence has been achieved, the question arises as to why bilateral agreements remain the most prevalent form of international antitrust agreement in spite of clear potential for some form of multilateral agreement. Given the historical relationship between trade and international antitrust,¹ it is helpful to briefly consider the trading relationship between those states that have entered into the principal cooperation agreements to assess whether any linkages exist. While the chapter 3 analysis strongly suggests that the particular bilateral relationship existing between two states has very little bearing upon the substance of any antitrust agreements they enter into, the decision regarding whether to enter into such an agreement is ordinarily a political decision² and as such is likely to be determined by the nature of the relationship between the two states. Therefore, the strength of a bilateral trading relationship may be an important factor. A noteworthy start is to highlight that in 2003, eight of the top ten leading importers and exporters in world merchandise trade were active in international antitrust³

¹ See discussion *supra*, as well as generally Y.H. Akbar, *Global Antitrust: Trade and Competition Linkages*, (Hampshire, Ashgate, 2003).

² See M.M. Dabbah, *The Internationalisation of Antitrust Policy* (Cambridge, Cambridge University Press, 2003) for a good discussion of the interface between antitrust and other disciplines including politics.

³ Referring to the US, the EC (external trade), Japan, Canada, Mexico, South Korea, Singapore and Taiwan. Sourced from the World Trade Organisation Press Release 373 on 5th April 2004, Appendix Table 2: Leading exporters and importers in world merchandise trade (excluding intra-EU trade), 2003.

(with China and Hong Kong the two other leading traders,⁴ although they are currently in the process of adopting domestic antitrust laws). Furthermore, the three other main states that have entered into bilateral antitrust agreements were included in the top 30 leading traders (Brazil, Australia and Israel).

The trading relationship between the US and the seven jurisdictions with which it has a bilateral antitrust agreement will now be considered. Arguably its most significant agreement, with the EC, is with one of its largest trading partners, as trade with the EC accounts for 19.3% of all US imports (with an approximate value of \$232,142million) and 20.8% of all US exports⁵. Similarly, underlying the US-Canada bilateral agreement is the trading relationship accounting for 17.8% of all US imports and 23.2% of all US exports. Furthermore, Mexican imports are 11.3% and Japanese imports 10.4% of total US imports, and exports to Mexico 14.1% and exports to Japan 7.4% of total US exports. While Australian, Israeli and Brazilian trade is far less significant with the US than those already mentioned, the US is the principal trading partner to Israel (accounting for 18.5% of all Israeli imports and 40.2% of all Israeli exports), and Brazil (accounting for 21.9% of all Brazilian imports, and 25.7% of all Brazilian exports), and one of the two main trading partners with Australia. While suggesting a link may be premature, it is noteworthy that 71.6% of all US exports go to one of the seven

⁴ For a discussion of the background to antitrust within these jurisdictions see M. Williams, *Competition Policy and Law in China, Hong Kong and Taiwan* (Cambridge, Cambridge University Press, 2005).

⁵The EC figures include the trading figures between the US and Germany, both of whom negotiated a bilateral antitrust agreement many years before the US-EC agreement was entered into. All trade statistics used in this section, apart from those detailing the total European Union imports and exports, are sourced from the United Nations International Trade Statistics Yearbook 2002, Volume 1.

trading partners with whom the US has a bilateral antitrust agreement, additionally 60.5% of all US imports are from those same trading partners.

The three bilateral antitrust agreements entered into by the EC exhibit a similar trend as the US, Japan and Canada are three of the largest single external trading partners with the EC. The US makes up 22.8% of all EC imports and 15.3% of exports, while Japan makes up 6.7% of all imports and 8.2% of exports, and Canada accounts for 4.8% of all imports into the EC and 5.6% of exports.⁶

Canadian trade figures are the most suggestive of a connection between the bilateral trade relationship and antitrust agreements. Canada has entered into bilateral antitrust agreements with the US, Mexico and Japan, additionally it has an agency-to-agency arrangement with the UK. These are 4 of Canada's top five trading partners (the other being China). Trade with the EC, including the UK, accounts for 11.2% of all Canadian imports and 4.4% of exports, second on both counts to the US which makes up a huge 62.6% of all Canadian imports and 87.2% of Canadian exports. These states coupled with Australia, Chile, and Japan account for a vast 82.3% of all Canadian imports and 94.7% of total exports. Whilst definitive conclusions from these figures alone may not be possible, they do highlight the importance of avoiding any disputes detrimental to trade (such as an antitrust dispute) with the principal trading partners, and many of the partners to bilateral antitrust agreements appear to be principal trading partners.

⁶Trade figures sourced from the 'European Union and its Main Trading Partners 2000 Economic and Trade Indicators', available at: <http://www.europa.eu.int/comm/trade/issues/bilateral/data.htm>.

Trade figures for Japan provide evidence of a similar trend, albeit on a smaller scale, as it has bilateral agreements with two of its top three trading partners: the EC and the US (the other being China). The current negotiations between Japan and Australia⁷ only serve to strengthen this trend. The EC, US, Australia and Japan amount to 36.8% of all Japanese imports and 47.4% of all Japanese exports.

Mexico also demonstrates the importance of the trading relationships that often underlie bilateral antitrust agreements as the two principal agreements are with trading partners accounting for 66.1% of all Mexican imports (63.4% from the US and 2.7% from Canada), and 90.8% of all Mexican exports (89.1% to the US and 1.7% go to Canada). Similarly Australia either has or is in negotiations to conclude antitrust agreements with its two principal trading partners as the US accounts for 18.4% of total Australian imports and 9.7% of total exports, while Japan accounts for 12.4% of imports and is the largest Australian exporter with 18.6% of the total. Including the United Kingdom and Korea, as well as New Zealand, with whom Australia has antitrust arrangements, Australia's antitrust partners account for 43% of total imports and 47.9% of total exports.

4.1.2 It is obvious that merely considering the size of the trading relationship between states with antitrust agreements is insufficient support to state that a strong trading relationship is a prerequisite to a bilateral antitrust agreement, or that a strong trading relationship between states with antitrust regimes will thereby lead to an

⁷ See ACCC Press Release MR 098/03 on 14th May 2003.

antitrust cooperation agreement. Nonetheless it is significant that those states with bilateral antitrust agreements also have a strong trading relationship.⁸ Conflict between antitrust authorities can clearly have a negative impact upon trade, and one of the principles evident in bilateral antitrust agreements is the avoidance of conflict. Concluding antitrust cooperation agreements in this context appears entirely logical.

The negotiation and conclusion of a bilateral antitrust cooperation agreement represents an acknowledgement by the signatory states of the presence of certain circumstances, namely that commerce taking place in one state has the potential (due to the movement of trade) to impact upon commerce in the other state. Furthermore, the agreements implicitly acknowledge that commerce may have cross-border anti-competitive effects, and that state authorities are entitled to act against such effects.⁹ Confronted with anti-competitive effects originating from foreign conduct, states will generally not however, seek to sever the commercial linkages that enabled the foreign conduct to have domestic effects¹⁰ because those commercial linkages are regarded as beneficial and indeed desirable by states

⁸ Note that while the size of US trade with Israel and Brazil is not particularly significant, the US is the principal trading partner to both nations, it is also possible, and probable, that political and regional motives influence the decision to negotiate a bilateral antitrust agreement.

⁹ In some respects it can therefore be argued that the conclusion of a bilateral antitrust cooperation agreement is an implicit acceptance of the legality of extraterritorial application of antitrust laws, i.e. a variation of the US effects doctrine. Equally however, one could argue that bilateral agreements are a means for a state, which may in essence oppose extraterritoriality, to minimise the detrimental impact upon national interests deriving from foreign extraterritoriality (particularly as certain states will use extraterritoriality as an antitrust enforcement tool with or without cooperation).

¹⁰ E.g. assume the hypothetical situation of a Japanese manufacturer cross-subsidising its US subsidiary to enable predatory pricing in the US market, to force a US competitor out of that domestic market. US antitrust authorities would not ordinarily seek to sever the Japanese firm's commercial links by requiring the disposal of the subsidiary or by prohibiting the sale or purchase of its goods, but would instead take remedial action against the Japanese firm, normally in the form of imposing financial and behavioural remedies.

operating a market economy. The importance attached to maintaining and encouraging increased commerce can effectively place external limitations/pressures upon extraterritorial antitrust enforcement. Thus, a balance is required between providing effective deterrence and remedial action for anti-competitive conduct, and maintaining the incentives that foster those beneficial commercial linkages.¹¹ There may be no need for a bilateral antitrust cooperation agreement in the absence of significant commercial linkages, as the foreign commerce cannot have a domestic effect. Another rationale for an agreement could arise if states were in the process of cultivating commercial links, and did not want the anticipated benefits to be nullified by anti-competitive practices or a damaging dispute resulting from unilateral antitrust enforcement. Trade issues are therefore clearly relevant considerations in international antitrust and important to the negotiation and conclusion of bilateral cooperation agreements, it is far from certain that antitrust considerations are equally important factors during the negotiation of trade agreements, or during the creation and development of trading blocs.

4.2 The role of antitrust in RTAs

4.2.1 Introduction

Assessing the importance of antitrust considerations (if indeed there are any) to the negotiation and conclusion of trade agreements and the creation of trading blocs will enable a fuller understanding of the extent of the international antitrust

¹¹ This balance is discussed in terms of a paradox for international merger control in chapter 5, *infra*.

dialogue, and indeed the objective that has attached to international antitrust. In carrying out such an assessment it is helpful to consider principal trade agreements and the legislative instruments of trading blocs, and examine whether they contain any antitrust provisions. This assessment will focus upon regional trade initiatives. As there have been in excess of 300 Regional Trade Agreements (RTAs) notified to the WTO, with at least 180 still in force,¹² it is neither possible nor productive to consider all current RTAs. The focus will therefore be upon those RTAs and trading blocs with a relatively large number of signatories/members and those concerning large commercial markets. Agreements between the EC and third countries will be considered at *infra* at 4.3.

The importance attached to antitrust considerations by trade negotiators will usually be reflected within the substance of trade agreements or within the stated objectives of trade blocs, yet the nature of any antitrust involvement varies widely amongst the principal RTAs. Not all RTAs have antitrust provisions and there are substantive differences amongst those with antitrust provisions. Substantive provisions can range from the setting up of a working group to examine antitrust and trade links, to a clear attempt at providing a harmonised set of antitrust rules.

¹² According to WTO compiled figures, see the table at http://www.wto.org/english/tratop_e/region_e/eif_e.xls. Note that many of these 'RTAs' are actually bilateral trading agreements included within the WTO definition of a regional trade agreement.

4.2.2 The ANDEAN Community/The 'CAN'

The ANDEAN Community (also known as the CAN) is a sub-regional grouping of four South American countries: Bolivia; Colombia; Ecuador; and Peru.¹³ The CAN was created by the signing of the *Cartagena Agreement* on 26th May 1969, and the member countries have been engaged in a process of closer cooperation and integration ever since. The ANDEAN Free Trade Area was formed in February 1993¹⁴ and the CAN has been operating as a Customs Union for Colombia and Ecuador (and originally Venezuela) since 1995 when they adopted a Common External Tariff (CET). Bolivia and Peru did not fully implement the CET until 2003. The CAN has been working towards the creation of a Common Market, initially with a target of 2005, and the Community has many features of such an integrated system, including the existence of *inter alia*, an ANDEAN Court of Justice, Commission, Presidential Council and Foreign Ministers Council. It has been suggested that:

‘A review of the competition rules of the CAN alongside those of the EU confirm that the CAN is closest to the EU model in terms of supranationality, institutions, and competition rules. Assuming completion of the common market, the resemblance may grow’.¹⁵

While a substantive comparison of the CAN and EC antitrust provisions could not support such a statement, if the suggestion was focusing upon the institutional structure and legal status of Community rules within national law, then the

¹³ Note that Venezuela withdrew from the ANDEAN Community following an announcement on 20 April 2006, see BBC News report, ‘Venezuela Quits Andean Trade Bloc’, available at <http://news.bbc.co.uk/1/hi/business/4925056.stm>.

¹⁴ Although note that Bolivia did not join the Free Trade Area until July 1997.

¹⁵ See Paper by C.A. Jones, ‘Leveling the Playing Field in the EU, NAFTA, CAN, Mercosur and Beyond: Comparing the Role of Competition Rules in Regional Economic Organizations’ presented to the European Union Studies Association Conference, Austin, Texas 31st March – 2nd April 2005.

statement is with merit. Currently the directly applicable antitrust rules of the CAN are principally found in two decisions adopted on the 21st March 1991: Decision 285 Rules and regulations for preventing or correcting distortions in competition caused by practices that restrict free competition; and Decision 283 Rules for preventing or correcting distortions in competition caused by dumping or subsidy practices. The CAN antitrust rules do not apply when practices solely affect one Member State and also originate from that same Member State, in which circumstances it is left to national antitrust rules to investigate.¹⁶ When the CAN antitrust rules are applicable, the Decisions set out the correct procedure for Member States or enterprises with a ‘legitimate interest’ to submit their investigation ‘request’ (i.e. complaint) to the Board of the Andean General Secretariat. Only the General Secretariat can investigate alleged antitrust infringements and issue ‘injunctions’ to require that activities are brought to an end, although the onus of enforcing the ‘injunction’ is upon national authorities. With regard to the substantive provisions within Decisions 283 and 285, neither Decision contains a clear prohibition against certain types of conduct or conduct having a certain type of effect. The Decisions confer a discretion upon Member States and ‘interested’ enterprises to ‘ask the Board for authorisation or a mandate to take measures to prevent or correct...’: i) ‘the threat of injury or injury to production or exports, caused by practices that restrict free competition originating in the Subregion or involving an enterprise that carries out its

¹⁶ Article 2, ANDEAN Community Commission Decision 285 Rules and regulations for preventing or correcting distortions in competition caused by practices that restrict free competition.

economic activity in a Member Country’;¹⁷ or ii) ‘distortions in competition in the Subregional market caused by dumping or subsidies’.¹⁸ Both Decisions elaborate upon the basic provisions with examples of behaviour caught by the provisions, and the examples within Decision 285 bear a clear resemblance to anti-competitive conduct identified by ECJ and CFI jurisprudence. Nonetheless, a large proportion of the provisions address procedural issues. It is clear that the substantive antitrust provisions of the ANDEAN Community lack depth and often clarity. It would be difficult to argue that the provisions alone were capable of informing firms of their rights and obligations. It is noteworthy that there are no explicit rules providing for merger control within the ANDEAN Community, and it is difficult to envisage any developing implicitly from the current provisions. Beyond the two principal Decisions providing for regional antitrust rules, there are also efforts within the CAN to harmonise and strengthen the domestic antitrust rules of its Member States. The EC has been assisting with these efforts through a joint ‘Competition Project’ with the aim ‘to improve the region’s legislative, administrative and judicial context for competition law, support the Andean institutions responsible for the application and control of provisions on the subject, and promote a culture of competition’.¹⁹ At the launch of the joint project, the CAN Director General, Héctor Maldonado, ‘underscored the importance of having rules of competition to ensure the free play of market forces and boost

¹⁷ Article 2, ANDEAN Community Commission Decision 285 Rules and regulations for preventing or correcting distortions in competition caused by practices that restrict free competition.

¹⁸ Article 2, ANDEAN Community Commission Decision 283 Rules for preventing or correcting distortions in competition caused by dumping or subsidy practices.

¹⁹ See Andean Community Press Release 3 March 2003, CAN country rules of competition to be harmonized with European Union assistance.

economic efficiency and, above all, reinforce the economic integration of the CAN countries'.²⁰ He also stated 'we believe that the project will help us to move ahead firmly toward our target of establishing the Andean Common Market'.²¹

4.2.3 APEC

The Asia-Pacific Economic Cooperation group (APEC) is not a trade bloc as such but a diverse inter-governmental forum established in 1989 aimed at 'facilitating economic growth, cooperation, trade and investment in the Asia-Pacific region'.²² The 21 'Member Economies'²³ are supported by a permanent secretariat and operate on the basis of non-binding commitments and open dialogue. APEC's long term objective is for 'free and open trade and investment in the Asia-Pacific by 2010 for industrialised economies and 2020 for developing economies'.²⁴ In pursuing this objective, the APEC leaders agreed upon Principles to Enhance Competition and Regulatory Reform in September 1999,²⁵ and created a Competition Policy and Deregulation Group within the APEC Committee on Trade and Investment with the aim of enhancing the region's 'competitive environment'. The 1999 set of principles is recognition by the Member Economies of:

²⁰ Andean Community Press Release 3rd March 2003, CAN country rules of competition to be harmonized with European Union assistance.

²¹ *Ibid.*

²² Further details are provided on the APEC website at: http://www.apec.org/apec/about_apec.html.

²³ Australia, Brunei Darussalam, Canada, Chile, China, Hong Kong, Indonesia, Japan, South Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, The Philippines, Russia, Singapore, Taiwan, Thailand, USA, and Vietnam.

²⁴ The so-called 'Bogor Goals' agreed at the APEC Leaders 1994 meeting in Bogor, Indonesia.

²⁵ *APEC Economic Leaders' Declaration: APEC Principles to Enhance Competition and Regulatory Reform*, 13th September 1999 Auckland, New Zealand, available at: http://www.apec.org/apec/leaders_declarations/1999/attachment_-_apec.html.

‘the strategic importance of developing competition principles to support the strengthening of markets to ensure and sustain growth in the region and that these principles provide a framework that links all aspects of economic policy that affects the functioning of markets’.

The principles do not, however, provide any guidance as to the structure, content or enforcement mechanism of any potential antitrust rules. Indeed the principles contain very little detail regarding an antitrust regime, other than endorsing the inclusion of the principles of non discrimination, comprehensiveness, transparency, accountability and implementation within any such regime. One key objective outlined in the principles is to ‘foster confidence and build capacity in the application of competition and regulatory policy’. The following specific tasks are then established: promote advocacy of competition policy and regulatory reform; build expertise in competition and regulatory authorities, the courts and the private sector; and adequately resource regulatory institutions, including competition institutions. It is clear that the work of the Competition Policy and Deregulation Group tends to focus upon these tasks, as well as developing means of cooperation between competition authorities,²⁶ and it is this work that forms the principal antitrust related activities of APEC. In substantive terms the CPD Group runs the APEC Training Programme on Competition Policy, which is strongly supported by the OECD. This programme operates a seminar series promoting discussion on themed topics between experts from member economies as well as international organisations.²⁷ Another key antitrust related activity has been the

²⁶ Which is another goal outlined in the 1999 set of principles.

²⁷ See Report on APEC Training Programme on Competition Policy presented to the CPD Group Annual Meeting 24th may 2005 at Jeju, Korea, available at: http://www.apec.org/content/apec/documents_reports/competition_policy_deregulation_group/2005.html.

creation of the APEC Competition Policy and Law Database,²⁸ which Taiwan took full operational and financial responsibility for setting up, although each member economy is responsible for updating its own data. The CPL Database is publicly accessible and given the lack of substantive convergence efforts under the auspices of APEC at this stage, the database is an important step in order to build mutual understanding and confidence amongst member economies with regard to their respective antitrust laws and policies. It also clearly increases the transparency of the operation of antitrust laws in several jurisdictions which can only be of benefit to the business community. The aim of the database is set out in its introduction:

‘Competition policy is complex and varies greatly from member to member. Some APEC member economies have laws dating back more than a century, some have relatively recent laws, and others still have no laws at all. Recognizing this disparity of conditions among member economies, gathering and collating information and the establishment of a regional database is one essential step towards narrowing the competition gap among member economies’.²⁹

The database contains information on the antitrust laws and policies of all 21 member economies split into one of 14 distinct categories including *inter alia*: policy statements; competition laws and policies; organisational structure; administrative procedures; decision guidelines; administrative decisions; and judicial decisions. Given the diversity of the 21 member economies it is difficult to envisage anything other than information sharing and capacity-building being

²⁸ Available at: <http://www.apeccp.org.tw/>.

²⁹ *Ibid.*

achieved in the area of antitrust under the auspices of APEC.³⁰ Nonetheless the APEC activities can be beneficial, particularly for members which are developing countries. A criticism of international antitrust initiatives has often been that there is too much emphasis on achieving convergence among developed countries, at the expense of adapting provisions to address the interests of developing countries, and APEC's activities may partially answer that criticism.³¹

4.2.4 ASEAN

The Association of South East Asian Nations (ASEAN) was created in 1967 with the signing of the Bangkok Declaration by the 5 founding states. ASEAN now comprises 10 Member Countries from South East Asia,³² the majority of which are also APEC member economies. One of ASEAN's primary goals is to accelerate economic growth in the region. There is no need to discuss ASEAN in particular depth given the lack of substantive antitrust activities within the organisation, and no mention of antitrust in the Bangkok Declaration or the 1976 Treaty of Amity and Cooperation in South East Asia (TAC) or subsequent agreements. Nonetheless there is a stated desire from the ASEAN Secretariat for

³⁰ For a detailed examination of the domestic antitrust laws of APEC members, and the prospects for a regional antitrust agreement, see M. Taylor, *International Competition Law: A New Dimension for the WTO?*, (Cambridge, Cambridge University Press, 2006), particularly at chapter 4.

³¹ Note that this has been a criticism often levied against the OECD, see A. Piilola, 'Assessing Theories of Global Governance: A Case Study International Antitrust Regulation' (2003) 39 *Stanford Journal of International Law* 207 at p.237. In the OECD's defence however, it's Global Forum on Competition does engage with non-member countries and it has been suggested that this forum offers greater opportunity for wider discussion than within the International Competition Network where the initial intent was to create a forum for discussion amongst antitrust authorities, the implication being that a state would need to have established an antitrust authority in order to participate in the ICN, see paper by Frederic Jenny, 'The OECD Global Forum, The ICN, the WTO, UNCTAD: who is doing what in the area of international competition and why?' presented at the 2002 Antitrust Conference. New York, 7 – 8 March 2002.

³² Indonesia, Malaysia, Philippines, Singapore, Thailand, Brunei Darussalam, Vietnam, Lao, Myanmar/Burma, and Cambodia.

this to change in the future.³³ Future antitrust activities are likely initially to include technical assistance, expert training and capacity-building,³⁴ although there have already been ASEAN conferences on fair competition law and policy. Additionally, antitrust is likely to gradually come within the ASEAN remit in light of the EC-ASEAN cooperative partnership which notes antitrust as an identified issue,³⁵ as well as due to the projected creation of an ASEAN Economic, Security and Socio-Cultural Community.³⁶ Note that there have also been persuasive arguments advanced in favour of substantive regional antitrust rules for the ASEAN.³⁷

4.2.5 CARICOM

The Caribbean Community (CARICOM) is a common market with substantive antitrust rules leading the way towards harmonised rules and centralised enforcement among its fifteen Member States³⁸ through The Revised Treaty of Chaguaramas Establishing the Caribbean Community, including the CARICOM

³³ See speech by T.D. Minh, Deputy Secretary General of the ASEAN Secretariat, 'Regional Approach to Competition law and Policy'. Hong Kong on 16-18 April 2002, note that any antitrust principles or rules developed under the auspices of ASEAN would likely include merger control as the Deputy Secretary General stated: 'Some countries take the view that competition law should control behaviour, not market structures, and thus have not enacted merger control. Experience suggests this is likely to be an error'.

³⁴ *Ibid.*

³⁵ See Report by the European Commission, *A New Partnership with South East Asia COM (2003) 399/4* at p.34.

³⁶ ASEAN leaders pledged to create such a Community by 2010 at the 9th ASEAN Summit in Bali, 7-8th October 2003.

³⁷ See e.g. L. Thanadsillapakul, 'The Harmonisation of ASEAN Competition Laws and Policy from an Economic Integration Perspective' (2004) Issue 2 (Spring) *Online Thailand Law Journal*, available at: <http://www.thailawforum.com/articles/theharmonisation.html>.

³⁸ In a manner not too dissimilar to that adopted within the Treaty of Rome establishing the EC. The Member States of CARICOM are Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St Lucia, St. Kitts and Nevis, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago. While Anquilla, Bermuda, British Virgin Islands, the Cayman Islands, and Turks and Caicos Islands are Associate Members.

Single Market and Economy.³⁹ The Revised Treaty has not yet entered into force in all Member States, and very few have given full effect to the provisions such as establishing national antitrust authorities,⁴⁰ and many have not adopted national antitrust rules, although the CARICOM Legal Affairs Committee (LAC) has approved a draft model law.⁴¹ The existence and regional harmonisation of national antitrust regimes is required by Article 74(2)(f) of the Revised Treaty, and while this has not fully taken place, the Member States are working towards this requirement. The perceived importance of antitrust to the CARICOM common market is clear from the preamble to the Revised Treaty where it states:

‘Mindful further that the benefits from the establishment of the CSME [CARICOM Single Market and Economy] are not frustrated by anti-competitive business conduct whose object or effect is to prevent, restrict or distort competition; Convinced further that the application and convergence of national competition policies and the cooperation of competition authorities in the Community will promote the objectives of the CSME’.

The substantive antitrust provisions are included in chapter 8 of the Revised Treaty including a general provision on the objective of Community Competition Policy within Article 169(1): ‘The goal of the Community Competition Policy shall be to ensure that the benefits expected from the establishment of the CSME are not frustrated by anti-competitive business conduct’, although consumer welfare and protection of consumer interests is noted as a secondary objective in Article 169(2)(c). Article 171 establishes the Competition Commission of the

³⁹ Available at: <http://www.caricom.org/jsp/communications/publications/revisedtreaty.pdf>.

⁴⁰ As required by Article 170(2) of the Revised Treaty. Only Barbados and Jamaica have established antitrust authorities thus far, although St Vincent and the Grenadines have passed relevant legislation and Trinidad and Tobago have a draft bill.

⁴¹ *Ibid.* Note that Jamaica, Barbados, and St Vincent and the Grenadines already have national antitrust rules.

CARICOM charged with the task of promoting Community antitrust policy and applying the antitrust rules laid out in the Revised Treaty in circumstances of ‘anti-competitive cross-border business conduct’.⁴² The antitrust rules regarding anti-competitive agreements and monopolistic behaviour are framed in very similar terms to Articles 81 and 82 of the EC Treaty. Article 177(1)(a) prohibits ‘agreements between enterprises, decisions by associations of enterprises, and concerted practices by enterprises which have as their object or effect the prevention, restriction or distortion of competition within the Community’. Article 177(1)(b) prohibits ‘actions by which an enterprise abuses its dominant position within the Community’ and while examples of such prohibited behaviour is then also provided in Article 177 and 179, there is also additional guidance on determining a dominant position,⁴³ on exemptions,⁴⁴ and additionally on the application of a *de minimis* rule.⁴⁵ While there are no distinct rules providing for merger control within CARICOM, it does appear that the third and general antitrust prohibition against ‘any other like conduct by enterprises whose object or effect is to frustrate the benefits expected from the establishment of the CSME’⁴⁶ could provide a wide discretion to review M&A activity. Indeed there also appears to be some scope for considering mergers under the prohibition against abuse of a dominant position, as one of the listed factors when considering whether conduct is abusive is ‘the concentration level before and after the relevant

⁴² The functions of the Competition Commission are provided for in Article 173.

⁴³ Article 178.

⁴⁴ Article 177(4), Article 179(3) and Article 183.

⁴⁵ Article 181.

⁴⁶ Article 177(1)(c).

activity of the enterprise measured in terms of annual sales volume, the value of assets and the value of the transaction'.⁴⁷

The CARICOM antitrust regime is still in its infancy, and will not enter into force until ratified by all Member States, yet the antitrust provisions and infrastructure are amongst the most advanced and detailed within a RTA or trading bloc. The antitrust regime is clearly modelled on the EC, to the extent that the CARICOM Competition Commission is the initial adjudicator and has *ex proprio motu* investigative jurisdiction.⁴⁸ A key factor must also be The Revised Treaty of Chaguaramas, which establishes a Common Market akin to the EC, notably unlike many of the other RTAs that are still in the Free Trade Area or Customs Union stages of economic integration.

4.2.6 COMESA

The Common Market for Eastern and Southern Africa (COMESA)⁴⁹ was established in December 1994 with a key aim being to form a large economic and trading bloc and work towards a Free Trade Area, which was achieved between 9 Member States on 31st October 2000. The Free Trade Area now consists of 11 of the 20 COMESA Member States.⁵⁰ COMESA is now working towards a Customs

⁴⁷ Article 179(2)(b).

⁴⁸ See Article 176, and contrast with the CDC within MERCOSUR, *infra* at 4.2.8.

⁴⁹ The COMESA website is available at: <http://www.comesa.int/about/>.

⁵⁰ Angola, Burundi*, Comoros, D.R. Congo, Djibouti*, Egypt, Eritrea, Ethiopia, Kenya*, Libya, Madagascar*, Malawi*, Mauritius*, Rwanda*, Seychelles, Sudan*, Swaziland, Uganda, Zambia*, and Zimbabwe*. *= Members of the Free Trade Area.

Union for 2008, and a Common Market for 2014.⁵¹ The regional organisation is based upon the COMESA Treaty⁵² which includes basic antitrust rules and provides for the future adoption of more detailed rules within the COMESA framework. Article 55 of the COMESA Treaty provides that:

‘The Member States agree that any practice which negates the objective of free and liberalised trade shall be prohibited. To this end, the Member States agree to prohibit any agreement between undertakings or concerted practice which has as its objective or effect the prevention, restriction or distortion of competition within the Common Market’.

Article 55 also allows for the COMESA Council to declare exceptions to the general prohibition when the conduct in question ‘improves production or distribution of goods or promotes technical or economic progress and has the effect of enabling customers a fair share of the benefits’⁵³ provided that it is consistent with the objectives of the COMESA Treaty⁵⁴ and does not eliminate competition. A particularly important section of Article 55 allows for the COMESA Council to make regulations providing for further regional antitrust rules,⁵⁵ which facilitated the draft COMESA Competition Regulations in February 2003⁵⁶ and the draft COMESA Competition Rules.⁵⁷ These antitrust provisions

⁵¹ See Paper by B. Ali El Dean, ‘Regional Integration Agreements Related to Competition Law and Policy: The Experience of the Common Market of East and Southern Africa COMESA’ presented to the Intergovernmental Group of Experts on Competition Law and Policy. Geneva, 8-10 November 2004. Also presented by COMESA to the UNCTAD.

⁵² Available at: <http://www.comesa.int/comesa%20treaty/comesa%20treaty/view>.

⁵³ Article 55(2) of the COMESA Treaty.

⁵⁴ It could be argued that this provision bears some resemblance to the teleological approach of the European Court of Justice when interpreting the Treaty of Rome, thereby ensuring that interpretation of specific Treaty provisions do not operate to circumvent the wider objectives of the Common Market, see discussion surrounding Case 26/63 *van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.

⁵⁵ Article 55(3) COMESA Treaty.

⁵⁶ Available at: <http://www.comesa.int/trade/issues/policy/>. Note that Member States are required by Article 5(2)(b) of the COMESA Treaty to ensure COMESA Council Regulations have the force of law within national legal systems.

are the result of a lengthy consultation period involving the COMESA Member States and the international consultancy team it commissioned.⁵⁸ One of the notable features of the development of the COMESA antitrust regime is that regional rules are being established while only 5 of the 21 Member States have national antitrust rules, and do not necessarily have an effective enforcement mechanism. A member of the COMESA consultancy team justifies this apparent discrepancy by stating, *inter alia*:

‘there are anti-competitive practices taking place on the regional level and leaving them unsanctioned would simply mean that benefits of integration shall not materialize. It is only a regional law that can protect such regional economic interests. Absent a regional competition law the negative effects of global and regional mergers shall not be dealt with’.⁵⁹

The draft COMESA antitrust rules are comprehensive and often bear significant similarity to the infrastructure and rules of the EC antitrust regime. The COMESA rules provide for the creation of a COMESA Competition Commission (CCC)⁶⁰ with significant powers and the ability to issue decisions that are legally binding in all Member States.⁶¹ The Board of the CCC can impose fines of up to 10% of an ‘undertaking’s’ annual turnover for infringing Article 16(1) (prohibition of anti-competition agreements) or Article 18 (prohibition of abuse of a dominant position) of the draft COMESA Competition Regulations.⁶² Part 4 of the Regulations also provides for an *ex ante* merger control regime within the

⁵⁷ By virtue of Article 39 of the COMESA Competition Regulations, these are available at: <http://www.comesa.int/trade/issues/policy/>.

⁵⁸ Consisting of six consultants, one from each of the US, Australia, Kenya, Zambia, Zimbabwe and Egypt. See Paper by B. Ali El Dean, *op. cit.* note 51.

⁵⁹ Paper by B. Ali El Dean, *op. cit.* note 51.

⁶⁰ Article 6 of the draft COMESA Competition Regulations.

⁶¹ *Ibid*, as well as Article 8 of the draft COMESA Competition Regulations

⁶² Rule 45(2) of the draft COMESA Competition Rules.

COMESA antitrust framework, whereby undertakings to a proposed merger or acquisition that has a ‘regional dimension’⁶³ must notify the CCC. The CCC has wide ranging powers within Article 26(7) of the Regulations to approve, vary or declare unlawful any proposed merger or acquisition. A decision must be based upon an initial finding that the proposed merger would ‘substantially prevent or lessen competition’ under Article 26(1), and secondly that it cannot be justified on specified efficiency or substantial public interest grounds. The proposed COMESA regional antitrust regime is remarkable in terms of its advanced stage of preparation and considerable detail, all the more so given the dearth of national antitrust rules amongst the Member States. The development of the regional system has been strongly motivated by a perceived threat to trade liberalisation, which is a central objective of COMESA. It remains to be seen how quickly each Member State will ratify the Competition Regulations and Rules, and whether an effective enforcement regime and antitrust culture can be cultivated within the COMESA.

4.2.7 FTAA

The Free Trade Area of the Americas (FTAA) was launched at the first summit of the Americas in December 1994 and had been set a ten year negotiation period. The original proposal intended for an agreement to be reached by 1st January 2005 to enter into effect in December 2005. Notwithstanding the monumental task of negotiating a common antitrust framework for the Americas, encompassing such diverse nations as the US and Venezuela, and coupling the current trade blocs of

⁶³ See Article 23(2) of the draft COMESA Competition Regulations.

NAFTA, MERCOSUR and the ANDEAN Community, a draft set of antitrust provisions was included within chapter XIX of the Third Draft FTAA, dated 21st November 2003.⁶⁴ The objective of chapter XIX has been stated as being ‘to guarantee that the benefits of the FTAA liberalization process not be undermined by anti-competitive business practices’,⁶⁵ and to ‘guarantee the enforcement of regulations on free competition among and within countries of the Hemisphere’.⁶⁶ The draft provisions appear to reflect a compromise between the antitrust provisions within NAFTA and MERCOSUR, with additional features more regularly found in bilateral antitrust cooperation agreements. There are general provisions recognising the importance of antitrust provisions to securing the benefits of the FTAA,⁶⁷ as well as ensuring confidentiality and the precedence of national rules regarding disclosure of confidential information.⁶⁸ There are also principles regarding cooperation and coordination of antitrust enforcement activities,⁶⁹ and consultation procedures.⁷⁰

There are provisions requiring the adoption and enforcement of national or sub-regional (i.e. at the level of MERCOSUR or the CAN) provisions to ‘proscribe anti-competitive business conduct so as to promote economic efficiency and consumer welfare’.⁷¹ The draft does permit the creation of monopolies⁷² and state

⁶⁴ Available at: http://www.ftaa-alca.org/FTAADraft03/Index_e.asp.

⁶⁵ Issued by the Negotiating Group on Competition Policy, FTAA Fourth Meeting of Ministers of Trade, Ministerial Declaration, Annex II. 19 March 1998, San Jose, Costa Rica.

⁶⁶ *Ibid.*

⁶⁷ Chapter XIX: Article 1 of the third draft FTAA.

⁶⁸ Chapter XIX: Article 4 of the third draft FTAA.

⁶⁹ Chapter XIX: Article 8 of the third draft FTAA.

⁷⁰ Chapter XIX: Article 14 of the third draft FTAA.

⁷¹ Chapter XIX: Article 6.1 of the third draft FTAA.

enterprises, but requires both to comply with the principle of non-discrimination, thereby reflecting certain provisions within chapter 15 of the NAFTA. Reflecting the nature of some provisions to be found within the MERCOSUR framework, the draft FTAA envisages the creation of a Committee on competition,⁷³ consisting of representatives from each signatory (national and sub-regional entities) in order to assist with, *inter alia*, monitoring of implementation of antitrust provisions, promoting cooperation among parties, and assisting in coordination of technical assistance. The draft also provides vague guidance on the type of conduct antitrust provisions should address.⁷⁴ A successful negotiation of the FTAA negotiations, with the current chapter XIX included, would represent a remarkable achievement for many reasons. An agreement would be a success for the antitrust advocacy of developed antitrust authorities, and it would also represent a significant change of direction for the US, to refocus its international antitrust cooperation efforts from bilateral cooperation to regional cooperation. Notwithstanding the extensive antitrust dialogue that has taken place within the FTAA framework, it is uncertain as to whether the Agreement will ever come into being.⁷⁵

⁷² Chapter XIX: Article 9 of the third draft FTAA.

⁷³ Chapter XIX: Article 12 of the third draft FTAA.

⁷⁴ Chapter XIX: Article 6.2 of the third draft FTAA.

⁷⁵ For a media assessment of the prospects of the FTAA see analysis on BBC News website 'Little hope for Americas free trade plan', available at: <http://news.bbc.co.uk/1/hi/business/4399354.stm>.

4.2.8 MERCOSUR

The Common Market of the Southern Cone (MERCOSUR), consisting of Argentina, Brazil, Paraguay, Uruguay, and Venezuela,⁷⁶ does not include any substantive antitrust provisions within the founding Treaty of Asunción in 1991.⁷⁷ The 1996 Protocol for the Defence of Competition⁷⁸ however, sought to establish guiding principles for domestic antitrust enforcement, as well as drafting regional provisions and creating the Committee for the Defence of Competition (CDC), as a central MERCOSUR antitrust investigative authority. The protocol primarily seeks to establish prohibitions against:

‘individual or concerted acts, of whatever kind, the purpose or final effect of which is to restrict, limit, falsify or distort competition or access to the market or which constitute an abuse of a dominant position in the relevant goods or services market in the framework of the MERCOSUR, and which affect trade between the states parties’.⁷⁹

To avoid any doubt as to whether merger control is a feature of the MERCOSUR framework, Article 7 requires Member States to adopt common rules:

‘for the control of acts and contracts of any kind, which may limit or in any way cause prejudice to free trade, or result in the domination of the relevant regional market of goods and services, including which result in economic concentration, with a view to preventing their possible anti-competitive effects in the framework of the MERCOSUR’.

⁷⁶ As well as Bolivia, Colombia, Ecuador, Peru (4 ANDEAN Community Member States), Chile, and Mexico holding associate membership status.

⁷⁷ Treaty Establishing a Common Market Between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, (MERCOSUR), 26th March 1991, 30 ILM 1041.

⁷⁸ MERCOSUR Protocol of the Defense of Competition, Decision 18/96, of 17th December 1996, as amended. English translation included within the *Inventory of the competition policy agreements, treaties and other arrangements existing in the Western hemisphere* available from the Organisation for American States’ (OAS) Trade Unit’s Foreign Trade Information System, see: http://www.alca-ftaa.org/ngroups/NGCP/Publications/treaty_e.asp.

⁷⁹ Article 4 MERCOSUR of the Defense of Competition, Decision 18/96, of 17th December 1996, as amended. Note that 17 examples of behaviour targeted by the prohibition are included within Article 6.

MERCOSUR's current status is more akin to a customs union working towards its overriding objective of becoming a common market.⁸⁰ The five Member States view antitrust rules (particularly those capable of functioning at a regional level) as essential to the eventual achievement and continuation of this goal as they have stated that 'the free movement of goods and services between the states parties renders essential that adequate conditions of competition be assured in order to contribute to the strengthening of the custom union'.⁸¹ MERCOSUR's goal of creating 'a competitive environment in the integrated framework of the MERCOSUR'⁸² is furthered by the creation of the CDC. The CDC however, can only act on references from domestic authorities where there is a MERCOSUR dimension, and must recommend appropriate sanctions to the MECOSUR Trade Commission.⁸³ The CDC's ability to act is clearly hampered by the developing nature of the domestic antitrust regimes, particularly with regard to Paraguay and Uruguay, as well as the continuing generality of many key provisions and the potential for inconsistency and divergence among the Member States.

The movement towards an effective antitrust regime for the MERCOSUR has been bolstered by the signing of an enabling agreement in 2002,⁸⁴ which set in

⁸⁰ See Paper by C.A. Jones, *op. cit.* note 15.

⁸¹ Preamble to the MERCOSUR Protocol of the Defense of Competition, Decision 18/96, of 17th December 1996, as amended.

⁸² *Ibid.*

⁸³ Only the MERCOSUR Trade Commission can adopt legally enforceable decisions to penalise entities for engaging in anti-competitive activities, although the CDC can negotiate and agree undertakings to remedy the detrimental effects. For a discussion of the antitrust rules and procedures established by the 1996 Protocol, as well as interesting views on antitrust enforcement see: J.T. de Araujo Jr & L. Tineo, 'The Harmonization of Competition Policies Among Mercosur Countries' (1998) 24 *Brook J. Int'l L* 441.

⁸⁴ Agreement on the Regulation of the Protocol of Defense of the Competition of the MERCOSUR, signed in Brasilia on 5th December 2002.

place rules regarding the CDC's composition, procedure and powers.⁸⁵ The 1996 Protocol has still to be ratified by all Member States however, and will not enter into force until that point. Additionally, the ongoing negotiations between the EC and MERCOSUR for the creation of a 'bi-regional or inter-regional Association Agreement' strongly encourages the continued development of an effective antitrust regime for MERCOSUR and its Member States. The agreement states that 'Ensuring adequate and effective competition policies and a mechanism for cooperation in the field of competition' is one of the ten primary objectives to be pursued by entering into a inter-regional free trade agreement.⁸⁶ Note that 'the EU is the 1st trading partner of MERCOSUR, representing 23% of total MERCOSUR trade, and its first source of inward investment. MERCOSUR ranks 9th among EU trading partners, accounting for 2.3% of total EU trade'.⁸⁷ Member States of the CAN are additionally either Members or Associate Members of MERCOSUR, and vice versa, and both regional blocs are moving towards gradual integration within the South American Community of Nations (SACN)⁸⁸. SACN should theoretically lead to a near-continental convergence and harmonisation programme.

⁸⁵ Note, however, that the CDC's powers are severely constrained by not being able to initiate investigations *ex proprio motu*, and by not having any adjudicative function. For further discussion of these issues and a comparison between the EC's antitrust regime and that developing under the MERCOSUR, see J.T. de Araujo Jr, 'Competition Policy and the EU-Mercosur Trade Negotiations', prepared for the Working Group on EU-Mercosur Trade Negotiations. Paris, 12-13 May 2000.

⁸⁶ See the following web pages of the European Commission for an overview of EU-MERCOSUR relations as well as an update on the negotiations towards an Association Agreement to create a free trade area: http://europa.eu.int/comm/external_relations/mercosur/intro/#1, as well as: http://www.europa.eu.int/comm/trade/issues/bilateral/regions/mercosur/index_en.htm.

⁸⁷ Information available from the European Commission Bilateral Trade Relations website, *ibid*.

⁸⁸ Created on 8th December 2004 by the Cusco Declaration on the South American Community of Nations. For discussion see speech by A. Wagner, Andean Community Secretary General, 'The South American Community of Nations: A great decentralized development program' Lima December 2004, available at: <http://www.comunidadandina.org/ingles/press/articles/Allanwagner8-2-04.htm>.

4.2.9 NAFTA

The antitrust provisions within the North American Free Trade Agreement (NAFTA) have been both productive and disappointing at the same time. The US, Canada and Mexico entered into the NAFTA on 1st January 2004, thereby giving effect to the five antitrust Articles within chapter 15 with a key objective being to ‘reduce trade distortions’.⁸⁹ While there are no substantive antitrust provisions, Article 1501 requires each signatory to ‘adopt or maintain measures to proscribe anti-competitive business conduct and take appropriate action with respect thereto, recognizing that such measures will enhance the fulfilment of the objectives of this Agreement’. This provision did not effect the US or Canada as they have long-established antitrust regimes, yet the signing of the Agreement in December 1992 did prompt Mexico to pass a more rigorous antitrust law in mid-1993.⁹⁰ Articles 1502 and 1503 impose limited restrictions by permitting signatories to create monopolies and state enterprises but nonetheless committing them to the obligations within the NAFTA, and the principle of non-discrimination. Article 1504 established a Working Group on Trade and Competition, which does not appear to have had an active role in the operation of the Agreement or in the function of the NAFTA Secretariat since 1998.⁹¹ The closer cooperation encouraged by Article 1501 has led to the conclusion of

⁸⁹ See Preamble to the North American Free Trade Agreement, 17th December 1992, 32 *ILM* 289 (1993).

⁹⁰ See J. Wilson, *Globalization and the Limits of National Merger Control Laws*, (The Hague, Kluwer Law International, 2003) at p.217.

⁹¹ See A.D. Melamed, ‘International Cooperation in Competition Law and Policy: What can be achieved at the bilateral, regional, and multilateral levels’ (1999) *JIEL* 423 at p.429. For a fuller discussion of the promise of the inclusion of antitrust within the NAFTA framework see P. Glossop, ‘Editorial: NAFTA and Competition Policy’ (1994) 15 *ECLR* 191.

bilateral antitrust agreements between the three signatories,⁹² all but one of which refer to chapter 15 of the NAFTA. Nonetheless, it is disappointing to observe the preference for a network of bilateral agreements, in spite of the potential for a trilateral cooperation agreement between the parties, within the framework of this regional agreement.

4.2.10 WAEMU/UEMOA

The West African Economic and Monetary Union (WAEMU)⁹³ was created in 1994 with seven Member States,⁹⁴ which increased to eight in 1997.⁹⁵ The WAEMU has supranational institutions such as the Court of Justice, and the Commission. The WAEMU has been a customs union since January 2000, and its Member States have the CFA franc as their single currency. The former Director of Trade and Competition of the WAEMU Commission, Jean-Luc Senou, has said that the Union's wider aim is 'to strengthen competitiveness in economic and financial activities in the Member States, in the framework of an open, competitive market and a rationalised and harmonised legal environment'.⁹⁶ The 1994 WAEMU Treaty contains several antitrust provisions which entered into

⁹² See the 1995 Agreement between The Government of the United States of America and the Government of Canada Regarding the Application of their Competition Deceptive Marketing Practice Laws, now supplemented by the Agreement on the Application of Positive Comity Principles to the Enforcement of their Competition Laws (5th October 2004), as well as the Agreement between the Government of the United States of America and the Government of the United Mexican States Regarding the Application of their Competition Laws (11th July 2000), and the 2001 Agreement between the Government of Canada and the Government of the United Mexican States on the Application of their Competition Laws, see chapter 2 for further discussion of these agreements.

⁹³ Which is more commonly known under its French title of Union Economique et Monétaire Ouest Africaine (UEMOA).

⁹⁴ Bénin, Burkina Faso, Côte d'Ivoire/Ivory Coast, Mali, Niger, Sénégal and Togo.

⁹⁵ Guinea-Bissau joined in May 1997.

⁹⁶ J.L. Senou, 'Development of Community Competition Law within WAEMU: The Role of Technical Assistance', in a contribution by WAEMU/UEMOA to the OECD Global Forum on Competition, 13 February 2002 (CCNM/GF/WD(2002)30).

force in 2003, including Article 76 which provides for the antitrust rules to apply to public and private enterprises, as well as state aids,⁹⁷ and more substantive rules within Articles 88-90. The antitrust provisions are closely modelled upon EC provisions and indeed at a general level, the WAEMU has been described as having enacted the ‘substantial constitutional law of the European Community’.⁹⁸ Articles 88 and 89 are modelled upon Articles 81 and 82 EC Treaty, and Article 90 provides for rules on state aid. The WAEMU appears to have a highly centralised antitrust regime under the direction of the Commission, which also has exclusive competence to deal with commercial activities that may breach the antitrust provisions.⁹⁹ There is also strong evidence to suggest that many Member States have reformed, or are in the process of reforming their antitrust laws in light of the WAEMU provisions.¹⁰⁰ The decision to base WAEMU antitrust provisions on the EC antitrust regime has caused problems however, and it has been accepted that a weakness of the technical assistance facilitated by the EC:

‘concerns the choice of the European competition regulation model, without properly evaluating the resources required to implement it. It should be noted that this weakness is also found in some [WAEMU] Member States which enjoyed considerable technical support from UNCTAD or French cooperation in formulating their laws, but which ran into difficulties due to the mismatch between the volume of rules adopted and the domestic capacity to enforce them’.¹⁰¹

⁹⁷ The text of the WAEMU Treaty can be accessed at: <http://www.worldtradelaw.net/fta/agreements/waemufta.pdf> (in French).

⁹⁸ M. Bakhoun, ‘Delimitation and Exercise of Competence between the West African Economic and Monetary Union (WAEMU) and its Member States in Competition Policy’ (2006) 29 *World Comp.* 653, at 655 and note 17.

⁹⁹ See discussion in M. Bakhoun, *ibid.*

¹⁰⁰ See paragraph 34 of the UNCTAD Report of the Intergovernmental Group of Experts on Competition Law and Policy, 19 September 2003 (TD/B/COM.2/CLP/39). Available at: http://www.unctad.org/en/docs/c2clpd39_en.pdf.

¹⁰¹ *Op. cit.* note 96.

This is undoubtedly an issue that is relevant to many of the RTAs discussed, particularly those adopting models based upon the EC regime. While the issue of how best to implement antitrust rules within developing countries is beyond the scope of this thesis, the desire to follow the EC model perhaps illustrates that regional blocs accept the need for a parallel approach to economic integration, encompassing both free trade and antitrust.

4.2.11 Conclusion

A common perception may be that antitrust is the exclusive purview of developed countries, yet the preceding assessment of RTAs provides evidence that many developing countries are engaged in regional antitrust initiatives. The infrastructure and enforcement mechanisms within such countries and trading blocs may be questionable and certainly in their infancy, yet the willingness of developing countries to commit to introducing antitrust regimes in parallel to their trade liberalisation efforts, is of some significance in itself. It is apparent that the nature of antitrust provisions within RTAs does vary, yet it is equally clear that this reflects the varying nature of the RTAs in existence. It may even be possible to discern a greater emphasis being placed upon antitrust provisions within RTAs that are moving towards a Common Market or Customs Union, than compared with those where the objective is a Free Trade Area such as NAFTA. The above assessment has enabled a fuller understanding of the extent of the international antitrust dialogue and its linkages with international trade. Consideration of the

role of antitrust in the EU's external affairs as well as multilateral antitrust initiatives will further strengthen this understanding.

4.3 Exporting antitrust

4.3.1 Introduction

It can be seen from the foregoing analysis of antitrust within regional trade agreements and trading blocs that there are often strong similarities between the RTAs and the EC, in terms of the wording and interpretation of antitrust provisions as well as enforcement structure. The principal EC antitrust provisions have been considered *supra* at 2.6, and in order to further understand the scope of the international antitrust dialogue, and its relationship with trade, the antitrust provisions within association, cooperation and partnership agreements between the EC and third countries must be considered. Perhaps the most legally significant of these EC agreements is the Agreement on the European Economic Area (hereinafter referred to as 'the Agreement') and will be considered first.

4.3.2 The EEA

The European Economic Area (EEA) creates a common market with common rules protecting the free movement of goods, services, capital and persons between the EU Member States and three of the European Free Trade Association (EFTA) countries.¹⁰² The Agreement entered into force on 1st January 1994¹⁰³ and

¹⁰² Norway, Iceland and Liechtenstein. Note that the fourth EFTA country, Switzerland, decided against joining the EEA following a referendum.

extended much of the EC *acquis communautaire* to the contracting EFTA countries. The EEA is far less politically significant than it once was. Several current EU Member States were members of the EEA prior to their accession to the EU, hence the EEA has lost importance as the EU has widened. The principal difference between EEA membership and EU membership is the lack of political objectives present in the former that exist in the latter, additionally EU membership entails the harmonisation of national laws across a wider range of areas than experienced by EEA membership alone.¹⁰⁴ *Prima facie*, it may be unclear why the three EFTA countries would wish to participate in the EEA, which effectively adopts and adheres to the internal market rules of the EC (including competition law), given that the three EFTA countries have no decision making or significant policy making role in relation to these rules. In spite of the apparent loss of sovereignty, it is apparent that the benefits of participation within the EEA outweigh the cost for these countries.

The aim of the Agreement is 'to promote a continuous and balanced strengthening of trade and economic relations between the contracting parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area'.¹⁰⁵ It appears that the benefits stemming from a strong trading relationship with the EU offers sufficient

¹⁰³ Albeit with different contracting states reflecting the changing membership of both the EU and EFTA.

¹⁰⁴ In order to gain further insight into the function and legal effect of the EEA see M. Johansson & L. Sevón, 'The protection of the rights of individuals under the EEA Agreement' (1999) 24 *EL Rev* 373. There is also some useful discussion in M.M. Dabbah, *op. cit.* note 2, at pp.116 – 120, additionally the websites of both the EFTA Secretariat (<http://secretariat.efta.int>) and the EFTA Surveillance Authority (<http://www.eftasurv.int>) are helpful sources of information.

¹⁰⁵ Article 1(1) European Economic Area Agreement.

incentives to adhere to EC laws. In order to achieve the objective of creating a European Economic Area with ‘equal conditions of competition’ the antitrust provisions within the Agreement are often substantively identical to those in the Treaty of Rome and subsequent Community Regulations. Articles 53 and 54 EEA Agreement mirror Articles 81 and 82 of the Treaty of Rome. Article 57 provides for the control of concentrations within the EEA and is applied in accordance with the terms of Protocols 21 and 24, as well as Annex XIV to the Agreement, which have been amended¹⁰⁶ to give effect to the revised ECMR¹⁰⁷ within the EEA. The EEA antitrust provisions apply to activities that may have an effect on trade between contracting parties and are enforced by the EFTA Surveillance Authority (ESA), established under Article 108 of the Agreement, as well as the European Commission.¹⁰⁸

There are clearly defined rules contained in Articles 56 and 57 of the Agreement for the attribution of competence to investigate cases between the ESA and the European Commission, which seek to avoid duplication of effort. The European Commission’s status amongst EU Member State antitrust authorities as *primus inter pares* is replicated within the EEA, as the Commission retains sole jurisdiction when trade between EU Member States is affected by anti-competitive activities, while the ESA will exercise jurisdiction only when there is

¹⁰⁶ See EEA Joint Committee Decisions No.78/2004 and No.79/2004. Note also the updates on the European Commission website regarding application of the merger control rules to the EEA: <http://www.europa.eu.int/comm/competition/mergers/legislation/eea.htm>.

¹⁰⁷ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) which replaced Regulation 4064/89 from 1st May 2004.

¹⁰⁸ Note that Protocol 4 of the Surveillance and Court Agreement provides the ESA with comparative investigative and adjudicative powers to that of the European Commission in the field of antitrust.

an effect on trade between contracting EFTA countries. In circumstances where trade between the EC and one or more EFTA countries is affected, the Commission retains jurisdictional competence should it wish to investigate alleged anti-competitive practices, although the ESA will normally deal with the case if internal EC trade is not appreciably restricted and the Commission decides against investigating the matter.¹⁰⁹ In the field of merger control the European Commission operates the ‘one-stop-shop’ principle across the whole of the EEA with the result that where concentrations have a ‘Community Dimension’ within the meaning of Regulation 139/2004,¹¹⁰ the Commission shall have ‘sole competence to take decisions on these cases’.¹¹¹ When the concentration fails to satisfy the requirements of having a ‘Community Dimension’, thereby removing the jurisdiction of the European Commission to scrutinise the merger, it may nonetheless be subjected to analysis by the ESA if it has an ‘EFTA Dimension’.¹¹² In order to ensure that the most appropriate antitrust authority deals with the concentration, there are provisions enabling the transfer of notified concentrations from one authority within the EEA to another,¹¹³ which are utilised when appropriate.¹¹⁴

¹⁰⁹ See the EFTA Surveillance Authority website for further discussion of the division of competence: <http://www.eftasurv.int/fieldsofwork/fieldcompetition/compregrole/dbaFile547.html>.

¹¹⁰ Article 1(2) of the ECMR, *op. cit.* note 107.

¹¹¹ Article 57(2)(i) EEA Agreement.

¹¹² A concentration will have an ‘EFTA Dimension’ if it satisfies the turnover thresholds laid out in EC Regulation 139/2004 when read in conjunction with Annex XIV of the EEA Agreement.

¹¹³ Article 10 of Protocol 24 to the EEA Agreement on cooperation in the field of control of concentrations. Note that Broberg has considered the issue of jurisdictional competence with regard to merger control in some depth, see M.O. Broberg, ‘The delimitation of jurisdiction with regard to concentration control under the EEA Agreement’ (1995) 16 *ECLR* 30, note that while the substantive tests have developed in light of the ECMR, the discussion regarding jurisdictional competence nonetheless remains valid.

¹¹⁴ See for example the proposed acquisition of Kvaerner by Aker Maritime where the European Commission referred the case to the Konkurransetilsynet (Norwegian Antitrust Authority), see Commission

There is some potential for parallel investigations by the ESA and EC national competition authorities (NCAs) when there is a lack of a Community dimension, or between EFTA antitrust authorities and EC NCAs when there is a lack of an EFTA or Community Dimension. In order to address the potential overlap the European Commission, EC NCAs, the ESA, and antitrust authorities of the contracting EFTA countries participate in the EFTA Network of Competition Authorities.¹¹⁵ To enhance the effectiveness and efficiency of the attribution of competence rules there are also extensive cooperation provisions within the principal EEA Agreement as well as the Surveillance and Court Agreement.¹¹⁶ It should be noted that in order to further enhance the harmonious application of common rules across the EEA, Article 6 of the Agreement provides for the recognition of ECJ and CFI rulings, relating to provisions of EC law that are replicated within the EEA Agreement. Articles 105 and 106 of the Agreement also provide a mechanism for monitoring EC case law and amending the Agreement if necessary ‘in order to ensure as uniform an interpretation as possible of [the] Agreement’.¹¹⁷ As a result of a parallel application of the European Commission’s modernisation package amending both EC and EEA

Press Release IP/02/123 and Unattributed, ‘Commission Decision: Commission Refers Aspects of *Aker Maritime/Kvaerner* Deal to Norway’ (2002) 94 *EU Focus* 7.

¹¹⁵ This entity closely resembles the European Competition Network established following modernisation of EC competition law brought about by Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, to provide guidance on cooperation the ESA has issued the Notice on cooperation within the EFTA Network of Competition Authorities (Adopted by College on 15 July 2005 by College Decision 175/05/COL).

¹¹⁶ See Articles 58 and 109(2) EEA Agreement for general cooperation obligations between the ESA and European Commission, there are also further provisions within Article 56 EEA Agreement and Protocols 23 and 24 to the Agreement, as well as several ESA Notices of relevance; see <http://www.eftasurv.int/fieldsofwork/fieldcompetition/otherpublications/>.

¹¹⁷ Article 106 European Economic Area Agreement.

antitrust provisions, the antitrust authorities of contracting EFTA countries now have powers and obligations to enforce Articles 53 and 54 of the EEA Agreement.¹¹⁸ This is comparable to those of EC NCAs with regard to Articles 81 and 82 of the Treaty of Rome. It is also noteworthy that the antitrust laws of Norway¹¹⁹ and Iceland¹²⁰ closely resemble the key EC antitrust provisions.

4.3.3 EU accession

The prospect of greater access to the vast EC internal market of 485 million citizens is of interest to many states aside from Norway, Iceland and Liechtenstein discussed above, yet the form of agreement enabling states to benefit from stronger trading ties with the EC varies considerably. For many European countries membership of the EU may have a wider appeal than trade-related benefits alone. States may apply to join in order to obtain benefits such as increased political stability, increased security, as well as strengthening of the rule of law. It appears clear however that the principal motivation for EU accession is often related to the economic benefits that stem from participation within the common market.¹²¹ The process of EU accession is far from guaranteed or straightforward however due to the EU's policy of conditionality.¹²² Conditionality requires prospective candidate states to satisfy the basic

¹¹⁸ See EEA Joint Committee Decisions No. 130/2004 and No. 178/2004.

¹¹⁹ For discussion of Norway's antitrust provisions see E. Vesterkjaer, 'Norway: Legislation – New Competition Law' (2004) 25 *ECLR* N144.

¹²⁰ Law No. 9/1993 of 25th February 1993 (as amended), in particular see Articles 10 and 11, available in English at: <http://www.samkeppni.is/>.

¹²¹ See discussion on the enlargement section of the European Union's website available at: http://www.europa.eu.int/pol/enlarg/overview_en.htm.

¹²² For an in depth assessment of the policy of conditionality see J. Hughes, G. Sasse & C. Gordon, 'Conditionality and Compliance in the EU's Eastward Enlargement: Regional Policy and the Reform of Sub-national Government' (2004) 42 *JCMS* 523.

‘Copenhagen criteria’¹²³ before their membership application is accepted, after which the individual state embarks upon a lengthy process of implementing the *acquis communautaire* into their domestic legal system. Only after completing this process and receiving the unanimous approval of the European Council, and the approval of the European Parliament can the state join the Union.¹²⁴

The relevance of the EU accession mechanism to the present discussion is to highlight that candidate or prospective candidate states (i.e. those wishing to join the EU but have either not yet submitted a formal application, or the formal application has not yet been approved) enter into a process of implementing EC law into domestic legal systems, including EC antitrust law. The legal basis for the implementation is grounded in the European Association Agreement between the EC, the Member States and the candidate country. Notably a state’s progress towards implementation is closely scrutinised by the European Commission and neither formal negotiations nor final accession can take place until the state’s progress is satisfactory. The burden upon candidate states with regard to implementing EC antitrust law is increasingly onerous in light of the modernisation programme and Regulation 1/2003.¹²⁵ Candidate countries will be expected to, *inter alia*, establish a national competition authority and empower it

¹²³ All prospective candidate states must: be a stable democracy, with respect for human rights, the rule of law, and the protection of minorities; have a functioning market economy; and adopt the common rules, standards and policies that make up the body of EC law. This is known as the ‘Copenhagen Criteria’ following the Presidency Conclusions of the European Council Summit in Copenhagen 21-22 June 1993, see section 7A(iii).

¹²⁴ Article 49 TEU.

¹²⁵ *Op. cit.* note 115.

to enforce EC antitrust law.¹²⁶ The result of the conditionality policy towards accession can be seen in the context of antitrust by noting that the ten Member States¹²⁷ that acceded to the EU on 1st May 2004 had implemented EC antitrust law into their domestic legal system by December 2002,¹²⁸ thereby ‘closing’ negotiations on the then chapter 6 of the *acquis communautaire*. Additionally the two Member States that joined on 1st January 2007, Bulgaria and Romania, ‘closed’ Chapter ‘6’ negotiations in June 2004 and December 2004 respectively.¹²⁹

Regarding the current candidate states, EU accession negotiations were opened on 3rd October 2005 with Croatia and Turkey¹³⁰ and the European Commission has begun assessing the preparedness of both candidates to implement the *acquis communautaire* into their domestic legal system. The Former Yugoslav Republic of Macedonia (FYROM) is perhaps the least advanced candidate state having only submitted an official application for EU membership on 22nd March 2004. Official candidate status was conferred in December 2005, following a

¹²⁶ See for example Article 5 Regulation No 1/2003, *op. cit.* note 115.

¹²⁷ For a detailed account of the antitrust provisions within the pre-accession Association Agreements of Eastern European states see A.M. Van den Bossche, ‘The International Dimension of EC Competition Law: The Case of the Europe Agreement’ (1997) 18 *ECLR* 24.

¹²⁸ Although note that many of the 10 Member States that joined in 2004 secured transitional time periods for the entry into force of state aid rules, for discussion see J. Rapp, ‘State aid in the accession countries – sorting through the confusion’ (2005) 26 *ECLR* 410.

¹²⁹ See the European Commission’s *2004 Annual Report on Competition Policy* at p.185. Also, for a detailed account of the progress towards implementation of EC antitrust law by the 12 most recent Member States pre-accession see J. Lorentzen & P. Mollgaard, ‘Competition compliance: limits to competition policy harmonisation in EU enlargement’ (2003) 24 *ECLR* 280, as well as T. Tóth, ‘Competition Law in Hungary: Harmonisation Towards E.U. Membership’ (1998) 19 *ECLR* 358.

¹³⁰ Note that the Former Yugoslav Republic of Macedonia (FYROM) has also been accepted as a candidate country although formal negotiations have yet to begin. For an insightful socio-legal discussion of the problems facing the proposed Turkish accession to the EU see I. Ward, ‘The Culture of Enlargement’ (Winter 2005/2006) 12 *The Columbia Journal of European law* 199.

recommendation by the European Commission. In spite of the lengthy negotiation process ahead, the impact of EC law upon both Croatian and Turkish antitrust law is already evident. Articles 9 and 16 of the Croatian Competition Act¹³¹ closely resemble Articles 81 and 82 of the Treaty of Rome while Article 18 of the Act prohibits concentrations in certain circumstances. The Croatian Competition Authority has also implemented secondary legislation to ensure that Croatian antitrust law was 'brought into compliance with the relevant EC regulations covering the respective areas'¹³² and has stated 'the harmonization process of the secondary legislation with the EC acquis in the area concerned is considered to be completed'.¹³³ In Turkey:

'[The] Protection of Competition No. 4054 was put into force on December 13, 1994, and the Competition Authority provided for in the Act was set up and commenced operation in 1997...The Competition Authority which commenced its operation in 1997 rapidly adapted the EU legislation which is the source of the Act, through the Communiqués issued by it, and ensured a considerable alignment with the EU in terms of competition policies, by means of closely following the EU practices'.¹³⁴

Articles 4 and 6 of the Turkish Act on the Protection of Competition closely resemble Articles 81 and 82 of the Treaty of Rome, whilst Article 7 of the Act seeks to establish a system for merger control based on the ECMR. The accession process leading to full EU membership necessarily involves candidate states implementing EC antitrust laws into their own legal system and can be seen as a

¹³¹ Official Gazette, No 122/2003.

¹³² See Croatian Competition Authority webpage at: http://www.aztn.hr/e_index.asp.

¹³³ *Ibid.*

¹³⁴ Statement on the website of the Turkish Competition Authority, see: <http://www.rekabet.gov.tr/ebaskanmesaj.html>.

very advanced form of international antitrust cooperation in the run-up to membership.¹³⁵

This heightened period of cooperation prior to accession is further enhanced by the activities of the Technical Assistance and Information Exchange (TAIEX) programme. TAIEX is operated by the European Commission and provides *inter alia*: advice to beneficiary states on implementing the *acquis communautaire* into national law; as well as organising study visits; expert exchanges; and training seminars and workshops.¹³⁶ The 2004 and 2007 accession states¹³⁷ as well as current EU candidate states, and Western Balkan states have all benefited from the TAIEX programme, which deals with many topic areas including EC antitrust law.¹³⁸ Many states that are not formal EU applicants have also entered into other forms of agreement that include an obligation to approximate their antitrust laws with those of the EC in order to further strengthen ties, these countries are discussed further below.

¹³⁵ Note that the 2005 progress assessment by the European Commission on the preparedness of Turkey was generally favourable: 'Harmonisation with the anti-trust *acquis* appears well advanced. The level of enforcement of anti-trust rules and merger control by the Competition Authority has continued to be satisfactory, although serious delays in the handling of appeal cases have occurred in the judiciary', SEC (2005) 1426 at p.70. Croatia's report was not as positive: 'Croatia has continued to make some progress, both as regards anti-trust and state aid, but needs to intensify its efforts. There is a need for important further legislative alignment, strengthening of administrative capacity and more effective enforcement.', SEC (2005) 1424 at p.60.

¹³⁶ See TAIEX website at: <http://taiox.ec.europa.eu>.

¹³⁷ For a discussion of the development of antitrust law and policy under the EU accession framework see J. Hölscher & J. Stephan, 'Competition Policy in Central Eastern Europe in the Light of EU Accession' (2004) 42 *JCMS* 321.

¹³⁸ See e.g. discussion of training seminars organised by the European Commission's Competition DG and TAIEX office within the *2004 Annual Report on Competition Policy* at p.185.

4.3.4 Other external agreements

There is a wide array of agreements entered into by the EC (as the legal personality of the EU¹³⁹) and its Member States with third countries,¹⁴⁰ which encompass a mixture of political and economic objectives, and which include some form of antitrust provision designed to foster antitrust dialogue and in certain instances work towards substantive convergence. These agreements will be considered below to assess their significance to the international antitrust dialogue, and the identification of the key objective in international antitrust. Many of these agreements are negotiated in furtherance of the EU neighbourhood policy, but they are best categorised according to the nature of the agreement. The categories are: i) agreements entered into under the stabilisation and association process; ii) partnership and cooperation agreements; iii) the so-called Med-agreements; iv) state specific association agreements; and v) the Cotonou Agreement entered into between the EC and the 71 signatories from African, Caribbean and Pacific (ACP) countries.

4.3.5 Stabilisation and association process

The Stabilisation and Association Process (SAP) defines the relationship between the EC and the Western Balkan states, namely Albania, Bosnia and Herzegovina, Serbia and Montenegro. The SAP previously included FYROM before it was accepted as a formal candidate state at the Brussels European Council Meeting on

¹³⁹ The agreements are entered into by the ‘European Community’ due to the distinct legal personality of the EC, which the European Union, as a wider political entity, currently lacks.

¹⁴⁰ For a wider and more conceptual discussion of agreements entered into by the EC and its Member States with third countries see R. Leal-Arcas, ‘The European Community and Mixed Agreements’ (2001) 6 *European Foreign Affairs Review* 483.

15th and 16th December 2005.¹⁴¹ Croatia also started the path to EU membership within the SAP, before being formally recognised as a candidate. The EU has consistently stated that the SAP is a means of encouraging long-term commitment to stability and democracy by Western Balkan states, as well as helping to move them towards fully functioning market economies. The medium to long-term benefit to these countries for engaging with the EU is the prospect of EU membership, whilst in the short-term the EU supports reform in these states with training assistance and financial support through the Community Assistance for Reconstruction, Democratization and Stabilization (CARDS) scheme. Following the EU Council Summit in Thessaloniki on 21st June 2003, the EU and Balkan states' heads of government signed a declaration stating: 'The future of the Balkans is within the European Union...Preparation for integration into European structures and ultimate membership into the European Union, through adoption of European standards, is now the big challenge ahead'.¹⁴²

In light of the ongoing movement towards functioning market economies of the SAP states, and indeed taking into account the differing stages of development of the states concerned, it is difficult to make an assessment on the significance of the SAP to the international antitrust dialogue. Nonetheless it is clear that to the extent that the SAP moves the concerned states toward EU accession the EC will play an important role in the development of antitrust regimes in these states, and

¹⁴¹ Paras 23-25 Presidency Conclusions of the Brussels European Council 15/16 December 2005, 15914/1/05 Rev 1. See also the Communication from the Commission: Commission opinion on the application of the Former Yugoslav Republic of Macedonia for membership of the European Union COM (2005) 562.

¹⁴² EU – Western Balkans Summit Declaration, Thessaloniki 21st June 2003, 10229/03 (163) Press Release.

that this will likely result in national antitrust laws modelled upon EC provisions. This process of ‘exporting’ the EC antitrust framework and provisions, already discussed in many examples above, is also evident in the SAP with the example of Albania. In assessing Albania’s recent ‘EC compliant’ antitrust reforms, Dajkovic commented:

‘Given that foreign investors are mainly attracted by an open market, competition reform, in any country, must include not only the adoption of competition legislation, but also the elaboration of a well defined competition policy, the creation and maintenance of a competitive environment and, in parallel with such reform, the establishment of a modern legal and institutional framework capable of supporting these developments’.¹⁴³

The comment highlights the motivation for reforms modelled on EC law in spite of antitrust harmonisation not being requirements of the SAP, although the European Commission does consider antitrust when assessing SAP states conformity with European standards.¹⁴⁴

¹⁴³ I. Dajkovic, ‘Competing to reform: an analysis of the new competition law in Albania’ (2004) 25 *ECLR* 734.

¹⁴⁴ European Commission 2005 Progress Report on Albania SEC (2005) 1421 Final at p.43 ‘Albania has taken important legislative and administrative steps in establishing structures to regulate competition and state aid. However, in a country where competition culture is still in its infancy, much more needs to be done to increase the overall understanding of the principles of competition, as a tool to protect the market and consumers’ interests. The Competition Authority is substantially understaffed and has an insufficient budget. Despite progress in adopting a legislative framework, legislation in this area needs to be further improved to make competition control effective’. Note also Commission’s 2005 Progress Report on Serbia and Montenegro SEC (2005) 1428 at p.41: ‘Serbia and Montenegro have taken the first preparatory steps towards setting up republican regimes for anti-trust and state aid control, but efforts should be intensified in order to make these regimes operational.’; Commission’s 2005 Progress Report on Bosnia and Herzegovina SEC (2005) 1422 at p.47 ‘the establishment of the Bosnia and Herzegovina Competition Council and the adoption of a new Competition Law in July 2005 have been important developments and confirm ongoing anti-trust efforts. However, the capacity of the Competition Council should be enhanced if it is to fully implement its tasks. Efforts aimed at further aligning legislation with the *acquis* need to continue.’; note that the Commission has stated with reference to FYROM that ‘the country might not be able to comply with the requirements of the *acquis* in the medium term’ with regard to antitrust law (see Communication from the Commission: Commission opinion on the application of the former Yugoslav Republic of Macedonia for membership of the European Union COM (2005) 562).

4.3.6 Partnership and cooperation agreements

The Partnership and Cooperation Agreements (PCAs) entered into by the EC and its Member States with third countries are primarily designed to foster closer economic and political relations with former Soviet Republics. The respective agreements between the EC and Armenia,¹⁴⁵ Azerbaijan,¹⁴⁶ Georgia,¹⁴⁷ Kazakhstan,¹⁴⁸ Kyrgyzstan,¹⁴⁹ Moldova,¹⁵⁰ Russia,¹⁵¹ Ukraine¹⁵² and Uzbekistan¹⁵³ are not identical, but they share common objectives and are for the most part substantively very similar. The principal difference is that the agreements between the EC and Russia, Moldova and Ukraine contain an additional and more onerous provision with regard to antitrust than the six other PCAs discussed. The reasons for the underlying similarity are twofold. Firstly bilateral relations with each of these states are essentially replacing the pre-1989

¹⁴⁵ Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Armenia, of the other part, [1999] O.J. L239/3.

¹⁴⁶ Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Azerbaijan, of the other part, [1999] O.J. L246/3.

¹⁴⁷ Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Georgia, of the other part, [1999] O.J. L205/3.

¹⁴⁸ Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Kazakhstan, of the other part, [1999] O.J. 196/3.

¹⁴⁹ Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Kyrgyzstan, of the other part, [1999] O.J. 196/48.

¹⁵⁰ Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Moldova, of the other part, [1998] O.J. 181/3.

¹⁵¹ Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part, [1997] O.J. L327/3. Note that the Agreement between the EC, its Member States and Russia is very similar to one concluded between the EC, its Member States and Belarus, although the latter agreement has as yet to be ratified following difficult relations between the EU and the Belarusian Government.

¹⁵² Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and Ukraine, of the other part, [1998] O.J. L49/3.

¹⁵³ Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Uzbekistan, of the other part, [1999] O.J. L229/3.

relationship established between the then EEC and Euratom, and the USSR¹⁵⁴ and subsequent relations have developed in a similar way with each of these states.¹⁵⁵ Secondly, due to a lack of European aspirations, their geographic location and/or the economic status of the state concerned, these states do not/cannot have EU membership as a short-to-medium term objective. All these states are therefore in the same category of relationship with the EU: EU membership is not a foreseeable prospect, although both the states concerned and the EU would benefit from closer relations and incremental steps towards a free trade area. In spite of the inherently limited relationship between the EU and these former Soviet Republics, the overarching objective of creating a free trade area increases the importance to the EU that these states develop antitrust laws in conformity with EC law.

There are broad obligations within the partnership and cooperation agreements on legislative cooperation that extend to antitrust. The obligation involves an acknowledgement that:

‘an important condition for strengthening the economic links between [the state concerned] and the Community is the approximation of legislation. [The state concerned] shall endeavour to ensure that its legislation will be gradually made compatible with that of the Community’.¹⁵⁶

¹⁵⁴ Agreement between the European Economic Community and the European Atomic Energy Community and the Union of Soviet Socialist Republics on trade and commercial and economic cooperation, signed on 18 December 1989 and approved by Council Decision 90/116/EEC [1990] O.J. L68/1.

¹⁵⁵ The term ‘subsequent relations’ refers to the period following the collapse of the USSR up until the negotiation and conclusion of the PCAs discussed, it is acknowledged that recent political changes and market-economy orientated reforms in both Georgia and Ukraine may clearly distinguish their future relations with the EU, from those of the other former Soviet Republics discussed in this section.

¹⁵⁶ Article 55(1) Russia-EC PCA; Article 50(1) Moldova-EC PCA; Article 51(1) Ukraine-EC PCA; Article 43(1) of the Georgia-EC PCA, the Armenia-EC PCA, Azerbaijan-EC PCA, and Kazakhstan-EC PCA, Article 44(1) Kyrgyzstan-EC PCA, and Article 42(1) Uzbekistan-EC PCA.

Further provisions then specify which areas of legislation are subject to this approximation obligation, which includes antitrust.¹⁵⁷ The agreements also provide for the EC to provide technical assistance to the other signatories including the exchange of experts, organising seminars and training activities. The Russian, Moldovan and Ukrainian PCAs impose additional requirements upon the former Soviet republics by creating a positive obligation upon the signatories to introduce and enforce domestic antitrust law to remedy ‘restrictions on competition by enterprises or caused by state intervention in so far as they may affect trade between the Community’ and the signatory state.¹⁵⁸ It will be interesting to observe the growing relationships between the EC and these former Soviet states and determine whether the creation of a free trade area is an achievable goal.¹⁵⁹ Particularly interesting will be the relations with Georgia and Ukraine both of which have experienced a radical realignment of foreign policy orientated towards the EU.¹⁶⁰

4.3.7 Med-Agreements

The so-called ‘Med-Agreements’ refer to the series of Euro-Mediterranean Agreements creating associations between the EC and its Member States on the one part, and each of eight territories in the Mediterranean region on the other

¹⁵⁷ Article 55(2) Russia-EC PCA; Article 50(2) Moldova-EC PCA; Article 51(2) Ukraine-EC PCA; Article 43(2) of the Georgia-EC PCA, the Armenia-EC PCA, Azerbaijan-EC PCA, and Kazakhstan-EC PCA, Article 44(2) Kyrgyzstan-EC PCA, and Article 42(2) Uzbekistan-EC PCA

¹⁵⁸ Article 53 of the Russia-EC PCA, Article 48 of the Moldova-EC PCA and Article 49 of the Ukraine-EC PCA.

¹⁵⁹ For a more in depth and focused discussion of the Russia-EC PCA see M.M. Dabbah, *op. cit.* note 2, at p.122.

¹⁶⁰ For a discussion of the impact of EU policies and the PCA upon Ukrainian law see R. Petrov, ‘Recent Developments in the Adaptation of Ukrainian Legislation to EU Law’ (2003) 8 *European Foreign Affairs Review* 125.

part. These agreements have been concluded as part of the Barcelona Process that began in November 1995 involving a ‘wide framework of political, economic and social relations between the Member States of the European Union and Partners of the Southern Mediterranean’.¹⁶¹ This process aims to foster peace and stability in the region and work towards the creation of a free-trade area. The current agreements are with Algeria,¹⁶² Egypt,¹⁶³ Israel,¹⁶⁴ Jordan,¹⁶⁵ Lebanon,¹⁶⁶ Morocco,¹⁶⁷ the Palestinian Authority,¹⁶⁸ and Tunisia.¹⁶⁹ These eight agreements contain limited provisions on antitrust often intended to assist the establishment and development of an antitrust regime within the partner territory. The antitrust provisions are very similar, although a couple contain elements of key principles ordinarily found in bilateral cooperation agreements.¹⁷⁰

All med-agreements contain the core provision declaring anti-competitive agreements and concerted practices that affect trade between the EC and the

¹⁶¹ See details at: http://www.europa.eu.int/comm/external_relations/euromed/index.htm.

¹⁶² Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People’s Democratic Republic of Algeria, of the other part.

¹⁶³ Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part and Egypt, of the other part.

¹⁶⁴ Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the state of Israel, of the other part, [2000] O.J. L147/3.

¹⁶⁵ Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part, [2002] O.J. L129/3.

¹⁶⁶ Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the Republic of Lebanon, of the other part, (COM(2002)170 27 March 2002).

¹⁶⁷ Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, [2000] O.J. L70/2.

¹⁶⁸ Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestine Liberation Organization for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the other part, [1997] O.J. L187/3.

¹⁶⁹ Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part, [1998] O.J. L97/2.

¹⁷⁰ Discussed *supra* at chapter 3.

partner territory incompatible with the agreement.¹⁷¹ There is a similar provision with regard to the abuse of market power within the territory of the EC or the partner territories or a substantial part of either. The EC-Jordan, EC–Morocco, EC-Palestinian Authority and EC-Tunisia agreements contain the additional provision that practices contrary to the two core prohibitions shall be assessed on the basis of the application of Articles 81 and 82 of the Treaty of Rome, signifying a strong acceptance of EC antitrust law to assess conduct affecting trade between the parties.¹⁷² The EC-Algeria agreement requires the parties to ‘ensure administrative cooperation in the implementation of their respective competition legislations and exchange information taking into account the limitations imposed by the requirements of professional and business secrecy’ within Article 41(2). Article 41(3) facilitates consultations when an anti-competitive practice taking place in one party’s territory seriously prejudices the interests of the other party. Both provisions are very similar to the principles within many bilateral antitrust agreements. These provisions are substantively identical to those within Article 35(2) and (3) of the EC-Lebanon agreement. Similar consultation provisions also exist within Article 35(5) of the EC-Egypt agreement, Article 36(5) of the EC-Israel agreement, Article 53(6) of the EC-Jordan agreement, Article 36(6) of the EC-Morocco and EC-Tunisia agreements, and Article 30(7) of the EC-Palestinian Authority agreement.

¹⁷¹ Article 41 of the EC-Algeria agreement, Article 35 of the EC-Egypt, EC-Israel and EC-Lebanon agreements, Article 53 of the EC-Jordan agreement, Article 36 of the EC-Morocco and EC-Tunisia agreements, and Article 30 of the EC-PA agreement.

¹⁷² Negotiations have also been concluded on a Euro-Mediterranean Agreement between the EC, its Member States and Syria. Although the final text has yet to be made available, the antitrust content is likely to closely resemble that discussed above. See the EU Commission’s External Relations website for further information: http://www.europa.eu.int/comm/external_relations/euromed/med_ass_agreemnts.htm.

The antitrust provisions within these agreements are clearly limited, although they are of significance in light of the wider framework within which they operate. Assisting partner territories to develop antitrust authorities is seen as essential within the Barcelona Process given the eventual objective of a free trade area. It is certainly beneficial to the EU that many of these agreements also stipulate that any assessment of anti-competitive activities affecting their trading relations be based upon the application of Articles 81 and 82 EC Treaty. In many respects this provision can be seen as securing the supremacy of EC antitrust law over the domestic law of the partner territories in assessing anti-competitive activities. It may even be regarded as akin to the approximation requirement seen in many of the Partnership and Cooperation Agreements, discussed *supra* at 4.3.6.

4.3.8 State-specific association agreements

Discussion of state specific association agreements is a reference to the three rather distinctive agreements that the EC and its Member States have entered into with third countries. The agreements are: a Trade, Development and Cooperation Agreement with South Africa;¹⁷³ an Economic Partnership, Political Coordination and Cooperation Agreement with Mexico;¹⁷⁴ and an Association Agreement with

¹⁷³ Agreement on Trade, Development and Cooperation establishing an association between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part, [1999] O.J. L311/3.

¹⁷⁴ Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part, [2000] O.J. L276/45.

Chile.¹⁷⁵ These agreements have both political and economic objectives, yet antitrust provisions are included with the aim of protecting benefits gained from a strengthened bilateral trading relationship. The EC-Chile mixed agreement exemplifies this underlying aim by stating ‘The parties undertake to apply their respective competition laws in a manner consistent with this...Agreement so as to avoid the benefits of the liberalisation process in goods and services being diminished or cancelled out by anti-competitive business conduct’.¹⁷⁶

Notwithstanding the wider and distinct framework within which the respective antitrust provisions operate, the provisions in all three agreements replicate principles of antitrust authority cooperation that are ever-present within the bilateral cooperation agreements considered in chapter 3. The provisions within the EC-South Africa agreement also closely resemble many of the provisions within the Med Agreements discussed above. *Prima facie* the provisions within the EC-Chile agreement (Articles 172-180) most closely resemble the principles of cooperation ordinarily seen in bilateral cooperation agreements, while the EC-South Africa agreement contains only a limited endorsement of these principles (Articles 35-40), and the EC-Mexico agreement delegates the responsibility for giving effect to the principles and creating mechanisms for cooperation to the EC-Mexico Joint Council (which is created by the agreement). In furtherance of Article 11 of the EC-Mexico agreement, Annex XV to Decision No 2/2000 of the

¹⁷⁵ Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, [2002] O.J. L352/3.

¹⁷⁶ Article 172(1).

EC-Mexico Joint Council contains 10 Articles effectively creating a bilateral antitrust cooperation agreement between the EC and Mexico.¹⁷⁷

Article 174 of the EC-Chile agreement, as well as Article 3 of the EC-Mexico Joint Council Decision, clearly give effect to the principle of notification. Article 38 of the EC-South Africa agreement also gives some effect to the principle of notification, under the heading of ‘Comity’ and permits the respective antitrust authorities to request each other to take remedial action against anti-competitive activities to address an adverse impact on their ‘important interests’. This provision is clearly a limited endorsement of the principle of positive comity present in many of the bilateral cooperation agreements, yet it is perhaps surprising that the EC-South Africa antitrust provisions do not also require notification from one authority to the other in circumstances where one’s enforcement activities affect the other’s important interests. Article 177 of the EC-Chile agreement and Article 4 of the EC-Mexico Decision address the complex and controversial topic of exchange of information, and establish a basic principle that the respective antitrust authorities should exchange information on their respective laws and enforcement activities in order to facilitate ‘the effective application of their respective competition laws’. Article 177 safeguards the rights of confidentiality within the domestic legal systems of both parties by stipulating that the principle of exchange of information is subject to the ‘standards of confidentiality applicable in each party’, and furthermore ‘confidential

¹⁷⁷ Annex XV is given effect by Article 39 of Decision No 2/2000 of the EC-Mexico Joint Council of 23 March 2000(1) (2000/415/EC), [2000] O.J. L157/10.

information...shall not be provided without the express consent of the source of the information'. Whilst Article 4 of the EC-Mexico Decision does not contain similar safeguards, a comparable result is ensured by the operation of Article 8 of the Decision dealing with the issue of confidentiality of information. Article 40 of the EC-South Africa agreement provides a relatively vague endorsement of these same principles by stating 'The parties shall exchange information taking into account the limitations imposed by the requirements of professional and business secrecy'.

Article 175 of the EC-Chile agreement and Article 5 of the EC-Mexico Joint Council Decision provide for the coordination of enforcement activities between the respective antitrust authorities, although both provisions include the caveat that coordination 'shall not prevent the parties from taking autonomous decisions'. The EC-South Africa agreement does not contain any provisions relating to enforcement coordination. Article 176 of the EC-Chile agreement and Article 6 of the EC-Mexico Decision entitle the parties' respective antitrust authorities to request consultations when enforcement activities of the other may affect its important interests. Upon receipt of a consultation request, the antitrust authority 'should give full and sympathetic consideration to the views expressed'. Article 38(4) of the EC-South Africa agreement contains a weaker form of consultation provisions. All three agreements contain provisions facilitating technical cooperation/assistance between the respective antitrust authorities. Article 178 of the EC-Chile agreement simply endorses the potential for parties'

antitrust authorities to receive technical assistance, while Article 39 of the EC-South Africa agreement provides some examples of the assistance that may be offered, and Article 9 of the EC-Mexico Decision provides for the parties to conduct joint studies of antitrust law and policy, as well as engage in antitrust advocacy. Article 35 of the EC-South Africa agreement contains provisions that are beyond the ambit of most bilateral cooperation agreements, and outlines substantive antitrust rules. Article 35 declares certain anti-competitive agreements and concerted practices that affect trade between the EC and South Africa incompatible with the agreement unless the firms concerned can prove the ‘pro-competitive effects’ outweigh the ‘anti-competitive’ ones. There is a similar provision with regard to the abuse of market power within the territory of the EC or South Africa or a substantial part of either.

4.3.9 Contonou agreement

The Contonou agreement was entered into between the EC and 71 African, Caribbean and Pacific countries on 23rd June 2000, and came into force on 1st April 2003. The agreement only merits brief consideration here. Article 45 of the agreement relates to antitrust, and is not designed to create supranational or regional antitrust provisions. The objective of Article 45 is to commit each signatory to implementing national or regional antitrust laws, designed to prohibit anti-competitive agreements and abuses of a dominant position within the EC or in the territory of the ACP countries. The article also commits the parties to cooperation in the field of antitrust, as well as stipulating that cooperation shall

include technical assistance aimed at drafting an appropriate legal framework for each ACP country.

4.4 Multilateral antitrust initiatives

4.4.1 Introduction

There has been intense academic debate as to how best to facilitate enforcement in international antitrust cases for many years. Debate has included criticism of the ongoing practice of extraterritoriality, comment on the increasing adoption of bilateral cooperation agreements and proposals as radical as adopting a binding international antitrust code. In light of the ongoing debate and lack of agreement on some of the more persistent recommendations, some may conclude that there has been no progress in adapting national antitrust law and policy to deal with international commercial behaviour that could have anti-competitive effects. That conclusion would be an erroneous one. The preceding discussion within this chapter has demonstrated an irrefutable link between the movement towards trade liberalisation and antitrust cooperation. The antitrust provisions within regional trade agreements and trading blocs, as well as the extensive antitrust dialogue fostered by the EU through its enlargement and neighbourhood policies, demonstrate the increasing recognition of antitrust as an important consideration in the pursuit of trade liberalisation. There have also been developments aimed at increasing the profile of antitrust advocacy as well as procedural convergence to assist cooperation in international investigations. The remaining part of this

chapter will focus upon multilateral antitrust initiatives, mainly identifying the current extent of antitrust dialogue within multilateral fora.

4.4.2 ICN

The International Competition Network (ICN) came into being on 25th October 2001¹⁷⁸ following widespread recognition that the existing multilateral efforts to deal with anti-competitive activities were insufficient. The stimulus underlying the creation of the ICN was the Final Report of the US-based International Competition Policy Advisory Committee (ICPAC) in 2000.¹⁷⁹ ICPAC was established in 1997 by the US Department of Justice with the mandate of investigating ‘What new tools, tasks and concepts will be needed to address the competition issues that are emerging on the horizon of the global economy’. In particular, the investigation focused upon: ‘multijurisdictional merger review; the interface of trade and competition issues; and future directions in enforcement cooperation between US antitrust authorities and their counterparts around the world’.¹⁸⁰ After submitting its final report in February 2000, ICPAC was officially disbanded in June 2000, although its recommendations were decisive in Assistant Attorney General Klein’s call for an inclusive Global Competition Initiative (GCI) in September 2000. The ICPAC Final Report proposed a “Global Competition Initiative” which is designed to address differences in national approaches to competition that have international consequences’.¹⁸¹ In essence the

¹⁷⁸ At the Fordham Corporate Law Institute’s annual international antitrust conference.

¹⁷⁹ ICPAC Final Report (2000) available at: <http://www.usdoj.gov/atr/icpac/icpac.htm>.

¹⁸⁰ *Ibid.* at p.1.

¹⁸¹ *Ibid.* at p.28.

GCI was envisaged as being complementary to pre-existing international fora involved in antitrust, although the GCI would have a transient form and operate as a type of inter-governmental conference solely for antitrust matters. It is probably the case that the GCI was seen by many in the US as an alternative to the European calls for a WTO agreement on competition issues,¹⁸² yet surprisingly seen by many Europeans as complementary to the vision of a WTO antitrust agreement.

The proposal for a GCI was further boosted when former EC Competition Commissioner Monti endorsed it in October 2000,¹⁸³ subsequently becoming one of the strongest and most consistent supporters of a GCI. Substantive progress was made at a ‘brain storming session’¹⁸⁴ held at Ditchley Park, UK from 2nd to 4th February 2001, when representatives and experts from 23 countries decided to make the GCI a reality. On 25th October 2001 at the Fordham Corporate Law Institute’s 28th Annual Antitrust Conference in New York, a GCI was launched under the title of the International Competition Network (ICN). It was famously billed as a forum that would be ‘all antitrust all the time’.¹⁸⁵ Since its creation, the ICN has focused upon three distinct areas of international antitrust: promoting

¹⁸² See the Communication submitted by Sir Leon Brittan and Karel Van Miert Towards an international framework of competition rules Communication to the Council, COM (96) 284, following a report submitted to the European Commission entitled ‘Report by the group of experts on competition policy in the new trade order’.

¹⁸³ Endorsed in a speech in Fiesole, see Commission Press Release *EU Competition Commissioner Outlines Ideas for an International Forum to Discuss Competition Policy Issues*, IP/00/1230.

¹⁸⁴ As per Commissioner von Finckenstein at the ICN’s inaugural conference in Naples, 28th September 2002 .

¹⁸⁵ The well known quote by C.A James, Assistant Attorney General, Antitrust Division, US Department of Justice, in ‘International Antitrust in the Bush Administration’, Annual Canadian Bar Association Fall Conference on Competition Law. Ottawa, Canada, 21 September 2001.

best practice in the field of merger review;¹⁸⁶ trying to address the challenges of anti-cartel enforcement;¹⁸⁷ and seeking to assist developing antitrust authorities with engaging in antitrust advocacy and capacity-building.¹⁸⁸

The ICN does not have a permanent secretariat and the administrative capability is provided by the chair of the 15 member steering group,¹⁸⁹ which leads the organisation. The membership of the ICN is composed of national and regional antitrust authorities, and the chair position is held by a member and rotates every two years. Whilst not members, non-Governmental advisers such as antitrust academics and practitioners, and other international bodies involved in antitrust (i.e. the other fora discussed in this section), are closely involved in the work of the ICN. The organisation is clear in that it is not working towards a binding international antitrust code, but instead adopts a ‘soft convergence’ approach by favouring the conclusion of best practice recommendations, the enforcement of which is entirely voluntary. The transient *modus operandi* recommended by the ICPAC Final Report has also been adopted by the ICN, as seen from its own description: ‘The initiative is project-oriented, flexibly organized around working groups, the members of which work together largely by Internet, telephone, fax

¹⁸⁶ See the ICN Mergers Working Group home page:

<http://www.internationalcompetitionnetwork.org/index.php/en/working-groups/mergers>.

¹⁸⁷ See the ICN Cartels Working Group home page:

<http://www.internationalcompetitionnetwork.org/index.php/en/working-groups/cartels>.

¹⁸⁸ See the ICN Competition Policy Implementation (CPI) home page: <http://www.internationalcompetitionnetwork.org/index.php/en/working-groups/competition-policy-implementation>.

¹⁸⁹ As required by the ICN Operational Framework (June 25, 2003). For details on the composition of the ICN steering group, see <http://www.internationalcompetitionnetwork.org/index.php/en/about-icn/steering-group>.

machine and videoconference'.¹⁹⁰ A key objective of the ICN is to foster an environment where antitrust enforcers and other experts could meet, share experiences and work towards convergence. This objective is certainly possible in light of the large ICN membership, currently in excess of 90 members representing over 70 jurisdictions. The membership alone is a significant success for an organisation that is a relatively recent addition to the international antitrust dialogue.

Some commentators may be ready to point out however, that the size of the ICN's membership, coupled with the mixing of antitrust authorities from developed and developing nations, may frustrate the organisation's efforts at convergence and consensus. The diverse membership and modest objectives, as compared with proposals for a binding multilateral antitrust code, led to some early criticism from Zanettin, who believed that the ICN was 'unlikely to significantly improve the present situation',¹⁹¹ referring to problems encountered due to a lack of multilateral antitrust initiatives. Other commentators however, were willing to applaud the creation of the ICN, albeit viewing the initiative as little more than an exercise in soft convergence, facilitating exchange of ideas at a policy level and the building of trust between antitrust authorities.¹⁹² More recent and reflective commentary appears to view the ICN positively whilst acknowledging its limitations. Williams appears to have a generally favourable view of the ICN,

¹⁹⁰ See ICN homepage at: <http://www.internationalcompetitionnetwork.org>.

¹⁹¹ B. Zanettin, *Cooperation Between Antitrust Agencies at the International Level*, (Oxford and Portland, Hart Publishing, 2002) at p.239.

¹⁹² See G. Murphy, 'Two powerful resources for competition law compliance now in place' (2002) 23 *ECLR* 479.

noting that it ‘has none of the disadvantages of offending political sensibilities on sovereignty issues that would inevitably arise in the more formal setting of the WTO’ and suggests it may be a more effective environment for ensuring compliance with core principles than the WTO.¹⁹³ Williams does however, highlight that the ICN does not have a clear role to play in influencing the very early stages of development of antitrust regimes, as those states without an existing antitrust framework cannot satisfy the criteria for ICN membership.¹⁹⁴ This is not to suggest that Williams was advocating that the ICN should take on such a role. Indeed, it would surely be counterproductive in the pursuit of convergence and consensus in an ‘all antitrust all the time’ forum to accommodate the views of those jurisdictions that have as yet to establish a basic antitrust framework. In Dabbah’s view, the capability of the ICN to ‘build a strong network between antitrust authorities from developed and developing countries’ is sufficient to recognise that the ICN is fulfilling an important role in the international antitrust arena. Dabbah also suggests that the work undertaken by the ICN in its first couple of years is ‘very promising’.¹⁹⁵

One of the most thorough analyses of the ICN conducted thus far is that undertaken by Budzinski, where he argues that ‘a reduction of jurisdictional conflicts and an enhancement of efficiency can be expected’ as a result of the

¹⁹³ M. Williams, *op. cit.* note 4, at p.92.

¹⁹⁴ *Ibid.*, this is of particular relevance to Williams’ text of course as he is engaging in a comparative study of antitrust in China and Hong Kong (where there are currently no comprehensive antitrust laws in place) as well as Taiwan.

¹⁹⁵ M.M. Dabbah, *op. cit.* note 2, at p.256-257 and 291.

ICN's work.¹⁹⁶ Budzinski does highlight the organisation's limitations however, and suggests that its long term future is far from clear, and inherently carries the risk of becoming an ineffective and impotent entity should peer pressure and transparency fail to secure compliance with best practice principles and recommendations. Amongst its limitations, Budzinski discusses the weakness of the ICN to work to avoid conflict when serious disputes arise. These cases are likely to involve non-competition interests, such as industrial or employment policy considerations, although history suggests that they will be small in number.¹⁹⁷ While much of the academic commentary, discussed above, assesses the ICN on the basis of its *modus operandi*, its mission statements and the work of its working groups, there is data beginning to emerge regarding the impact of ICN best practice recommendations upon legislative and procedural changes within national antitrust regimes.¹⁹⁸ This type of data is vital in order to measure the success of the non-binding, soft convergence approach adopted. The ICN's reliance upon transparency and peer pressure among antitrust authorities, as a means of securing compliance with voluntary best practice recommendations, can be judged on the basis of data on implementation of those recommendations. Indeed the ICN's future as a meaningful forum dealing with international antitrust is likely to depend upon its ability to demonstrate high levels of best practice

¹⁹⁶ O. Budzinski, 'The international competition network: prospects and limits on the road towards international competition governance' (2004) 8 *Competition & Change* 223.

¹⁹⁷ *Ibid*, p.13-14. See also M. Bode & O. Budzinski, 'Competing Ways Towards International Antitrust: the WTO versus the ICN' in F. Columbus (ed.), *New Developments in Antitrust*, (New York, Nova, 2005).

¹⁹⁸ Also note the discussion of the ICN in the context of multi-jurisdictional merger review *infra* at chapter 5, particularly 5.5.4.

implementation in the medium term.¹⁹⁹ The initial indicators in this regard are encouraging, particularly regarding procedural changes concerning merger review to achieve compliance with ICN recommendations.²⁰⁰ Australia²⁰¹ and the EC²⁰² are two prominent examples of antitrust regimes that have implemented many of the ICN recommendations whilst undergoing an internal reform programme. The ICN guiding principles and recommended practices for merger notification and review procedures will be considered in greater depth in chapter 5.

4.4.3 OECD

The Organisation for Economic Cooperation and Development (OECD) was created in 1961 as a forum for industrialised countries to discuss how to combat common problems stemming from globalisation effectively. The membership has

¹⁹⁹ As Ezrachi notes: this is ‘the beginning of a process. The substance of the [ICN and OECD] recommendations adopted, the number of states endorsing them, and the real level of compliance will determine the future impact of these voluntary initiatives.’ in ‘Merger Control and Cross Border Transactions – A Pragmatic View on Cooperation, Convergence and What’s in Between’, University of Oxford Centre of Competition Law and Policy Working Paper (L) 11/05.

²⁰⁰ The mergers notification and procedures subgroup is one of the two groupings within the ICN mergers working group. The recommendations referred to are provided within two documents; the guiding principles for merger notification and review procedures (available at: http://www.internationalcompetitionnetwork.org/media/library/conference_1st_naples_2002/icnnpworking_groupguiding.pdf) and the recommended practices for merger notification and review procedures (available at: <http://www.internationalcompetitionnetwork.org/media/archive0611/mnprecpractices.pdf>).

²⁰¹ See R. Lewis & A. George-Deacons, ‘Australia: Mergers – Procedure’ (2005) 26 *ECLR* N67.

²⁰² See the ICN report: *Implementation of the ICN Recommended Practices for Merger Notification and Review Procedures* (April 2005) at p.10-11 where it states that the ICN Recommended Practice on Timing of Notification was ‘a source of inspiration for the changes’ to the ECMR. Presented to the Fourth Annual ICN Conference, Bonn, Germany, 5-8 June 2005. Available from <http://www.internationalcompetitionnetwork.org>. Also see a speech by M. Monti, ‘International antitrust – a personal perspective’, Fordham Corporate Law Institute. New York, 11 October 2004 (SPEECH/01/449), where he states ‘With regard to procedures and jurisdictional issues [in the field of merger control], the ICN has already achieved a lot. It is now time for each of our competition authorities and legislators to move decisively forward with the implementation of the agreed ICN standards. After the Merger Review, the EU already substantially conforms to the recommendations. If the same standards of compliance would be achieved by all the ICN members who have subscribed to the recommendations, I believe companies would find compliance with multi-jurisdictional merger review much less burdensome’ [emphasis added]. Furthermore, speech by J.W. Rowley, ‘The internationalisation of merger review: global solutions require both words and actions’ to the 2003 Antitrust Conference: Antitrust issues in today’s economy. New York, 18 – 19 March 2003.

grown from 20 to 30 in the intervening years,²⁰³ although it has nonetheless remained something of a cliquish organisation where there is a large degree of convergence and mutual interdependence between the economies of the respective members.²⁰⁴ The organisation does, however, endeavour to establish working relationships with non-member countries and various international organisations. This is coordinated through its Centre for Cooperation with Non-Members, which tends to focus upon engaging in dialogue with and assistance that can be provided to developing countries.²⁰⁵ In general terms, the work of the OECD seeks to identify best practice within its 31 Committees (i.e. designated topic areas), and often ‘produces internationally agreed instruments, decisions and recommendations to promote rules of the game in areas where multilateral agreement is necessary for individual countries to make progress in a globalised economy’.²⁰⁶ In contrast to the ICN, the OECD has an established secretariat based in Paris with around 2000 members of staff that support the various committees.

²⁰³ A modest increase by comparison with the rapid membership growth of the ICN, discussed *supra* at 4.4.2.

²⁰⁴ See M.M. Dabbah, *op. cit.* note 2, at p.253 where he states ‘Moreover, many non-member countries regard the organisation as one for more developed countries’, and the ICPAC Final Report (2000) at p.258. Note also that while the OECD has indicated its desire to enlarge its membership in order to maintain its current international role and influence, the 2004 OECD Report entitled ‘A STRATEGY FOR ENLARGEMENT AND OUTREACH’ stated ‘Members agreed on the usefulness of “like-mindedness” and “significant players” as criteria evaluating candidate countries’, thereby highlighting the inherently limited potential for enlargement (p.38, available at <http://www.oecd.org/dataoecd/24/15/37434513.pdf>).

²⁰⁵ See discussion in M. Williams, *op. cit.* note 4, at p.81, as well as the centre’s homepage: http://www.oecd.org/department/0,2688,en_2649_33709_1_1_1_1_1,00.html.

²⁰⁶ OECD home page: http://www.oecd.org/about/0,2337,en_2649_201185_1_1_1_1_1,00.html.

The OECD issues non-binding best practice recommendations in all areas of its activity including antitrust²⁰⁷ to try to encourage consensus and promote convergence. Similarly to the ICN, compliance with these instruments relies upon peer pressure, although the OECD has a reputation for instigating a vigorous policy of peer review.²⁰⁸ Interestingly the OECD competition committee, as well as the OECD global forum on competition, and OECD Latin American competition forum, have encouraged both members and non-members to voluntarily submit their antitrust legislation and institutions for peer review since 1998. Several antitrust jurisdictions have undergone an OECD peer review including the EC in 2005,²⁰⁹ and several non-member antitrust jurisdictions such as South Africa, Russia, Peru and Brazil.²¹⁰ The importance of this mechanism to the OECD modus operandi is clear from the foreword to the 2005 Brazilian peer review report:

“Peer review” has always been a core element of OECD cooperation. The mechanisms of peer review vary, but OECD cooperation has always been founded upon the willingness of all OECD countries to submit their laws and policies to substantive questioning by other members. This process not only promotes transparency and mutual understanding for the benefit of all, it also provides the peer reviewed country with valuable insights about possible improvements... [recent reviews] confirm that the peer review process is an extremely useful means of promoting cooperation and voluntary convergence among OECD and non-OECD economies,

²⁰⁷ Competition Law and Policy is a designated OECD topic area, see:

http://www.oecd.org/about/0,2337,en_2649_37463_1_1_1_1_37463,00.html.

²⁰⁸ Indeed the OECD views the peer review mechanism as essential in order to ensure effective compliance with its soft law approach, see discussion on OECD website as well as the Foreword by Donald J. Johnston, OECD Secretary General to the 2004 OECD Report, *op. cit.* note 204.

²⁰⁹ *Competition Law and Policy in the European Union: A Peer Review*, 2005 OECD Report, available at: <http://www.oecd.org/dataoecd/7/41/35908641.pdf>.

²¹⁰ All OECD peer reviews of antitrust regimes are available from: http://www.oecd.org/document/43/0,2340,en_2649_33759_2489707_1_1_1_1,00.html. See also the discussion in M. Williams, *op. cit.* note 4, at p.83.

providing both transparency and a candid discussion of what constitutes “best practice” in different situations’.²¹¹

The OECD peer review mechanism has a good reputation for providing thorough yet objective recommendations for future reform of specific antitrust regimes, and also facilitating increasing transparency and mutual understanding amongst antitrust authorities. Nonetheless, the OECD’s antitrust activities extend beyond that of peer review. The competition committee has a sizeable capacity-building programme that was initiated in 1990, and is supported by expertise and financial assistance from member countries. The programme provides a wide range of technical assistance to countries in the process of implementing an antitrust regime, as well as those with a developing antitrust authority. Capacity-building activities include ‘case studies seminars, courses in merger analysis, help in legislative drafting, studies in sector specific regulation and high-level policy briefings’,²¹² as well as training programmes for national judges. The capacity-building programme has been further enhanced by the opening of regional centres in 2004 and 2005 in Seoul²¹³ and Budapest²¹⁴ respectively, designed to act as regional hubs for antitrust exchanges and activities.

In addition to facilitating peer reviews and the development of antitrust regimes, the most prominent feature of the OECD activities in international antitrust is likely to be the various guidelines and best practice recommendations that have

²¹¹ *Competition Law and Policy in Brazil: A Peer Review*, 2005 OECD Report, at p.3. Available at: <http://www.oecd.org/dataoecd/12/45/35445196.pdf>.

²¹² See: http://www.oecd.org/about/0,2337,en_2649_34535_1_1_1_1_1,00.html.

²¹³ See: http://www.oecd.org/document/43/0,2340,en_2649_34535_35118955_1_1_1_1,00.html.

²¹⁴ See: http://www.oecd.org/document/5/0,2340,en_2649_34535_35118981_1_1_1_1,00.html.

been adopted since 1967. The Recommendations and guidelines have addressed many diverse antitrust issues. A key OECD instrument is the set of Recommendations concerning antitrust cooperation between member countries, the latest set of which was produced in 1995,²¹⁵ and which was discussed in detail *supra* at 3.3. The other principal instruments are Recommendations concerning effective action against hard core cartels,²¹⁶ structural separation in regulated industries,²¹⁷ merger review,²¹⁸ and for the formal exchange of information between antitrust authorities in hard core cartel investigations.²¹⁹

Two preliminary observations can be made at this stage regarding the OECD's role in international antitrust. Firstly, the organisation's activities over many years have been fairly successful and continue to be important. Secondly, there is clear potential for overlap and duplication of effort between the OECD and the ICN.²²⁰ Most commentators would agree that the OECD's activities in the field of antitrust have been important in acknowledging the inherent limitations of unilateral enforcement in international antitrust, and seeking to avoid conflict through stimulating consensus and convergence. Damro cites convincing empirical evidence demonstrating the success of the OECD Recommendations in

²¹⁵ OECD Council Recommendation Concerning Cooperation between Member Countries on Anticompetitive Practices affecting International Trade, 27 July 1995, C(95) 130/Final.

²¹⁶ OECD Council Recommendation Concerning Effective Action Against Hard Core Cartels, 25 March 1998 - C(98)35/FINAL, available at: [http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C\(98\)35](http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C(98)35).

²¹⁷ OECD Recommendation of the Council on the Structural Separation in Regulated Industries, 26 April 2001 - C(2001)78, available at: [http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C\(2001\)78](http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C(2001)78).

²¹⁸ OECD Recommendation of the Council on Merger Review, 23 March 2005 - C(2005)34, available at: [http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/c\(2005\)34](http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/c(2005)34). Discussed further *infra* at 5.5.

²¹⁹ OECD Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations (October 2005), available at: <http://www.oecd.org/dataoecd/1/33/35590548.pdf>.

²²⁰ This is an issue that is also considered *infra* at 5.5.2

increasing international antitrust authority cooperation, particularly evident during the 1980s.²²¹ Judge Wood shares this view and states that ‘it would be hard to overestimate the contribution [that OECD Recommendations] have made over time to the development of consistent and harmonious competition rules that have influence at a global level’.²²² Wilson also clearly views the OECD antitrust activities as a success and believes that the competition committee ‘has made substantial contributions in harmonizing competition laws within its member states’.²²³ Wilson’s view may be exaggerating the true impact of the OECD, however, given that it seems clear in this context that harmonisation and convergence are two distinct concepts. While the organisation has undoubtedly achieved some success in the latter (through best practice recommendations, peer reviews and facilitating capacity-building), its ability to effectively pursue the former has been questioned by Dabbah and Akbar amongst others.²²⁴ Indeed Piilola has suggested that the impression of the OECD is ‘as more of a forum for discussion than for decision making...’ and that ‘[t]his view has given the organization a second-class status in the international arena’.²²⁵ Tarullo has also highlighted the ‘organizational shortcomings’ of the organisation.²²⁶ Nonetheless the OECD has now accumulated valuable experience within international antitrust

²²¹ C. Damro, ‘Multilateral Competition Policy and Transatlantic Compromise’ (2004) 9 *European Foreign Affairs Review* 269 at p.272.

²²² D.P. Wood, ‘Soft harmonization among competition laws: track record and prospects’ (2003) Summer *The Antitrust Bulletin* 305 at p.312.

²²³ J. Wilson, *op. cit.* note 90, at p.215.

²²⁴ See M.M. Dabbah, *op. cit.* note 2, at p.253 and Y.H. Akbar, *op. cit.* note 1, at p.143 and p.162. Both authors use the failure of the OECD to agree upon the Multilateral Agreement on Investment (MAI), due to its implications upon national sovereignty, to suggest that the organisation would be unable to foster any further movements towards a set of binding rules for international antitrust. Also see the ICPAC Final Report (2000) at p.258.

²²⁵ A. Piilola, *op. cit.* note 31, at p.237.

²²⁶ D.K. Tarullo, ‘Norms and Institutions in Global Competition Policy’ (2000) 94 *American Journal of International Law* 478 at p.503.

and has certainly played a key role in assisting many countries, including non-members, with capacity-building programmes. It has also increased mutual awareness and trust amongst antitrust authorities and in many ways prompted the proliferation of bilateral antitrust cooperation agreements,²²⁷ which has been a welcome move away from unilateralism in international antitrust.

In spite of the previous success of the OECD in this field, it is necessary to ponder whether the organisation can continue to maintain that position in light of the changing ‘landscape’ of international antitrust. In particular, the ICN may be accused of encroaching upon the ‘territory’ of the OECD by also working towards best practice recommendations and providing technical assistance to developing antitrust regimes. A report presented to the Fourth Annual ICN Conference on implementation of best practice recommendations draws attention to the potential for duplication of effort with regard to merger review best practices by making the following statement:

‘The OECD Competition Committee, particularly its working party on enforcement cooperation, has devoted substantial efforts to studying the merger review process and its work helped inform the development of the ICN Recommended Practices. Following the ICN’s adoption of Recommended Practices, the OECD Council adopted a Recommendation Concerning Merger Review that closely follows the Recommended Practices and further supports the ICN’s work’.²²⁸

It may be that the OECD and the ICN have distinct strengths and weaknesses and that their roles in international antitrust are complementary, yet that is far from

²²⁷ See discussion in B. Zanettin, *op. cit.* note 191, at p.57.

²²⁸ *Implementation of the ICN Recommended Practices for Merger Notification and Review Procedures* (April 2005) at pp.5-6, presented to the Fourth Annual ICN Conference, Bonn, Germany, 5-8 June 2005. Available at: <http://www.internationalcompetitionnetwork.org>.

certain. Perhaps the expertise of the OECD in conducting peer reviews and providing certain types of technical support and training through its regional centres suggests a distinct strength over the ICN. Equally the ICN's wider reach by appealing to all antitrust jurisdictions irrespective of economic status, thereby being seen as more of an 'honest broker' may enable it to achieve greater success in antitrust advocacy, and more likely to achieve global convergence than the OECD. If each forum indeed has distinct strengths and limited activities to the pursuit of those, then they are arguably complementary whilst also ensuring for the efficient allocation of resources in international antitrust. Yet, as the above statement demonstrates, the activities of these fora are not mutually exclusive. It is clear that these fora engage in similar activities with no clear delineation of competences, and this *prima facie* suggests duplication of effort and hence inefficient allocation of resources.²²⁹ The ICN's view is that its work and that of the OECD 'have been mutually reinforcing in establishing benchmarks for multi-jurisdictional merger review',²³⁰ and it is arguable that some overlap is unavoidable amongst international organisations that all deal with a particular subject area, albeit from different perspectives. It may be that the most realistic solution (in contrast to a clear delineation of competences) is to ensure coordination of activities (which the OECD and the ICN certainly do) to avoid conflicting advice and recommendations. Furthermore, some may argue that any overlapping competence should be viewed positively as it increases the likelihood

²²⁹ The same conclusion is drawn *infra* with regard to activities concerning multi-jurisdictional merger control, see 5.5.2.

²³⁰ *Op. cit.* note 228 at p.6.

of convergence through greater peer pressure.²³¹ Notwithstanding these possible justifications for refusing to combat overlapping competences, the concern that this muddled situation may hinder rather than support efforts at convergence and undoubtedly create some inefficiency in the process is inescapable,²³² and damages the pursuit of clarity and transparency in international antitrust. These concerns will be revisited, focusing upon the role of international fora with regard to merger control, in chapter 5.

4.4.4 UNCTAD

The United Nations has been the longest serving forum engaged in international antitrust following its efforts in negotiating the doomed Havana Charter in 1948 for the creation of the International Trade Organisation (ITO). The ITO incorporated antitrust provisions that were not included in the next multilateral trade agreement, the General Agreement on Tariffs and Trade (GATT).²³³ Following the failure to introduce a set of multilateral antitrust provisions through either the ITO or within the GATT, it was a considerable period of time before the UN would again be at the forefront of debate within international antitrust. In 1978 when the United Nations Conference on Trade and Development

²³¹ For example; by agreeing common best practice recommendations within both the ICN and OECD it may increase the likelihood of compliance by antitrust regimes, by subjecting jurisdictions to peer pressure within both organisations.

²³² A concern that has been alluded to by, *inter alia*, B. Zanettin, *op. cit.* note 191, at p.239. Note that Budzinski also raises important questions in this regard 'Does a competition of ways represent an efficient regime in regard to balancing the prospects and limits of harmonisation versus policy coordination? Or does it disperse forces instead of unifying them to overcome the dissatisfactory regime of effects-doctrine based national competition policy?'. O. Budzinski, *op. cit.* note 196, at p.21.

²³³ See discussion in chapter 2, as well as M. Williams, *op. cit.* note 4, at p.78, and generally in A.O. Krueger (Ed.), *The WTO as an International Organization* (Chicago and London, University of Chicago Press, 1998) at pp.1-4.

(UNCTAD) convened a Conference on Restrictive Trade Practices to discuss how to deal with such activities impacting upon international trade,²³⁴ the landscape of international antitrust had considerably changed due increased unilateralism,²³⁵ and the negotiation of a bilateral cooperation agreement.²³⁶ The OECD Competition Law and Policy Committee, whose membership was already a far more homogenous grouping than that within the United Nations, had made substantive efforts at achieving convergence in international antitrust a decade earlier.²³⁷

Notwithstanding the multi-track approach already in existence, the UN Conference on Restrictive Trade Practices worked through 1979 and produced the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (hereinafter referred to as ‘the UN Set’) in 1980, which was unanimously adopted by the UN General Assembly on 5 December 1980.²³⁸ The UN Set has been reviewed several times since its adoption, most

²³⁴ Note, however, that discussions on international antitrust within the UNCTAD were underway before the Conference on Restrictive Trade Practices was set up, see M.M. Dabbah, *op. cit.* note 2, at p.254.

²³⁵ Following the espousal of the effects doctrine in the US, see discussion in chapter 2.

²³⁶ Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices, 23 June 1976, available from <http://www.usdoj.gov/atr/public/international/docs/0353.htm>. See discussion in chapter 3.

²³⁷ See *supra* at 4.4.3.

²³⁸ 35th Session of the UN General Assembly, Resolution 35/63 of 5th December 1980. Available from: <http://www.unctad.org/en/docs/tdrbpconf10r2.en.pdf>. The UN Set is now formally referred to as the *UN Set of Principles and Rules on Competition* since the UNCTAD Fourth Review Conference on the Set in 2000 (TD/RBP/CONF.5/15 of 4 October 2000). See D.L. Miller & J. Davidow, ‘Antitrust at the United Nations: A Tale of Two Codes’ (1982) 18 *Stanford Journal of International Law* 347, for detailed examination of the negotiations leading up to the adoption of the UN Set in 1980. Also see discussion in P. Brusick, ‘UNCTAD’s role in promoting Multilateral Co-operation on Competition Law and Policy’ (2001) 24 *World Comp.* 23.

recently in 2005.²³⁹ One of the key objectives of the UN Set is to ‘ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting world trade’.²⁴⁰ It is clear however, that the UN Set is not designed to provide a multilateral antitrust code as a stated objective is ‘to facilitate the adoption and strengthening of laws and policies in this area at the national and regional levels’.²⁴¹ Furthermore, the UN Set is not designed to be binding and enforceable, and is merely a recommendation that states should adopt antitrust rules addressing the matters discussed. In light of the nature of UNCTAD’s other antitrust activities, it is perhaps too strong to describe the UN Set as a best practice recommendation, since there is little attempt to monitor or enforce compliance. The true nature of this instrument is best reflected by considering it as an educational tool to assist those states (or indeed RTAs) that are either contemplating or in the process of adopting antitrust rules. In stark contrast to recommendations advanced from other fora in this field, the UN Set advanced by UNCTAD appears to be devoid of any peer pressure, and this is intentionally so. In addition to the UN Set, UNCTAD produces a ‘Model Law on Competition’,²⁴² which its Inter-governmental Group of Experts on Competition Law and Policy keeps under review. The model law has been described as ‘a non-prescriptive’

²³⁹ Fifth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, 14-18 November 2005, Antalya (Turkey).

²⁴⁰ UN Set at p.9, Article A(1).

²⁴¹ UN Set at p.9, Article A(5).

²⁴² TD/RBP/CONF.5/7/Rev.3, available at: http://www.unctad.org/en/docs/tdrbpconf5d7rev3_en.pdf.

instrument,²⁴³ and is intended to be of use to developing states as a flexible and educational tool whilst adopting their own antitrust laws.²⁴⁴

In spite of the ambitious beginning for antitrust at the UN, with efforts to include antitrust rules in the new international trade order following World War II, as well as the agreement upon the UN Set and the ongoing value of the model law, UNCTAD can no longer be said to play a leading role in international antitrust. Nonetheless UNCTAD appears to have cultivated a specialist role and recognised expertise. The organisation's activities in this field are predominantly focused upon antitrust within developing countries, both at a national and regional level. In contrast, to the other fora involved in international antitrust, UNCTAD's activities are not geared towards achieving convergence or harmonisation in international antitrust. Instead, the focus of UNCTAD is upon increasing the awareness and transparency of the antitrust rules adopted by developing countries, as well as providing technical assistance to those states that need it. Technical assistance includes educational programmes designed to provide guidance and information to those jurisdictions considering introducing antitrust rules. The UN Set outlines the particular responsibility of UNCTAD with regard to developing countries in Article F(6) and F(7).²⁴⁵ Its role is to provide resources and finance along with other international organisations for the facilitation of technical assistance, advisory and training programmes in antitrust to developing countries including, *inter alia*, exchange of experts, provision of seminars and training of

²⁴³ M. Williams, *op. cit.* note 4, at p.78.

²⁴⁴ See also comment by J. Wilson, *op. cit.* note 90, at pp.213-214.

²⁴⁵ UN Set at p.18.

officials. Notably the organisation is not actively involved in antitrust advocacy (beyond recommending the UN Set) and does not advise developing countries to support moves towards a binding multilateral agreement for antitrust,²⁴⁶ preferring to remain neutral and offer assistance and information only if requested to do so. In comparison to the activities of the ICN and OECD in international antitrust, it is clear that the UNCTAD approaches this area from a particular perspective – the protection of developing countries. Whilst at a general level the UNCTAD believes it is in the interests of developing as well as developed countries to adopt antitrust rules,²⁴⁷ it is equally of the view that developing countries should adopt antitrust rules in a way and at a time that best meets their own needs and does not jeopardise their economy and other interests. Due to the particular focus of UNCTAD’s antitrust activities, as well as their limited objective (provide information and assistance), it is likely that UNCTAD has secured a distinct territory for itself in the landscape of international antitrust. Whilst the ICN, OECD and UNCTAD all engage in some form of technical assistance/capacity-building in international antitrust, UNCTAD appears to enable a pooling of resources to offer the assistance necessary to developing countries and does not appear to cause any significant overlap or duplication of effort with the activities of either the ICN or OECD.

²⁴⁶ See discussion in M. Williams, *op. cit.* note 4, at p.79.

²⁴⁷ As clearly seen by the UN Set and model law.

4.4.5 WTO

When the World Trade Organisation (WTO) was established on 1 January 1995 as a result of the GATT Uruguay Round, it increased the scope of the international trading system from providing legally binding rules for the international trade in goods, to additionally encompassing international trade in services, and trade involving intellectual property rights. The Uruguay Round did not however, provide for explicit antitrust rules to be included within the WTO framework. In spite of widespread awareness of the linkages between trade and antitrust, as has been discussed in this and previous chapters, the failure of the ITO has effectively excluded antitrust from the binding rules that establish an international trading system, i.e. the GATT, GATS and TRIPS under the auspices of the WTO. In light of the persistent proposals for including antitrust rules within the WTO framework, the WTO agreed to establish a working group on the interaction between trade and competition policy at the Singapore Ministerial Conference in December 1996,²⁴⁸ a proposal that was strongly supported by the EC. Discussion at this point will outline the pertinent organisational features of the WTO and examine the current question mark over the role for the body in international antitrust. Proposals arguing for greater WTO involvement in this field will be considered where relevant in chapter 5 and the thesis conclusion, and will not be dealt with in detail here.

²⁴⁸ See the Singapore Ministerial Declaration WT/MIN(96)/DEC 18 December 1996 at paragraph 20, available at: http://www.wto.org/english/news_e/pres96_e/wtodec.htm. The working group held its first meeting in July 1997, its publications are available at: http://www.wto.org/english/tratop_e/comp_e/comp_e.htm#top.

The WTO has unique experience and expertise, which would undoubtedly complement the current international antitrust fora. Principally, the binding nature of the Agreements under the auspices of the WTO, accompanied by its reputation for successfully operating a dispute settlement mechanism, offers the potential to introduce binding international antitrust rules with a proven ability to enforce the rules against signatory states. The large and diverse membership²⁴⁹ could potentially boost convergence and harmonisation efforts to a near-global level. Several commentators are concerned however, that introducing antitrust rules into the WTO framework would incur a 'race to the bottom' as only a weak set of rules are likely to attract approval from the diverse WTO membership, many of which still have no functioning antitrust regime.²⁵⁰ Another particular concern is held by developing states, many of which fear for the strength of their domestic enterprises to cope with the rigours of international competition after a quick transitional period. There are also general concerns about the adaptability of the WTO mechanisms to cope with the differences between antitrust disputes and trade disputes. Notwithstanding these not insignificant concerns, there was agreement in 2001 to undertake preparatory research towards a WTO antitrust agreement.

²⁴⁹ The WTO has 150 members from both developed and developing economies.

²⁵⁰ See e.g. C.D. Ehlermann & L. Ehring, 'WTO Dispute Settlement and Competition Law: views from the perspective of the appellate body's experience' (2002/03) 26 *Fordham International Law Journal* 1505.

The Fourth Ministerial Conference at Doha in 2001²⁵¹ was ground-breaking due to an agreement that formal negotiations on a multilateral framework on trade and competition policy should begin after the Fifth Ministerial Conference. At this time the working group on the interaction between trade and competition policy was directed to ‘focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity-building’ in the build up to the Fifth Ministerial Conference.²⁵² Many commentators regarded this agreement to open negotiations on a multilateral antitrust agreement as leading the way towards an inevitable realisation of antitrust rules within the WTO framework. Zanettin commented that ‘...the remaining question [in international antitrust] is whether this multilateral structure will be completed by a WTO competition agreement. After the Doha Ministerial Conference in November 2001, this solution seems possible, even likely, but not certain’.²⁵³ Dabbah shared a similar view for the WTO’s prospects: ‘Beyond that, the [4th Ministerial WTO] Conference has provided a great deal of optimism that soon formal negotiation of the envisaged agreement at the WTO will begin’.²⁵⁴ In spite of such optimism however, the widely publicised failure of the WTO’s Fifth

²⁵¹ Apparently a key factor that facilitated the agreement at the 4th Ministerial Conference was the differing policies of the incoming Republican Bush administration in the US, see speech by A. Schaub, former Director-General, European Commission DG Competition, ‘Co-operation in Competition Policy Enforcement between the EU and the US and New Concepts Evolving at the World Trade Organisation and the International Competition Network’, Mentor Group. Brussels, 4 April 2002.

²⁵² Doha Ministerial Declaration WT/MIN(01)/DEC/1 20 November 2001, at paragraphs 23-25, available at: http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

²⁵³ B. Zanettin, *op. cit.* note 191, at p.280.

²⁵⁴ M.M. Dabbah, *op. cit.* note 2, at p.246.

Ministerial Conference in Cancún in September 2003 to reach agreement upon how to conduct negotiations upon the so-called Singapore issues²⁵⁵ – of which antitrust is one – left efforts aimed at the inclusion of antitrust rules within the WTO in disarray. The likelihood of progress in this area has been considerably weakened by the EC's change of negotiating position. The EC will now consider entering into agreement upon one or more of the Singapore issues without necessarily reaching agreement upon all four, which was the EC position in Cancún. The natural implication is that agreement may well be reached with regard to investment protection, transparency in government procurement or trade facilitation but not necessarily antitrust.²⁵⁶ The future for antitrust within the WTO framework is far from certain.

4.5 Conclusion

The landscape of international antitrust has grown incrementally and has become a very crowded scene. Extraterritorial application of domestic antitrust law provides the sole enforcement capability for antitrust on the international stage, but creates obvious and unavoidable jurisdictional tensions, which have been alleviated by the steadily rising number of bilateral cooperation agreements. These activities have been explored in depth in the second and third chapters, yet do not present a complete view of international antitrust activities. Regional

²⁵⁵ i.e. the working groups established by the Singapore Ministerial Declaration WT/MIN(96)/DEC 18 December 1996.

²⁵⁶ See EU Release: *Singapore Issues: Clarification of the EU position*, European Commission, 31 March 2004. Also see comment in M. Williams, *op. cit.* note 4, at p.88, and A. Burnside & H. Crossley, 'Cooperation in Competition: A New Era' (2005) 30 *EL Rev* 234 at pp.257-258.

bodies and multilateral fora are also important participants in the international antitrust dialogue, but have become involved in this field at varying times and represent diverse interests, which raises the question of whether the numerous instruments and bodies are pursuing common or differing objectives through their antitrust dialogue.

This chapter has sought to consider the motivations and wider circumstances that have resulted in the crowded landscape, and whether there is a common objective of the current international antitrust dialogue. The chapter has considered the motivation for the adoption of bilateral antitrust cooperation agreements, and why entities such as CARICOM, COMESA, the OECD, and the WTO are active in this field. Antitrust provisions within diverse international agreements such the NAFTA, and those negotiated under the auspices EU's neighbourhood policy have also been considered. As a result of this comprehensive analysis it is clear that international antitrust activities are, and always have been, intertwined with bilateral and regional trading relations, and with global trading policy.

Notwithstanding a clear lack of consensus as to appropriate goals and objectives for an antitrust regime, demonstrated by the failure of the WTO to begin negotiations on the Singapore issues at the 5th Ministerial Conference, there has been considerable support for some form of international antitrust activity for over half a century. Indeed, there have been many cooperation and coordination successes in this field simply by linking international antitrust with trade

liberalisation policies, an area where there is a very large consensus in principle. The result is that existing instruments and entities in international antitrust are neither designed nor directed to pursue objectives that go further than preventing anti-competitive activities from diminishing or negating the beneficial effects of trade liberalisation policies. Anu Piilola convincingly argues: ‘one of the most compelling reasons for internationalization of antitrust law and policy has been the need to complement the trade liberalization process’.²⁵⁷ International antitrust is a very different proposition from being domestic antitrust on the international stage as it is clear that the objective is not to pursue domestic antitrust objectives (albeit some may wish this was the case), but is in fact to support and supplement trade liberalisation.

²⁵⁷ A. Piilola, *op. cit.* note 31, at p.225. Anu Piilola also states at p.246 (note 213) that ‘The essential task of the international [antitrust] network is to define the differences that have the potential to hinder the efficient functioning of global markets and international trade’.

Merger control and trade liberalisation

5.1 Focusing on mergers and acquisitions

5.1.1 Up to this point, this thesis has discussed the development of international antitrust and assessed whether there is a common objective for the various strands of activity in this field. Having already concluded that the international antitrust dialogue seeks to support and supplement trade liberalisation (the ‘primary objective’), this chapter will discuss the difficulties of facilitating such an objective in the specific context of merger control. The key elements of this discussion will be a consideration of the significance of mergers and acquisitions to the pursuit of trade liberalisation, followed by an analysis of the current international merger control framework, and an assessment of its compatibility with the primary objective. Taking into account the extent to which there is current cooperation and convergence in this area, the latter part of this chapter will briefly consider the capability of proposals for reform in this field to better achieve the primary objective.

5.1.2 To initiate the wider discussion concerning how and to what extent the international merger control framework facilitates the primary objective, it is important to justify why the research has focused upon this area to the exclusion of other types of activity subject to antitrust scrutiny, such as cartels. At a basic level, mergers and acquisitions are particularly difficult for antitrust authorities to scrutinise because they are not *per se* illegal, and indeed are often strongly

encouraged because of the many positive effects that can stem from a successful merger, such as creation of economies of scale and synergies that can be passed on to the consumer. On the other hand however, as horizontal mergers invariably increase the market power of the firms involved, and vertical mergers can lead to market foreclosure,¹ they can lead to anti-competitive effects and irreparably damage market structures. Thus merger control exemplifies something of an international antitrust paradox, comparable to that described by Bork,² since the default position is surely to permit the operation of the free market, yet the threat presented by anti-competitive mergers to the fulfilment of antitrust objectives necessitates some form of scrutiny and intervention capability. The paradox lies in the realisation that by establishing a mechanism to scrutinise mergers and identify problematic transactions then such intervention (i.e. the suspension of the merger or at least the legal uncertainty until the antitrust authorities' analysis of the market effects has been completed) of itself acts as a hindrance upon the free movement of trade and jeopardises the realisation of the benefits that should flow from trade liberalisation. As Lipsky queries while discussing merger control: 'How can antitrust law fulfil its role as a protector of free markets without chocking off the avenues of international commerce it was originally intended to

¹ Horizontal mergers undoubtedly present the greatest cause for concern amongst antitrust authorities, although vertical mergers can lead to market foreclosure, and the theory of 'portfolio effects' suggests that even 'pure' conglomerate mergers may result in enhanced market power. For discussion see T. Kaseberg, 'Are Merger Control and Article 82 EC in the Same Market? The Assessment of Mergers Which Facilitate Exclusionary Conduct Under EC Merger Control' (2006) 27 *ECLR* 409. Also see discussion in E. Navarro, A. Font, J. Folguera, and J. Briones, (Navarro et al.), *Merger Control in the EU* (2nd Ed, Oxford, Oxford University Press, 2006) at 6.77-6.86 and chapter 9, M. Furse, *The law of merger control in the EC and UK*, (Oxford, Hart Publishing, 2007) at pp.39-42, as well as the 2001 Commission Decision in *GE/Honeywell*, Case No COMP/M.2220 [2004] O.J. L48/1, and the Court of First Instance rulings on 14 December 2005 in T-209/01 *Honeywell v. Commission* [2005] ECR II-5527 and T-210/01 *General Electric v. Commission* [2005] ECR II-5575.

² R.H. Bork, *The Antitrust Paradox: A Policy at War With Itself* (New York, Free Press, 1993).

protect?'.³ Hence the research has focused upon mergers at this stage because they highlight the difficult balance that merger control regimes must achieve: M&As contribute to the benefits that should flow from trade liberalisation, yet undue interference (resulting in time delays and legal uncertainty) may negate some of these benefits.

The key initial challenge for merger control is therefore to establish a mechanism that identifies problematic transactions (i.e. those mergers that may fail the substantive merger test adopted by a particular jurisdiction) and the ability to determine whether either a form of remedy or a prohibition decision are necessary, whilst not creating undue delays or costs for the pro-competitive or competitively neutral mergers. This issue may also be described as trying to ensure that there is some balance between managing the risk of causing a Type I (i.e. a false negative: blocking a transaction that should have been cleared) and a Type II (i.e. a false positive: clearing a transaction that should have been blocked) error. Most merger control systems have developed an *ex ante* review mechanism (also known as 'pre-closing reporting regimes')⁴ rather than an *ex post* review

³ A.B. Lipsky, 'The Global Antitrust Explosion: Safeguarding Trade and Commerce or Runaway Regulation?', (2002) 26-Summer/Fall *Fletcher Forum of World Affairs* 59 at 60.

⁴ See discussion in W.P.J. Wils, 'Notification, Clearance and Exemption in EC Competition Law: An Economic Analysis' (1999) 24(2) *EL Rev.* 139 at 151 where he states 'It appears to be generally accepted that ex ante enforcement through pre-screening is indeed appropriate for merger control'. Also see discussion of the problem posed by 'the proliferation of pre-closing reporting regimes' in a report by J.W. Rowley, O.K. Wakil and A.N. Campbell, 'Streamlining International Merger Control', presented to the EC Merger Control 10th Anniversary Conference. Brussels, 14 September 2000. Report available at: http://www.globalcompetitionforum.org/regions/n_america/canada/Streamlining%20International%20Merger%20Control_Sept%202000.pdf.

system.⁵ The rationale being that the latter would likely lead to greater legal and market uncertainty, as well as increasing the cost of transactions that fail to receive clearance, i.e. anti-competitive mergers would have to de-merge in an *ex post* system rather than simply aborting the proposed merger.⁶ One further reason suggested by Wils is ‘the unavailability of sufficiently high sanctions to deter the excessive risk bearing under *ex post* enforcement’ thus driving firms to carry the risk and complete anti-competitive mergers in such systems.⁷ A significant consequence of the widespread use of an *ex ante* review mechanism is the burden placed upon merging firms to assess whether their transaction satisfies notification thresholds in particular jurisdictions (to which the transaction may have no readily identifiable nexus) and then compile and submit often lengthy analysis to the relevant authority as part of the notification. Large international M&As must expend greater resources on these requirements as multiple filings are often required given the lack of international coherence to the current system of merger control.⁸ This chapter will investigate the benefits that stem from M&As, as well as outlining the way in which antitrust authorities balance the advantages and disadvantages of intervention, and explore the complexity and

⁵ Although the United Kingdom is a notable exception as there is a voluntary notification regime of proposed mergers to the Office of Fair Trading. The OFT nonetheless has a statutory obligation to refer completed and anticipated mergers to the Competition Commission when a ‘relevant merger situation has been created’ and has resulted or may be expected to result in a substantial lessening of competition, by virtue of s.22 and s.33 of the Enterprise Act 2002.

⁶ Although note that even in an *ex ante* system of merger control, there is potential for merged firms being forced to de-merge, e.g. if a clearance decision is later overturned. Such a scenario is apparent from the decision of the European Court of First Instance in Case T-464/04 *Independent Music Publishers and Labels Association (IMPALA) v. Commission*, [2006] ECR II-2289.

⁷ For a detailed comparative analysis of *ex ante* and *ex post* enforcement systems see W.P.J. Wils, ‘Notification, Clearance and Exemption in EC Competition Law: An Economic Analysis’ (1999) 24 *EL Rev.* 139, particularly at 152. Also see discussion *infra.* at 5.5.3 and 5.6.

⁸ These issues will be considered in further depth *infra.* at 5.5 and 5.6.

significance of these issues in the context of merger control in the international arena where multi-jurisdictional filings and investigations are commonplace.

5.2 International M&As and their contribution to trade liberalisation

5.2.1 In order to substantiate the suggestion of a paradox within the international merger control framework there must be a clear objective, and likelihood that enforcement activity may hinder the achievement of that objective in practice. In light of the chapter 4 conclusion that the objective for the international antitrust dialogue is to support and supplement trade liberalisation, the suggestion of a paradox is reinforced if merger control in the international arena hampers trade liberalisation policies. This suggestion may be seen to be accurate by assuming that pro-competitive and competitively neutral international mergers are part of the trade liberalisation process and help create the ensuing benefits, while anti-competitive international mergers jeopardise the ultimate benefits that should flow from trade liberalisation. Furthermore, the paradox presents itself if the current international merger control framework unduly hinders the former category (pro-competitive and competitively neutral mergers), whilst trying to identify and intervene in the latter (anti-competitive mergers). Thus the international merger control framework may be unduly hindering trade liberalisation instead of supporting it. It is unnecessary to prove that the current framework is actually inhibiting trade liberalisation, but sufficient to demonstrate that it could operate more effectively and efficiently to the benefit to all bar the anti-competitive

mergers. In order to investigate the first of these assumptions, the research must consider whether international M&As make a positive contribution to trade liberalisation policies.

5.2.2 Political decisions and state action that pursue trade liberalisation policies are insufficient to achieve the anticipated economic benefits that should flow from such policies. Indeed the main role for the state is to gradually remove the barriers to trade, but it is then market forces that must take over in order to realise the benefits of trade liberalisation and for them to flow down to the consumer. The importance of the market in this regard is summed up by Eleanor Fox, stating: ‘markets have overtaken the strong and insular economic authority of the nation state’.⁹ The benefits of trade liberalisation are primarily achieved by the globalisation of markets: firms face increased competition within domestic markets from foreign firms entering the market through *inter alia* foreign direct investment. Mergers and acquisitions have an increasingly important role to play in such investment and hence in reaping benefits stemming from liberalisation also. As the OECD has stated in its 2001 report *New Patterns of Industrial Globalisation*: ‘An overwhelming share of foreign direct investment (FDI), the prime vehicle for seriously engaging in business across international borders, now goes for M&As rather than Greenfield investment’.¹⁰ Furthermore: ‘Cross-border M&As can lead to economy-wide efficiency gains through economies of scale

⁹ E.M. Fox, ‘Competition in World Markets: A Global Problem in Need of Global Solutions’ *Global Competition Review* (April/May 2000) at 17.

¹⁰ *New Patterns of Industrial Globalisation: Cross-Border Mergers and Acquisitions and Strategic Alliances* (OECD, 2001) at p.13.

and scope and synergy effects in research and development (R&D), production and marketing'.¹¹ To be more specific regarding the wider benefits that should flow from mergers, the report also comments:

‘the globalisation of industry through cross-border M&As and strategic alliances has static resource reallocation benefits and thus positive impacts on efficiency. Greater mobility of resources and the resulting increase in competition free up unproductive resources for more effective use elsewhere. There is also a longer-term dynamic benefit: cross-border M&As and strategic alliances drive growth and generate jobs by integrating firms into global value-added chains and knowledge networks and by accelerating industrial restructuring. They can help revitalise ailing firms and local economies and create jobs through technology exchange, economies of scale and related productivity growth’.¹²

There are two points that should be made at this juncture: firstly it is obvious that not all mergers will result in the benefits outlined above, yet the benefits discussed are illustrative of those which may flow from such transactions. Thus there is a sound argument as to why the presumption should be in favour of encouraging mergers, as a supplement to trade liberalisation. Analysis suggesting that a merger would be anti-competitive can obviously rebut such a presumption.¹³ Secondly, it is not merely cross-border mergers that are of interest since mergers between domestic firms, such as that between US based firms Exxon and Mobil,¹⁴ may involve international subsidiaries and operations and be

¹¹ *Ibid.* at p.110.

¹² *Ibid.* at p.111.

¹³ Note it is arguable that anti-competitive mergers are far less likely to create the efficiency savings and beneficial effects that are discussed above than pro-competitive and competitively neutral mergers in any case. Hence anti-competitive mergers would tend to hinder the realisation of benefits that should flow from trade liberalisation. The distinction (if there is any) between ‘anti-competitive’ mergers and those that hinder the objective of supporting and supplementing trade liberalisation would depend upon the goals and objectives of the particular merger control regime, which may or may not focus upon efficiency considerations.

¹⁴ See European Commission Decision, *Exxon/Mobil*, Case No.IV/M.1383 of 29 September 1999, [2004] O.J. L103/1. Budzinski states: ‘recent mergers of enterprises with the same jurisdiction of origin, like

sufficiently large in scale to have an effect in other national markets, and therefore be of interest to ‘foreign’ as well as ‘domestic’ merger control authorities. Many large ‘domestic’ mergers are in reality of an international character, and equally capable of producing wider economic benefits. Given the discussion in this section of how mergers can contribute to economic prosperity, it is timely to consider the scale of international M&As and thereby assess their importance vis-à-vis the objective of the international antitrust dialogue to support and supplement trade liberalisation.

5.2.3 Black notes that: ‘[m]ergers and acquisitions (M&A) activity seems to come in waves’.¹⁵ The global economy is currently experiencing an upsurge in merger activity in the aftermath of what has been termed as both the ‘first truly international takeover wave’,¹⁶ and ‘the fifth big merger wave in market economy’s history’¹⁷ (the latter is in reference to the first four merger waves in US history).¹⁸ The latest merger wave, which began around 1992,¹⁹ was by far the largest with 37,671 transactions worldwide being announced in 1999 with an

Exxon/Mobil (USA), *Hoechst/Rhone-Poulenc* (EU), or *Chevron/Texaco* (USA), also must be termed international since they affect markets all over the world, often are inspired by the globalization of markets, and usually are motivated by the will to perform successfully as global players’ in O. Budzinski, ‘Toward an international governance of transborder mergers? Competition networks and institutions between centralism and decentralism’, (2003) 36 *International Law and Politics* 1at 2-3.

¹⁵ B.S. Black, ‘The First International Merger Wave (and the Fifth and Last US Wave)’ (1999-2000) 54 *U. Miami L. Rev.* 799 at 799.

¹⁶ *Ibid.*

¹⁷ O. Budzinski, *op. cit.* note 14.

¹⁸ Roughly noted to take place between 1895-1903, 1920-1929, 1960-1973, and 1978-1989, for discussion of these merger waves see P.A. Gaughan, *Mergers, Acquisitions & Corporate Restructurings* (3rd Ed, John Wiley & Sons, 2002), chapter 2.

¹⁹ P.A. Gaughan, *ibid.* at p.51, although note that Budzinski merely states that the latest merger wave began in ‘the mid 1990s’ (*op. cit.* at note 14), and Van Marrewijk suggests in began in 1995, see C. Van Marrewijk, ‘An Overview of Cross-Border Mergers and Acquisitions for Five Countries’ Working Paper. Erasmus University Rotterdam, October 2005, at p.1.

aggregate value of \$4.4 trillion,²⁰ although other sources suggest that the figures for completed mergers and acquisitions were significantly lower at \$2.25 trillion for 24,113 transactions.²¹ Van Marrewijk notes that the latest wave ended in 2000: ‘with the collapse of the “New Economy”’.²² Other factors such as the events of September 11 2001 and corporate scandals such as Enron and the resulting Sarbanes Oxley Act of 2002²³ contributed to low levels of M&A activity for 2002 and 2003. M&A activity is experiencing something of a recovery however, with global completed M&As valued at \$2.16 trillion in 2005, accounting for 22,503 deals.²⁴ 2006 appeared to continue the upward trend with 11,008 completed M&A in the first half of the year amounting to \$1.22 trillion.²⁵ There are many features of the last merger wave and recent M&A activity that indicate their ability to further the primary objective of international antitrust, these: ‘include the international and transcontinental character of the mergers (in terms of both their origins and their effects), the phenomenon of equal mergers and the increasing size of the average merger’.²⁶ In addition to highlighting the significance of M&A, these figures also indicate the strain upon the resources of antitrust

²⁰ B.S. Black, ‘The First International Merger Wave (and the Fifth and Last US Wave)’ (1999-2000) 54 *U. Miami L. Rev.* 799 at 814-815.

²¹ *New Patterns of Industrial Globalisation: Cross-Border Mergers and Acquisitions and Strategic Alliances* (OECD, 2001) at p.20.

²² C. Van Marrewijk, *op. cit.* note 19.

²³ See commentary in Moneysoft publication: ‘M&A Outlook 2005: “Steady as you go...”’ available at http://www.mergerdigest.com/articles/merger_outlook_2005_p.html.

²⁴ Data sourced from Thomson Financial ‘Global M&A Financial Review: 4Q 2005’, available from <http://www.thomson.com/pr/pressreleases>. Note that slightly differing figures are presented by MergerStat, although figures account for announced transactions and are in any case not as comprehensive as those presented by Thomson Financial. See ‘FactSet Mergerstat Release: Global M&A Wrap Up for 2005’, available at www.mergerstat.com/new/press/release31.htm.

²⁵ Figures sourced from Thomson Financial ‘Global M&A Financial Advisory Review: 2Q 2006’ available from <http://www.thomson.com/pr/pressreleases>.

²⁶ O. Budzinski, *op. cit.* note 14. at p.2.

authorities in order to conduct *ex ante* reviews of proposed M&As,²⁷ although clearly not all transactions are notified, depending upon whether there is a system of mandatory or voluntary notification, and also the particular jurisdictional triggers.

5.3 The international merger control framework 1: introduction

5.3.1 In light of the economic benefits that can flow from international M&As and the contribution they can make to furthering trade liberalisation, the current system of international merger control (or lack thereof) is potentially working against the primary objective if it unduly inhibits or burdens M&As, i.e. could operate more effectively and efficiently, particularly with regard to all but anti-competitive mergers. In order to determine the impact of the current system, an evaluation of the extent of cooperation and convergence in the current merger control framework will be undertaken, with a consideration of the costs and requirements imposed upon merging parties. There are at least 80 jurisdictions with some form of merger control laws,²⁸ and 73 of those jurisdictions have *ex ante* notification

²⁷ This is true for a number of reasons, including the large volume of proposed mergers and acquisitions (that is on an upwards trend year on year), and the large value and complexity of those involved suggesting a complicated merger review analysis and the availability of financial resources for the merging firms to contest any adverse decision.

²⁸ R. Whish, *Competition Law*, (5th Ed, London, LexisNexis Butterworths, 2003) at p.782. Other sources have comparable figures; the ICN suggested there were 75 merger control regimes in 2004, '*Report on the Costs and Burdens of Multijurisdictional Merger Review*' prepared by the ICN Mergers Working Group, Notification and Procedures Subgroup, November 2004 at p.4. Available from <http://www.internationalcompetitionnetwork.org>. The number of regimes has increased considerably from the 61 noted in the 2000 ICPAC Final Report, at Annex 2-C, available at <http://www.usdoj.gov/atr/icpac/2c.htm>.

requirements.²⁹ The growth of merger control regimes can be regarded as a positive development for a number of reasons.³⁰ For the most part it is evidence of widespread recognition by countries of the merits of having merger control laws, such as the ability to control ‘the concentration of capital and/or economic power’, and to ‘protect and promote social welfare in general and, in particular, the interests of consumers’.³¹ Although clearly the nature and extent of the benefits deriving from merger control laws will vary depending upon the objectives of the particular regime, as well as its effectiveness. The *UN Model Law on Competition* adds that:

‘It should also be noted that prohibiting a cartel, while being unable to act against the cartel members if they merge, is unwarranted. Moreover, by not having a merger control system, a host country deprives itself of the powers to challenge foreign mergers and acquisitions which might have adverse effects on the national territory’.³²

In spite of the benefits however, the increasing number of reviewing jurisdictions also increases the difficulty for firms wanting to merge, as Langenfeld highlighted: ‘obviously the more agencies that look at a merger in a world without

²⁹ Figure sourced from *Merger Notification Filing Fees: A Report of the International Competition Network* (April 2005) at p.2, available from <http://www.internationalcompetitionnetwork.org>.

³⁰ William Kolasky has been more specific in this regard by commenting upon the beneficial effects of the growth of merger notification; ‘The spread of merger notification is, of course, a positive development as a general matter. Merger regimes with notification requirements give antitrust authorities the ability to identify and potentially remedy problematic transactions before they close, to the benefit of consumers and competition in their markets’, in W. Kolasky, DOJ DAAG, ‘Can the International Competition Network Help Tame the Growing Multinational Merger Thicket?’, 2002 ABA Annual Meeting, Washington DC, 12 August 2002. Available from: <http://www.usdoj.gov/atr/public/speeches/speeches.htm>.

³¹ See discussion of the objectives and benefits of antitrust law in the *United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices* (the ‘UN Set’) at p.8 in particular, available at <http://r0.unctad.org/en/subsites/cpolicy/index.htm>. Ariel Ezrachi comments simply that ‘the proliferation of merger regimes worldwide is a welcome product of states’ understanding the significance of monitoring transactions’ in ‘Merger Control and Cross Border Transactions – A Pragmatic View on Cooperation, Convergence and What’s in Between’ University of Oxford Centre for Competition Law and Policy Working Paper (L) 11/05, available from <http://www.competition-law.ox.ac.uk/competition/portal.php>.

³² UNCTAD *Model Law on Competition* (2007) at p.51, available at http://www.unctad.org/en/docs/tdrbpconf5d7rev3_en.pdf.

true harmonization, the more time and the more cost'.³³ The increased monetary cost incurred by firms having to complete multi-jurisdictional merger filings is perhaps a secondary concern in light of the uncertainty that is created by trying to satisfy multiple jurisdictions, which may be investigating different markets, and applying different economic models and legal tests. Indeed the problem that Ezrachi describes as 'system friction', i.e. the risk of 'conflicting decisions and remedies' in the context of 'simultaneous application of numerous domestic merger regimes to a single transaction',³⁴ creates a nightmare scenario for firms wanting to merge. Whilst irreconcilable decisions are rare occurrences, the increasing number of merger control regimes and growing confidence of developing antitrust authorities, as well as the increasing size of international mergers (making them more likely to multi-jurisdictional review) increases this risk yet further.³⁵ Another important and fairly obvious factor is that in practice it only takes one jurisdiction to block a merger or require overly onerous remedies that scupper the deal, irrespective of how many jurisdictions have approved it. Lipsky colourfully notes that: 'in international antitrust, the slowest boat sets the speed of the convoy...the most restrictive standard, wherever applied in the world, [will] automatically become the world standard'.³⁶ Eleanor Fox sums up

³³ James Langenfeld, former Director for Antitrust at the FTC Bureau of Economics, in testimony to the now disbanded ICPAC on 3 November 1998. Available from: <http://www.usdoj.gov/atr/icpac/transcripts.htm>.

³⁴ A. Ezrachi, *op. cit.* note 31.

³⁵ There is some anecdotal evidence to suggest that firms attempt to address the risk of irreconcilable decisions, as well as spiralling costs when dealing with multi-jurisdictional filings and investigations, by conducting a risk-assessment to determine which jurisdictions to notify and when, see further discussion *infra.* at 5.6.

³⁶ A.B. Lipsky, 'The Global Antitrust Explosion: Safeguarding Trade and Commerce or Runaway Regulation?' (2002) 26-Summer/Fall *Fletcher Forum of World Affairs* 59 at 62.

the situation in international antitrust in a way that is equally applicable to merger control by commenting:

‘Our markets are global but we have only national law. This means that, in the absence of law that is as broad as the affected market, we must stretch our minds to mimic a law that would span the whole market’.³⁷

Thus far however, with the notable exception of the EC merger Regulation,³⁸ international merger control essentially remains a plethora of national merger control regimes, whose substantive legal tests tend to assert jurisdiction on the basis of some formulation of the effects doctrine.³⁹ There have been various bilateral and multilateral efforts specific to merger control that are deserving of comment in addition to the discussion of bilateralism and multilateralism in antitrust in earlier parts of the thesis.

5.4 The international merger control framework 2: bilateral cooperation

5.4.1 Bilateral activities in international antitrust primarily consist of cooperation agreements and less formal agency-to-agency arrangements. The focus of these agreements is undoubtedly upon the desire to implement effective action against hardcore cartels, although the key principles of notification, consultation as well as enforcement cooperation and coordination in the basic agreements have

³⁷ Eleanor Fox in testimony before the Antitrust Modernization Committee, 15 February 2006. Available from www.amc.gov.

³⁸ Council Regulation (EC) No 139/2004, of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] O.J. L24/1.

³⁹ See discussion in chapter 2, as well as J. Wilson, *Globalization and the Limits of National Merger Control Laws* (The Hague, Kluwer Law International, 2003) at p.49, and A.B. Lipsky, ‘The Global Antitrust Explosion: Safeguarding Trade and Commerce or Runaway Regulation?’ (2002) 26-Summer/Fall *Fletcher Forum of World Affairs* 59.

practical significance for international merger control.⁴⁰ Indeed the majority of notifications under the 1991 EC-US agreement (as an example) concern merger cases.⁴¹ In the *Halliburton/Dresser*⁴² merger, for example, there was close cooperation between the European Commission and the US Department of Justice (DOJ) investigations, and it became clear that the divestiture of shares in M-I Drilling would satisfy the antitrust concerns of both authorities. In light of the common remedy, ‘the European Commission, invoking the 1991 US-EC bilateral cooperation agreement, requested that the DOJ take appropriate enforcement action to ensure that the divestiture was implemented’.⁴³ In practice, bilateral cooperation in merger investigations can involve a range of activities, such as notification to an antitrust authority that merging parties based in its jurisdiction are subject to merger review by another jurisdiction,⁴⁴ or more substantive cooperation in the form of meetings between authorities reviewing the same proposed merger. Cooperation in merger review can result in agreements between authorities to coordinate the timetable for a particular review, as well as policy discussions to ensure the authorities understand each others’ approach and factors

⁴⁰ See discussion in chapter 2, as well as J. Galloway, ‘Moving Towards a Template for Bilateral Antitrust Agreements’ (2005) 28 *World Comp.* 589, and O. Budzinski, *op. cit.* note 14.

⁴¹ See the respective Commission reports to the Council and the European Parliament on the application of the agreements between the European Communities and the USA and Canada regarding the application of their competition laws for the year 2000 (COM(2002)45 final), 2001 (COM(2002)505 final), and 2002 (COM(2003)500 final).

⁴² Commission Decision *Halliburton/Dresser* Case No IV/M.1140, [1998] O.J. C239/16.

⁴³ See case discussion in the US submission to the OECD Working Party No.3 on Co-operation and Enforcement, entitled ‘Roundtable discussion on cross-border remedies in merger review’, 9 February 2005 (DAF/COMP/WP3/WD(2005)7), available at:

<http://www.ftc.gov/bc/international/docs/compcomm/2005--Roundtable%20Discussion%20on%20Cross-Border.pdf>.

⁴⁴ See comments by S. Scott, Canadian Commissioner of Competition, ‘Canadian Perspectives on the Role of Comity in Competition Law Enforcement in a Globalized World To Defer or Not To Defer? Is that the question?’, ABA Antitrust Law Section 2006 Spring Meeting, Washington D.C., 29 March 2006. Speech available at: <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2049&lg=e>.

involved in decision-making. If merging parties grant confidentiality waivers⁴⁵ then reviewing authorities may also be able to enter into advanced consultations regarding the proposed transaction, thereby sharing materials and analyses submitted by the parties, and seeking to agree upon market definitions and reach either common or compatible remedies if necessary. The formal bilateral antitrust agreements contain very little detail on the types of cooperation that are possible between authorities in the context of merger control. Notwithstanding the limitation of the formal agreements, the European Commission, US DOJ and Federal Trade Commission (FTC) have propelled the EC-US bilateral relationship to the forefront of international merger cooperation, by establishing a joint merger working group. Following the ‘near-miss’ in the Boeing/McDonnell Douglas merger where the EC and US antitrust authorities narrowly avoided conflicting decisions,⁴⁶ and the damaging clash in the GE/Honeywell merger,⁴⁷ the joint

⁴⁵ As an example see the Model Waiver Letter drafted by the US Department of Justice. A signed waiver letter would enable the relevant antitrust authority to share confidential information submitted by the parties with counterparts reviewing the same transaction. Available at <http://www.usdoj.gov/atr/public/international/206543.htm>.

⁴⁶ Commission Decision, *Boeing/McDonnell Douglas*, Case No IV/M.877, [1997] O.J. L336/16, and FTC Press Release of 1 July 1997, available at <http://www.ftc.gov/os/1997/07/boeingclose.htm>. See discussion in W.E. Kovacic, ‘Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy’ [2001] 68 *Antitrust Law Journal* 805; B. Zanettin, *Cooperation Between Antitrust Agencies at the International Level* (Oxford and Portland, Hart Publishing, 2002) at pp.93-98; and the case study T.L. Boeder ‘The Boeing-McDonnell Douglas Merger’ in SJ Evenett, A Lehmann and B Steil (Eds), *Antitrust Goes Global: What Future for Transatlantic Cooperation?* (Washington D.C., Brookings Institution, 2000) at 139.

⁴⁷ See Commission Decision in *General Electric/Honeywell*, Case No COMP/M.2220 [2004] O.J. L48/1. Discussion in E.M. Fox, ‘Mergers in Global Markets: GE/Honeywell and the Future of Merger Control’ (2002) 23 *University of Pennsylvania Law Review* 457; A. Burnside, ‘GE, Honey, I Sunk The Merger’ (2002) 23 *ECLR* 107. See also discussion in speech by M. Delrahim, Deputy Assistant Attorney General, DOJ, ‘Facing The Challenge of Globalization: Coordination and Cooperation Between Antitrust Enforcement Agencies of The US and EU’, ABA Fall Meeting. Washington D.C., 22 October 2004. Note that the Commission Decision in GE/Honeywell has recently been upheld (although subject to some severe criticism) by the Court of First Instance rulings on 14 December 2005 in T-209/01 *Honeywell v. Commission* [2005] ECR II-5527 and T-210/01 *General Electric v. Commission* [2005] ECR II-5575, see commentary in D. Howarth, ‘The Court of First Instance in GE/Honeywell’ (2006) 27 *ECLR* 485.

working group developed a set of best practices for cooperation and coordination in merger investigations in October 2002.⁴⁸

5.4.2 The best practices provide for very close enforcement cooperation and coordination between the European Commission and the relevant US authority – either the FTC or the DOJ⁴⁹ – when concurrent merger reviews of the same transaction are underway. The best practices note that, *inter alia*, the objectives are: ‘to facilitate coherence and compatibility in remedies, to enhance the efficiency of their respective investigations, to reduce burdens on merging parties, and to increase the overall transparency of the merger review processes’.⁵⁰ The best practices also specify many practical steps that should be taken to facilitate enhanced cooperation, such as making efforts to synchronise investigation timetables and offer to hold joint meetings between EC and US officials and the merging parties. Yet the potential benefits to be realised from enhanced cooperation and coordination depends upon the willingness of the merging parties to facilitate such joint activities. As the best practices note states:

‘cooperation is more complete and effective when the merging parties allow the agencies to share information the disclosure of which is subject to confidentiality restrictions...at the same time, the EU and US agencies

⁴⁸ Best Practices on Cooperation in Merger Investigations, available at <http://www.usdoj.gov/atr/public/international/docs/200405.htm>. See discussion of the circumstances surrounding the development of the best practices in a speech by W. Kolasky, *op. cit.* note 30.

⁴⁹ The US DOJ and FTC both have statutory powers for conducting merger investigations, which can lead to disputes regarding which authority investigates a particular merger. The standard practice is that neither authority will open a merger investigation until cleared to do so by the other, so as to avoid duplication of effort. The allocation of a merger for review under federal antitrust law will normally depend upon the industry concerned, and the authority with the most experience in that industry will ordinarily assume responsibility for the investigation. For further information and a list of the allocation of industries, see the 2002 ‘Memorandum of Agreement between the FTC and the Antitrust Division of the DOJ Concerning Clearance Procedures for Investigations’, available at <http://www.ftc.gov/opa/2002/02/clearance/ftcdojagree.pdf>.

⁵⁰ Paragraph 2 of the Best Practices on Cooperation in Merger Investigations, *op. cit.* note 48.

recognize that many considerations go into confidentiality waiver and transaction timing and/or notification decisions and that these decisions are within the discretion of the merging parties'.⁵¹

In spite of the latter statement, paragraph 7 of the best practices recommends that once a transaction has been announced that requires scrutiny by EC and US antitrust authorities: 'the staffs of the reviewing agencies should, in appropriate cases, enter into discussion with the parties with a view to requesting the possible execution by the merging parties of confidentiality waivers'. There are similar provisions with regard to third parties with an interest in the transaction. Merging parties are also advised to: 'consider coordinating the timing and substance of remedy proposals being made to the EC and US agencies, so as to minimize the risk of inconsistent results or subsequent difficulties in implementation'.⁵²

Regarding the 'collection and evaluation of evidence', the best practices encourage the reviewing authorities to:

'share publicly available information and ... [discuss] their respective analyses at various stages of an investigation, including tentative market definitions, assessment of competitive effects, efficiencies, theories of competitive harm, economic theories, and the empirical evidence needed to test these theories'.⁵³

Exchanging draft questionnaires where legally permissible is another practical suggestion. A separate section of the document deals with 'communication between the reviewing agencies' and recommends first contact be made between reviewing authorities when it becomes clear that a transaction will be scrutinised by both EC and US authorities. Furthermore, the authorities should designate an

⁵¹ *Ibid.* at paragraph 3.

⁵² *Ibid.* at paragraph 14.

⁵³ *Ibid.* at paragraph 6.

official as a contact person for cooperation concerning that case, with responsibilities including: ‘setting up a schedule for conferences between the relevant investigative staffs of each agency; discussing with the merging parties the possibility of coordinating investigation timetables; and...seeking waivers from the merging parties and from third-parties’.⁵⁴

The reviewing authorities are also invited to attend ‘certain key events’ in each others’ review procedure such as the EC’s Oral Hearing and the merging parties’ presentation to the DOJ/FTC prior to the final decision being taken on enforcement action.⁵⁵ The best practices also envisage cases where it may be appropriate to have consultations between senior officials of the reviewing authorities, and specify four separate points in time during the review procedure for such consultations. The four points that indicate crucial moments in the review process are:

‘(a) shortly before or after the US issues a second request and the EU initiates a Phase II investigation; (b) approximately one week before the EU anticipates issuing its Statement of Objections; (c) approximately one week after the relevant DOJ/FTC section/division investigating the merger makes its case recommendation to the relevant DOJ DAAG [Deputy Assistant Attorney General] or FTC Bureau Director; and (d) prior to a decision by the Antitrust Division of FTC to challenge a merger or by the Competition Commissioner to recommend that the European Commission prohibit a merger’.⁵⁶

Hence upon identification of a transaction that will be or has been notified to authorities in both jurisdictions, the best practices provide detailed guidelines of

⁵⁴ *Ibid.* at paragraph 10.

⁵⁵ *Ibid.* at paragraph 13.

⁵⁶ *Ibid.* at paragraph 12.

how and when officials from EC and US authorities should meet to cooperate and coordinate activities in reviewing the case.

5.4.3 With regards to the practical application of the best practice guidelines by the EC and US authorities, several points can be noted from anecdotal evidence gathered from independent research,⁵⁷ concerning the issue of confidentiality waivers. Firstly, the degree and exact nature of cooperation between authorities in specific cases is not particularly transparent; often the parties involved are unclear as to the extent and depth of cooperation. The merging parties would likely be aware of the fact of ongoing cooperation, and could assume detailed cooperation following the signing of a confidentiality waiver, but they are not normally kept informed of the detail of cooperation between the authorities. Such cooperation means that parties must assume and anticipate full document exchange, and ensure consistent arguments are presented to both authorities when seeking merger clearance. The independent research revealed occasions where firms had hampered their hopes for merger clearance, because they did not anticipate the exchange of certain documents between EC and US authorities, in spite of signing a waiver. The *Solvay/Ausimont* case⁵⁸ provides such an example. The merging firms had argued that they were not competitors in a particular market (the non-coatings PDVF market) to the European Commission. Subsequently, the Commission received

⁵⁷ The author engaged in a series of interviews with leading antitrust practitioners and officials while on a research trip to Brussels during the summer of 2006. Interviews were of an informal nature, albeit loosely following the terms of a questionnaire provided to interviewees in advance. Copies of the questionnaires used are provided at Appendix I and II. The rationale for this very small-scale empirical project was simply to develop a better understanding of the operation of case cooperation in multi-jurisdictional merger review, by entering into discussions with experienced practitioners and officials. The methodology for this research has been provided in chapter 1.

⁵⁸ Commission Decision *Solvay/Montedison-Ausimont* Case No COMP/M.2690 [2002] O.J. C153/11.

internal company documents from the FTC, facilitated by the waiver, which directly contradicted the parties' original argument. The documents were submitted to the FTC following a 'second request'.⁵⁹ The inconsistency was not necessarily a conscious strategic decision, as Freshfields have noted:

'parties and their advisers cannot afford to treat each jurisdiction discretely and must co-ordinate their US and EU strategies on a continuous basis. For example, it is an obvious point that the advisers on both sides of the Atlantic should liaise with each other before and after every significant meeting with their respective agencies...In truth, co-ordination amongst advisers needs to catch up with co-ordination amongst the regulators'.⁶⁰

If nothing else, the *Solvay/Ausimont* case demonstrates the ignorance of merging firms to the detail of cooperation undertaken by EC and US antitrust authorities once a waiver is signed, at which moment the firms must accept a certain loss of control over the use of the information provided.

Clearly, detailed cooperation can and must be assumed from joint meetings taking place between the firms and EC and US antitrust authorities, and may also be apparent from the coordinated timing of respective investigations. Yet public awareness of cooperation in merger review often stems from short comments made in press releases,⁶¹ or following anecdotes from antitrust authority officials

⁵⁹ See discussion in paragraphs 41 and 42 of the Commission decision, *ibid*. Also see discussion of the US 'second request' *infra* at 5.5.4 and 5.6.

⁶⁰ *Transatlantic merger control: The same destination but by different routes*, (Freshfields Bruckhaus Deringer, July 2006) at p.5.

⁶¹ As an example see European Commission Press Release: 'Commission clears Oracle's takeover bid for PeopleSoft' (IP/04/1312), which states 'The Commission conducted its investigation in close cooperation with the antitrust division of the US Department of Justice. It also took into account evidence that became available during the US trial in the US District Court of Northern California'. Additionally, Press Release 'Mergers: Commission opens in-depth investigation into Johnson & Johnson's takeover of Guidant Corporation' (IP/05/471), which states 'The Commission is actively co-operating with the US Federal Trade Commission, which is also investigating the merger.'

or the parties' respective counsel after the investigation.⁶² Additionally, extensive cooperation can sometimes be seen from the similarity of remedies required by different authorities, and possibly the appointment of a joint trustee to overview compliance post-merger with conditions of clearance.⁶³ Interestingly, there is no provision within the best practices for the appointment of a joint trustee, yet the EC and US antitrust authorities clearly have the flexibility to engage in further practical steps of cooperation when appropriate in a particular case, note that such flexibility can be contrasted with cooperation with many other antitrust authorities, discussed *infra*.

Thus, agreeing to a confidentiality waiver has significant implications for both the merging firms and potentially for the authorities involved, yet it would be naïve to assume that firms therefore face a difficult assessment before agreeing to a waiver (in spite of the unpredictable implications). DG Competition officials have said that they are unaware of any instance when a Commission request for parties to sign a waiver has been refused,⁶⁴ and this has been corroborated by practitioners⁶⁵

⁶² As an example, see the discussion of cooperation in the *GE-Instrumentarium* case in a speech by M. Delrahim, *op. cit.* note 47.

⁶³ The *GE-Instrumentarium* case is again an example as the European Commission and Department of Justice agreed that the jointly required divestiture of Spacelabs by Instrumentarium would be overseen by a joint trustee, if one was needed. See Commission Decision *GE/Instrumentarium* Case No COMP/M.3083, [2004] O.J. L109/1, Section D (paragraph 16) of Annex 1 'Commitments to the European Commission', and the US Department of Justice's 'Proposed Final Judgment and Competitive Impact Statement, United States v. General Electric Company & Instrumentarium' at V.A, which states: ' If defendants have not divested Spacelabs within the time period specified in Section IV.A., defendants shall notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a trustee selected by the United States in good- faith consultation with the European Commission to ensure selection of a trustee acceptable to both the United States and the European Commission and approved by the Court to effect the divestiture of Spacelabs.' (available at <http://www.usdoj.gov/atr/cases/f202400/202436d.htm>). The *Solvay/Ausimont* case, *op. cit.* note 53, is another example whereby the EC and FTC appointed a joint trustee.

⁶⁴ Information gained from independent empirical-based research, *op. cit.* note 57.

who emphasise that merging parties' top priority is receiving clearance as quickly as possible because time delays (particularly those caused by a decision to open a Phase II investigation or issue a 'second request' in the US) impose significant costs, and can even threaten the merger of themselves.⁶⁶ Practitioners and merging parties appear to view confidentiality waivers as facilitating quicker, more efficient investigations and also decreasing the risk of conflicting antitrust decisions from different jurisdictions. Refusing a request would also jeopardise the good relationship that parties try to build with their case handlers. In short, refusing a waiver request from EC and US authorities would, on balance, likely cause greater harm to prospects of a speedy merger clearance than unforeseen consequences of granting one. Notwithstanding the granting of a waiver, independent empirical research suggests that firms try to impose conditions upon the use of the information, although this does not restrict cooperation between EC and US antitrust authorities and it is unclear how successful firms are in this endeavour.

⁶⁵ *Transatlantic merger control: The same destination but by different routes*, (Freshfields Bruckhaus Deringer, July 2006) p.5 which states, as an example of EC and US cooperation: 'asking merging parties for a waiver to allow the agencies to exchange confidential information (which parties now routinely grant)'.

⁶⁶ It is widely recognised that 'during the time that transactions are delayed, the parties may lose savings, synergies, and efficiencies that motivated the transaction' (ICN *Report on the costs and burdens of multijurisdictional merger review*, November 2004), and it is not uncommon for proposed transactions to collapse if the merger is subjected to a second phase review. See discussion by P. Willis & G. Young citing some examples in the context of UK antitrust law: 'Proposed merger transactions that are made conditional on clearance from the OFT may lapse following a reference to the [Competition Commission] (where the purchase agreement is conditional on the OFT not deciding to refer the transaction to the CC). Even where there the transaction is not conditional on clearance, the parties may agree to back out of it when faced with the prospect of a lengthy and expensive inquiry by the CC. For example, between April 2005 and March 2006, six CC merger inquiries were cancelled, because the parties abandoned the transactions shortly after referral. All six were proposed rather than completed transactions' in 'UK Merger Law', chapter 55 of *Global Competition Review Special Report: The European Antitrust Review 2007*.

Shortly after becoming aware of concurrent EC-US merger investigations, and normally following initial discussions and the granting of a confidentiality waiver if requested, officials will share preliminary market definitions. The market definitions relevant to the respective investigations are crucial and may be determinative of the extent of cooperation possible between EC and US authorities. It may also be the case that cooperation between the authorities will assist them in confidently identifying the relevant markets involved.⁶⁷ Independent research has suggested that it is neither effective nor efficient for authorities to cooperate closely and coordinate investigations unless they are investigating the same market(s). Nonetheless, it is clear that the focus of respective investigations can differ, whilst still allowing for enhanced cooperation. A US account of the *GE/Instrumentarium* merger⁶⁸ highlights the willingness of the EC and US authorities to cooperate, in spite of a differing focus, which may ultimately benefit the merging firms by avoiding conflicting remedies:

‘The markets of concern to the DOJ and EC are different...These differences were based on different market conditions in Europe and the US...DOJ staff communicated and cooperated extensively with their EC colleagues during the course of the investigations and in reaching our respective settlements. The agencies kept each other apprised of the status and timetables of their respective investigations, including when decisions would be reached ...[the DOJ] discussed the coordination of the relief sought with the EC ...[and] worked together to harmonize terms in DOJ’s proposed consent decree with the EC’s undertakings...DOJ also consulted with the EC in assessing the proposed purchaser of [the required divestiture]’.⁶⁹

⁶⁷ On this point see discussion in B. Zanettin, *op. cit.* note 46 at p.86, particularly regarding the *Kimberly-Clark/Scott* case.

⁶⁸ *Op. cit.* note 63.

⁶⁹ US submission to the OECD Working Party No.3, *op. cit.* note 43. See discussion of *GE/Instrumentarium*, as an exemplar of bilateral cooperation in a speech by M. Delrahim, *op. cit.* note 47.

Whilst the focus of the European Commission investigation was upon the patient monitoring market, the DOJ appeared far more concerned about competition in the mobile C-arm market, concerning fluoroscopic x-ray machines.⁷⁰ Furthermore, the Commission conducted a thorough investigation of the X-ray machine market involving C-arms, and determined that it ‘did not reveal any serious competition concerns’ in that market.⁷¹ Thus, in spite of a different focus, the Commission and DOJ were able to cooperate effectively throughout their investigations and ultimately ensured compatible remedies were imposed upon the merging firms. The case exemplified that if there are concurrent investigations into the same or related markets (even with differing emphases), and enhanced cooperation would be ‘mutually beneficial’,⁷² then EC and US authorities tend to engage in detailed and fairly informal cooperation, often on a daily basis. A greater understanding of the extent of cooperation possible between EC and US authorities (due to the bilateral agreements and best practices) will be possible by considering further case examples.

⁷⁰ DOJ Antitrust Division Press Release ‘Justice Department requires divestitures in General Electric’s acquisition of Instrumentarium’, 16 September 2003. Available from http://www.usdoj.gov/atr/public/press_releases/2003/index03.htm.

⁷¹ Commission Press Release ‘Commission clears acquisition of Instrumentarium by General Electric subject to conditions’, 2 September 2003, (IP/03/1193).

⁷² Given the resources needed for enhanced cooperation, authorities are highly unlikely to do so unless it would, on balance, be beneficial for their ongoing investigation. This ‘mutually beneficial’ test is a key factor that must be considered in assessing the likelihood/effectiveness of multi-jurisdictional merger investigation cooperation, the point was forcefully made in the course of independent empirical research that engaging in merger cooperation with more than one antitrust authority (not including European Commission intra-EEA cooperation) would reap ‘diminishing returns’. Note that Sheridan Scott, Canadian Commissioner of Competition has supported this view by stating: ‘We speak informally with our foreign counterparts on matters of mutual interest, be they at the head of agency or working level’ in a speech, *op. cit.* note 44.

5.4.4 There are several noteworthy cases that demonstrate the extent of cooperation that takes place between the European Commission and the DOJ/FTC on a regular basis. Perhaps one of the most cited examples of bilateral cooperation in merger review, which probably led the way for the set of best practices, is the *WorldCom/MCI* case.⁷³ The proposed merger between the two telecommunications companies raised antitrust concerns in complex new technology markets, where both companies were Internet Service Providers.⁷⁴ Cooperation between the European Commission and DOJ ranged from discussions and ultimate agreement on the relevant product market and the firms' market strength,⁷⁵ to 'co-ordination of information gathering and joint meetings and negotiations with the parties'.⁷⁶ A Commission official worked within the DOJ for part of the investigation, and one experienced practitioner has stated that 'the DOJ and the Commission worked hand-in-hand throughout the procedure and worked in effect as a single agency'⁷⁷ during the case.⁷⁸ The scale of the \$37 billion merger was probably one of the key motivations behind the extensive and groundbreaking cooperation between the two antitrust authorities. Following *WorldCom/MCI*, cooperation between the EC and US authorities in merger review has become more commonplace, although the degree of cooperation depends upon the facts of each case. The annual reports from the European

⁷³ Commission Decision *WorldCom/MCI* Case No IV/ M.1069, [1999] O.J. L116/1.

⁷⁴ For a concise discussion of the case see A. Nourry 'Case Study: The WorldCom – MCI Case' in S.J. Evenett, A. Lehmann and B. Steil (Eds), *op. cit.* note 46.

⁷⁵ B. Zanettin, *op. cit.* note 46 at p.87.

⁷⁶ European Commission Press Release 'Commission clears WorldCom and MCI subject to conditions' (IP/98/639).

⁷⁷ Clive Stanbrook QC, in an oral statement to the ICPAC Hearings, Washington DC, 3 November 1998. Transcripts of Committee Hearings are available from <http://www.usdoj.gov/atr/icpac/transcripts.htm>.

⁷⁸ Also see paragraphs 11 and 12 of the Commission Decision, *op. cit.* note 73.

Commission to the Council and European Parliament between 2000 and 2002 provide examples of case cooperation and also list the number of formal notifications between antitrust authorities concerning merger investigations.⁷⁹ The vaunted cooperation in *WorldCom/MCI* was in stark contrast to the disillusionment felt by DOJ officials in the aftermath of the *GE/Honeywell* case,⁸⁰ where in spite of extensive cooperation and parallel investigations essentially dealing with the same markets, the Commission and DOJ reached conflicting conclusions.⁸¹ Far from permanently damaging relations between US and EC authorities however, the case appears to have reinvigorated efforts to forge greater policy, procedural and substantive convergence, and to ensure close cooperation and mutual trust and understanding in future merger investigations.⁸² The joint merger working group and set of best practices aim to diminish the risk of similar conflict again, and given that extensive cooperation is now commonplace and high-profile conflict is rare, they appear to have achieved a degree of success.

⁷⁹ See the respective Commission reports to the Council and the European Parliament on the application of the agreements between the European Communities and the USA and Canada, regarding the application of their competition laws for the year 2000 (COM(2002)45 final), 2001 (COM(2002)505 final), and 2002 (COM(2003)500 final).

⁸⁰ Commission Decision *General Electric/Honeywell* Case No. COMP/M.2220 [2004] O.J. L48/1.

⁸¹ See discussion of the close cooperation in 'Report from the Commission to the Council and the European Parliament on the application of the agreements between the European Communities and the Government of the USA and the Government of Canada regarding the application of their competition laws: 1 January 2001 to 31 December 2001', COM(2002)505 final at pp.3-4. For an insightful discussion of the case see B. Zanettin, *op. cit.* note 46, particularly at pp.98-102. Also see A. Burnside 'GE, Honey, I Sunk the Merger' (2002) 23 *ECLR* 107.

⁸² See the speech by W. Blumenthal, General Counsel FTC, 'The Status of Convergence on Transatlantic Merger Policy', 2005 Fall Meeting of the ABA Section of International Law. Brussels, 27 October 2005.

A more recent example of cooperation between the FTC and the European Commission was Boston Scientific's acquisition of Guidant,⁸³ involving cardiovascular medical products. The case was briefly cited by practitioners during the course of empirical research, and has been referenced by the FTC as an example of cooperation,⁸⁴ although there are few specific details on what measures that cooperation entailed. More tangible results of EC-US antitrust cooperation can be seen from the *Bayer/Aventis CropScience* case⁸⁵ where the European Commission and FTC had to closely cooperate on the remedies required to satisfy antitrust concerns, so as to avoid conflicting obligations being imposed upon the merging firms.⁸⁶ Practitioners also suspected that European Commission requests for further information in the case were coordinated with information sought by the FTC by means of a second request.⁸⁷

The *Sanofi-Synthélabo/Aventis* case⁸⁸ involved multiple pharmaceutical markets with regional variations, ongoing clinical trials, complex intellectual property

⁸³ See Commission Press Release IP/06/491 of 11 April 2006 'Mergers: Commission clears, subject to conditions, takeovers of Guidant by Boston Scientific and of Guidant's vascular businesses by Abbott Laboratories'. Commission Decision *Boston Scientific/Guidant* Case No. COMP/M.4076 of 11 April 2006. *Boston Scientific/Guidant*, FTC Consent Order, Docket no. C-4164, 21 July 2006.

⁸⁴ R. Tritell and E. Kraus, "The Federal Trade Commission's International Antitrust Program" at p.4. FTC paper to the ABA Section of Antitrust Law Spring Meeting. Washington D.C., 18 April 2007. Available from: <http://www.ftc.gov/bc/international/docs/ftcintantiprogram0407.pdf>.

⁸⁵ See European Commission Press Release IP/02/570 'Commission clears Bayer's acquisition of Aventis Crop Science, subject to substantial divestitures', 17 April 2003. Commission Decision *Bayer/Aventis Crop Science* Case No. COMP/M.2547, [2004] O.J. L107/1.

⁸⁶ See discussion in US submission to the OECD Working Party No.3, *op. cit.* note 43.

⁸⁷ Comment made during independent empirical-based research, *op. cit.* note 57.

⁸⁸ European Commission Decision *Sanofi-Synthélabo/Aventis*, Case No. COMP/M.3354 (decision is in French). Commission Press Release 'Commission approves planned acquisition of Aventis by Sanofi-Synthélabo subject to conditions' (IP/04/545). *Sanofi-Synthélabo/Aventis*, FTC Press Release 'Resolving Anticompetitive Concerns, FTC Clears Sanofi-Synthélabo's Acquisition of Aventis', 28 July 2004, available at <http://www.ftc.gov/os/caselist/0410031/0410031.htm>. FTC Consent Order, Docket No. 0410031, July 2004.

rights, and third party interests in the US, and is a further example of very close cooperation between the European Commission and FTC. The merger was cleared by both authorities, but only after extensive investigations and cooperation on market definition and coordinated remedies. Both authorities had particular concerns regarding medicines used in the treatment of colorectal cancer and insomnia, although the investigations highlighted significant differences in the market for these medicines between the EC and US. In order to address antitrust concerns, Sanofi agreed to a number of divestitures to competitors, but the Commission and FTC had to work closely to ensure that the timing and substance of the divestitures were compatible.⁸⁹ Several other case examples of merger investigation cooperation between EC and US authorities have been discussed in depth by fellow researchers in this field.⁹⁰

5.4.5 The cooperation that regularly takes place between EC and US antitrust authorities sets a model for bilateral cooperation in international merger control that has few comparators.⁹¹ There are provisions for close cooperation and coordination between the Australian and New Zealand antitrust authorities, although that must be considered in light of the political objective of harmonising

⁸⁹ See discussion in US submission to the OECD Working Party No.3, *op. cit.* note 43. Also see commentary in the FTC paper by R. Tritell and E. Kraus, *op. cit.* note 84.

⁹⁰ See discussion of several cases in a paper by J.J. Parisi 'Developments in EU competition law & policy – 2003: mergers & international aspects', ABA Seminar, Washington D.C. 4 March 2004. Particularly at Section V. Parisi paper available at: http://www.abanet.org/intlaw/committees/business_regulation/antitrust/eucompetitionparisi.pdf. Also see B. Zanettin, *op. cit.* note 46 particularly at pp.85-102. Also see M.M. Dabbah, *The Internationalisation of Antitrust Policy* (Cambridge, Cambridge University Press, 2003) at pp.113-114.

⁹¹ The special relationship between the European Commission and the antitrust authorities of the EC, EEA, Swiss and EU accession countries is noted, but considered to be beyond the scope of the current discussion, given their peculiar status due to the wider legal and political context of relations with the EU.

Australian and New Zealand business laws.⁹² In spite of the close relationship between the Australian Competition and Consumer Commission (ACCC) and New Zealand Commerce Commission (NZCC), and the overriding political objectives, it is notable that there is no suggestion of either authority ceding its ability to reach an independent decision following parallel merger investigations.⁹³ Furthermore, substantive cooperation will only be undertaken when ‘it appears that a review by one or both agencies is likely and that cooperation between the agencies may be beneficial’.⁹⁴ Notably, it appears that the cooperation must be of benefit to the ACCC and NZCC investigations, and there is little to suggest that such cooperation will be undertaken purely on the basis of it being of benefit to the merging parties (e.g. by coordinating review timetables).⁹⁵ Thus it appears that the cooperation and coordination principles adopted by the EC and US authorities, when conducting parallel merger investigations, are comparable to those adopted by the ACCC and NZCC. Nonetheless, convergence and closer ties are undoubtedly further facilitated in the ACCC/NZCC relationship given the need for consistency ‘with the Australian and New Zealand governments’ shared objective of streamlining the trans-Tasman business environment’.⁹⁶

⁹² Noted at 3.6.2 *supra*.

⁹³ See the ACCC and NZCC Cooperation Protocol for Merger Review, August 2006, available from <http://www.accc.gov.au/content/index.phtml/itemId/757826/fromItemId/774553>. The absence of presumptive deferrals from the ACCC/NZCC accord, in spite of an overriding political objective for harmonisation, is perhaps telling of the potential for presumptive deferrals in international merger cooperation more generally, and is an issue that will be discussed further *infra*.

⁹⁴ *Ibid.* at paragraph 10.

⁹⁵ *Ibid.* at paragraph 11, where an indicative list of factors in determining whether cooperation will be ‘beneficial’ is provided.

⁹⁶ Preamble to the ACCC and NZCC Cooperation Protocol, *ibid.* Also see discussion in Freehills Competition Law Update, 11 September 2006, available at:

Lesser degrees of cooperation have taken place between EC/US authorities and their Canadian counterparts, and there have also been occasional references to cooperation with Japanese, Australian and Mexican antitrust authorities.⁹⁷ Mergers that prompt multi-jurisdictional merger review, resulting in concurrent investigations concerning the same or related markets do not automatically result in cooperation between antitrust authorities, neither does the existence of a state-to-state or agency-to-agency antitrust cooperation agreement guarantee substantive cooperation will take place. In order for substantive cooperation and coordination between investigating authorities, it appears necessary for the authorities to have confidence in each others' practices, to have built up a strong working relationship, and for cooperation in a particular case to be 'mutually beneficial'. Assuming these elements are in place, bilateral cooperation is then possible. Prima facie, multilateral cooperation in merger investigations is also possible (with the greatest likelihood being trilateral cooperation between the European Commission, US and Canadian antitrust authorities), and there are supporting statements, particularly from the FTC,⁹⁸ indicating cooperation with multiple international counterparts in particular cases. Nonetheless, there is a difference between multiple examples of bilateral cooperation in a particular case,

http://www.freehills.com.au/publications/publications_6138.asp. See also speech by P. Rebstock, Chair of the NZCC, 'The Trans-Tasman economic relationship from a regulator's perspective', *Trans-Tasman Business Circle*, 4 September 2006, available at: <http://www.transtasmanbusiness.com.au/paula%20rebstock%20speech%20040906.pdf>.

⁹⁷ See discussion *infra*. There are also case examples of cooperation involving national competition authorities within the EC, and US authorities, as well as occasional cooperation with Switzerland, although intra-EEA and EEA-Switzerland cooperation will not be discussed in detail within the thesis.

⁹⁸ See FTC press releases e.g. 20 April 2006 Press Release: 'FTC Requires Asset Divestitures Before Allowing Boston Scientific's \$27 Billion Acquisition of Guidant Corporation'. *Boston Scientific/Guidant*, FTC Consent Order, Docket no. C-4164, 21 July 2006.

and what could accurately be described as multilateral cooperation. It will be suggested below that substantive cooperation in merger investigations has thus far remained on a bilateral basis, with occasional trilateral meetings. Furthermore, there are doubts as to whether multilateral cooperation is possible or even worthwhile, in light of the ‘diminishing returns’ reaped from multilateral cooperation.

The *Alcan/Pechiney II*⁹⁹ case was highlighted during independent research as well as being cited during DOJ speeches as a more recent model for international cooperation in merger investigations.¹⁰⁰ In a press release the DOJ stated: ‘The Department cooperated closely with the European Commission and the Canadian Competition Bureau (CCB) in its review of this transaction’,¹⁰¹ a view echoed by the CCB,¹⁰² yet unusually the European Commission case documents do not mention cooperation with international counterparts.¹⁰³ Nonetheless, practitioners have suggested that the case was far from an exemplar for international cooperation, and this view would seem logical in light of the facts and the relevant markets. It is likely that the reviewing antitrust authorities would coordinate on the timing of review if possible and engage in preliminary discussions, but there is

⁹⁹ Commission Decision *Alcan/Pechiney (II)* Case No.COMP/M.3225 of 29 September 2003.

¹⁰⁰ US submission to the OECD Working Party No.3, *op. cit.* note 43. Also see reference in a speech by J.B. McDonald, DAAG, ‘Antitrust update: Trinko and Microsoft’ to the Houston Bar Association. 8 April 2004.

¹⁰¹ DOJ Press Release ‘Department of Justice will require a divestiture of Alcan Inc. to complete its pending tender offer for Pechiney SA’, 29 September 2003. Available at: http://www.usdoj.gov/atr/public/press_releases/2003/201302.htm.

¹⁰² Annual Report of the Commissioner of Competition for the year ending 31 March 2004 – Reviewing Mergers, available at: <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1345&lg=e>. Canadian Competition Bureau Press Release: ‘Alcan’s Offer for Pechiney Cleared by the Competition Bureau’, 14 October 2003.

¹⁰³ European Commission Press Release ‘Commission clears Alcan takeover bid for Pechiney, subject to conditions’ (IP/03/1309), Commission Decision *op. cit.* note 99.

little evidence to suggest more extensive cooperation took place in this particular case. Alcan and Pechiney are aluminium producers, with products spanning a very wide range of markets. The European Commission and DOJ investigations identified distinct geographic markets of concern that also concerned different product markets. The focus of the EC investigation was threefold: firstly the worldwide market involving alumina refining technology and the IP rights of the respective parties in this market; secondly the flat rolled aluminium product market, particularly the sub-market for ‘aluminium can end/tab stock’; and the related third market of particular concern was the sub-market for beverage and food can sheet.¹⁰⁴ The second and third markets were limited to the EEA and Switzerland.¹⁰⁵ The DOJ, however, was particularly concerned with brazing sheet, an aluminium alloy used in manufacturing radiators and parts of vehicle engines. The relevant geographic market in the US investigation was the North American market.¹⁰⁶ In order to resolve the antitrust concerns, different and unrelated remedies were also required by the EC and US. Clearly there was little need for close cooperation and coordination in *Alcan/Pechiney II* in light of the unrelated relevant markets. With regard to the merger investigation by the Canadian Competition Bureau, it is unclear whether the CCB had any significant concerns regarding the merger, and indeed acknowledged that there was no actual overlap between Pechiney and Alcan assets in Canada.¹⁰⁷ The primary focus of the CCB

¹⁰⁴ *Op. cit.* note 99.

¹⁰⁵ *Op. cit.* note 99, at paras 66-68.

¹⁰⁶ See *United States v. Alcan & Pechiney*, complaint before the Washington D.C. District Court, Case No. 1:03CV02012 29 September 2003. Available at <http://www.usdoj.gov/atr/cases/f201300/201303.htm>.

¹⁰⁷ Canadian Competition Bureau Press Release: ‘Alcan's Offer for Pechiney Cleared by the Competition Bureau’, 14 October 2003.

investigation would appear to be the North American brazing sheet market, as with the DOJ investigation. In closing its investigation, the CCB adopted a rationale it often cites in decisions involving multi-jurisdictional merger review. It believed that the enforcement activities of the DOJ and European Commission resolved Canadian antitrust concerns in the case and thus determined that there was no need to take further action. The CCB essentially deferred to the enforcement activity of its international counterparts. Hence, in spite of *prima facie* evidence of close cooperation between the European Commission, DOJ and CCB in *Alcan/Pechiney II*, it appears highly unlikely in light of the facts that substantive cooperation would be productive, and thus probably did not proceed beyond initial case discussions. For these reasons, there is doubt as to whether this case could be accurately described as an example of trilateral cooperation given the differing markets being investigated. Furthermore, the action of the CCB in the case is perhaps best described as a deferential approach to international cooperation in merger review, and not an example of extensive cooperation. The timing issue is also important in assessing the extent of cooperation undertaken, and the decision of the CCB two weeks after the EC and DOJ press releases support the view that a deferential approach was adopted. There is no evidence of the CCB engaging in detailed cooperation/coordination with either the DOJ or European Commission, and certainly no evidence of the EC or US authorities proactively trying to take account of CCB concerns when devising their own remedies.

There are several other cases where the CCB has adopted the same deferential approach. The CCB refrained from taking enforcement action in *Boston Scientific/Guidant*¹⁰⁸ because it believed that the FTC and EC remedies dealt with Canadian antitrust concerns. Interestingly, the FTC has suggested that cooperation took place with the Japanese Fair Trade Commission (JFTC) in this case, in addition to cooperation with the European Commission and CCB.¹⁰⁹ Practitioners familiar with the case note that the European Commission discussed a variety of issues with the FTC, including the impact of intellectual property rights on market entry in the case.¹¹⁰ There is however, no suggestion in the EC documents of cooperation with either the CCB or JFTC. Similarly the CCB press release does not refer to the JFTC, although it does suggest some cooperation with the European Commission as well as the FTC. The true extent of cooperation in *Boston Scientific/Guidant*, is however unclear, although it is unlikely that there was extensive trilateral cooperation taking place, and even less likely that the FTC engaged in detailed cooperation with the JFTC.¹¹¹ It is also noteworthy that there is no mention of cooperation with international counterparts in the JFTC press release concerning the case.¹¹² In the course of research, practitioners and antitrust officials have remarked that cooperation with the JFTC in general, is unlikely to

¹⁰⁸ CCB Press Release: 'International Remedies Resolve Canadian Issues in Boston Scientific, Guidant Merger', 11 May 2006. Also see European Commission Press Release of 11 April 2006 'Mergers: Commission clears, subject to conditions, takeovers of Guidant by Boston Scientific and of Guidant's vascular businesses by Abbott Laboratories' (IP/06/491). Commission Decision *Boston Scientific/Guidant* Case No. COMP/M.4076 of 11 April 2006.

¹⁰⁹ FTC Press Release, 20 April 2006: 'FTC Requires Asset Divestitures Before Allowing Boston Scientific's \$27 Billion Acquisition of Guidant Corporation'.

¹¹⁰ See discussion in R. Brandenburger & M. O'Regan, 'EU Merger Control - Developments in 2005' (2006) Issue 2 *Antitrust Report* 46-137.

¹¹¹ For further discussion of the likelihood of trilateral or multilateral cooperation in multi-jurisdiction merger investigations, see *infra* at 5.5.

¹¹² JFTC Press Release 'The proposed acquisition of the stock of Guidant Corporation by Boston Scientific Corporation', 1 May 2006, available at <http://www.jftc.go.jp/e-page/pressreleases/2006/may/060501.pdf>.

have significant benefits for the merging parties, and the extent of cooperation is likely to be very basic. Indeed only very rarely will cooperation take place with the JFTC regarding concurrent merger reviews. The difficulty of cooperation with the JFTC appears to stem from structural and cultural differences that inhibit informal cooperation between case handlers. In the course of empirical research, a DG Comp official indicated that JFTC officials are willing to cooperate in principle but that case handlers have little autonomy to engage in cooperation with counterparts, and each element of cooperation must be approved by senior JFTC staff before any cooperation can take place. The hierarchical structure effectively diminishes the benefits that could be gained from cooperation, and inhibits efforts at cooperation in all but the most rare of cases.

The *Proctor and Gamble/Gillette* merger¹¹³ is a further example of the CCB deferential approach, as its antitrust concerns relating to the merger were addressed by the remedies imposed by the European Commission and FTC.¹¹⁴ The European Commission and FTC closely coordinated their respective investigations, and shared concerns regarding the market strength of the merged firm in the battery-powered toothbrush market, which ultimately resulted in a coordinated remedy.¹¹⁵ In this particular case the FTC press release mentions cooperation with the Mexican Federal Competition Commission (MFCC), in

¹¹³ European Commission Decision *Proctor & Gamble/Gillette* Case No.COMP/M.3732, 15 July 2005. See also Press Release ‘Mergers: Commission approves acquisition of Gillette by Procter & Gamble subject to conditions’ (IP/05/955).

¹¹⁴ CCB Press Release ‘Competition Bureau’s Concerns Resolved in Procter & Gamble’s Acquisition of Gillette’ 30 September 2005.

¹¹⁵ See speech by W. Blumenthal, *op. cit.* note 82.

addition to cooperation with the European Commission and CCB.¹¹⁶ Nonetheless there are no details on what the cooperation actually involved, and FTC speeches that comment on the case do not make any reference to the MFCC.¹¹⁷ It is likely therefore, that the cooperation was at a very basic level.

The deferential approach of the CCB in appropriate circumstances is now well known and FTC officials have noted that ‘Canada has been explicit about abstaining from bringing its own case when it has concluded that its interests were protected by another jurisdiction’s actions’.¹¹⁸ Nonetheless the CCB deferential approach does have limits and the *Bayer/Aventis CropScience* case¹¹⁹ highlights that the CCB will continue to impose separate remedies if it does not believe those imposed by the European Commission and relevant US authority satisfies all of its antitrust concerns relating to the Canadian market.

In addition to the cases above, there are also examples of bilateral cooperation between the European Commission and CCB following the conclusion of the state-to-state antitrust cooperation agreement in 1999. CCB staff attended European Commission hearings relating to the *Dow Chemical/Union Carbide*¹²⁰

¹¹⁶ FTC Press Release, 30 September 2005, ‘FTC Consent Order Remedies Likely Anticompetitive Effects of Procter & Gamble’s Acquisition of Gillette’.

¹¹⁷ Speech by W. Blumenthal, *op. cit.* note 82.

¹¹⁸ Statement of R.W. Tritell, Assistant Director for International Antitrust, FTC, to the Antitrust Modernization Commission (AMC). Hearing on International Antitrust Issues, 15 February 2006, available from <http://www.amc.gov>.

¹¹⁹ CCB Press Release: ‘Competition Tribunal Orders Canadian Divestitures in Bayer’s Acquisition of Aventis CropScience’, 19 July 2002.

¹²⁰ Commission Decision *Dow Chemical/Union Carbide* Case No.COMP/M.1671, [2001] O.J. L245/1.

and *Alcoa/Reynolds* mergers.¹²¹ These cases are also clear examples of basic levels of trilateral cooperation as three-way teleconferences and meetings took place between the European Commission, CCB and FTC/DOJ respectively.¹²² The CCB again deferred to the enforcement activity of the FTC in *Dow Chemical/Union Carbide*, as it believed the US consent decree dealt with its antitrust concerns.¹²³ The European Commission press release concerning *Alcoa/Reynolds* also notes some cooperation with the ACCC, and the ACCC press release comments that:

‘In considering the proposed merger the ACCC liaised with European and American authorities in trying to reach an effective outcome. Alcoa has offered undertakings to the American and European authorities to divest itself of the interest in the Worsley alumina refinery and these undertakings are sufficient to allay the concerns of the ACCC. In reaching its decision the ACCC took into account the obligation for Alcoa to divest its interest in the Worsley refinery’.¹²⁴

The *Alcoa/Reynolds* case therefore highlights that the ACCC is willing to adopt the deferential approach commonly seen in CCB decisions in multi-jurisdictional merger reviews, when enforcement action of international counterparts adequately deal with its own antitrust concerns. The case also highlights that in spite of the existence of basic levels of trilateral cooperation, there are inherent limits to the extent of multilateral cooperation in any particular case, even where relatively developed antitrust regimes are involved. Notably, the DOJ press release only

¹²¹ European Commission Press Release ‘Commission clears merger between Alcoa and Reynolds Metals, under conditions’ (IP/00/424). European Commission Decision *Alcoa/Reynolds*, Case No.COMP/M.1693. See discussion in speech by D. Burlone, Assistant Deputy Commissioner, CCB, ‘Canada and the internationalization of competition policy’, to the Canadian Bar Association. 21 September 2000.

¹²² Commission report to the Council and the European Parliament on the application of the agreements between the European Communities and the USA and Canada regarding the application of their competition laws for the year 2000 (COM(2002)45 final) at p.11.

¹²³ Speech by S. Scott, *op. cit.* note 44.

¹²⁴ ACCC Press Release ‘ACCC not to intervene in ALCOA/Reynolds Metals merger’, 4 May 2000, available at <http://www.accc.gov.au/content/index.phtml/itemId/323061>.

refers to cooperation with the EC, whereas the CCB press release refers to cooperation with the EC and DOJ, and the ACCC press release clearly refers to cooperation with the DOJ and EC. The lack of clarity and inconsistency is obvious and probably highlights varying degrees of cooperation, with the EC/US cooperation being the most detailed. Clearly in a case of this nature, with antitrust concerns worldwide, close cooperation is more likely to take place on a bilateral basis between several authorities running concurrent investigations than on a multilateral basis.

In light of the foregoing discussion of practical cooperation in previous multi-jurisdictional merger investigations, close cooperation and coordination in concurrent merger review is possible and regularly takes place. The relationship between EC and US antitrust authorities clearly facilitates the closest degree of cooperation (perhaps also motivated by the heightened risk of conflict between these jurisdictions), yet it has also been shown that the existence of bilateral cooperation agreements (and the OECD Recommendation) facilitates cooperation with other antitrust authorities. However, there are clear limitations as there are relatively few antitrust authorities active in merger review cooperation, when compared with the growing number of merger control regimes (even if limited to those with *ex ante* notification requirements). Furthermore, cases involving concurrent review by more than two antitrust authorities do not necessarily result in trilateral or multilateral cooperation, and are more likely to result in multiple

instances of bilateral cooperation. Extensive cooperation and coordination is, for the moment at least, likely to remain predominantly on a bilateral basis.

The numerous examples of cooperation, sometimes including coordinated remedies and deferential approaches, fail to illustrate a significant point relevant to this discussion. In spite of close cooperation in many cases, particularly between EC and US authorities, each antitrust authority ultimately retains independent decision-making authority and must work within differing legislative parameters, and may also pursue differing objectives and have underlying conceptual differences. In short, sometimes close cooperation is insufficient to avoid conflicting outcomes, as seen in the *GE/Honeywell* case.¹²⁵ Cooperative relationships and the ability to coordinate timing and remedies etc. is an incomplete solution to the risks of conflicting decisions, and must be complemented by broader, longer-term approaches aimed at achieving convergence in multi-jurisdictional merger review.

5.5 The international merger control framework 3: multilateral cooperation & convergence

5.5.1 In the first part of the thesis, the limitations of extraterritoriality and bilateral cooperation agreements were readily apparent and thus formed the rationale for

¹²⁵ *Op. cit.* note 47.

developing multilateral antitrust initiatives.¹²⁶ Bilateral cooperation in specific cases, and joint working groups striving towards greater understanding and convergence, is equally limited in international merger control. In light of the increasing number of merger control regimes,¹²⁷ and increasing number of large, international M&A, the number of multi-jurisdictional merger reviews are likely to increase. Furthermore, given the importance of avoiding conflicting decisions contrary to the primary objective,¹²⁸ there is a need for multilateral efforts to minimise the risk of conflicting decisions through greater international convergence, and also decrease the overall burden upon business created by multi-jurisdictional merger control. Bilateral and occasional trilateral cooperation and coordination of concurrent merger investigations is inherently limited given the small number and commonality of cooperating authorities. Furthermore, while there appear to be benefits stemming from the EC-US joint mergers working group, this will do little to achieve convergence with developing merger control regimes and particularly those jurisdictions, such as China and India, with whom antitrust cooperation may become crucial in the future, in light of increasing trade relations. Multi-jurisdictional merger reviews are likely to continue to increase in scale,¹²⁹ and bilateral or trilateral cooperation is unable to effectively or efficiently

¹²⁶ One of the most detailed and convincing arguments advocating the need for multilateral initiatives in international antitrust can be found within the ICPAC Final Report (2000), available at <http://www.usdoj.gov/atr/icpac/icpac.htm>, which ultimately led to the creation of the International Competition Network (ICN).

¹²⁷ See discussion *supra* at 5.3.1.

¹²⁸ See discussion *supra* at 5.1 and 5.2.

¹²⁹ It must be noted that an increase in the number of merger control regimes will not necessarily result in a greater number of multi-jurisdictional merger reviews, even if the developing regimes have low notification thresholds and claim jurisdiction over international M&A. Anecdotal evidence suggests that merging parties likely undertake some form of risk assessment when determining whether to submit notifications pre-closing to developing antitrust authorities. See discussion *infra* at 5.6. Nonetheless, even if a form of

minimise the risk of conflict. The various multilateral fora and initiatives involved in international antitrust were outlined in chapter 4. The thesis will now re-examine these initiatives, focusing upon their contribution in the specific context of international merger control.

Multilateral antitrust activities concerning merger review normally have one of two objectives: i) achieving or facilitating greater convergence; or ii) making proposals for the future development of international merger control. The emphasis here will be on the former type of activities, while there will be some consideration of relevant examples of the latter in the next section and in the thesis conclusion. Activities aimed at convergence will tend to organise research and recommendations by reference to certain key stages/issues in merger control. Discussion here will be split into four sections, that concerning: a) key principles adopted during the merger review process; b) notification by the merging parties to the authorities (which will form a significant part of the discussion as it has formed a significant part of the work of multilateral fora in this area); c) merger investigation and analysis; and d) merger remedies.

5.5.2 Given the large and increasing number of merger control regimes in existence, it is hardly surprising that there is no universally accepted objective or set of objectives for such laws. Nonetheless, there are multilateral efforts to develop an

risk assessment reduces the number of multi-jurisdictional merger reviews, this should not diminish the importance of working towards convergence amongst the rising number of merger control regimes. In fact it may heighten the desire to achieve convergence, so as to reduce the perceived need to conduct a risk assessment.

agreed set of principles to which merger control should adhere, with some degree of success. The ICN mergers working group has produced a set of eight ‘guiding principles for merger notification and review’.¹³⁰ The work of the ICN in this area has been aided by preparatory work undertaken by non-governmental organisations, leading practitioners and the OECD.¹³¹ The so-called ‘Merger Streamlining Group’, funded by leading international companies and consisting of leading antitrust practitioners, produced a set of best practices for the review of international mergers in October 2001 (herein referred to as the MSG best practices).¹³² The set of best practices included fundamental principles that should guide the design and operation of merger control regimes, and are reflected within the ICN principles. The MSG best practices were supplemented almost immediately by substantively similar recommendations produced jointly by the business and industry advisory committee to the OECD (BIAC) and the International Chamber of Commerce (ICC).¹³³ The BIAC/ICC best practices also highlighted many of the key principles that have been further developed by the ICN.¹³⁴ The ICN principles are: sovereignty; transparency; non-discrimination on the basis of nationality; procedural fairness; efficient, timely and effective review; coordination; convergence; and protection of confidential information.

¹³⁰ Available at: <http://www.internationalcompetitionnetwork.org>.

¹³¹ See discussion in the paper by J.W. Rowley, ‘The internationalisation of merger review: towards global solutions (perspectives of a non-governmental advisor)’, first ICN annual conference. Castel Dell’Ovo, Naples, 28-29 September 2002.

¹³² J.L. McDavid, P.A. Proger, M.J. Reynolds, J.W. Rowley & A.N. Campbell, ‘Best practices for the review of international mergers’, October 2001, available at http://www.globalcompetitionforum.org/regions/n_america/canada/MergerSep21.pdf?id=323.

¹³³ J.W. Rowley paper, *op. cit.* note 131.

¹³⁴ BIAC/ICC Recommended Framework for Best Practices in International Merger Control Procedures, 4 October 2001, available at <http://www.biac.org/statements/comp/BIAC-ICCMergerPaper.pdf>.

The inclusion of the principle of sovereignty is significant as it limits the work of the ICN in this area to promoting convergence, and does not support some of the more radical proposals for reform that have been suggested.¹³⁵ The key principles of transparency, and non-discrimination (between domestic and foreign companies) within merger analysis have been gaining widespread recognition, and are reflected in the work undertaken by other bodies at the international level, including the WTO.¹³⁶ The principle of transparency should apply generally with regard to the policies, practices and procedures within each jurisdiction, but also at a case-by-case level with regard to the antitrust assessment undertaken and to ensure that the bases for any adverse decision are clear and understood.¹³⁷ The principles of procedural fairness and efficient, timely and effective review are with regard to the investigative and determinative stages of a merger review. The principles seek to ensure that merging firms are provided with an opportunity to respond to adverse findings before a final decision is taken, and also provide that the timetable for merger review should be ‘reasonable and determinable’. The latter principle notably provides that the merger review process: ‘should not impose unnecessary costs on transactions’.¹³⁸ The principles of coordination and convergence reflect the international context within which national merger control regimes must operate. The principle of coordination encourages jurisdictions to coordinate respective investigations when dealing with a multi-jurisdictional

¹³⁵ See J. Wilson, *op. cit.* note 39 at chapters 7 and 8, for a thorough discussion of the leading proposals for an international merger control regime, ranging from work sharing and lead jurisdiction models (e.g. part of the ICPAC proposals) to the creation of a supranational institution (e.g. The Munich Group of antitrust scholars, and Campbell and Trebilcock proposals).

¹³⁶ See discussion *supra* at 4.4.5, and *infra*.

¹³⁷ The importance of the principle of transparency was highlighted J.W. Rowley, *op. cit.* note 131.

¹³⁸ ICN Guiding Principles, *op. cit.* note 130.

merger that is subject to concurrent review. Although this is encouraged only to the extent that coordination would: ‘enhance the efficiency and effectiveness of the review process and reduce transaction costs’,¹³⁹ and is presumably consistent with the general approach of antitrust authorities to engage in coordination only when it is ‘mutually beneficial’, discussed *supra* at 5.4.3 and 5.4.5. The principle also recognises the requirement to work within the framework of domestic laws. The principle of convergence highlights the importance of agreed best practice recommendations in achieving convergence. The eighth principle within the ICN document recognises the need to protect confidentiality at all stages of the merger review process. Protecting confidential information is crucial to every merger control regime in order to gain the trust of merging firms, which are required to notify and provide sensitive commercial information.¹⁴⁰

Whereas the ICN has compiled a document with eight concise ‘guiding principles’ for merger control regimes, and a supplementary and detailed set of ‘recommended practices for merger notification procedures’,¹⁴¹ the OECD has combined principles and best practice within a relatively short OECD recommendation on merger review.¹⁴² The work of the ICN and the sovereignty of OECD Member countries are recognised within the preamble to the OECD recommendation, and the other seven ICN principles are included within the

¹³⁹ *Ibid.*

¹⁴⁰ See further discussion *infra* at 5.5.3.

¹⁴¹ Document available at:

<http://www.internationalcompetitionnetwork.org>. See discussion *infra* at 5.5.3.

¹⁴² *OECD Recommendation of the Council on Merger Review*, 25 March 2005 – C(2005)34 at I.A1.2.2 and A2 respectively. Available from:

[http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/c\(2005\)34](http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/c(2005)34).

substantive recommendations, albeit with varying degrees of emphasis. The OECD recommendation also ‘invites non-member economies to associate themselves with [the] Recommendation and to implement it’.¹⁴³ ‘Non-member economies’ will only be in a position to implement the recommendation if they have a merger control regime. Furthermore, as the ICN now has a membership from 80 different jurisdictions, it is perhaps likely that those states able to implement the OECD recommendation (as well as the 30 Member countries of the OECD) will have some form of ICN membership, and thus be aware of the ICN guiding principles and recommended practices. Hence, as discussed *supra* at 4.4.3, there is clear duplication of effort and resources occurring with regard to key merger review principles in the work of the ICN and OECD. It could be argued that the nature of membership and legal status of recommendations/guidelines differs between the OECD and ICN, as the OECD has state-level membership, whilst ICN membership consists of antitrust authorities. Assuming that antitrust authorities hold ICN membership with government support, this distinction appears trivial and does not present a strong justification for producing twin sets of principles and best practice recommendations that tend to use very similar language.

UNCTAD and the WTO working group on the interaction between trade and competition policy both engage in general antitrust activity. Whilst the activities can be relevant for merger control, they are not focused upon addressing the peculiar problems and issues relevant to multi-jurisdictional merger review.

¹⁴³ *Ibid.* at III.

Nonetheless the UN Set¹⁴⁴ reflects many of the core principles already discussed such as non-discrimination,¹⁴⁵ transparency,¹⁴⁶ confidentiality,¹⁴⁷ and effective review,¹⁴⁸ as does the UN Model Law, to a more limited extent.¹⁴⁹ WTO activity in this area has stagnated since the failure of the 2003 Fifth Ministerial Conference in Cancún to agree on the Singapore issues, which included antitrust.¹⁵⁰ WTO activity has always focused on the key principles of non-discrimination, transparency and procedural fairness however, and would be unlikely to conflict with the work undertaken as part of other multilateral initiatives such as the ICN and OECD.¹⁵¹

There are indicators suggesting that providing for independent antitrust analysis in merger control (i.e. free from government intervention in all but exceptional cases) is gaining recognition as an important means of implementing many of the key principles outlined above.¹⁵² Indeed the ICN has said that ‘competition

¹⁴⁴ See discussion in *supra* at 4.4.4. The United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices is available at: <http://www.unctad.org/en/docs/tdrbpconf10r2.en.pdf>.

¹⁴⁵ UN Set at E3. Although note that the UN Set also recommends flexibility to enable preferential or differential treatment when dealing with developing countries. In particular it states at C7 that in order to ensure the equitable application of the UN Set, competition rules in developing countries may reflect the need to promote ‘the establishment or development of domestic industries and the economic development of other sectors of the economy’.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.* at E5.

¹⁴⁸ *Ibid.* at E6.

¹⁴⁹ For example, see the chapter X.II provisions on confidentiality, UNCTAD Model Law on Competition, *op. cit.* note 32.

¹⁵⁰ See discussion *supra* at 4.4.5.

¹⁵¹ Also see discussion in the WTO Secretariat background note on *The Fundamental Principles of Competition Policy*, Working Group on the Interaction between Trade and Competition Policy, WT/WGTCP/W/127 7 June 1999 (99-2281), available at: http://www.wto.org/english/tratop_e/comp_e/wgtcp_docs_e.htm.

¹⁵² See ‘Aspects of Independence of Regulatory Agencies and Competition Advocacy – a Getúlio Vargas Foundation (NGA) Contribution’, submitted to the ICN competition policy implementation working group;

agencies should have sufficient independence to ensure the objective application and enforcement of merger control laws'.¹⁵³ Independent antitrust analysis (or 'depoliticised' antitrust analysis) is not explicitly recognised as a key principle within international merger control currently, but is perhaps destined to become more important in future. Implementation of such a principle would likely require legislative changes in many antitrust jurisdictions, and given the developing nature of many antitrust authorities with ICN membership, this is unlikely to be an immediate priority,¹⁵⁴ unless pursued by the OECD, given that its membership is a fairly homogenous group of developed economies.

5.5.3 The overwhelming degree of consensus achieved with regard to key principles applicable to multi-jurisdictional merger review contrasts with the divergent national procedures and rules that determine the timing and form of merger notification, as well as the substantive merger analysis and case determination. In recognition of the growing number of merger control regimes, and the prevalence of *ex ante* systems of mandatory notification,¹⁵⁵ many commentators and non-governmental organisations have identified notification thresholds as a key issue, including Hawk, who commented:

subgroup 3: competition advocacy in regulated sectors, 6. Available from: <http://www.internationalcompetitionnetwork.org>.

¹⁵³ The ICN recommended practices for merger notification procedures, *op. cit.* at note 141, at XII.C.

¹⁵⁴ For further discussion of the trend towards recognising the importance of independent antitrust analysis see J. Galloway, 'The pursuit of national champions: the intersection of competition law and industrial policy' (2007) 28 *ECLR* 172. Also see a speech by R. Hewitt Pate, whilst Assistant Attorney General for Antitrust at the DOJ, 'Competition and Politics', delivered to the 12th International Conference on Competition. Bonn, Germany, 6 June 2005.

¹⁵⁵ See discussion *supra* at 4.1.2 and also the Global Competition Review Publication, 'Getting the Deal Through: Merger Control 2006', which provides a detailed review of merger control regimes in 54 jurisdictions worldwide; one of the points of reference is whether notification is mandatory or voluntary.

‘there is a proliferation of merger controls throughout the world. What is the problem? The problem is volume... The solution is volume control...the trick is minimizing all this volume of merger control and all these costs or somehow try to reduce the volume so that transactions that have little or no antitrust importance are screened out’.¹⁵⁶

Merger notification thresholds are a fundamental consideration in the assessment of the current international merger control framework. The large number of merger control regimes becomes particularly problematic if jurisdiction is readily asserted over international M&A,¹⁵⁷ resulting in multi-jurisdictional merger reviews. Merger notification thresholds essentially act as a procedural means of asserting jurisdiction, particularly in regimes with *ex ante* mandatory notification.¹⁵⁸ Thus generally low thresholds, or those which assert jurisdiction (i.e. require notification) in spite of the merger having insubstantial or superficial links with the reviewing regime, tend to increase the burden upon merging firms and raise the potential for conflicting decisions. Notification thresholds can therefore affect the ability of international merger control to conform to the primary objective of the international antitrust dialogue. Non-governmental organisations (NGOs), the OECD and the ICN have all been active in this area to help identify the specific issues involved, and work towards best practice recommendations so as to facilitate convergence. The key issues regarding notification concern: a) the proximity of the nexus between the merging firms and

¹⁵⁶ Barry E. Hawk, in an oral statement to the ICPAC Hearings, Washington DC, 3 November 1998. Transcripts of Committee Hearings are available from <http://www.usdoj.gov/atr/icpac/transcripts.htm>.

¹⁵⁷ Other problems can of course arise, notably when it is difficult to determine whether notification is actually required (perhaps due to a lack of publicly available information, vague thresholds or those which are subject to local, subjective assessments). The ICN guiding principles and recommended practices attempt to address these issues.

¹⁵⁸ Although note that even if notification thresholds are not met, many jurisdictions may nonetheless enable/oblige antitrust authorities to challenge proposed mergers *ex proprio motu* when applying the substantive legal tests within the merger control regime.

the reviewing jurisdiction (jurisdictional nexus);¹⁵⁹ b) the clarity and transparency of the notification thresholds;¹⁶⁰ c) the timing requirements for notification;¹⁶¹ d) the amount of information required in a notification;¹⁶² and to a limited extent e) the issue of filing fees.¹⁶³ The ICN appears to have undertaken the most recent and certainly the most in-depth work regarding these key issues. Achieving convergence through notification best practices could reduce the number of jurisdictions that review particular mergers, and is likely to be far more productive in the short-term than efforts towards substantive convergence. For these reasons, it is necessary to conduct a detailed analysis of the attempts to achieve convergence on the key issues regarding notification.

a) Broad consensus on the issue of jurisdictional nexus appears to have been achieved through the various NGO, OECD and ICN best practice recommendations. Although, as with most ‘soft law’ tools for convergence, the significance of the consensus can only be determined by monitoring implementation. While there has been no attempt to provide a precise template for determining when a merger has a sufficiently proximate or ‘material’ nexus to the reviewing jurisdiction, the NGO, OECD and particularly ICN work suggests that

¹⁵⁹ See the ICN recommended practices for merger notification procedures, *op. cit.* at note 141, at I; the OECD merger recommendation, *op. cit.* at note 142, at I.A.1.2(1); as well as Part I(1) of the MSG best practices, *op.cit.* note 132; and the BIAC/ICC best practices, *op. cit.* at note 134, at 2.1.2. Also see speech by W. Kolasky, *op. cit.* note 30.

¹⁶⁰ See the ICN recommended practices at II, the OECD merger recommendation at I.A.1.2(2), and the BIAC/ICC best practices at 2.1.2.

¹⁶¹ See the ICN recommended practices at III, the OECD merger recommendation at I.A.1.2(5), and the BIAC/ICC best practices at 2.1.3.

¹⁶² See the ICN recommended practices at V, the OECD merger recommendation at I.A.1.2(3), and the BIAC/ICC best practices at 2.1.4.

¹⁶³ See the ICN Merger notification filing fees report, April 2005, available at <http://www.internationalcompetitionnetwork.org>. Also see the MSG best practices, *op.cit.* note 132, at Part I(8), and the BIAC/ICC best practices at 2.1.5.6

notification thresholds should require that mergers have a minimum ‘local nexus’ to the reviewing jurisdiction.¹⁶⁴ In implementing such a recommendation, a minimum level of sales or asset levels within the jurisdiction could establish a minimum ‘local nexus’, and the ICN recommendation suggests that the test should ensure that at least two of the entities involved have a ‘local nexus’, so as to avoid the possibility of a combined ‘local nexus’ test being satisfied by one of the entities alone.¹⁶⁵ The MSG best practices are likely to be slightly more controversial by stating that ‘transactions should not be pre-notifiable unless at least two parties have some local presence in the jurisdiction. Substantive competition concerns are substantially less likely in a jurisdiction where only one or neither of the parties to a merger has local operations’.¹⁶⁶ Regarding implementation, it is noteworthy that in a survey of 53 ICN member jurisdictions only 35 had a ‘local nexus’ requirement within their notification thresholds.¹⁶⁷

b) The jurisdictional nexus, as part of the notification threshold, is entwined with the issue of clarity and transparency of notification thresholds. There is a clear effort, as demonstrated by the best practices in this area,¹⁶⁸ to avoid opaque and subjective merger notification thresholds. The MSG best practices state that in the interests of certainty ‘market share (or other judgement-based) tests should not be used as the basis for pre-merger notification thresholds because they require up-

¹⁶⁴ *Op. cit.* at note 159.

¹⁶⁵ The ICN recommended practices for merger notification procedures, *op. cit.* at note 141, at I.C, particularly Comments 2 and 3.

¹⁶⁶ Part I(2) of the MSG best practices, *op.cit.* note 132.

¹⁶⁷ ICN Report, ‘Implementation of the ICN recommended practices for merger notification and review procedures’, April 2005, at Annex B: Compliance with recommended practices, RP I: Nexus. Report available at: <http://www.internationalcompetitionnetwork.org>.

¹⁶⁸ *Op. cit.* note 160.

front analyses of product and geographic markets which are time-consuming and uncertain'.¹⁶⁹ The recommendation to move away from market share thresholds towards objective thresholds (such as those based on local assets and/or sales) is mirrored within the BIAC/ICC best practices,¹⁷⁰ the ICN recommendation and briefly within the OECD merger recommendation.¹⁷¹ The ICN recommendation notes that 'notification thresholds should be based on information that is readily accessible to the merging parties'.¹⁷² Whilst the point links into discussion *infra* at 5.6 regarding the burden upon merging parties, it also has the consequence that objective thresholds, such as local assets and/or sales, should be expressed in currency values and not other economic measures such as wage multiples.¹⁷³ The majority of those ICN members surveyed by the ICN implementation project group in 2005, responded that their merger notification thresholds used subjective criteria contrary to the ICN recommended practices, with 18 jurisdictions adopting a variant of a market share test.¹⁷⁴ The argument in favour of certain subjective tests such as one based on market share, is of course that they are much more likely to identify (and thus pull within a state's jurisdiction) mergers that may cause antitrust concerns. Note that the best practices do not recommend against the use of market share or other subjective tests throughout the merger

¹⁶⁹ Part I(4) of the MSG best practices, *op.cit.* note 132.

¹⁷⁰ The BIAC/ICC best practices, *op. cit.* at note 134, at 2.1.2.3.

¹⁷¹ *Op. cit.* at note 160.

¹⁷² The ICN recommended practices for merger notification procedures, *op. cit.* at note 141, at II.C.

¹⁷³ The oft-cited example of a jurisdiction with merger notification thresholds that are partially expressed in terms of monthly wage multiples is Russia. Pre-merger notification is currently required to the Russian Federal Antimonopoly Service (FAS), when, *inter alia*, the total amount of assets involved in the merger exceeds 30 million times the Russian Federal monthly minimum wage (currently Rb100). For further information see the Global Competition Review Publication, 'Getting the Deal Through: Merger Control 2006' at chapter 39: Russia, as well as the ICN Russian merger notification and procedures template (July 2006), available at: <http://www.internationalcompetitionnetwork.org>.

¹⁷⁴ *Op. cit.* at note 167, at RP II: Notification thresholds/pre-notification guidance.

control process,¹⁷⁵ but merely suggest it is an inappropriate model for merging parties to be able to determine whether notification is required or not.¹⁷⁶ The best practices suggest that where subjective notification thresholds are nonetheless adopted, the antitrust authority should provide guidance on interpretation for the merging parties or allow pre-notification contact.¹⁷⁷ Independent research tends to suggest a mixed reaction to subjective pre-merger notification thresholds on the part of leading practitioners.¹⁷⁸ While many recommend and favour the adoption of objective thresholds, there is a real debate concerning how much of a burden subjective thresholds actually cause for merging firms. Several practitioners suggested that law firms with expertise of dealing with antitrust authorities in key jurisdictions, as well as links with local practitioners dramatically minimises the apparent difficulty for clients in determining when notification is required under subjective thresholds.¹⁷⁹ Nonetheless it is clear that if the convergence of pre-merger notification procedures and practices are to be of benefit to merging parties, then jurisdictions should work towards adopting clear and objective notification thresholds, as opposed to market share thresholds which could still vary significantly in interpretation.

¹⁷⁵ Hence the share-of-supply test employed by UK merger control under s.23 Enterprise Act 2002 would be unlikely to conflict with these best practices in a strict sense, as the test is not utilised as part of a mandatory pre-merger notification regime. Nonetheless, merging firms may wish to consider this issue when deciding whether it is in their interests to notify the OFT pre-merger. For a discussion of the UK share-of-supply test under s.23 and the UK voluntary notification procedure see M Furse, *op. cit.* note 1 at pp.210-212 and pp.236-240 respectively.

¹⁷⁶ See the ICN recommended practices, *op. cit.* at note 141, at II.B, particularly Comment 1.

¹⁷⁷ See the ICN recommended practices, *op. cit.* at note 141, at V.C, and the MSG best practices, *op.cit.* note 132, at Part II(2). Also note that only 2 jurisdictions out of the 53 taking part in the ICN survey, *op. cit.* note 167 at RP II, stated that they do not provide formal or informal pre-notification guidance.

¹⁷⁸ Research noted *supra* at 4.4.3 and note 57.

¹⁷⁹ Returning to the Russian example of a threshold partially based upon a multiple of the federal minimum wage, one leading practitioner stated that international law firms would very easily use a formula to determine whether notification was required, and that any legal changes would be monitored so as to adjust their practice.

c) The issue of timing is crucial throughout the whole merger review process, particularly for the merging parties themselves, and this is not any different at the pre-merger notification stage. Notifications tend to require the coordination of legal and commercial strategies designed to ‘get the deal through’. Hence for merging firms and their counsel, the issue of notification timing, including notification triggers and any associated deadlines, is crucial and easily complicated by the burden of multiple notifications. The notification triggers are the points in the merger/acquisition process at which the merging parties should/can notify relevant antitrust authorities for merger clearance. There is a tension regarding notification triggers for while they ostensibly establish a point in the commercial M&A process from which merging firms must notify within a set time period, the triggers often act to prevent premature notifications. In essence, notification triggers balance the interests of legal certainty (which is furthered by early notification) with the need to ensure efficient and effective use of resources (flexible triggers may encourage notifications regarding M&As that are at very early stages of the commercial negotiation stage, with the obvious risk that an antitrust investigation is undertaken while the deal collapses for commercial reasons).¹⁸⁰ The ICN recommended practices suggest that parties ‘should be permitted to notify proposed mergers upon certification of a good faith intent to consummate the proposed transaction’.¹⁸¹ Thus the best practices envisage allowing the merging parties flexibility in deciding when to notify,

¹⁸⁰ This tension is apparent from the wording of the best practice recommendations regarding timing and filing deadlines, in particular see the BIAC/ICC best practices, *op. cit.* at note 134, at 2.1.3.1 – 2.1.3.4.

¹⁸¹ ICN recommended practices, *op. cit.* note 141, at III.A.

whilst also aiming to prevent notifications with regard to ‘speculative’ mergers.¹⁸² The ICN best practices implicitly favour allowing notification filing on the basis of a signed letter of intent, which would allow notification before the proposed merger had become public. The BIAC/ICC and MSG best practices share this view, whereas the OECD merger recommendation is too vague on this point to offer guidance.¹⁸³ Nonetheless, where jurisdictions continue to require a definitive merger agreement, the ICN best practices recommend that parties should be allowed to enter into pre-notification consultations with the antitrust authority.¹⁸⁴ A secondary issue regarding notification timing, is whether jurisdictions should impose deadlines for notification after the trigger point has occurred. Whilst there is the general and obvious point that deadlines should allow merging parties a ‘reasonable time’ for compiling the relevant information and submitting the notification,¹⁸⁵ there is a consensus against the imposition of notification deadlines in jurisdictions that suspend the merger transaction pending merger review.¹⁸⁶ The clear rationale is that there is sufficient impetus for merging parties to notify as quickly as possible when jurisdictions prohibit the conclusion of the merger pending review, without the need to impose notification deadlines. The ICN implementation survey highlights a wide divergence between the 53 respondents with regard to triggering events, with 10 jurisdictions requiring the parties to conclude a definitive agreement pre-notification. 12 jurisdictions allow

¹⁸² *Ibid.* at III.A: Comment 1.

¹⁸³ The BIAC/ICC best practices, *op. cit.* note 134, at 2.1.3.1 – 2.1.3.4, the MSG best practices, *op.cit.* note 132, at Part I(6), and the OECD merger recommendation, *op. cit.* note 142, at I.A.1.2(5).

¹⁸⁴ ICN recommended practices, *op. cit.* note 141, at III.A: Comment 4.

¹⁸⁵ *Ibid.* at III.C.

¹⁸⁶ *Ibid.* at III.B. Also see the MSG best practices, *op.cit.* note 132, at I(7).

notification upon evidence of a good faith intent to consummate the merger, and 13 jurisdictions have very flexible notification triggers.¹⁸⁷ This likely highlights the continuing need for further convergence efforts in this area.

d) The information requirements, or so-called ‘form filing requirements’, in a notification have been the subject of harmonisation efforts for many years, with attempts having been made to achieve consensus upon the type and amount of information required by jurisdictions. There have been ambitious attempts to produce a common filing form, spurred on by recommendations in the influential OECD Whish/Wood Report in 1994.¹⁸⁸ Whilst recommending the creation of ‘one or two model filing forms, which request common information in a single format, and which use different country annexes as appropriate’,¹⁸⁹ the Whish/Wood Report highlighted some of the difficulties of such an undertaking by stating ‘the notification form and the timetable in themselves are a reflection of the substantive criteria by reference to which mergers are judged’.¹⁹⁰ Hence the implication is that harmonising procedural requirements, such as the information required in pre-merger notification, is often very difficult without accompanying harmonisation, or at least convergence of the substantive legal tests involved. The United Kingdom, France and Germany produced a voluntary common filing form in September 1997, to be used when a merger would be subject to review in two

¹⁸⁷ *Op. cit.* at note 167, at RP III: Timing of Notification.

¹⁸⁸ R. Whish & D. Wood, *Merger cases in the real world – a study of merger control procedures*, (Paris, OECD, 1994).

¹⁸⁹ *Ibid.* at p.108.

¹⁹⁰ *Ibid.* at p.109.

or more of the jurisdictions.¹⁹¹ The OECD also produced a somewhat vague template notification form in February 1999,¹⁹² although it failed to be implemented by its relatively homogenous membership. In spite of these apparent developments, common notification forms appear destined to failure unless they are built upon substantive convergence, and also receive the support of merging firms and their legal counsel, in the form of common usage. In the absence of substantive convergence, common filing forms are likely to require a level of information so as to satisfy the most onerous jurisdiction amongst the signatories. Furthermore, a common form may simply necessitate supplemental information to be provided at the notification stage to particular jurisdictions, following the submission of the common form (as the UK, French and German common form allows for). Hence, in the absence of substantive convergence, a common filing form simply masks over diverging legal tests and requirements, and the incentive remains for merging parties to notify jurisdictions individually where less information may be required, and direct contact is more efficient.¹⁹³

In light of the difficulty of agreeing upon an effective common filing form for pre-merger notification, it becomes more important to work towards convergence

¹⁹¹ See discussion in J.W. Rowley & A.N. Campbell 'Multi-jurisdictional merger review – is it time for a common form filing treaty?' at VI, in *Policy Directions for Global Merger Review, a Special Report by the Global Forum for Competition and Trade Policy*, published by the *Global Competition Review*, 1999. Also see the UK Office of Fair Trading guidance document, *Mergers: Procedural Guidance* (OFT 526), at paragraphs 3.26 and 4.30.

¹⁹² *OECD Report on notification of transnational mergers* (DAFFE/CLP(99)2/FINAL), 24 February 1999, specifically the appendix which provides a 'framework for a notification and report form for concentrations'.

¹⁹³ In spite of apparent support amongst many practitioners for a common notification filing form, many have expressed strong concern for such a form in the absence of substantive convergence. See J.W. Rowley & A.N. Campbell, *op. cit.* note 191, this stance was also representative of the views of practitioners interviewed in the course of independent research, see *supra* at note 57. Also see J. Wilson, *op. cit.* note 39 at p.296.

as to the type and detail of information that jurisdictions actually need from merging firms at the notification stage. After reviewing the notification requirements of many jurisdictions, the ICPAC final report observed that:

‘many of the forms used in various jurisdictions require the submission of extensive information about markets, competitors, customers and suppliers, and entry conditions in each of the markets in which the merging parties operates. This information is required even for transactions that pose few or no competition issues’.¹⁹⁴

A key objective of the best practices in this area is to minimise the notification burden for merging firms; jurisdictions should only require information in a notification that is necessary to determine whether the proposed merger would pose serious antitrust concerns meriting a more detailed review. If the information in the initial notification suggested to the reviewing authority that a more detailed review was merited, then obviously a more onerous level of information would subsequently be required from the parties.¹⁹⁵ The ICN recommended practices also suggest alternative notification formats, depending upon whether the merger transaction appears to represent ‘material competition concerns’,¹⁹⁶ this appears to suggest a possible way of significantly minimising the notification burden (and antitrust authority resources) for mergers that are clearly pro-competitive or competitively-neutral. Indeed the Form CO and Short Form used by DG Comp at the European Commission¹⁹⁷ exemplifies such an approach, although at least 17 ICN jurisdictions do not provide for such flexibility in notifications depending

¹⁹⁴ Chapter 3 of the ICPAC Final Report (February 2000).

¹⁹⁵ ICN recommended practices, *op. cit.* note 141, at V: Requirements for initial notification. Also see the MSG best practices, *op.cit.* note 132, at I(9) and (10).

¹⁹⁶ *Ibid.* at V.B: Comment 2.

¹⁹⁷ See Annex I and II of Commission Regulation (EC) No.802/2004 implementing Council Regulation (EC) No. 139/2004, [2004] O.J. L133/1.

upon the anticipated level of antitrust concern.¹⁹⁸ The ICPAC final report and multilateral best practice recommendations concerning ‘form-filing requirements’ are closely tied to recommendations regarding the merger review process in general, e.g. the recommended level of information at the notification stage is premised upon jurisdictions having a two-phase approach to merger review. Further multilateral recommendations concerning the merger investigation and analysis stage will be considered at 5.5.4 below.

e) Many jurisdictions require merging firms to pay filing fees upon the submission of a pre-merger notification. Jurisdictions vary widely regarding filing fees, with many having no such requirement,¹⁹⁹ but it is common practice among those imposing fees to adopt a progressive system whereby the fee depends upon the size of the merger.²⁰⁰ While filing fees tend to impose a small cost to the merging parties relative to the overall scale of the merger and the costs incurred through time delays resulting from multi-jurisdictional merger review,²⁰¹ it is

¹⁹⁸ ICN Implementation Report, *op. cit.* note 167, at RP V: Requirements for Initial Notification.

¹⁹⁹ As an example, the European Commission does not charge filing fees for merger notifications under Article 4 of the ECMR (Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] O.J. L24/1), also see Commission Regulation (EC) No.802/2004 implementing Council Regulation (EC) No. 139/2004, [2004] O.J. L133/1.

²⁰⁰ The UK and US are leading examples. Pre-merger notifications in the UK under the Enterprise Act 2002, and in the US in accordance with the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (§7A of the Clayton Act, 15 U.S.C 18a) both have a progressive system of fees. In the UK, there are three levels of filing fees depending upon the turnover of the acquired undertaking (see OFT Notice, *Merger fee information*, February 2006). There are also three levels of fees in the US, yet the categories are linked to the aggregate value of assets that would be held by the merged entity (see the instructions to the *Antitrust Improvements Act Notification and Report Form for Certain Mergers and Acquisitions*, available on the FTC website at <http://www.ftc.gov/bc/hsr/hsr.htm>).

²⁰¹ It has been suggested that notification filing fees on average account for 19% of the total external costs encountered by merging firms during multi-jurisdictional merger review, *ICN Report on the costs and burdens of multijurisdictional merger review*, November 2004, available at <http://www.internationalcompetitionnetwork.org/media/archive0611/costburd.pdf>. Also see the suggestion that, on average, external costs amount to 0.11% of the overall transaction value, Pricewaterhouse Coopers survey (commissioned by the International and American Bar Associations), *A tax on mergers? Surveying*

nonetheless a facet of pre-merger notification that has been considered by multilateral fora. The MSG best practices are unique in arguing against filing fees, suggesting that as merger review should ultimately benefit consumers, review costs are more appropriately 'borne by the public treasury'.²⁰² As the merger streamlining group was funded by leading international companies, this is not a surprising view. The ICN produced a report on merger notification filing fees in 2005²⁰³ and it is notable for its lack of recommended practices. The report is essentially a restatement of the diverging practices of ICN members in this area. Nonetheless, there is implicit recognition of the rationale for requiring filing fees in order to recoup part of the cost of undertaking a merger review, albeit in 2005 the majority of ICN members with a notification system did not charge a fee (although many were considering introducing one).²⁰⁴ The BIAC/ICC best practices likely provide the most accurate guide as to current international consensus regarding appropriate pre-merger notification merger filing fees. The best practices accept the legitimacy of filing fees, but detail a variety of safeguards to ensure that the fee only covers the cost of the merger review and is not an arbitrary means of levying charges upon large companies.²⁰⁵ These best practices also indicate that whilst fees can vary depending upon the size of the merger (presumably to reflect the complexity and cost of conducting a merger review), antitrust authorities' budgets and funding should not be directly linked to

the time and costs to business of multi-jurisdictional merger reviews, June 2003. PWC survey available at: <http://www.globalcompetitionforum.org/gcfpaper.htm>.

²⁰² MSG best practices, *op.cit.* note 132, at I(8).

²⁰³ *Merger Notification Filing Fees: A report of the International Competition Network*, April 2005. Available at: http://www.internationalcompetitionnetwork.org/media/archive0611/filing_fees_rpt.pdf.

²⁰⁴ 42 of 73 jurisdictions did not charge a filing fee in 2005 according to the ICN filing fees report, *ibid.* at p.2.

²⁰⁵ BIAC/ICC best practices, *op. cit.* note 134, at 2.1.5.6.

the sum received through pre-merger notifications.²⁰⁶ Given that the revenue from filing fees in 2003 was in excess of \$110 million in the US alone,²⁰⁷ there is potential to manipulate such a system to the detriment of the merging firms. There clearly exists a large divergence in international merger control as to whether jurisdictions impose filing fees, and if so, there are many different methods used to determine the amount due. Yet it is equally clear that the business community considers such fees to be ‘part of doing business’, and provided the fees are reasonable and antitrust authorities do not have a financial incentive to receive more notifications, it is arguable that there is no pressing need for extensive convergence or harmonisation in this area.

5.5.4 Multilateral efforts aimed at achieving convergence regarding merger investigation and analysis address both procedural and substantive issues. Recommendations seeking to bring about convergence regarding investigation and review seek to adhere to the principles discussed at 5.5.2, whilst also building upon best practices regarding notification discussed at 5.5.3, and further laying the foundation for recommendations regarding coordinated remedies, discussed at 5.5.5 below. Overlap between these different stages/issues is inevitable given the international convergence towards a coherent set of principles and practices for merger review. Additionally, many of the initiatives aimed at achieving substantive convergence are supported by antitrust advocacy and capacity

²⁰⁶ *Ibid.*

²⁰⁷ ICN filing fees report, *op. cit.* note 203, at Appendix D.

building programmes as well as general roundtable discussions run by the OECD, ICN and other multilateral fora, some of which were discussed *supra* at 4.4.

The procedural aspects of merger investigations and analyses primarily concern the length of merger review periods and whether there are strict deadlines, although a key distinction between merger control regimes, relevant to this discussion, is whether a one or two phase review process is adopted. The implementation of several of the guiding principles, namely procedural fairness, transparency and efficient, timely and effective review, are also relevant considerations. The best practices generally recommend that merger control regimes adopt a two-phase merger review process, with reviews entering the second phase if there are antitrust concerns regarding the merger at the end of an initial investigative stage.²⁰⁸ The adoption of a two-phase process has many benefits, particularly for the merging parties, as the ‘form-filing requirements’ at the notification stage can be less burdensome because further information can be sought at the beginning of the second phase if necessary.²⁰⁹ Indeed it appears that on average only 10% of notified mergers tend to progress to a second phase review, although the percentage is 4% in the US.²¹⁰ The end of the first phase also

²⁰⁸ See the BIAC/ICC best practices, *op. cit.* note 134, at 2.1.5.1, the MSG best practices, *op.cit.* note 132, at I(7), and the ICN recommended practices, *op. cit.* note 141, at IV: B.

²⁰⁹ The US second request has an international reputation for being extraordinarily burdensome, see comments by W.J. Baer before the US Antitrust Modernization Commission on 17 November 2005 (http://www.amc.gov/commission_hearings/merger_enforcement.htm). Although note that the FTC and DOJ have implemented reforms to reduce the burden of second requests, see the FTC document, *Reforms to the merger review process*, announced on 16 February 2006 by D.P. Majoras, Chairman of the FTC, available at <http://www.ftc.gov/os/2006/02/mergerreviewprocess.pdf>. Also see N.R. Koberstein and J.J. Hegarty, ‘US Antitrust Law: Enforcement of Laws Governing Mergers and Acquisitions’ [2003] 2 *Comp Law J* 361, where they state that second requests are ‘extraordinarily burdensome’, at 366.

²¹⁰ See the ICN filing fees report, *op. cit.* note 203, at Appendix D.

presents an opportunity to ensure that there is adequate procedural fairness by affording the merging parties the right to be heard. Perhaps the most advantageous aspect of a two phase review process is that many pro-competitive and competitively-neutral mergers should be cleared at the end of phase one, without being subjected to the significant burden of a full merger review, hence this would appear to be 90% of notified transactions, on average. In spite of the convergence upon a two phase process for merger review, the ICN implementation survey identified 13 jurisdictions that currently adopt a one phase merger review process.²¹¹ The divergence has obvious implications for the ability of antitrust authorities to cooperate and coordinate investigations in multi-jurisdictional reviews. The ICN best practices do not state what the length of merger reviews should be, but recommend that those jurisdictions adopting a two-stage review process should complete the first phase review after a specified and transparent period, and the second phase should be completed in a ‘determinable time frame’.²¹² The BIAC/ICC best practices are more explicit and recommend that the first phase of merger review should ‘conclude within 30 days of the initial filing’,²¹³ and there should be a ‘maximum phase II review period of 4 months’.²¹⁴ The MSG best practices mirror these recommendations and also suggest allowing parties to ‘stop the clock’ in merger review.²¹⁵ In spite of the apparent general consensus, the ICN implementation survey identified five jurisdictions whereby the initial phase of merger review lasted for longer than six weeks (which is

²¹¹ ICN Implementation Report, *op. cit.* note 167, at RP IV: Review Periods.

²¹² ICN recommended practices, *op. cit.* note 141, at IV: C and D, and VI: D.

²¹³ BIAC/ICC best practices, *op. cit.* note 134, at 2.1.5.2(2).

²¹⁴ *Ibid.* at 2.1.5.2(3).

²¹⁵ MSG best practices, *op.cit.* note 132, at I(13)-(16).

comparable to the 30 day recommendation, assuming the ‘days’ are ‘working days’ as is normally the case), and identified at least three jurisdictions where it was not possible to complete a merger review, involving a second phase, within 6 months from the date of notification.²¹⁶ These best practices highlight that there is a growing international convergence upon reasonable time frames for the first and second phases of merger review, but a lot of divergence nonetheless exists.

The substantive aspects of merger investigations and analyses are unlikely to affect the ability of antitrust authorities to engage in basic cooperation and coordination in multi-jurisdictional merger review, yet extensive cooperation regarding assessment of relevant markets and competitive harm and will not be possible without substantive convergence being achieved on these issues. Substantive convergence is crucial to diminish the risk of conflict in international merger control, and the primary objective of the international antitrust dialogue is in jeopardy unless there is progress towards substantive convergence. The multilateral efforts at convergence in this area have mainly focused upon opening up a multilateral dialogue on substantive issues affecting the investigation and analysis stage of merger review, hence promoting convergence through discussion and antitrust advocacy, rather than prescribed sets of best practices. The ICN merger working group²¹⁷ and OECD roundtable discussions²¹⁸ have focused on

²¹⁶ *Ibid.* note 211.

²¹⁷ See the *ICN Merger Guidelines Workbook*, April 2006, available at: http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/ICNMergerGuidelinesWorkbook.pdf.

²¹⁸ See the OECD Roundtable on Competition Policy, *Substantive Criteria Used for the Assessment of Mergers*, 11 February 2003 (DAFFE/COMP(2003)5). Available at: <http://www.oecd.org/dataoecd/54/3/2500227.pdf>.

issues such as investigative techniques (role of the counterfactual, and measures of concentration in the market), conceptual thinking (including role of efficiencies and theories of competitive harm), and assessment of respective merits of the differing legal tests for merger review (i.e. the dominance test, significant impediment to effective competition test, the substantial lessening of competition test, and variations thereof, possibly including a public interest test). While the multilateral activities in this area appear somewhat limited, convergence on the substantive issues is undoubtedly occurring at an international level, as evinced by the discussion of the EC – US bilateral relationship *supra* at 5.4. Furthermore, antitrust advocacy is assisting in ensuring that developing antitrust authorities are making use of the examples provided by the mature authorities, taking the experience and expertise of the latter into account when drafting and applying their own embryonic regimes.²¹⁹ In any case, it is highly unlikely that convergence of substantive issues, to the point of harmonisation, is necessary in order to ensure that international merger control conforms with the primary objective. To recommend significant international convergence in all facets of merger control would surely move beyond the identified objective of supporting and supplementing trade liberalisation, and drift towards the more audacious objective of an international merger control regime, which several commentators support.²²⁰

²¹⁹ See discussion *supra* at 4.3, 4.4.3, and 4.4.4.

²²⁰ See discussion in, *inter alia*, J. Wilson, *op. cit.* note 39.

In light of remaining divergence between jurisdictions regarding procedural matters in merger review (apparent from the foregoing discussion and 5.5.3), it is perhaps clear as to why cooperation and coordination of concurrent merger reviews is only likely to proceed on a bilateral basis between comparable authorities. Detailed coordination and cooperation in merger review is far more difficult to undertake at a multilateral than bilateral level. Significantly, there are also likely to be ‘diminishing returns’ for antitrust authorities engaging in multilateral cooperation regarding concurrent merger reviews.²²¹ Cooperation at a bilateral level between comparable antitrust authorities, conducting concurrent reviews of the same transaction, could produce many direct benefits for the reviewing authorities, such as: improving information gathering; developing a better understanding of the transaction and its effects upon the market (as well as developing a better understanding of a counterpart’s view of substantive issues); and identifying suitable remedies. Nonetheless, there are unlikely to be additional benefits reaped with each additional authority engaging in the cooperation and coordination, and as multilateral cooperation would be more resource intensive, the rationale for such idealist levels of cooperation, from an antitrust authority’s perspective at least, soon disappears. Cases ostensibly involving cooperation between three and four different antitrust authorities were discussed *supra* at 5.4, yet the discussion highlighted that extensive cooperation and coordination is only likely to take place at a bilateral level. Trilateral and multilateral cooperation was either at a very basic level (e.g. early notification of the merger investigation from

²²¹ See discussion above at 5.4.5, the term ‘diminishing returns’ was used in this context by an antitrust official during an interview as part of independent research, see note 57.

one authority to the other and some three-way conference calls) or was extensive bilateral cooperation, supplemented by further jurisdictions adopting a deferential approach to multi-jurisdictional merger review.

It is perhaps noteworthy at this stage that there is no detailed guidance or best practice recommendations dealing with the circumstances of when a reviewing authority should enter into extensive cooperation/coordination with counterparts conducting a concurrent merger review. There are general principles outlined in multilateral best practices as to considerations during cooperation and coordination,²²² and there are certain specified cooperation triggers, and types of cooperation and coordination outlined in many bilateral antitrust cooperation agreements.²²³ However, there are no detailed guidelines specifying when antitrust authorities should engage in bilateral or multilateral cooperation/coordination in respect of a multi-jurisdiction merger review, and what factors should be taken into account when reaching such a decision.

5.5.5 The multilateral efforts aimed at achieving convergence with regard to merger remedies take a similar form to efforts regarding merger investigation and analysis in that the issue of merger remedies has also been the subject of OECD roundtable discussions.²²⁴ There appears to be an international consensus on certain key principles regarding the proper role of remedies in merger control,

²²² As an example see the ICN recommended practices, *op. cit.* note 141, at X: Interagency Coordination.

²²³ See discussion *supra* in chapter 3.

²²⁴ See the OECD Roundtable on Competition Policy, *Merger Remedies*, 23 December 2004 (DAF/COMP(2004)21). Available at: <http://www.oecd.org/dataoecd/61/45/34305995.pdf>.

these key principles have been identified by the OECD roundtable discussions as well as multilateral best practices. The OECD and ICN key principles²²⁵ regarding merger remedies are consistent, albeit the OECD principles are espoused with greater clarity and detail than the ICN principles, perhaps surprising given the ICN's more detailed work in other areas of merger control. Although it should be remembered that the OECD membership has greater commonality, and thus it may be more able to reach a consensus on certain issues than the ICN. The OECD principles initially consider the proper role of remedies, and state that they should only be considered by the reviewing authority once a 'threat to competition has been identified'.²²⁶ Furthermore, the roundtable discussion suggested that the principle of proportionality should be applied, such that remedies should be the 'least restrictive means to effectively eliminate' the identified antitrust concerns.²²⁷ Additionally, remedies should not be used to advance non-antitrust concerns, such as furthering industrial policy considerations, and antitrust authorities must have a flexible and creative approach in 'devising' remedies.²²⁸ The consensus within the OECD regarding the unsuitability of using remedies to further non-antitrust policies is significant as divergence on this point would make cooperation between reviewing authorities very difficult. However, it would likely be of greater significance to have such a principle endorsed via the ICN, where there is a far more diverse membership. The OECD roundtable also acknowledges that antitrust authorities generally prefer imposing structural, rather than

²²⁵ ICN recommended practices, *op. cit.* note 141, at XI: Remedies.

²²⁶ OECD Roundtable on *Merger Remedies*, *op. cit.* note 224, at the Executive Summary at (1)(i).

²²⁷ *Ibid.* at (1)(ii).

²²⁸ *Ibid.* at (1)(iii) and (iv).

behavioural remedies, but recommends that the latter type should nonetheless be considered, albeit regularly reviewed, if appropriate.²²⁹ Finally the roundtable emphasises the importance of antitrust authorities coordinating remedies in multi-jurisdictional merger review, even in spite of any procedural and/or substantive differences, so to avoid inconsistencies and possible conflict.²³⁰

The principles regarding merger remedies within the ICN recommended practices complement the OECD principles, and appear more concerned with the process of identifying and implementing suitable remedies. Initially the principles highlight the need to ensure the causal connection between the identified antitrust concern and the remedy that is being proposed by the antitrust authority, but then address the issue of transparency and procedural fairness, so as to facilitate discussion with the merging parties when devising suitable remedies.²³¹ Regarding implementation of remedies, the ICN principles suggest that remedies should not require ‘significant administrative intervention’ post-merger,²³² which would suggest a favouring of structural remedies as acknowledged within the OECD principles. The ICN principles also highlight the need for an effective monitoring mechanism of compliance post-merger, and suggest that antitrust authorities should have appropriate resources and powers for the monitoring and possible alteration of remedies, as well as the capability to enforce the remedies through

²²⁹ *Ibid.* at (2) – (5).

²³⁰ *Ibid.* at (6).

²³¹ ICN recommended practices, *op. cit.* note 141, at XI.A and B.

²³² *Ibid.* at XI.C: Comment 1.

the judicial process.²³³ As with the OECD principles, the ICN principles recommend cooperation regarding remedies between authorities conducting concurrent reviews of the same transaction, so as to avoid inconsistent results. Furthermore, the ICN principles propose that reviewing authorities coordinate post-merger compliance with measures such as common trustees and harmonised reporting requirements – which would be in the interests of effective and efficient enforcement as well as being in the parties’ best interests.²³⁴

5.6 Assessing the international merger control framework against the primary objective

5.6.1 In assessing whether the current merger control framework unduly hinders the pursuit of the primary objective, i.e. to support and supplement trade liberalisation, (and thereby creates something of a paradox for international merger control) it is beneficial, and indeed crucial, to consider the impact of the current framework upon merging parties. As discussed at 5.2.1, it is unnecessary to demonstrate that the current framework is actually inhibiting M&A, but sufficient that international merger control could operate more effectively and efficiently for the benefit of merging parties. The key concern must be that international merger control is currently imposing unduly burdensome requirements upon pro-competitive and competitively-neutral M&As, perhaps by stifling or delaying such mergers, thereby hindering the pursuit of the primary

²³³ *Ibid.* at XI.D.

²³⁴ *Ibid.* at X.E.

objective. Thus, if the international merger control framework could be streamlined to be more effective and efficient, for the benefit of all but anti-competitive mergers, then it would better facilitate the primary objective. Kolasky has commented that:

‘As cross-border trade and investment grows, and as more and more jurisdictions enact antitrust laws, it becomes all the more critical that antitrust agencies impose no unnecessary bureaucratic roadblocks on the merger process and that antitrust authorities worldwide continue to achieve greater convergence’.²³⁵

The elements of multi-jurisdictional merger review, in the current framework, that impose a particular burden upon the merging parties are likely implicit from the discussion *supra* at 5.5. Nonetheless it is helpful to elucidate upon some of the key issues at this point.

5.6.2 The burden imposed upon merging parties as a result of multi-jurisdictional merger review results in additional ‘costs’ being borne by the parties in terms of: working time devoted to gaining antitrust approval; direct pecuniary costs incurred; and crucially the implications of the delay and legal uncertainty arising from the review process (i.e. costs resulting from lost merger synergies arising as a result of the delay, particularly relevant when jurisdictions prohibit ‘closing’ pending a completed merger review).²³⁶ Costs associated with each of these categories will vary depending upon the stage of the merger review process. Costs tend to heighten at particular points in the process, such as at the actual point of

²³⁵ Speech by W. Kolasky, *op. cit.* note 30.

²³⁶ See the Pricewaterhouse Coopers survey and ICN report on the costs and burdens of multi-jurisdictional merger review, *op. cit.* note 201.

submitting pre-merger notification, and if a second phase merger investigation is initiated, requiring further information and market analysis from the parties by the antitrust authorities. The seminal Pricewaterhouse Coopers survey on the costs involved in multi-jurisdictional merger review ('the PWC survey'), suggested that the burden imposed upon firms represents 'a relatively small, [0.11%] regressive tax on mergers', and noted that 'while merger review costs do represent a substantial proportion of the overall costs of a merger, they do not amount to a significant tax on the overall value of deals.'²³⁷ Nonetheless, as Rowley and Campbell have argued:

'Some officials and [practitioners] have focused on survey responses which indicated that merger review costs were a small fraction of deal value and that they have not deterred subsequent transactions. This misses the point: unnecessary inefficiency is a serious policy concern precisely because the costs are borne by businesses that have no alternative to avoid such regulatory processes'.²³⁸

'Unnecessary inefficiency' suggests the existence of an unduly burdensome international merger control framework that would likely hinder those transactions capable of achieving the benefits sought by the primary objective.

In its November 2004 report, the ICN sought to build upon the PWC survey by identifying four categories of 'unnecessary costs' that merging firms encounter in multi-jurisdictional merger review.²³⁹ The four categories are:

'i) ascertaining notification and filing requirements;

²³⁷ *Op. cit.* note 201, at p.42.

²³⁸ J.W. Rowley and A.N. Campbell, 'A Comment on the Estimated Costs of Multi-Jurisdictional Merger Reviews' September 2003 *The Antitrust Source* at p.3.

²³⁹ ICN report on the costs and burdens of multi-jurisdictional merger review, *op. cit.* note 201, at pp.2, 9 – 18.

- ii) complying with notification requirements for transactions lacking an appreciable nexus to the notified jurisdiction;
- iii) complying with unduly burdensome filing requirements; and
- iv) unnecessary delays in the merger filing and review process.’

As is clear from discussion *supra* at 5.5, multilateral initiatives are attempting to address each of these issues (and other costs not stated). In order to counter the issues at i), the ICN has *inter alia*, encouraged the implementation of: the principle of transparency; the use of objective pre-merger notification thresholds; and pre-notification contact between the merging parties and reviewing authorities on an informal basis. In response to ii), there are ongoing efforts aimed at achieving convergence on notification thresholds, including ensuring that mergers have a sufficiently proximate nexus to the reviewing jurisdiction. The growing consensus upon a two-phase merger review process should reduce the information required at the pre-merger notification stage, which alongside convergence on the type of information required at the form filing stage should reduce the ‘unnecessary costs’ of ii) and iii). The ICN has also encouraged flexibility with regards to the ‘form-filing’ requirements of pre-merger notification, and this should also address the concerns regarding burdensome filing requirements. Convergence regarding procedural time limits, and extensive cooperation, including information-sharing between antitrust authorities, should alleviate the implications of unnecessary delays in the review process.

In addition to the efforts briefly discussed above, it must be considered whether i) and ii) really are significant ‘unnecessary costs’ for merging parties. Many

practitioners suggest that the costs incurred while determining the jurisdictions where notification is required, should not be exaggerated and is manageable by most experienced law firms.²⁴⁰ Law firms must establish and maintain international links with antitrust authorities and ‘local’ counsel in order to offer antitrust expertise to clients, and would generally keep track of notification filing requirements as part of this process/service. Notification requirements and thresholds are widely known and discussed openly in practitioner-orientated publications, irrespective of whether a jurisdiction adopts objective or subjective thresholds.²⁴¹ Many firms maintain a database with up-to-date notes on merger control regimes worldwide. Obviously the cost of maintaining such a networking ‘service’, will directly or indirectly be passed onto clients, i.e. the merging firms, yet such links are unlikely to become redundant even if there were harmonised notification thresholds. Legal counsel consider it important to build a rapport with antitrust officials, and maintaining links with local counsel can be important to help address translation requirements and for other practical reasons. In short, the cost of ‘ascertaining notification and filing requirements’ in multi-jurisdictional merger review is clearly an ‘unnecessary cost’. Nonetheless, the actual costs incurred may not be as significant as first thought, in light of the proactive response of law firms in addressing this issue in the course of maintaining relationships and links with many antitrust authorities and local counsel. Regarding the issue of ‘complying with notification requirements for transactions lacking an appreciable nexus to the notified jurisdiction’ at ii) above, there are

²⁴⁰ This was a commonly held view and expressed to the author in the course of interviews during independent empirical-based research, see note 57 *supra*. But see, e.g., comments made by Baer (*infra*).

²⁴¹ *Ibid.* and see e.g. the *Global Competition Review, Antitrust Source* and in-house law firm publications.

also clear signs that most experienced law firms ‘manage’ this issue. There is strong anecdotal evidence to suggest some form of risk assessment takes place in determining where pre-merger notifications are submitted,²⁴² this could clearly result in not notifying jurisdictions unless parties have ‘assets on the ground’, irrespective of whether notification is legally required. There are many commercial considerations involved in determining where to submit pre-merger notifications, it is not limited to being a legal assessment.²⁴³ In short, jurisdictions with notification requirements for mergers which lack a proximate nexus clearly impose an unnecessary cost upon merging parties, but it cannot be assumed that all M&A notify every jurisdiction where filing is required. Achieving convergence on this issue however, to the point where filing could only be required if a sufficiently proximate nexus existed, would remove a great deal of the risk in such a ‘risk assessment’.

In addition to the ‘unnecessary costs’ identified by the ICN, which focus upon pre-merger notification, many other features of the current international merger control framework impose a significant burden upon the merging parties. Costs incurred as a result of substantive divergence are considered to be particularly burdensome, thus requiring different analyses to be undertaken on the part of the merging parties, and increasing the likelihood of divergent (and possibly

²⁴² Ibid. and also note that in spite of their being c.73 jurisdictions with *ex ante* pre-merger notification systems (see *supra* at 5.3.1) and many with low notification thresholds, large multinational M&As only submit eight pre-merger filings, on average (see the PWC survey, *op. cit.* note 201).

²⁴³ Note that there can also be strategic reasons for the timing and location of pre-merger filings. Such a strategy, which determines the timing and order of multi-jurisdictional pre-merger notifications according to the perceived best interests, although such a strategy has its pitfalls, and is commonly advised against, see discussion *supra* at 5.4.3 regarding the *Solvay/Ausimont* case.

conflicting) outcomes by reviewing authorities.²⁴⁴ A leading antitrust practitioner, William Baer, has commented:

‘It is tough enough today determining where, when and how a transaction must be notified in the roughly sixty nations with some notice requirement. But it is much worse to have fundamental differences in the analytics and the outcome. That uncertainty potentially discourages otherwise pro-competitive and efficiency enhancing M&A activity’.²⁴⁵

In addition to the particular features of multi-jurisdictional merger review highlighted above, and in light of the discussion throughout this chapter, it is apparent that many facets of the current international merger control framework operate with ‘unnecessary inefficiency’,²⁴⁶ and therefore impose unnecessary or unduly burdensome requirements upon merging parties. Thus international merger control is in a paradoxical position, it aims to support and supplement trade liberalisation, yet it inhibits that objective by imposing unduly burdensome requirements upon international M&As.

5.6.3 The most obvious and often recommended solution to the deficiencies of the current international merger control framework, is to create an international merger control regime (IMCR) of a supranational nature, which would complement the current framework. The exact form of the IMCR varies among its proponents, but there are generally three modes into which most proposals would fit. The first mode focuses upon pre-merger notification and would harmonise

²⁴⁴ These costs were not identified by the ICN in the list provided at 5.6.2, as they are not considered to be ‘unnecessary costs’.

²⁴⁵ Testimony of W.J. Baer before the US Antitrust Modernization Commission, 17 November 2005, available at http://www.amc.gov/commission_hearings/merger_enforcement.htm.

²⁴⁶ *Op. cit.* note 238.

procedural rules at the notification stage of merger review, and place some of the operational responsibilities under an international body. This mode is often thought of as a common pre-merger notification ‘clearing house’,²⁴⁷ and national authorities would retain investigative and substantive merger review responsibilities. The second mode for an IMCR involves a harmonised set of substantive antitrust principles to which national antitrust regimes must adhere or converge towards. The second mode also generally, but not universally, involves the proposal to have a dispute settlement mechanism to deal with jurisdictional conflict. Most advocates of the second mode tend to suggest the WTO as the most appropriate forum given its experience and recognition as an impartial dispute settlement body.²⁴⁸ The third mode is the most unlikely to come into being, and is essentially a combination of the first and second modes, combining the substantive harmonisation of key principles, with a common pre-merger

²⁴⁷ Eleanor Fox has consistently advocated in favour of harmonisation at the pre-merger notification stage, in the form of a ‘disinterested common clearinghouse’, although it would perhaps be wrong to describe the proposed international body as a supranational entity. See the testimony of E.M. Fox before the US Antitrust Modernization Commission on 15 February 2006, available at: http://www.amc.gov/commission_hearings/international_antitrust.htm. Also see Annex 1-A of the ICPAC Final Report (2000): Separate Statement of Advisory Committee Member Eleanor M. Fox, as well as footnote 24 of chapter 3, available at: <http://www.usdoj.gov/atr/icpac/icpac.htm>. Additionally, Andre Fiebig’s proposals essentially fall into the first mode, by suggesting a ‘Premerger Office’ be created and operate under the auspices of the World Trade Organisation. Fiebig proposes that the WTO Premerger Office would act as a filter to avoid antitrust authorities seizing jurisdiction without a sufficiently proximate nexus to the merger. It would operate on the basis of voluntary notifications by merging parties, which would identify the jurisdictions requiring notification, after which the Premerger Office would remove the notification requirement for jurisdictions without a proximate nexus. See A. Fiebig, ‘A Role for the WTO in International Merger Control’ (2000) 20 *Northwestern Journal of International Law & Business* 234.

²⁴⁸ See e.g. B. Zanettin, *op. cit.* note 46, and M.M. Dabbah, *op. cit.* note 90. In chapter 10, Dabbah argues in favour of a Global Antitrust Framework (GAF) that would eventually include a dispute settlement mechanism, although significantly this would review differences between signatories in general terms, but not engage in case-by-case disputes. Also see the proposals by Martyn Taylor for the conclusion of a plurilateral antitrust agreement under the auspices of the WTO, which would initially be of a soft law nature and encourage convergence in key areas (as opposed to complete harmonisation), in M. Taylor, *International Competition Law: A New Dimension for the WTO?*, (Cambridge, Cambridge University Press, 2006).

notification system, both under the auspices of a supranational institutional framework.²⁴⁹

It is unnecessary to engage in a detailed critique of the various IMCR proposals as the arguments are longstanding and have been thoroughly discussed elsewhere.²⁵⁰

It is sufficient to consider whether an IMCR would reform international merger control so as to further advance the primary objective. Proponents of an IMCR present convincing arguments as to why global consumer welfare would be advanced with the implementation of such harmonisation. Nonetheless it is far from certain that an IMCR, particularly the third mode, would reduce the burden of multi-jurisdictional merger review for merging parties. It is equally uncertain therefore, and perhaps doubtful, whether an IMCR would move international merger control any closer to conforming to the primary objective. Widely diverging political views on the acceptable aims and objectives for antitrust regimes have, when combined with other factors, derailed all previous attempts to agree upon a multilateral antitrust agreement. It is difficult to envisage the political willingness that would be necessary to bring about some of the more ambitious IMCR proposals at any point in the short or medium-term future, particularly as some proposals involve a clear transfer of sovereignty. The third mode would involve the largest transfer of competence from individual states to the IMCR, due to the creation of a supranational antitrust body.

²⁴⁹ For example, see the proposals of the ‘Munich Group’ for the creation of an International Antitrust Authority alongside an International Antitrust Code, ‘A Draft International Antitrust Code as a GATT-MTO Plurilateral Trade Agreement’, 64 *Antitrust & Trade Reg. Rep.* (BNA) No.1628 (Special Supp. 19 August 1993), and commentary within J. Wilson, *op. cit.* note 39, at pp.253-258. Also see the proposals by J. Wilson, at chapter 8, for a ‘WTO Competition Office’ that would run parallel to the current international merger control framework; receiving pre-merger notifications and assist in the identification of a ‘lead authority’ and settle disputes.

²⁵⁰ See e.g. J. Wilson, *op. cit.* note 39.

There are many difficulties encountered by IMCR proposals in addition to the lack of political support. Crucially an IMCR would need to secure the confidence of national/regional antitrust authorities, in addition to the confidence of merging parties themselves. Confidence would stem from: the IMCR having sufficient expertise; staff with adequate experience; and there would have to be a transparent, predictable and efficient division of competence identifying when national/regional merger control regimes would operate independently, and when the IMCR would operate. These considerations are relevant to all three modes identified, although they become more pressing as the role of the IMCR becomes more substantive. A particular difficulty that the second and third modes would likely encounter, is the need to ensure confidentiality of commercial information following a pre-merger notification by merging parties. Independent research highlighted that a key concern on the part of merging parties would be that an IMCR in the form of (or including) a common notification system would likely require a large amount of information at the pre-notification stage, in order to satisfy the notification requirements of multiple jurisdictions.²⁵¹ Furthermore, the merging parties would likely have less control over that information than under the current decentralised framework, where parties retain the ability to decide where to notify, and whether the information can be shared with other jurisdictions (i.e. the confidentiality waiver).

²⁵¹ *Op. cit* note 57.

The multilateral fora involved in international merger control (i.e. the ICN and OECD) appear to have achieved a degree of convergence upon key principles for merger control as advocated by the second form of IMCR. Nonetheless these principles are not legally binding upon jurisdictions and are not subject to a dispute settlement mechanism in the event of conflict. The stalled efforts at negotiating a basic WTO agreement on competition law would present the most likely route for furthering proposals in the form of the second mode of IMCR. It is equally likely however, that the substantive principles applicable to merger control will remain on a ‘soft law’ basis for the foreseeable future – advanced through the OECD and ICN. Advocates in favour of the first mode of a possible IMCR, notably Eleanor Fox, received a recent boost when the US Antitrust Modernization Commission endorsed a ‘common premerger notification system across countries that would reduce the burden associated with multiple filings’ within its final recommendations to the US Congress.²⁵² The AMC suggested there should be ‘an opportunity for companies to provide a single, simple initial submission for use by all jurisdictions’ and stated that ‘further steps toward a common system would be valuable and should be feasible’. It suggested that the FTC and DOJ should evaluate the potential for such a system and report promptly to the US congress.²⁵³ In order to have a common pre-notification system, there must be extensive convergence between jurisdictions on underlying procedural and substantive issues, so that the information supplied in the common notification is sufficient for each jurisdiction to carry out a preliminary

²⁵² Antitrust Modernization Commission Final Report (April 2007) at p.217, available at: www.amc.gov.

²⁵³ *Ibid.*

investigation.²⁵⁴ Paradoxically, radical proposals for a common pre-merger notification ‘clearinghouse’, which assumes the notification responsibilities of national merger control regime, is politically infeasible, and yet it is likely that only a radical proposal would actually produce benefits for the merging parties, and advance the primary objective. A common clearinghouse is more likely to be politically acceptable if it provides for voluntary notification, allows national antitrust authorities to seek further information if necessary, and enables jurisdictions to conduct merger reviews when important ‘national interests’ are affected. There is a clear danger that a weakened form of the common clearinghouse would act as a further layer of bureaucracy for merging parties and may have the same fate as that of the common British, French and German filing form.²⁵⁵ Hence, while this form of IMCR appears to offer efficiencies for the merging parties and reviewing jurisdictions, if a weak form were to be implemented it could actually offer merging parties an inefficient and ineffective means of achieving merger clearance within the respective jurisdictions.

There is the additional question of whether a dispute settlement mechanism, in the form of that often suggested in the second mode of IMCR, is necessary in order to ensure international merger control operates to advance the primary objective. It is axiomatic that a conflict between jurisdictions where a particular merger is cleared by at least one and prohibited by another, as in the *GE/Honeywell* case,²⁵⁶ represents the most severe form of system friction and inhibits M&A. The desire

²⁵⁴ See discussion *supra* at 5.5.3 and 5.5.4.

²⁵⁵ *Supra* at 5.5.3 (d).

²⁵⁶ *Op. cit.* note 1.

to minimise the risk of conflicting decisions underlines much of the bilateral and multilateral convergence efforts in this area. Nonetheless, it must be considered whether eliminating the risk of conflicting decisions, or merely minimising that risk is necessary in order to conform with the primary objective. Certainly, from the merging parties' perspective, a dispute settlement mechanism is unlikely to offer a practical means of overturning a prohibition decision and consummating the merger. Time delays in reaching the dispute settlement body (e.g. consider the lengthy appellate procedure from European Commission decisions) would likely lead to the abandonment of the transaction in any case, and the legal uncertainty that would stem from an additional appellate route could actually be detrimental to both merging and third parties. Hence, the value of decisions on specific cases would likely be limited to encouraging antitrust authorities to avoid conflicting decisions in the future. Arguably, this outcome is already being achieved by means of multilateral convergence efforts and peer review systems. If a dispute settlement mechanism were to become politically viable, it would likely be most effective in the form suggested by Taylor,²⁵⁷ whereby points of divergence are resolved by reference to international standards, but case-by-case reviews are not possible. Regarding conflicting decisions, unless a global standard is adopted for merger review, it is logical and legitimate for antitrust authorities to review mergers in accordance with the domestic legal standard, and on the basis of predicted effects (in an *ex ante* regime) within the particular jurisdiction. It is also imminently logical that different assessments, conducted by different bodies, on the basis of effects in different markets, may produce different results. Indeed the

²⁵⁷ *Op. cit.* note 248.

example of the FTC commissioners highlights that reasonable people can reasonably disagree when dealing with same facts, same laws and same market definitions.²⁵⁸ As long as merger reviews and any conflicting decisions are transparent and every effort had been made to avoid conflict, including flexibility when considering possible remedies, then the international merger control framework should be able to support and supplement trade liberalisation without the presence of a dispute settlement mechanism.

The various proposals for an IMCR are clearly not devoid of merit and offer possible solutions to the inefficiencies, risks, and burdens that are an inherent part of the current international merger control framework. Indeed, the former President of the German Bundeskartellamt, Dieter Wolf, stated that ‘I do not consider that the current co-existence of national merger control systems and bilateral agreements will in the long run be sufficient to adequately control the wave of transnational mega-mergers’.²⁵⁹ Hence, some form of an IMCR may offer a complementary dimension to the current framework. Yet it is clear that an IMCR is not the panacea that many commentators suggest, and proponents would have to overcome many political, legal and practical obstacles before an IMCR is feasible in any form. Furthermore, it cannot be assumed that the operation of such a regime would reduce the burden for merging firms, and advance the primary objective. Indeed many proposals would operate to further increase the legal

²⁵⁸ A point that has also been made in a speech by S. Scott, *op. cit.* note 44.

²⁵⁹ D. Wolf, ‘International Mergers’, in R. Zach (ed), *Towards WTO Competition Rules: Key Issues and Comments on the WTO Report (1998) on Trade and Competition*, (The Hague, Kluwer Law International, 1999).

uncertainty and overall burden for merging firms, particularly at the pre-merger notification stage.²⁶⁰ In the absence of an established common political objective necessitating an international merger control regime, it would be unjustified to bring about harmonisation by creating a supranational IMCR, particularly in the model of the third mode, when less radical and controversial multilateral proposals would offer a viable solution to the problems of the current framework.

5.6.4 There are compelling proposals of a different nature that seek to build upon the current level of bilateral and multilateral cooperation, which stops short of creating an IMCR. These proposals primarily seek to extend the concept of comity, discussed in chapter 2, to include work sharing models and deferential approaches to multi-jurisdictional merger review. Eleanor Fox has commented that:

‘Comity is a concept of reciprocal deference. It holds that one nation should defer to the law and rules (or dispute resolution) of another because, and where, the other has a greater interest; a greater claim of right...It is irrelevant that the outcome may not be the preferred one of the deferring country. Indeed, that is the point’.²⁶¹

Work sharing models would not necessarily fully adhere to the reciprocal deference approach outlined by Eleanor Fox, indeed there are many variants such as the deferential approach often adopted by the Canadian Competition Bureau, discussed *supra* at 5.4. Work sharing, which formed part of the recommendations within the ICPAC Final Report, would involve the identification of a ‘lead authority’ in each case involving multi-jurisdictional merger review. The proposal

²⁶⁰ See e.g. the Fiebig proposal, *op. cit.* note 247.

²⁶¹ E.M. Fox in testimony before the Antitrust Modernization Committee, 15 February 2006. Available at: www.amc.gov.

could be limited to providing a single point of contact for merging parties during the pre-merger notification stage, but would likely include the lead authority taking overall responsibility for conducting the substantive review of the proposed merger, while taking account of the interests of counterpart jurisdictions. A particular difficulty of such a system would be how to identify the lead authority, and while suggestions of deference to the ‘best-placed’ jurisdiction or the authority with the most substantial nexus to the transaction are indicative, it would be a very difficult determination in practice. There is also legitimate concern that smaller jurisdictions would tend to have a lesser connection to multinational mergers, and thus always be required to defer to larger antitrust jurisdictions such as the EC and US.²⁶²

Perhaps the most complex aspect of the work sharing model is whether it should include a commitment on the part of antitrust authorities to presumptive deferrals to the lead authority, which could bind authorities to follow the assessment and finding of the lead authority. The AMC suggests that ‘other compelling reasons’, presumably important national interests, could enable independent merger review and an opt-out from work-sharing, even under a principle of presumptive deferral.²⁶³ Nonetheless, there are obstacles to implementing an apparently modest proposal of work-sharing. Legislative changes to domestic merger control laws may be required to facilitate the principle of presumptive deferrals, given that

²⁶² See statement of R.W. Tritell, Assistant Director for International Antitrust, FTC, to the Antitrust Modernization Commission (AMC). Hearing on International Antitrust Issues, 15 February 2006. The concern was also reflected within the AMC Final Report at p.224. Available at: www.amc.gov.

²⁶³ *Op. cit.* note 252 at p.224.

antitrust officials have highlighted²⁶⁴ there is a legal obligation upon authorities to review the impact of M&A within their jurisdiction, and to take action to prevent and/or resolve any anti-competitive effects. It may be difficult to reconcile the two.²⁶⁵ Variations of the principle of presumptive deferral or enhanced comity would operate to further decrease, if not remove, the risk of conflicting decisions and hence further advance the primary objective. Yet there are significant obstacles to its implementation at both bilateral and multilateral levels, which are easily underestimated.

5.7 Conclusion

This chapter sought to focus upon the means of reviewing mergers and acquisitions in the international antitrust framework, and to evaluate the means of review against the primary objective of the international antitrust dialogue, as determined at the end of chapter 4. Initially, the beneficial effects stemming from M&A activity were highlighted, alongside the paradoxical position of international merger control if it were found to unduly inhibit all but the anti-competitive transactions. It was this potential paradox, and need for further research, which justified the decision to focus upon M&A at the exclusion of other types of commercial activity subject to antitrust scrutiny and intervention. In

²⁶⁴ See speeches by S. Scott, *op. cit.* note 44, and R.W. Tritell, *op. cit.* note 262.

²⁶⁵ The need for antitrust authorities to engage in an independent merger analysis that satisfies their legal obligations is perhaps highlighted by the *Impala* case (Case T-464/04 *Independent Music Publishers and Labels Association v. Commission* [2006] ECR II-2289), where a third party successfully appealed the European Commission's clearance of the Sony/BMG merger to the CFI, on the basis of an inadequate market analysis.

simplistic terms, with international M&A increasing in scale, and the number of merger control regimes increasing coupled with the predominant use of *ex ante* mandatory review mechanisms, there is a clear danger that the international merger control framework (in its decentralised form) imposes significant burdens upon merging parties.

A large part of the chapter engaged in a review of the current international merger control framework, analysing both its bilateral and multilateral dimensions. As with other parts of the thesis, research did not deal with intra-EC cooperation and convergence. The research identified very strong cooperative relationships between the EC and US antitrust authorities in particular, with good relations extending to the Canadian, Australian and New Zealand authorities also. Bilateral co-operation, and very limited examples of trilateral co-operation was also found to exist in particular cases between strong trading partners such as the US and Mexico.²⁶⁶ In general terms however, in spite of there being in excess of 80 merger control regimes, there is clearly a small clique of antitrust authorities between whom substantive case cooperation and co-ordination is possible. Even within this clique, substantive cooperation is unlikely to meaningfully extend beyond bilateral cooperation due to the diminishing returns for the antitrust authorities involved. Hence in transactions subject to multi-jurisdictional merger

²⁶⁶ In the course of independent research, *op. cit.* note 57, it is noteworthy that experienced practitioners including Professor Hawk suggested that close co-operation between antitrust authorities was possible in large part due to the personal relationships and trust that has established between authorities, and not necessarily linked to the mature or developing status of the authority involved. The ability to establish informal connections appears to mark out the relationship between the European Commission and US authorities in particular, and this is one area where the regular ICN meetings could informally engender more co-operation between a larger group of authorities in the future.

review, the merging parties may benefit (in terms of greater efficiency stemming from information exchanges and coordination of timing, as well as a diminishing risk of conflict) from the close cooperation between leading antitrust authorities, but this is unlikely to take place at a multilateral level and thus has inherent limitations when average multinational M&A file in eight jurisdictions.²⁶⁷

Discussion shifted focus away from case-by-case cooperation to assess the means by which multilateral cooperation and convergence efforts seek to minimise the impact of the decentralised system of merger control upon merging parties. Research focused upon the means by which antitrust authorities assert initial jurisdiction in merger review, i.e. notification thresholds, in light of compelling arguments that the key problem for merging parties, and hence the likely key inhibitor to merger control advancing the primary objective, is actually the number of authorities reviewing a particular transaction, and not the differences between reviewing regimes. Discussion identified key principles and best practices that have been developed by multilateral fora and NGOs with regard to all stages of merger control, although considered pre-merger notification in most depth. At each stage of this discussion, evidence pertinent to the implementation and thus effectiveness of the best practices was considered, and the burden upon merging parties at each stage of the review process was also highlighted. In the latter stages of the chapter, the overall burden, including ‘unnecessary costs’, upon merging parties was considered and linked into preliminary conclusions as to whether the current international merger control framework does in fact unduly

²⁶⁷ PWC Survey, *op. cit.* note 201.

inhibit M&A activity and thereby frustrate the primary objective. It is argued that the current framework occupies a paradoxical position by not operating as efficiently and effectively as possible, exemplified by the limitations upon bilateral and multilateral cooperation. Nonetheless, the research does not suggest that a supranational international merger control regime is an appropriate, viable or likely solution to the deficiencies of the current framework, in contrast to the work of many fellow researchers. The most ambitious form of IMCR neither looks politically feasible or indeed a solution to the unduly burdensome nature of the current framework, it is arguable that an IMCR would only serve to further frustrate the primary objective. The chapter finally considered alternative, and more modest international merger control proposals that have been advanced elsewhere, the thesis conclusion and recommendations will touch on some of these issues further.

Conclusions and recommendations

6.1 The three faces of international antitrust

6.1.1 The three faces of the international antitrust dialogue have developed incrementally at different points in time, yet all three approaches attempt to address a fundamental problem: antitrust laws remain on a national or regional basis in spite of the increasingly borderless nature of commercial activity and markets. The Havana Charter for the International Trade Organisation recognised that anti-competitive commercial behaviour could undermine the benefits that should flow from trade liberalisation. Nonetheless, the failure to ratify the ITO, and the subsequent omission of antitrust rules from the global trading system, resulted in a lack of international antitrust rules, which several states, international fora, NGOs, practitioners and others have attempted to remedy with unilateral enforcement, bilateral engagement and multilateral initiatives. The lack of international antitrust rules has prevented the emergence of a parallel approach to trade liberalisation, which is arguably necessary to protect the benefits that should flow from free trade. The International Competition Policy Advisory Committee (ICPAC) implicitly recognised the desire for a parallel approach to trade liberalisation, by stating that it had tried to identify antitrust initiatives ‘that would contribute to achieving the integration of markets’¹ throughout its two year existence.

¹ ICPAC Final Report (February 2000) at p.2, available at: <http://www.usdoj.gov/atr/icpac/icpac.htm>.

Unilateral enforcement of domestic antitrust law was developed in the US in the 1940s, in the form of extraterritorial assertions of jurisdiction over foreign firms, on the basis of effects within US markets. While extraterritoriality can be seen as a means of protecting domestic markets from anti-competitive behaviour, it also prevents firms from exploiting the globalisation of trade to escape antitrust scrutiny. In spite of the hostile reaction of many states to US extraterritoriality in the mid-20th century,² variants of the US effects doctrine have gained greater recognition as more jurisdictions have adopted some form of antitrust law. In the context of increasing volumes of cross-border trade and the increasing number of antitrust regimes, the unilateral approach to international antitrust was destined to result in conflict between antitrust jurisdictions and ongoing ‘regulatory overlap’ and ‘system friction’.³ The unilateral approach to international antitrust is clearly flawed,⁴ and offers an incomplete solution to the difficulties created by a lack of international antitrust rules. Indeed the ICPAC final report pondered, somewhat rhetorically, ‘is it possible to rely upon national law, yet at the same time work towards the development of a more seamless international system that facilitates the workings of global markets?’⁵ Bilateral engagement between antitrust jurisdictions was seen as an obvious means of trying to remedy the failings of the unilateral approach.

² See discussion *supra* at 2.7.

³ See a discussion of system friction in the context of merger control in A. Ezrachi, ‘Merger Control and Cross Border Transactions – A Pragmatic View on Cooperation, Convergence and What’s in Between’ University of Oxford Centre for Competition Law and Policy Working Paper (L) 11/05. Available from <http://www.competition-law.ox.ac.uk/competition/portal.php>. Also see discussion *supra* at 5.3.

⁴ See discussion *supra* at 2.8 and 3.1.3.

⁵ *Op. cit.* note 1, at p.2.

6.1.2 Bilateral engagement has primarily taken the form of bilateral antitrust cooperation agreements, although it can also include the formation of joint working groups,⁶ both of which should lead to greater convergence and some form of enforcement cooperation in specific cases. The number of formal state-to-state bilateral cooperation agreements and informal agency-to-agency bilateral cooperation arrangements is increasing every year, although the agreements tend to be limited to a core group of antitrust jurisdictions. The US, the EC, Canada, Japan, Australia, New Zealand, and to a lesser extent South Korea and Mexico, are responsible for the vast majority of bilateral cooperation agreements. The core group of signatories indicates that a large number of antitrust jurisdictions do not actively engage on a bilateral basis, given that there are in excess of 100 antitrust regimes worldwide.⁷ Bilateral agreements are often said and thought to be unique to the bilateral relationship between the signatories,⁸ which would limit their general significance to international antitrust, and indicate that differing objectives exist within the international antitrust dialogue. On the contrary, the comparative analysis of the principal bilateral antitrust cooperation agreements in chapter 3, suggests that these agreements are actually very similar in terms of format and substance, and share common objectives. Indeed, the analysis revealed that the only significant variable factors regarding bilateral agreements are which jurisdictions will enter into an agreement, and when. Further investigation and discussion, at 4.1 *supra*, suggests that a strong bilateral trading relationship may

⁶ See e.g. the joint EC-US mergers working group, discussed *supra* at 5.4.1-5.4.3.

⁷ See discussion *supra* at 3.1.3.

⁸ See e.g. speech by C.S. Stark, former Chief, Foreign Commerce Section, Antitrust Division, US Department of Justice, 'Improving Bilateral Antitrust Cooperation', Washington, D.C., 23 June 2000.

be regarded as a key prerequisite to antitrust jurisdictions entering into a cooperation agreement, although there are clearly other relevant factors.⁹

The comparative analysis in chapter 3 and discussion at the beginning of chapter 4 also established that the principal bilateral antitrust cooperation agreements are sufficiently homogeneous to query why jurisdictions primarily rely upon bilateral and not multilateral cooperation agreements. While the basic 1995 OECD Recommendation can be regarded as a multilateral instrument, albeit a limited one in light of the limited and cliquish OECD membership,¹⁰ it is very much regarded as a default agreement in the absence of a bilateral agreement. Nonetheless, the limitations of the OECD do not explain why OECD member countries have entered into supplementary bilateral agreements with each other, and do not explain why a multilateral cooperation agreement or template is not pursued through a more inclusive international fora, such as the ICN. Clearly, the relationship between international trade and antitrust is very strong in the context of bilateral antitrust engagement. The principle of avoidance of conflict, stated as a key objective in the bilateral agreements, carries greater significance when one considers that a strong bilateral trading relationship underpins most, if not all of the bilateral cooperation agreements. It is obvious that antitrust disputes between jurisdictions are capable of hindering trade, and it is clear in light of the foregoing discussion, that this is a key motivating factor in the decision to enter into a bilateral antitrust cooperation agreement with key trading partners. In spite of the

⁹ Such as mutual trust and confidence between the antitrust jurisdictions and authorities – something that is undoubtedly enhanced through engagement and discussion in multilateral fora, such as the ICN.

¹⁰ See discussion at 4.4.3 *supra*.

pre-existing circumstances and apparent objectives of bilateral cooperation agreements, they have been proven to be a limited form of engagement in the international antitrust dialogue. Bilateralism cannot provide a feasible means of securing cooperation and avoiding conflict between antitrust authorities in a globalised market, when over 100 antitrust regimes exist, particularly as the number of formal bilateral agreements are limited, and primarily involve the ‘mature’ antitrust authorities. Before discussing the third and final face of international antitrust, it is useful to identify conclusions at this stage:

Conclusions and recommendations regarding bilateral engagement:

- Greater recognition and transparency is required within the international antitrust dialogue regarding the relevant factors antitrust jurisdictions should consider when deciding whether to enter into a bilateral antitrust cooperation agreement.
- Most antitrust jurisdictions have chosen to give greater prominence to bilateral, rather than multilateral cooperation agreements, without sufficient explanation.
- The current bilateral antitrust cooperation agreements have largely achieved substantive harmonisation, and created a common template for bilateral cooperation. This template should be recognised at a multilateral level, to establish common principles and procedures for all bilateral cooperation in international antitrust. Ideally, the template for cooperation would be endorsed by the ICN, as it is the most inclusive international antitrust fora.
- More jurisdictions should be actively involved in the web of antitrust cooperation agreements, particularly those states with fast growing economies and those that are in the process of adopting antitrust laws, such as India and China. The onus should be upon the developed antitrust jurisdictions to encourage others to participate.

6.1.3 The third face of international antitrust, multilateralism, has been shown to include a wide array of international agreements, fora, and initiatives, involving both developed and developing countries. Many regional trade agreements and trade blocs (RTAs), such as the ANDEAN Community, CARICOM and WAEMU/UEMOA, have strong *prima facie* similarities to the EC, in terms of comparable linkages between antitrust and trade. Indeed the RTAs highlight that the linkages between antitrust and trade are strengthened as the level of economic integration is deepened. Most of the RTAs adopt a parallel approach to trade liberalisation, which attaches importance to antitrust rules in order to support free trade policies. A deeper understanding of the relationship between international trade and antitrust has been made possible by also considering the external relations of the European Union, focusing upon the trade agreements entered into by the EC, its Member States, and third countries. The discussion at 4.3 *supra*, highlights the importance of a parallel approach to trade liberalisation from the European perspective. Antitrust is firmly rooted as an essential element in the trade relations of the EC, irrespective of the nature of the trade relationship or the status of the third country.

The final multilateral element of the international antitrust dialogue consists of multilateral antitrust initiatives and fora. Discussion at 4.4 *supra*, considered the key international bodies active in international antitrust, namely the ICN, OECD, UNCTAD and the WTO, and their respective roles and responsibilities. The

discussion identified a clear niche in the international antitrust dialogue for the UNCTAD in working in the interests of, and supporting the needs of, developing countries in introducing antitrust rules. It is also evident that antitrust dialogue under the auspices of the WTO has the capability to provide for greater convergence in international antitrust, given its large and diverse membership. Furthermore, the potential for a binding set of key principles, with an experienced and respected dispute settlement mechanism, are unique characteristics of the WTO within the international antitrust dialogue. The distinctive roles of respective international antitrust fora become blurred however, when considering the two most active bodies.

The OECD and ICN undoubtedly have particular strengths and weaknesses. The OECD has an active and respected peer observation programme, and engages in capacity building activities supported by its own secretariat. The OECD also has a long standing involvement in international antitrust, and has produced several notable best practice recommendations. Nonetheless, the OECD's limited and selective membership is widely regarded as a weakness in trying to achieve convergence in international antitrust (in spite of many activities involving non-member countries). The role of the OECD in international antitrust has also been seen as a diminishing one in recent years.¹¹ Conversely, the ICN's primary strengths rest upon its large and diverse membership, its transient and flexible

¹¹ See comments by A. Piilola, 'Assessing Theories of Global Governance: A Case Study International Antitrust Regulation' (2003) 39 *Stanford Journal of International Law* 207 at p.237.

modus operandi, as well as its ‘all antitrust all the time’¹² mission. While the ICN was established as recently as 2001, the organisation has worked to achieve convergence in several areas of antitrust by establishing working groups, involving NGOs and renowned experts, and producing several best practice recommendations. The weakness of the ICN is however recognised as being the voluntary nature of the best practices, and the possible difficulty of achieving consensus in such a diverse organisation. Hence, in spite of the differing structures and membership of the OECD Competition Committee and the ICN, there is a clear overlap of competences and duplication of effort and resources between these organisations, particularly with regard to the formulation of best practice recommendations.¹³ The two organisations could ensure a more effective and coherent multilateral framework for international antitrust by focusing upon their own strengths and coordinating their activities so as to avoid duplication of scarce resources. While the OECD should continue to focus upon peer observation and capacity building activities, it should work to directly support the ICN best practice recommendations (by using the ICN best practices when conducting peer reviews) and avoid unnecessary duplication. The ICN could also coordinate capacity building activities with the OECD, and should strengthen its best practice recommendations by regularly reflecting upon its soft law approach and reviewing implementation in coordination with the OECD. In order to reinforce attempts to achieve greater convergence among antitrust regimes, the

¹² The well known quote by C.A James, Assistant Attorney General, Antitrust Division, US Department of Justice, ‘International Antitrust in the Bush Administration’, Annual Canadian Bar Association Fall Conference on Competition Law. Ottawa, Canada, 21 September 2001.

¹³ See discussion at 4.4.3 at 5.5.2 *supra* for specific examples of the overlap between the antitrust activities of the OECD Competition Committee and the ICN.

ICN should also consider whether a more robust means of encouraging implementation of best practice recommendations is possible. One option may be to consider introducing a ‘comply or explain’ principle¹⁴ whereby members would regularly self-assess their antitrust laws and practices against the ICN recommendations, and explain any inconsistencies.

6.1.4 The lack of a coherent and structured multilateral approach within the international dialogue is a direct result of the decentralised and fragmented nature of international antitrust. Nonetheless, it remains clear that trade relations and considerations underpin all of the multilateral antitrust initiatives in some form or another. Indeed, the discussion at 4.5 *supra*, argued that trade considerations underpin all international antitrust activities, and identified the primary objective of the international antitrust dialogue as being to support and supplement trade liberalisation. In light of this conclusion at the end of chapter 4, the thesis was able to focus upon a particular area of antitrust concern, mergers and acquisitions, in chapter 5, and assess the operation of multi-jurisdictional merger review against the primary objective. Before discussing the international merger control framework, several conclusions can be identified:

¹⁴ The principle of ‘comply or explain’ is a recognised element of principles based regulation, and is adopted within the EC and UK corporate governance regulatory framework. For some general discussion see the European Commission Press Release: ‘Corporate governance: European Forum clarifies ‘comply or explain’ principle and issues annual report’ (IP/06/269) 6th March 2006. The ‘comply or explain’ approach underpins the UK Combined Code on Corporate Governance (July 2003), available at: http://www.fsa.gov.uk/pubs/ukla/lr_comcode2003.pdf.

Conclusions and recommendations regarding multilateralism and the objective of the international antitrust dialogue:

- The primary objective of the international antitrust dialogue is to support and supplement trade liberalisation, and thus is not necessarily to achieve harmonisation of national antitrust rules.
- There is a lack of coordination of antitrust activities between international fora, evinced by a large degree of overlap between the OECD and ICN.
- The OECD and ICN should enter into a memorandum of understanding, setting out respective roles and responsibilities, and avoiding duplication of effort and resources. Each body should focus upon its core strength, and coordinate activities with the other.
- The ICN should regularly consider the suitability and viability of shifting towards a more robust soft law approach to encourage implementation of best practices, perhaps by imposing a ‘comply or explain’ regulatory model.

6.2 The international merger control framework

6.2.1 The thesis is akin to a story of two parts. The first part is a critical review of the development of international antitrust, and identifies the primary objective of the international antitrust dialogue after reviewing unilateral, bilateral and multilateral activities. The second part focuses upon mergers and acquisitions (M&A), and analyses the operation of multi-jurisdictional merger review, and its consistency with the primary objective. M&A are important means of foreign direct investment and can create cross-border synergies, which should help realise the benefits to be reaped from trade liberalisation. While anti-competitive M&A jeopardise those benefits, and are correctly scrutinised (and occasionally blocked), the operation of merger control at an international level must balance the need to intervene in anti-competitive M&A, with the need to facilitate all other M&A,

which should be encouraged. Furthermore, a paradoxical position arises if multi-jurisdictional merger review unduly hinders those M&A which would further the cause of trade liberalisation, whilst attempting to control the anti-competitive mergers. Chapter 5 assessed the current international merger control framework (i.e. the operation of multiple merger control regimes, which often results in multi-jurisdictional merger review, as well as the other international activities regarding merger control) against the primary objective. The assessment explored the extent of policy, procedural and substantive convergence efforts at bilateral and multilateral levels, as well as the extent of cooperation between antitrust authorities in merger investigations.

In light of the preponderance of *ex ante* notification systems within merger control regimes,¹⁵ it is obvious that multi-jurisdictional merger review imposes a significant burden upon merging firms. Furthermore, it is arguable that the burden will increase given the rising number of merger control regimes, and the growth of international M&A. Greater market liberalisation in Europe and parts of Asia, greater market access and perhaps also progress in the WTO Doha trade round will likely further encourage cross-border trade and international M&A. Growing market integration and economic inter-dependency suggests that international M&A will continue to have effects across a wider geographic area, and will lead to a heightened risk of jurisdictional conflict, or ‘system friction’. It is within this context that the international merger control framework must operate as

¹⁵ See discussion at 5.3.1 *supra*, which highlights the adoption of *ex ante* notification requirements within 73 antitrust jurisdictions.

seamlessly as possible to avoid imposing unnecessary burdens upon merging parties, which could hinder the consummation of the merger and negate the economic benefits that should follow from the transaction. Research suggests that time delays and legal uncertainty as a result of multi-jurisdictional merger review, are the most significant ‘costs’ to merging parties, and are of greater concern than the direct pecuniary costs incurred.¹⁶ Importantly, it is also arguable that coordination and cooperation within the current international merger control framework could alleviate the burden upon merging firms without the need for international harmonisation of merger control regimes, which could actually and ironically result in a greater burden upon merging firms in the short to medium term.¹⁷

6.2.2 In order to gain a firm understanding of the operation of the current international merger control framework, it was necessary to investigate the extent of cooperation undertaken between antitrust authorities conducting concurrent merger investigations. The procedural and substantive merger control rules, which apply to multi-jurisdictional merger review, remain on a national (or regional) basis, hence cooperation and coordination is required between antitrust authorities in order to minimise the risk of conflicting decisions and the burden upon merging firms, thereby furthering the primary objective. The relationship between the European Commission and US antitrust authorities is clearly the closest and most informal example of bilateral cooperation in multi-jurisdictional merger review,

¹⁶ See discussion at 5.6.2 *supra*.

¹⁷ See discussion at 5.6.3 *supra*, and *infra*.

likely spurred on by previous high-profile conflicts and the importance of their trading relationship.¹⁸ It is also clear however, that underlying similarities and convergence at the policy, procedural and substantive levels, have facilitated the development of a good bilateral working relationship, and created the potential for close cooperation and coordination during concurrent merger investigations. The extent of cooperation and coordination possible in multi-jurisdictional merger review will naturally vary from case to case, depending upon many factors including the relevant market definition,¹⁹ yet it is evident that widely varying levels of cooperation are possible, depending upon the jurisdictions involved. It is also clear that case cooperation and coordination in merger review only rarely occurs on a multilateral basis, probably due to practical difficulties in achieving multilateral cooperation and coordination, but also due to the ‘diminishing returns’ of such practices from the antitrust authorities’ perspective.²⁰ Short case studies in chapter 5 highlight that cooperation and coordination between antitrust authorities can involve *inter alia*: discussions on the relevant market; procedural timetables; assessment of post-merger effects and efficiencies; discussion of suitable remedies, and joint meetings at key stages in the review process. It is clear however, that confidentiality waivers are essential to facilitate extensive cooperation and coordination, although receiving consent from merging parties is

¹⁸ See discussion at 5.4.1 *supra* and case examples such as that of *GE/Honeywell*: Commission Decision in *General Electric/Honeywell*, Case No COMP/M.2220 [2004] O.J. L48/1. Further discussion in E.M. Fox, ‘Mergers in Global Markets: GE/Honeywell and the Future of Merger Control’ (2002) 23 *University of Pennsylvania Law Review* 457, and A. Burnside, ‘GE, Honey, I Sunk The Merger’ (2002) 23 *ECLR* 107.

¹⁹ See the discussion of case examples at 5.4.3 *supra*.

²⁰ See discussion at 5.4.5 and 5.5.4 *supra*.

unlikely to be problematic, in the context of cooperation between established antitrust authorities at least.²¹

In spite of the regularity of cooperation in multi-jurisdictional merger review, there is evidence suggesting that it is limited to a core group of antitrust authorities, notably the EC, US, Canada and to a far lesser extent: Australia; Japan; and Mexico.²² Furthermore, extensive cooperation and coordination is likely limited to that between the EC and US, albeit the Canadian Competition Bureau often adopts a commendable deferential approach to multi-jurisdictional merger review. Bilateral cooperation and coordination involving a small clique of antitrust authorities is an insufficient means of diminishing the risk of conflict and reducing the burden upon merging firms, given the growing number of merger control regimes and the preponderance of *ex ante* notification requirements. In light of the limited capability and practice of bilateral engagement, it is an incomplete means of ensuring the international merger control framework furthers the primary objective. An additional multilateral dimension is required to prevent the current framework operating to further burden and inhibit legitimate M&A activity. The paradoxical position of international merger control can be resolved by ensuring there is a coherent and coordinated structure to multi-jurisdictional merger review, and multilateral initiatives may help to establish one. Before considering the multilateral dimension to multi-jurisdictional merger review however, several conclusions can be identified regarding bilateral cooperation.

²¹ See discussion of confidentiality waivers, and the factors taken into account by merging firms at 5.4.3 *supra*.

²² See discussion at 5.4.5 *supra*.

Conclusions and recommendations regarding bilateral cooperation and coordination in multi-jurisdictional merger review:

- There is a lack of clarity and criteria for determining when antitrust authorities should engage in cooperation and coordination regarding concurrent merger investigations (see discussion at 5.5.4 *supra*). The circumstances that can ‘trigger’ cooperation, as well as the type of cooperation possible are well known, yet there may be too much discretion for antitrust authorities to determine when they will actually engage in cooperation in specific cases.
- The ICN should develop a set of best practices setting out relevant factors for antitrust authorities when deciding whether to engage in cooperation and coordination of concurrent merger reviews.
- There is a need for a transparent debate among antitrust authorities, NGOs and other interested parties on the merits and demerits of engaging in multilateral cooperation in specific merger cases. Multilateral cooperation and coordination may be infeasible for practical reasons, but could benefit merging parties and advance the primary objective and should therefore be seriously considered.
- The EC/US joint mergers working group facilitated greater understanding and trust between the respective antitrust authorities, and enabled a more detailed structure for cooperation and coordination to develop.
- In light of the regularity of concurrent merger investigations involving the EC, US and Canadian antitrust authorities, the EC/US joint working group should expand to include Canada. These jurisdictions could form a vanguard group under the auspices of the ICN, to test possible levels of cooperation and coordination, particularly in light of the Canadian willingness to advance deferential approaches to multi-jurisdictional merger review.

6.2.3 Multilateral activities concerning international merger control have primarily sought to achieve greater convergence between antitrust jurisdictions, so as to further minimise the risk of conflict, i.e. reduce ‘system friction’, in multi-jurisdictional merger control, and also to diminish the burden upon merging firms. Multilateral activities primarily focus upon achieving consensus with regards to

policies, procedural issues and substantive law. There are several sets of best practice recommendations, produced by the ICN, OECD and NGOs, which set benchmarks to facilitate convergence. The wide consensus among the sets of best practices on most issues sets key benchmarks, although this again highlights ongoing duplication of effort and resources, and does not necessarily result in universal implementation of the best practices. Nonetheless, it is clear that achieving consensus upon best practices as well as bringing about underlying convergence is insufficient to further the primary objective, because divergence is not necessarily the key problem. The key problem is often considered to be the number of concurrent merger reviews. More specifically, the key problem is the burden imposed upon merging firms as a result of multi-jurisdictional pre-merger notification filing requirements.²³ The problem is particularly difficult as it is an inherent feature of the international merger control framework, given the lack of an international merger control regime (IMCR), and the globalisation of trade. The current solution is to attempt to set benchmarks on minimum nexus requirements, before jurisdiction can be asserted and notification required, so as to alleviate the situation. Many commentators would argue that an IMCR is the only solution, although it is clear that multi-jurisdictional notification filings are considered manageable by practitioners, and it is equally unclear that an IMCR would on balance reduce the overall burden upon merging firms.²⁴ Building upon discussion at 5.5 *supra*, and comments immediately above, it is possible to outline

²³ See the testimony of Barry E. Hawk to the ICPAC Hearings, Washington DC, 3 November 1998. Transcripts of Committee Hearings are available from <http://www.usdoj.gov/atr/icpac/transcripts.htm>.

²⁴ See discussion at 5.6.2 – 5.6.3 *supra*, and *infra*.

conclusions regarding the multilateral dimension of the international merger control framework:

Conclusions and recommendations regarding multilateral activities in the international merger control framework:

- There should be greater recognition of the principle of independent antitrust authorities and analysis, see 5.5.2 *supra*.
- Greater procedural convergence is required. Efforts should focus upon the jurisdictional nexus and notification thresholds, in conjunction with the principle of transparency, so as to ensure that pre-merger notification filings are only required when there is a material link with the reviewing jurisdiction. While the ICN best practices already address this issue, there could be greater guidance on what amounts to a sufficiently ‘material’ nexus to the reviewing jurisdiction. There should also be a renewed effort to encourage implementation of the best practice recommendations.
- A common filing form should be seriously considered, and could build upon the increasing convergence between key merger control regimes. If a common form was viable and could be effective, it should be developed within the ICN. A common form should only be introduced as a replacement for the standard form and not as an alternative means of notification (lessons should be learned from the common British, French and German filing form, see 5.5.3 (d) and 5.6.3 *supra*). A vanguard group of jurisdictions, likely including the EC and its Member States, the US, and Canada, should consider introducing such a form. The issue should be periodically reviewed. Discussions on this issue should involve NGOs and other interested parties.
- There should be recognition that multilateral coordination regarding appropriate remedies should be undertaken where possible, irrespective of whether the merger investigation has involved extensive bilateral/multilateral cooperation.
- The ICN should consider the efficacy of a work sharing mechanism to monitor joint remedies post-merger, and undertake greater post-merger reflection of the effectiveness and suitability of imposed remedies.

6.2.4 The failure of the ITO and subsequent efforts to establish an international antitrust regime, and an IMCR in the particular context of M&A, has undoubtedly created difficulties for the operation of international antitrust, and the need to support and supplement trade liberalisation. Ideally, the parallel approach to trade liberalisation would likely include international antitrust rules and an IMCR. Nonetheless it is unrealistic and unnecessary to seek to introduce such a system to replace the current combination of unilateral, bilateral and multilateral activities, which provide the current form of international antitrust, including international merger control. The crucial test that should guide future reform with regard to multi-jurisdictional merger review, is whether the proposed reform would provide for a more coherent and coordinated system of multi-jurisdictional review, and whether it would on balance lessen the burden upon merging firms, particularly in terms of providing for a streamlined clearance process. Most commentators would accept that substantive harmonisation coupled with a common pre-merger notification system under a supranational IMCR,²⁵ is an unrealistic and unobtainable prospect, although weaker forms of IMCR, which would supplement the current framework, are often recommended. As discussed at 5.6.3 however, a weakened form of IMCR may simply act as a further layer of bureaucracy on top of the current merger control framework, and could operate to further burden merging firms by increasing the periods of review and legal uncertainty. Future reforms must operate to further streamline the international merger control process in order to advance the primary objective. Implementation of work-sharing models are less controversial options for reform than IMCR proposals,

²⁵ i.e. the third mode of international merger control regime discussed at 5.6.3 *supra*.

although these too are fraught with practical difficulties, which may require legislative amendments in order to be feasible. The key recommendations outlined below are as a result of the foregoing discussion, and particularly that at 5.6 and 5.6 *supra*.

Key recommendations:

- Establish a clear and coherent framework for the operation of current activities within the international merger control framework, including a delineation of respective roles and responsibilities of international fora.
- The ICN and OECD in particular, should enter into a memorandum of understanding so as to identify their respective roles and areas of responsibility in international antitrust, and ensure consistency and complementarity.
- Reform initiatives involving international merger control should concentrate upon working towards the implementation of work-sharing models in multi-jurisdictional review, with initial steps likely to involve a small group of three or four jurisdictions.
- Adoption of a ‘comply or explain’ principle to encourage greater implementation of ICN best practice recommendations.
- Creation of a vanguard group of jurisdictions within the ICN, likely including the EC and its Member States, the US, and Canada, to engage in enhanced cooperation that can be observed and studied by international counterparts within the ICN.
- Antitrust authorities and other interested parties should engage in a transparent debate regarding the merits and demerits of a ‘disinterested’ common pre-merger notification system, although it is not recommended that one should be introduced at the current time.
- If a dispute settlement mechanism in the form of an IMCR is viable, likely under the auspices of the WTO, it should not facilitate direct appeals against merger decisions taken by antitrust authorities. Such a mechanism could however, resolve jurisdictional conflicts arising due to policy, procedural or substantive divergence, by reference to agreed international standards (this is in line with Taylor’s proposed IMCR, see 5.6.3 *supra*).

Appendix: multi-jurisdictional merger review questionnaire

Dear Sir/Madam,

Thank you for agreeing to assist with ongoing research into international merger control cooperation, this questionnaire merely presents an outline of the types of issues I would like to discuss and receive your views on at our meeting. The questionnaire is focused upon multi-jurisdictional merger filings and the associated costs incurred by merging firms. The information gained from this research will form part of my PhD thesis at the University of Glasgow. I would hope to talk through these issues and some others that may arise in the course of our meeting. Whilst providing written answers to the questions below could be useful, it is not a requirement and participants may simply wish to consider the questions before the meeting if time permits. While the questions deal with issues where better understanding and increased awareness would benefit the research, it is possible that some questions may raise issues of client confidentiality and commercial sensibilities, I apologise if this is the case and would respect any decision not to answer a question on that basis. Could you also please indicate during our meeting whether you would like your responses to be treated as anonymous.

Yours Sincerely,
Jonathan Galloway

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A FILING

1) At what stage in seeking competition law approval for a proposed transaction, would the burden on the merging parties/law firm normally be at its most costly in terms of total resources? e.g. identifying notification jurisdictions; submitting merger notifications; immediately preceding competition authority decision at the end of Phase I; beginning of a Phase II investigation/responding to a second request.

2) Could you estimate as a percentage, how much of your M&A case load involves notification to more than one jurisdiction?

3) In your experience do merger transactions often require notification to jurisdictions other than the US and EU (incl. Commission and NCAs)? If so, which other jurisdictions tend to attract a large number of notifications?

4) Is there any form of risk assessment involved in identifying which jurisdictions should be notified regarding a proposed transaction? If so, could you indicate possible rationale for such an assessment?

5) To what extent are costs incurred in investigating whether notification is necessary in a particular jurisdiction, for that not to be required.

6) In your opinion, does the current multijurisdictional notification burden operate at a fair level for business? If not, could you indicate possible reasons for the perceived unfairness? e.g. notification required in jurisdictions with weak/insufficient nexus to the transaction. Could you also indicate whether you are aware of the prevailing attitude of business to these costs, if different from your own.

7) Does it remain common to deal with jurisdictions with market share requirements or other subjective criteria that determine notification thresholds? Do you have any views on appropriate criteria for notification thresholds, or criteria that work well with minimised costs involved?

8) Could you comment on the degree of convergence between jurisdictions often involved in a merger notification with regards to their filing requirements?

9) Are you aware of the work of the International Competition Network? If so, do you believe the work of the ICN has improved convergence with regards to filing requirements and/or improved the ability of identifying jurisdictions requiring notification?

(see: <http://www.internationalcompetitionnetwork.org/mergercontrollaws.html>)

10) Are any economies of scale possible during the filing of multiple merger notifications, or during multiple merger investigations by competition authorities?

11) To what extent is it necessary to recruit 'local counsel' to advise on filing requirements and assist with merger investigations? Does this amount to a significant cost in the overall multijurisdictional notification burden?

12) Could you indicate the scale of the burden imposed by translation requirements in an average transaction requiring multiple filings?

B MERGER INVESTIGATIONS

13) Can you comment on the degree to which you believe it is possible to coordinate procedural timetables between reviewing jurisdictions? Does this occur regularly, and does it operate at a satisfactory level?

14) It is common practice for firms to recommend that merging parties sign confidentiality waivers, enabling enhanced cooperation and coordination between the European Commission and US DOJ/FTC, when both are reviewing the same transaction? Are there any other jurisdictions capable of participating in this level of enhanced cooperation/coordination?

15) What would you highlight as the key advantages and disadvantages of signing confidentiality waivers from the merging parties' perspective?

16) To what extent do multiple merger investigations add to the complexity of econometric analyses and the associated costs? i.e. do differing theories of economic harm and analyses relied upon in jurisdictions impact upon the strategy and arguments advanced by merging parties?

17) Can you comment upon any experiences (omitting case names and identifiers) you may have had, or be aware of, concerning cooperation between competition authorities reviewing the same transaction, and any resulting difficulties/benefits?

C CHANGING CIRCUMSTANCES

18) Have you noticed an upsurge in the number of jurisdictions that must be considered for merger filing, or that require notification of a proposed transaction in the last 3 years? If so, what has been the approach of these new merger review authorities to dealing with notifications?

19) Are there any other changes/matters that have occurred in the last 3 years that have impacted upon the costs involved in multijurisdictional merger review?

20) In your opinion, how beneficial is procedural convergence between competition authorities for merging parties? Would a common merger filing form reduce the burden upon merging firms?

21) Do you have a view on the debate between Professor Barry Hawk and Professor Eleanor Fox regarding a clearinghouse for submitting merger filings? Prof Fox has stated “One way to achieve [efficient coordination of filings and reduce the burden on parties of multiple notifications] would be to permit the merging parties to file with a disinterested clearinghouse center on the day of the first filing”. Prof Hawk responded “A clearing house is out of the question”. Please include any personal views on other ways to reduce the burden upon merging firms.

Thank you for assisting with this research.

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