

**INTERNATIONAL ANTI-COMPETITIVE PRACTICES IN THE TWENTY-
FIRST CENTURY: DEALING WITH CARTELIZATION PRACTICES
AFFECTING INTERNATIONAL TRADE**

BY

NODIRBEK ORMONOV

**A Thesis submitted to the Faculty of Graduate Studies of
The University of Manitoba
in partial fulfillment of the requirements of the degree of**

MASTER OF LAWS

**Faculty of Law
University of Manitoba
Winnipeg**

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ABSTRACT

The successive reduction of government-imposed barriers to trade and the active integration of the economies of many countries have resulted, among others, in the increase and internationalization of anti-competitive practices. Cartelization practices are the most harmful type of anti-competitive activities, and they cause many negative effects, including: short and long-term restrictions against non-cartel producers to compete freely; price increases to the detriment of consumers; decreases in technological and better service innovations; and market foreclosure for non-cartel competitors from a trade perspective. These restrictions apply not only to consumers and businesses at the domestic level, but they are also among the most harmful barriers to international trade. Limitations on existing domestic and international tools to deter international cartels are resulting in joint efforts of the international community to address the problem. This thesis concludes that among the options to fight international cartels, the negotiation of a multilateral agreement is one of the best solutions, rather than bilateral and regional cooperation in the antitrust area.

This study involves an analysis of the practical implications of cross-border anti-competitive business practices in the form of cartelization. It will also engage in an analysis of the scholarly discussions in the antitrust area, as well as an examination of the materials of international organizations, including decisions, resolutions, recommendations, and reports. A comparison of proposals and options for cooperation will also be part of the study for this thesis.

ACKNOWLEDGEMENT

I would like to acknowledge and thank all of the people who helped me during the process of researching and writing this thesis. I thank my supervisor, Professor Brayn Schwartz, for his intellectual suggestions and encouragement in writing this thesis. I also thank Professor DeLloyd Guth and Professor Michelle Gallant for their valuable comments and efforts in editing early editions of this work. I also thank Alexandra Dueck for her help in editing earlier drafts of this thesis. I appreciate and thank the University of Manitoba, Faculty of Law for their financial assistance towards my studies in the LLM program. I also thank Sonja De Gannes, Maria Tepper, and Pat Power for their support and friendship. I would like to thank the staff of the Law Library and especially Muriel St. John.

I especially appreciate and thank my parents for all of their efforts, prayers, and support. I appreciate my sister, Muattar, and my brothers, Bobur and Bahodir, for their love and support.

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INTRODUCTION

Competition in business is, in many respects, the impulse of advancement. Improvements in the means of production (technology), improvements in the quality of service, cheaper prices, and more choices for customers all result from competitive business. An OECD (Organization for Economic Cooperation and Development) publication defined the major goal of competition policy as:

Competition policy has as its central economic goal the preservation and promotion of the competitive process, a process which encourages efficiency in the production and allocation of goods and services, and over time, through its effects on innovation and adjustment to technological change, a dynamic process of sustained economic growth. In conditions of effective competition, rivals have equal opportunities to compete for business on the basis and quality of their outputs, and resources deployment follows market success in meeting consumers' demand at the lowest possible cost.¹

To protect that competition process, every country introduces its competition policy to control the anti-competitive business practices. Restrictive national (anti-competitive) practices have long been criticized in every jurisdiction. As the economies of countries became more integrated, due to factors, such as low tariffs within the framework of GATT (and later within the WTO) and the collapse of a giant closed economy of the Soviet Union, states began to prefer liberal, open economies. Opening up public trade barriers increased cross-border business transactions. With the increase of cross-border trade in goods and services, there emerged forms of anti-competitive business practices with an international dimension. International anti-competitive practices may affect more than one country in two different ways: as a participant of

¹ R. Weinrauch, *Competition Law in the WTO: The Rationale for a Framework Agreement* (Wien: NWV Neuer Wissenschaftlicher Verlag: Wien, 2004) at 18.

business in those countries or without presence in those countries by doing business in one country but affecting another.

While states may benefit from trade liberalization by the reduction of public barriers, private barriers to trade slow down the flow of international trade. By private barriers we mean cartelization, monopolization, market allocations, and other types of anti-competitive business practices to raise prices and limit access to markets. These result in the improper allocation of resources and shift of profits from consumers to producers. Many researchers have expressed the view that cross-border private anti-competitive practices will undermine the benefits of trade liberalization.² But few others think that private barriers to trade rarely occur, thus they do not impede trade and market access.³ This thesis argues that the latter argument underestimates private anti-competitive practices. For example, a study found that imports affected by the cartels comprised approximately 6.7 per cent of all developing countries' imports in 1997, or a total of US\$81.1 billion in goods and services.⁴ Also, a recent OECD survey addressed more than one hundred cartelization cases investigated in OECD member countries and about 20 non-member countries between 1996 and 2000.⁵ The magnitude of welfare losses caused by the cartels amounted to billions of dollars annually. These examples show that international anti-competitive practices had reached the point where they have

² Daniel J. Gifford & Mitsuo Matsushita, Antitrust or Competition Laws Viewed in a Trading Context: Harmony or Dissonance, in Jagdish N. Bhagwati & Robert E. Hudec, eds. 1996, *Fair Trade and Harmonization*, at 269; See also *Ibid.* at 15, cited in Clair Wilcox, *A Charter for World Trade* (1949) at 105

³ Weinrauch, *supra* note 1 at 63, cited in Daniel K. Tarullo, "Norms and Institutions in Global Competition Policy" (2000) 94 *Am J. Int'l L.* at 487 and 484.

⁴ WTO, *Report (2002) of the Working Group on the Interaction between Trade and Competition Policy, Report Presented to the General Council on 9 December 2002*, WT/WGTCP/6, at 49.

⁵ OECD, Competition Committee, *Fighting Hard-Core Cartels: Harm, Effective Sanctions and Leniency Programme*, 19 June 2002, [hereinafter *Hard-Core Cartels: Leniency Programme*], online: OECD <<http://www.oecd.org/dataoecd/41/44/1841891.pdf>> (date accessed: 5 June 2006).

already been negatively affecting international trade. Among international anti-competitive practices, cartelization is recognized as the most harmful to consumers, producers, international trade, and competition process as a whole.⁶ The theme of this thesis is that cartelization practices are capable of negatively affecting international trade to a serious extent and that collective cooperation by states is the key point for their deterrence. This thesis will attempt to address the following questions: what are the definition and criteria for determining international and domestic cartels; what is the significance of barriers to international trade caused by international cartels; what existing tools and forms can be used to remedy international cartels and how effective are they; how important is the exchange of information for the investigation of cross-border cartels; and how successful are the existing forms of multilateral and bilateral cooperation.

From this study we came to the following conclusions. There are several levels of cooperation for the deterrence of cartelization practices including bilateral, regional and multilateral. Although bilateral and regional cooperation have been useful to some extent in cartel prosecutions, they have major limits in information exchange, prosecutions outside its member countries, lacking mechanism for resolving disputes, and resolving the case of developing and least developed countries which lack resources and competition laws. Multilateral cooperation based on international antitrust agreement with its dispute settlement mechanism is considered to cover those limitations of bilateral and regional arrangements which will bring one of the best solutions for the deterrence of international cartels. This thesis argues for multilateral cooperation based on international

⁶ OECD, *Recommendations of the Council Concerning Effective Actions against Hard Core Cartels*, 25 March 1998-C(98)35/FINAL, at A, [hereinafter *OECD Recommendations against Cartels*].

antitrust agreement; it further advocates competition approach rather than trade law approach for this agreement and considers the WTO as an appropriate venue for international antitrust agreement.

Structure of the Thesis

This research is based on an analysis of the practical implications of cross-border anti-competitive business practices in the form of cartelization and addressing them through existing tools and proposed options.

In the first chapter, the definition, nature, and effects of cartelization practices will be given. Cartel activity has already been affecting international trade negatively and it is no longer purely a domestic phenomenon. Based on this, the second chapter will cover the interaction of trade and competition issues in the quest to clarify their similarities and differences in order to better understand the problem. A better understanding of the problem is important at least for two reasons: first, to find a solution, and secondly, to increase the knowledge of the trade community which has been involved in addressing the competition problems. In the third chapter, we analyze the usefulness of the existing tools for the deterrence of cartels and how they might be improved. This chapter is devoted to the analysis of domestic tools, whereas chapter four will look at the international efforts to deter cartels. It will cover the existing international efforts, including notification, cooperation and coordination during the investigations, consultations, and conciliation. Divergent national laws hamper active involvement in the process of cooperation. This chapter will also cover the Canadian experience with international cartel enforcement. Since the exchange of information is one of the main subject matters of international cartel investigation, the next chapter will be devoted to a

detailed analysis of this issue. The final chapter will examine current efforts to negotiate a multilateral agreement on competition issues.

CHAPTER ONE

NATURE AND IMPACT OF CARTELIZATION PRACTICES IN INTERNATIONAL TRADE

1.1 Background

According to Recommendations of the Organization for Economic Cooperation and Development (OECD), the term cartel means:

... an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce⁷

This recognizes cartels to be the most harmful and egregious violations of competition law. They injure consumers in many countries by raising prices and restricting supply, making goods and services unavailable to some purchasers and unnecessarily expensive for others.⁸

In cases where anti-competitive practices in one country affect another country, with the purpose to protect domestic consumers and fight against anti-competitive practices, a country often extends its jurisdictional claim over such activities occurring in a foreign country's jurisdiction. Application of domestic laws extraterritorially comes under doctrines of "effects" and of "enterprise unity", as they have evolved in the US, EC, Japan and Canada.

The effects doctrine developed in the U.S. courts. According to this doctrine the U.S. antitrust laws (based on the 1890 Sherman Act) may reach a foreign anti-competitive act affecting the U.S. markets, even when the anti-competitive act did not

⁷ *OECD Recommendations against Cartels, ibid. at A*

⁸ *Ibid. at A*

occur within the territory of the U.S. This doctrine was first applied in the *Alcoa* case in 1945.⁹

According to the enterprise unity doctrine, the antitrust laws of one country can be applied to foreign-based entities for the acts of their affiliates present on the national territory. In the E.C., the European Court of Justice has first developed this doctrine, particularly in the *Dyestuffs* case.¹⁰

However, negative reactions from the international community especially for the extension of U.S. antitrust laws extraterritorially in light of the “effects doctrine”, can be seen in the adoption of blocking statutes, claw-back statutes¹¹ and diplomatic notes of protest. For example, the British *Shipping Contracts and Commercial Documents Act* 1964, the British *Protection of Trading Interests Act* 1980, the Australian *Foreign Proceedings (Excess of Jurisdiction) Act* 1984 and the Canadian *Foreign Extraterritorial Measures Act* 1984.¹²

These reactions prompted countries to investigate anti-competitive activities of enterprises by the way of co-operation among antitrust agencies. This co-operation was pursued through the conclusion of bilateral agreements.

To illustrate cartel activities from an historical perspective, one cartel that lasted for five years managed to raise the price of graphite electrodes by 50% in certain markets and to extract monopoly profits on an estimated \$ 7 billion in world-wide sales.¹³

⁹ *United States v. Aluminium Company of America*, 148 F. 2d 416 (2d Cir. 1945)

¹⁰ Weinrauch, *supra* note 1 at 79.

¹¹ Claw back statutes allow a foreign defendant to sue in its domestic courts to recover two-third's the damages, paid as a result of a judgment in a U.S. court.

¹² *Shipping Contracts and Commercial Documents Act* 1964 (U.K.), c.87; *Protection of Trading Interests Act* 1980 (U.K.), c. 11; *Foreign Extraterritorial Measures Act*, R.S.C., c. F-29, (1984) (Can.); *Foreign Proceedings (Excess of Jurisdiction) Act*, No. 3 (1984) (Austl.).

¹³ Weinrauch, *supra* note 1 at 66.

Another example is the vitamins case¹⁴, a conspiracy between Swiss, German, Canadian, and Japanese companies which controlled everything with regard to worldwide sales of vitamins A, B2, B4, B5, C, E, beta carotene and vitamin premixes. Cartel members allocated market shares, supplied contracts and sales volume among themselves and fixed and raised prices of vitamins worldwide. As a result of the U.S. investigations F. Hoffmann-La Roche and BASF AG plead guilty and paid fines of \$500 million and \$225 million, respectively. Six Swiss and German executives from HLR and BASF were convicted for their role in the reported conspiracy.¹⁵

1.2 Definitions, Nature and Impact of International Cartels

In 1998 the OECD Council adopted “Recommendations concerning Effective Action against Hard Core Cartels” and defined the term of cartelization.¹⁶

In this description, cartelization is an act done by competitors, *i.e.*, business enterprises of the market, which is anti-competitive in nature involving the above mentioned restrictive practices.

This description of international cartels, also applies to domestic cartels, which have the same qualities but operate only within their domestic market. The OECD Council, in its above mentioned Recommendations, considers hard core cartels to promote “the most egregious violations of competition law”.¹⁷ From an international perspective, effective actions against them are emphasized for two important reasons. First, “their distortion of world trade creates market power, waste, and inefficiency in

¹⁴ In re Vitamins Antitrust Litigation, Nos. Misc. 99-197, MDL 1285 (D.D.C.); See also *supra* note 1 at 66.

¹⁵ S. D. Hammond, “A Summary Overview Of The Antitrust Division’s Criminal Enforcement Program” (New York State Bar Association Annual Meeting, 23 January 2003) [unpublished] online: U.S. Department of Justice <<http://www.usdoj.gov/atr/public/speeches/200686.htm>> (date accessed: 7 February 2006).

¹⁶ *OECD Recommendations against Cartels*, *supra* note 6 at A.

¹⁷ *Ibid.*

countries whose markets would otherwise be competitive”; secondly, “they generally operate in secret, and relevant evidence may be located in many different countries”.¹⁸

From this description, the most important characteristics of hard core cartels are:

- a conspiracy among enterprises, as former competitors in the manufacturing, distribution or services sectors;
- restrictive business practices, as most harmful among anti-competitive acts; and,
- operations that extend to many different countries.

A clear description of an international cartel is offered by Margaret Levenstein and Valerie Suslow: “1) it must involve more than one producer (otherwise, we consider it an extension of monopoly power case); 2) it must include firms from more than one country; and 3) it must have attempted to set prices or divide up markets in more than one country.”¹⁹

Types of restrictive practices conducted by cartels are price-fixing, output restriction, market and customer allocations, and collusive tendering.

Price-fixing usually means raising prices above the competitive level, which results in consumers purchasing less of the cartelized product while paying more for it.²⁰ This clearly shows the transfer of wealth from consumers to producers by the illegal action of cartel members. There is another more harmful economic effect, apart from the misallocation of financial resources. Because of the passive participation in the market by a sheltered cartel not having to compete in a free market, “productive” and “dynamic”

¹⁸ *Ibid.*

¹⁹ Margaret Levenstein and Valerie Suslow, “Private International Cartels and Their Effect on Developing Countries”, background paper for the World Bank’s World Development Report 2001, CCNM/GF/COMP/WD(2002)34, at 7.

²⁰ OECD, *Report on the Nature and Impact of Hard Core Cartels and Sanctions against cartels under National Competition Laws*, April 9, 2002, DAF/COMP(2002)7, at 6 [hereinafter *OECD Report on Impact of Cartels*].

efficiencies will decrease; such a decrease is due to the reduced pressure to innovate and to control costs.²¹

Market and customer allocation is another restrictive practice by cartels. In order to gain profits proportionately, members of the cartel geographically allocate sales markets and customers.

Collusive tendering (or bid rigging) is another restrictive practice by cartel which involves:

- a) competing companies agree to refrain from tendering or to withdraw their submitted tenders so that another company can win the tender;
- b) the competitors take turns being the winning tender, with the others submitting high bids; in this way they equalize tenders won by each over time; or,
- c) competing companies agree among themselves about who should win, and the others submit artificially high bids to make an appearance of active competition.²²

For example, bid rigging was the subject matter of the USAID (United States Agency for International Development) Construction case. Four companies were convicted for engaging in bid-rigging practices on water treatment construction contracts funded by USAID in Egypt. According to the report from the US antitrust agency, fines totaling more than \$140 million were imposed in addition to over \$10 million in restitution to the US government.²³

Cartelization activity does not choose any specific sector of the economy and can be observed across a wide range of sectors of any economy. Research conducted under

²¹ *Ibid.*

²² OECD & World Bank, *A Framework for the Design and Implementation of Competition Law and Policy*, (Paris: OECD, 1998), (17 December 1998), at 23 [hereinafter *A Framework*] [unpublished].

²³ Hammond, *supra* note 15.

the auspices of the World Bank, devoted to the study of international cartels and most of the collected cases were prosecuted by the US and EC competition agencies during the 1990's. According to this study, these cartels operated in a variety of industries, including chemicals, metals, paper products, transportation, and services.²⁴

International cartels involve companies from two or more countries. According to the same study, a typical international cartel had firms from two or three countries; some cartels involved companies from four or five, and in the case of shipping cartels, as many as thirty countries.²⁵ In August 1996 the Antitrust Division of the U.S. Department of Justice began prosecution of two cartels in the contexts of cartels of food and feed additives: *Citric Acid* and *Lysine Cartels*.²⁶ A U.S. firm, German and two Swiss and a French based Dutch firms as well as several foreign nationals were involved in the *Citric Acid* cartel, which fixed prices and allocated sales volumes in the U.S. and elsewhere for citric acid, an organic food additive used in beverages, cosmetics, medicine, detergents, chemicals, and textiles. This cartel lasted from July 1991 to June 1995 and annual sales of citric acid exceeded \$1.2 billion worldwide; prices were raised to U.S. customers by more than 30%, resulting in hundreds of millions of dollars in added revenue for the members of the cartel.

²⁴ Simon J. Evenett, Margaret C. Levenstein, and Valerie Y. Suslow, "International Cartel Enforcement: Lessons from the 1990's", World Bank Policy, Research working paper series; No. WPS 2680, (30 September 2001) at 5, 6.

²⁵ *Ibid.* at 6.

²⁶ U.S. Department of Justice, *International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust, Final Report*, (2000), at chapter 4 "International Anti-cartel Enforcement and Interagency Enforcement Cooperation" [hereinafter "*ICPAC Final Report*"] online: U.S. Department of Justice <<http://www.usdoj.gov/atr/icpac/finalreport.htm>> (date accessed: 2 March 2006).

In the *Lysine* cartel, such restrictive practices as price fixing and market allocation were conducted for the sale of lysine, a livestock feed additive. During the first months alone of this conspiracy, prices went up on average 70%.

One might wonder what percentage international cartels account for, alongside domestic cartels. According to the available data from the U.S. cartel investigations, approximately twenty-five percent of the more than 625 criminal antitrust cases filed by the Department of Justice since fiscal year 1990 were international in scope.²⁷

It is recognized that cartel activity is the most harmful among the anti-competitive acts.²⁸ For example, the U.S. antitrust agencies (Antitrust Division of the USDOJ and FTA) see the prosecution of cartels as their top priority.²⁹ According to the OECD's Competition Committee survey among its Members between 1996 and 2000, a total of 119 cases were reported. Unfortunately, it was not possible to estimate the harm caused by most of these; still, the amount of commerce affected by just sixteen large cartel cases reported in the OECD survey exceeded USD 55 billion world-wide. Furthermore, the survey showed that the cartel mark-up, *i.e.*, artificial raising of prices by a cartel, can vary significantly across cases, in some very large and as much as 50% or more; therefore, the researchers concluded that the magnitude of harm from cartels is many billions of dollars annually.³⁰ Available information from cartel investigations is limited to only the U.S. and E.C. reports; thus it is difficult to estimate the harm caused by most cartels. However,

²⁷ *Ibid* at Ch. 4.

²⁸ *OECD Recommendations against Cartels*, *supra* note 6.

²⁹ S.D. Hammond, "An Overview of Recent Developments in the Antitrust Division's Criminal Enforcement Program" (ABA Midwinter Leadership Meeting, Kona, Hawaii, 10 January 2005) online: U.S. Department of Justice <<http://www.usdoj.gov/atr/public/speeches/207226.htm>> (date accessed: 20 February 2006).

³⁰ Simon J. Evenett, Margaret C. Levenstein, and Valerie Y. Suslow, "International Cartel Enforcement: Lessons from the 1990's", World Bank Policy, Research working paper series; No. WPS 2680, (30 September 2001) at 2.

William J. Kolasky, former Assistant Attorney General for the Antitrust Division of the USDOJ, noted that "... it is clear much of the harm from cartels falls on developing countries, which are often significant purchasers of cartelized products or services and must pay grossly inflated prices"³¹.

1.3 Effects of International Cartels on Developing Countries

Considering the fact that most countries of the world are developing countries, especially in terms of their import-export economies in general, developing countries play important roles in international trade. About two thirds of the WTO's 150+ members are developing countries and there are currently fifty least-developed countries on the UN list, thirty-two of which to date have become WTO members.³²

Numbers show that developing countries are significant parts of the world economy; but when it comes to the examination of international cartels in developing countries we encounter frustrating problems. There is almost no publicly available information about investigated international cartel cases by developing countries. Only data from the U.S. Department of Justice and the European Commission on investigated international cartel cases are available. Thus, only international cartels operating in the most developed countries were successfully prosecuted. With few exceptions, all statistical data, case files, and academic research concerning international cartels are devoted to those limited cases investigated by competition authorities in the U.S., Canada, E.C., Australia, Japan and few other developed countries.

³¹ Ky P. Ewing, *Competition Rules for the 21st Century: Principles from America's Experience* (The Hague: Kluwer Law International, 2003), at 43, citing William J. Kolasky, Deputy Assistant Attorney General, *North Atlantic Competition Policy: Converging Towards What?*, address before the BIICL Second Annual International and Comparative Law Conference, London, England, May 17, 2002.

³² "Who are the developing countries in the WTO?" online: WTO <http://www.wto.org/english/tratop_e/devel_e/dlwho_e.htm> (date accessed: 3 March 2006).

Does this mean that the international cartel is a phenomenon peculiar to the most developed countries?

The answer is difficult. If we answer positively, our reply might be inaccurate because enough research has not been done on those international cartels that exist in the developing countries. If we answer negatively, our reply might be inaccurate too, because many of the developing countries do not have competition laws, especially the least-developed ones; and even in those countries that have adopted competition laws, enforcement is weak to non-existent. This is because of the scarcity of resources, including but not limited to finance and skilled staff. From this perspective, we can argue that an international cartels that exist in developing countries but have not been investigated does not mean that such activities are only peculiar to developed countries.

Therefore, considering the lack of available data and research, we can only measure the impact of known (investigated) international cartels on developing countries.

According to the study done for the World Bank, in 1997 developing countries imported \$81.1 billion of goods from industries subject to price-fixing conspiracies by cartels during the 1990s; and these imports represented 6.7% of imports and 1.2% of GDP in developing countries. They represented an even larger fraction of trade for the poorest developing countries, for whom these sixteen products represented 8.8% of imports. However, this data does not represent the complete value of harm by all cartels because only information from sixteen international cartelization cases was available, of forty cases investigated or currently being investigated by the U.S. Department of Justice and the European Commission in the last decade.³³

³³ Levinstain, *supra* note 19 at 2.

Apart from direct financial impact, there are other types of anti-competitive acts employed by cartels, for example, blocking entry into markets. The price-fixing conspiracy in the E.U. steel beam market between 1988 and 1994, restricted information about technology using the patent tools, thereby blocking the entry of new enterprises into the market.³⁴ Another example is the *Graphite Electrodes* case where producers from the U.S., E.U. and Japan agreed to restrict non-conspirators' access to certain graphite electrode manufacturing technology.³⁵ Levenstein and Suslow argue that these kinds of activities might be particularly effective in limiting entry from developing country producers who are new to international trading.³⁶

Analyzing all data available, we can conclude that thorough research on the impact of international cartels to developing countries is still to be done and that developing countries should also share (fulfill) the responsibility of vigorous investigation of international cartels with developed countries because of the following reasons:

- a) financial harm amounts to billions of dollars per year that affect developing countries;
- b) concerns related to market foreclosure by international cartels result in reduced competition, and in turn a non-competitive market leads to reduced pressure on innovation and slow economic development, which is already an issue among developing nations; and,

³⁴ *Ibid.* at 10

³⁵ *ICPAC Final Report*, *supra* note 26 at Ch. 4

³⁶ Levenstein, *supra* note 19 at 10.

- c) it is in the interests of developing countries to make sure that private barriers to trade by enterprises are eliminated during the difficult process of lifting public barriers to trade, to take full advantage of the benefits of trade liberalization.

We have analyzed the definition, nature, and impact of cartelization practices on international trade. Addressing the issue of cartels that affect international trade requires understanding the interaction of competition and trade issues. Additionally, examining the types of anti-competitive activities that go beyond national borders affecting international trade is an essential part of understanding of the interaction of trade and competition issues, which will be addressed in the following chapter.

CHAPTER TWO

TRADE AND COMPETITION POLICIES

2.1. The Interaction of Trade and Competition Policies

One of the major negative effects of cartelization practices is on international trade. From this perspective, the problem of international cartels cannot be reviewed separately from international trade. In the process of discussions of international competition issues at different levels, including academia, international and inter-governmental organizations, there emerged a need for understanding the consistencies and divergences of international trade and competition issues initially, in order to address the problem adequately. Since different trade and competition policies of countries make the address of international cartels very complicated, by understanding the consistencies and divergences, the international community will be able to prepare the ground for future international agreement. Additionally, examining the types of anticompetitive activities that affect international trade is important because the internationalization of these activities starts from domestic anticompetitive activities.

In many cases, these convergences and divergences have been presented as a result of analyses of different levels, such as international trade and national competition policy or national trade policy and international competition issues or by comparing the purpose of one policy and practical implications of another. Therefore, from our perspective, it is more relevant to compare trade and competition policies on equal terms rather than comparing domestic to international issues (for example, national competition

issues to international trade), where it surely reveals many inconsistencies and convergences because of the non-equal comparison.

From this perspective, it will be relevant to start from the interrelation of national trade and competition policies; secondly, national trade and competition policies, as complicated by remedy laws and exemptions that exist in the practice of the countries; and then we will examine international trade (liberalization) and international competition policies.

The objective of a liberal national trade policy is reduction of governmental barriers to trade; the objective of national competition law is to ensure that the market is competitive, leading to efficient allocation of resources and innovation. This means that both policies should be mutually supportive of each other because in the process of lowering public, *i.e.*, governmental barriers to trade, we should also eliminate private barriers by enterprises. Results of trade liberalization can be hampered by private restraints that raise prices, preventing access by foreign competitors into the domestic market, and its goods and services by means of import and international cartels, abuse of market power, or exclusionary agreements. Historically, trade liberalization policy has focused on governmental measures “at the border”, whereas competition policy has focused on “behind the border” activities, assuring competitive conditions within the national markets.³⁷

However, such harmonization of the trade and competition policies reveals divergences if objectives and current roles of both trade and competition policies are analyzed on the basis of existing policies held in both developing and developed

³⁷ OECD, Trade Directorate, *Report of the Joint Group on Trade and Competition on Consistencies and Inconsistencies between Trade and Competition Policies, 25 February 1999, COM/TD/DAFFE/CLP (98)25/FINAL (Feb. 25, 1999)*, at 4 and 5.

countries. Protectionism in trade policy, including tariff and non-tariff barriers protecting producers from import competition and export promotion policies, raise competition concerns. Governmental protectionism will give an opportunity for domestic private enterprises to collude and raise prices in an uncompetitive market, to the detriment of consumers; furthermore, due to the market power, companies will tend to abuse their position by concluding exclusive distribution agreements and tie-in sales, eventually charging high prices abusing its monopoly position.

In its turn, competition policy also reflects governmental policies by excluding export cartels from the application of antitrust laws. For example, the U.S. Sherman Act does not apply to export cartels which do not affect U.S. markets. In Canada, section 45(5) of the *Competition Act* provides "...the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to the export of products from Canada", unless it limits the exportation or its value, affects or restricts businesses exporting from Canada or lessens or prevents services facilitating export from Canada.³⁸

Interaction of international trade and competition policies remains a controversial topic. The objective of international trade policy is open trade, though this is not stated explicitly in GATT or in any WTO agreement.³⁹ Although competition issues have been regarded as domestic, they have been expanding internationally as trade in goods and services is intensifying among nations. One example is international mergers. One way of penetrating an export market is to establish a physical presence in that market by merging with an existing firm; in 1999, cross-border mergers accounted for \$ 720 billion,⁴⁰ with

³⁸ *Competition Act*, R.S.C., 1985, C-34.

³⁹ K. Kennedy, *Competition Law and the World Trade Organization: the Limits of Multilateralism* (London: Sweet & Maxwell, 2001), at 2.

⁴⁰ *Ibid.* at 12, citing *The Economist*, Oct 7, 2000 at 124

\$3.4 trillion in mergers announced world-wide.⁴¹ Another example is international cartelization among producers of the same product to raise prices and restrict output, observed in the Vitamins and the graphite electrodes cases.

In this perspective, the main objective of international competition policy is to deter and prevent cartelization and abuse of any dominant position by means of co-operation among competition agencies of different countries. If two producers from different jurisdictions are conspiring to limit competition, then the competition agency of one country will not be able to investigate that cartel without co-operation from the second country, where one member of the cartel usually resides. Ending and preventing international anti-competitive activities will result in a globally competitive market for that particular sector of an economy which previously was subjected to output restrictions and market allocation among cartel members. Since the objective of international trade policy also focuses on opening up markets, then removing barriers to trade and increasing of international competition become objectives of both international trade and competition policies, making them inter-complementary.

2.2 International Anti-Competitive Practices Affecting International Trade

In this part we will define types of anti-competitive conduct affecting international trade. First, we will clarify those domestic anti-competitive activities affecting international trade; these domestic activities work in two ways: first, activities in one country affect markets in another countries; secondly, obstructing market access in one's own country for competitors from foreign countries. Following the examination of domestic anti-competitive activities, we will move to international ones.

⁴¹ *Ibid.* at 12, citing *ICPAC Final Report* para.1.03, n.3, at 44

According to national antitrust laws, anti-competitive conducts are generally divided into four major groups: horizontal and vertical agreements, mergers and abuses of a dominant position.⁴² Those anti-competitive activities that have an international trade dimension also develop from within national forms of conduct; therefore, the analysis of the types of anti-competitive activities affecting international trade, in this chapter, will follow the same order as national types.

Horizontal agreements are between companies which compete with similar products in the same market at the same stage of production; whereas vertical agreements are between companies at different stages of supply and distribution. Export cartels and import cartels are two types of domestic horizontal agreements that affect international trade.

Vertical agreements that affect international trade are as follows: exclusive distribution agreements, exclusive dealing agreements, tie-in sale agreements, refusals to deal, discriminatory pricing, predatory pricing and loyalty rebates.⁴³

Mergers between two or more companies in different jurisdictions are usually considered as affecting international trade. However, a merger of two or more companies within one country also can affect foreign markets, when merging companies have a greater portion of output sales in a world market.

The same is true as regards abuse of dominant position.

⁴² Weinrauch, *supra* note 1 at 30.

⁴³ UNCTAD, Investment, Technology and Enterprise Development Program, *World Investment Report 1997 on Transnational Corporations, Market Structure and Competition Policy* published on 1 August 1997, UNCTAD/ITE/IIT/5, at 191.

2.2.1 Export Cartels

This is an explicit or implicit agreement or arrangement between exporters of the same product to fix prices, to restrict output, to allocate markets for the purpose of gaining more profit in relation to goods or services to be exported to a foreign country.

According to the OECD report, clear definitions of export cartels are given from two different perspectives:

Export cartels are usually classified by the nationality of their members and by their objectives. National cartels consist only of firms within a single country, while international cartels include firms from two or more nations. Cartels can also be classified by their intended sphere of influence. In its 1974 Report, the Committee defined "pure" export cartels as those cartels which cover exclusively competition on foreign markets, while "mixed" export cartels are those which affect competition both on foreign and domestic markets.⁴⁴

Since there are two forms of export cartels, first, the national form will be analyzed, which will be followed by its global type.

As noted above, national export cartels are arrangements between exporting firms for the purpose of such anti-competitive activities as fixing prices, restricting output and allocating of markets of foreign country where members of the cartel export their goods and services. However, not all co-operative arrangements among exporting firms are considered to be export cartels; only those which seek to restrain competition through cartel-like behavior, such as price fixing, output restriction, and market allocation.

Price fixing activities by cartel members include the following forms: Agreements on 1) prices to be charged to customers; 2) to eliminate price discounts or to establish uniform discounts; 3) to remove products offered at low prices from the market in order to limit supply and keep prices high; 4) not to reduce prices without notifying the other

⁴⁴ OECD, Competition Committee, *Competition and Trade Policies: Their Interaction* (1984), online: OECD <<http://www.oecd.org/dataoecd/7/51/2375610.pdf>> (date accessed: 10 March 2006), [hereinafter *Report on Interaction*].

cartel members; 5) to adhere to published prices; and 6) to use a uniform price as the starting point for negotiations.⁴⁵

The effects of an anti-competitive act by a national export cartel are directed to a foreign market, not a domestic one. Therefore, many countries give immunity rights to export cartels from application of their own antitrust laws, as long as they do not affect their domestic markets. Exemptions and immunities from antitrust laws will be discussed in more detail in the chapter devoted specifically to the issue of exemptions.

Export associations of competing firms are officially allowed according to the antitrust laws of many countries. The reason is that such associations can offer small and medium-sized firms efficiencies of scale by means of expertise in penetrating foreign markets, familiarity with foreign markets, promotional assistance and channels of distribution. Export associations provide good tools for export expansion of businesses and they are allowed as long as they are not involved in anticompetitive activities such as price fixing and market sharing in foreign markets.

Between the two World Wars the share of export cartels (international and national) was significant. According to a study done by an OECD Committee, prior to World War II, export cartels controlled from 30 to 50 per cent of world trade.⁴⁶ Data from the U.S. Department of Justice shows that there were 179 international cartels in 1940.⁴⁷ The OECD Committee concluded that, prior to World War II, most OECD countries did not have competition laws and policies. The post war period was characterized by

⁴⁵ *Framework*, *supra* note 22 at 22-23,

⁴⁶ *Report on Interaction*, *supra* note 44 at 24.

⁴⁷ *Ibid.* at 24

adoption of competition laws in many countries, resulting in the break-up of many international cartels; and this in turn contributed to the expansion of world trade.⁴⁸

Data on the share of export cartels is limited. Therefore, we had to use the data from the study of 1984 OECD report. Its data on the share of export cartels among total exports was available for Germany, the United Kingdom and the United States. The share of the national and international export cartels in total exports for Germany was approximately two per cent in 1982, in the U.K. a maximum of five per cent, and in the U.S. less than two per cent in 1981.⁴⁹

As regards data on the product or industry coverage of export cartels, the OECD Committee report obtained information for five countries only. For example, in Denmark industry coverage of export cartels included agricultural and dairy products, air transport, linoleum, film rights and paint sectors; in Germany, electronics, chemicals, electrical engineering, food and the iron and steel industries; in Japan, in 1983 there were a total of fifty-three export cartels, with textiles accounting for twenty-seven, machinery and equipment for nine, miscellaneous products for five; in the U.K., engineering goods, consumer goods, producer services and consumer services; in the U.S., prior to 1973 wood pulp, chips and fiber, still and motion films, picture negatives, textile machinery, liquid sulphur, clay, anthracite coal, bit coal, phosphate rock, and agricultural products (generally fruit and vegetables, frozen poultry, milled rice, beef tallow, raw cotton), and after 1973 predominantly agricultural products and raw materials.⁵⁰

In fact, the report of the Committee on the study of export cartels concluded:

⁴⁸ *Ibid.* at 24

⁴⁹ *Ibid.* at 25

⁵⁰ *Ibid.* at 25

... on the basis of experience in some Member countries, that the expectations underlying policies to encourage national export cartels and exempt them from competition laws in their home countries have not been fulfilled and that small firms, who would be expected to benefit from reductions in overhead costs of exporting, have received little assistance.⁵¹

The success of the cartel is understandable according to a simple formula, according to which its success depends on the size of the share of output which it is representing. If it accounts for a small percentage of output, its ability to raise prices will be diminished because of the competitive prices established by other competitors who are not members of that cartel.⁵² Therefore, when a cartel includes almost all of the domestic producers, or even producers from many jurisdictions, and its share of the same product represents a significant percentage of the total output, then such a cartel will be able to practice cartel-like behavior, raising prices, restricting output and allocating markets between cartel members. In this case, such a cartel may affect the domestic market as well, because of its sales not only to foreign markets but also within domestic markets too.

As defined above, international cartels include firms from two or more nations having the intention to raise prices, restrict output and allocate markets in their sales across the markets of several countries. According to the data collected from the study of OECD, UNCTAD and other organizations, the typical international cartel of the 1990s had firms from two or three countries; some cartels included firms from four or five countries, and, in the cases of shipping cartels, as many as thirty countries.⁵³

Cartelization is accomplished through regular meetings, communications with other producers and agreements to coordinate the timing and amounts of price increases

⁵¹ *Ibid.* at 27

⁵² *Ibid.* at 26

⁵³ Evenett, *supra* note 24 at 6.

for certain products, sharing customers and sale volumes, as well as exchange of sales data and customer information on a periodic basis in order to monitor and enforce adherence to the agreement.

A recent Rubber Chemicals case uncovered in Canada and prosecuted in 2004 involved cartelization by the multinational corporations including Crompton Corporation and Bayer AG; the latter has its head office in Germany. Cartel members used the same tactics mentioned above and were prosecuted by Canada and the U.S.; the European Commission's investigation of the same case is in progress.⁵⁴

The negative impact of cartels is significant, according to the OECD Competition Committee report (2005). The estimated overcharges of recent cartels were reported as follows: in Japan, prices were raised by cartels on average 16.5 per cent; in Sweden and Finland, prices declined by 20-25 percent following the successful prosecution of asphalt cartels; in the United Kingdom, 30 percent price reductions were observed after enforcement against football replica kits; in Israel, price declines by approximately 40-60 per cent were observed after uncovering a bid-rigging cartel among envelop producers; estimates in the U.S. suggest that some hard core cartels may result in price increases of up to 60 or 70 per cent.⁵⁵

These data from recent international cartelization cases underpin the importance of the issue of export cartels.

⁵⁴ OECD, *Hard Core Cartels: Third report on the Implementation of the 1998 Recommendation*, (2005), at 12, online: OECD <<http://www.oecd.org/dataoecd/30/2/36600303.pdf>> (date accessed: 13 March 2006).

⁵⁵ *Ibid.* at 25.

2.2.2 Import Cartels

The second type of horizontal agreement that affects international trade is the import cartel. It is an arrangement between or among firms in a particular country made for the purpose of coordinating the importation into that country of goods or services.⁵⁶

Concerns related to import cartels are that they may increase the market price of imported articles and limit the importation of goods by increasing prices; also they may exclude foreign firms from selling their goods in the domestic market; therefore, import cartels are declared illegal according to the laws of some countries, particularly the U.S.

It should be noted that only those import arrangements between firms that are of concern are those practicing cartel-like behavior, which are: prices fixing, limiting the importation of goods, market allocation, and exclusion of foreign competitors.

A study done by the OECD Competition Committee argues that an import cartel practices commit cartel-like behavior "...with a view to the acquisition and exercise of market power".⁵⁷ The term "acquisition and exercise of market power" is used for a single company, according to antitrust laws; but an import cartel is usually comprised of several (it might be all of the importers of a certain product) firms, although in some cases it can be only one firm. However, cartelization behavior by an import cartel can lead to gaining market power. This can result in members of the cartel restricting supplies in the domestic market and hence raising prices on the domestic market.⁵⁸

However, this type of cartel can only exist when it excludes its competitors from the market, both domestic non-member importers and foreign importers.⁵⁹ According to

⁵⁶ *Report on Interaction, supra* note 44 at 32.

⁵⁷ *Ibid.* at 33

⁵⁸ *Ibid.* at 33

⁵⁹ *Ibid.* at 33

the OECD report, such an exclusion of competitors by cartel members can be done in two ways: cartel members may have exclusive purchasing arrangements with foreign sources of supply or they may otherwise control distribution of the product into the domestic market.⁶⁰ Furthermore, if it is a closed economy, especially in developing countries, the government itself can prevent competition with the cartel by establishing non-tariff barriers for importation, such as quotas.

The prosecution and qualification of the import cartel is clear and straightforward, according to national competition laws. Import cartels with price fixing or other anti-competitive objectives or effects are considered illegal, in the same category as international or export cartels.

For example, in the U.S., anti-competitive cartelization activities of companies are illegal under the *Sherman Act* and *Wilson Tariff Act*. Under Section 23 of the latter:

Every combination, conspiracy, trust, agreement or contract made by or between two or more persons either of whom ... is engaged in importing any article from any foreign country into the United States ... is illegal and void if intended to operate in restraint of trade or to increase the market price of any imported article in any part of the United States or of any manufacture into which such article enters or is intended to enter.⁶¹

The *Wilson Tariff Act* is supplemented by the *Sherman Act*, which applies to any arrangement which restricts U.S. trade or commerce between States or with foreign nations, according to Section 1 of the Act.⁶²

There are many cases involving import cartels. For example, the Japanese Fair Trade Commission required the only four Japanese soda ash manufacturers, which were also the only firms that imported soda ash from the United States, to terminate a cartel agreement which set the overall quantity to be imported, established the share that each

⁶⁰ *Ibid.* at 33

⁶¹ *Wilson Tariff Act*, 15 U.S.C. § 8 (1994).

⁶² *Ibid.*

of the four would import, and imposed other restrictions on storage terminal facilities to discourage new entrants from circumventing the cartel.⁶³ (Another example is not recent enough due to the lack of data.) In the late 1920s an injunction was sought against a group of American corporations and one Mexican corporation which had effected a plan to monopolize the supply abroad, and the domestic supply and price, of sisal, a fiber used to make twine. The Court noted that the “fundamental object [of the plan] was control of both importation and sale of sisal”.⁶⁴

2.2.3 Vertical Restraints

Vertical restraints or agreements are not between competing firms but between a producer and distributor or customer, *i.e.*, from upstream to downstream in the process of production, distribution and sales. Therefore, they are called vertical agreements. These include both price and non-price restrictions. Price restrictions set minimum or maximum resale price maintenance; whereas, non-price restrictions include exclusive distribution or dealing agreements, tie-in sales, and quantity forcing.⁶⁵

Vertical agreements that affect international trade can be any of these, with their objective to exclude foreign competitors in order to enjoy a market dominant position as regards sales and prices: exclusive distribution agreements (distributors are assigned exclusively within a geographical area, over particular types of clients, or over specific products), exclusive dealing agreements (restrictions on a firm’s choice of buyers and suppliers), tie-in sales agreements (restrictions on the source of supplies for particular inputs used by firms), refusals to deal (a supplier refuses to sell to parties wishing to buy),

⁶³ *Ibid.* at 34

⁶⁴ *Ibid.* at 34

⁶⁵ OECD, Directorate for Financial, Fiscal and Enterprise Affairs, Trade Directorate, *Report of the Joint Group on Trade and Competition on Competition and Trade Effects of Vertical Restraints*, 26 May 1999, COM/DAFFE/CLP/TD(99)54, at 4, [hereinafter *Report on Vertical Restraints*].

discriminatory pricing (a supplier charges different parties different prices under similar circumstances), predatory pricing (suppliers sell at a low price in order to drive competitors out of business) and loyalty rebates (a dominant supplier offers discounts to certain parties on condition that they do not sell someone else's products).⁶⁶

Among anti-competitive practices, the issue of vertical restraints is complicated and subject to different arguments by many experts in the field. According to the OECD report, vertical restraints have complex potential pro- and anti-competitive effects; therefore, they should be reviewed on a case-by-case basis using the "rule of reason" analysis rather than prohibition *per se*.⁶⁷

In recent cases involving the U.S. and Japanese auto makers' dispute, and in the *Kodak/Fuji* cases, vertical restraints were the subject matter. In the *Kodak/Fuji* case⁶⁸, Kodak, an American company claimed that Fuji, a Japanese company, had closed Japanese photographic film and paper distribution markets from foreign competitors by concluding exclusive distribution agreements with distributors. Some experts argue that "neither Kodak, in its submissions, nor the U.S. Trade Representative made any appropriate economic analysis of Fuji's practices: Fuji's market power was assumed, and

⁶⁶ UNCTAD, Investment, Technology and Enterprise Development Program, *World Investment Report 1997 on Transnational Corporations, Market Structure and Competition Policy* published on 1 August 1997, UNCTAD/ITE/IIT/5, at 191.

⁶⁷ *Report on Vertical Restraints*, *supra* note 67 at 10

⁶⁸ WTO, *Japan – Measures affecting consumer photographic film and paper*, 31 March 1998, WT/DS44/R; The case started in July, 1995 when the U.S. Trade Representative (U.S. TR) decided to initiate an investigation regarding the Japanese consumer photographic film and paper markets upon the petition submitted by the Kodak, a photographic product company. The USTR's involvement was based on the fact that under Section 301 of the Trade Act of 1974, as amended by the 1988 Trade Act, the U.S. TR is empowered to address the toleration by a foreign government of systematic, anticompetitive practices by private firms that restrict access of U.S. goods or services to a foreign market. See 19 U.S.C. § 2411 (1994).

no effort was made to assess whether Fuji's distribution contracts were promoting efficiency."⁶⁹

According to the submissions of the parties during the WTO Panel review⁷⁰, the U.S. argued that the Japanese government tolerated the anti-competitive business practices by its domestic company in order to foreclose the distribution market. However, the Japanese government argued that Japanese single brand film distribution wholesale was not peculiar to Japan, but a worldwide phenomenon in the film market, like Kodak's own distribution structure in the U.S. market. Furthermore, primary wholesalers that handled Fuji's products were under no contractual obligation to handle Fuji's product exclusively, but rather they chose to do so as a matter of business judgment. The WTO decision panel rejected all U.S. claims and decided that the case should take issue not with market structures but with the measures of the Japanese government; therefore, the panel concluded that the U.S. could not demonstrate that alleged Japanese measures breached GATT's Article XXIII: 1(b); also the U.S. could not demonstrate that alleged Japanese distribution measures accorded as "less favorable treatment to imported photographic film and paper within the meaning of GATT Article III:4".⁷¹

This is a case of vertical restraint, particularly as exclusive dealing agreements that affect international trade, although the panel ignored the assessment of private barriers based on the U.S. complaint on the breach of public barriers to trade, *i.e.*, measures of the Japanese government. Kodak, an American company, could bring its law

⁶⁹ B. Zanettin, *Cooperation between Antitrust Agencies at the International Level* (Oregon: Hart Publishing, 2002) at 243, citing William H. Barringer "Competition policy and cross border dispute resolution: Lessons learned from the US-Japan film distribution", (1998) 6 *George Mason University Law Review* 458, 470.

⁷⁰ Masabumi Suzuki, "Towards constructive international trade dispute resolution: lessons from recent U.S.-Japan disputes on restrictive practices" The Brookings Institution, CNAPS Working Paper (Fall 1999), online: Brookings Institution <http://www.brook.edu/fp/cnaps/papers/1999_suzuki.htm> (date accessed: 15 March 2006).

⁷¹ *Supra* note 68.

suit in a Japanese court against Fuji's anti-competitive distribution practices. In this way, the case would not be through the U.S. government as it was done, but directly from its own name. In order for the U.S. Trade Representative to bring a complaint at the WTO on anti-competitive activities of private companies, there should be an international agreement within the WTO regulating competition issues, which has not been concluded to date. Therefore, the U.S. government had to challenge Japanese companies on the basis of provisions of the existing WTO agreements, which deal with public barriers rather than private.

2.2.4 Mergers of Companies Affecting International Trade

When enterprises combine through purchases of outstanding securities or operating assets from another company, or two firms exchange securities to form one firm, the result of such an agreement or takeover is called a merger.⁷² Mergers can be horizontal, vertical and conglomerate. Horizontal mergers are between companies which compete with similar products in the same market at the same stage of production, whereas vertical mergers are between companies at different stages of production and distribution, meaning that it is not between competing rival companies but between manufacturers, distributors and retailers or wholesalers who are in a buyer-seller relationship. Conglomerate mergers are between companies which operate at different sectors of an economy. Of the three types of mergers, vertical and conglomerate mergers are rare and in most cases they do not harm any competition process. However, the third type of merger, horizontal mergers, impact on the competitive process because they

⁷² Weinrauch, *supra* note 1 at 33.

reduce the number of independent competitors in a market to form a dominant firm with substantial market power or even a monopoly.⁷³

Mergers may affect international trade in two ways, *i.e.*, in the case of a merger of two or more companies residing in different jurisdictions, and in the case of a merger in one jurisdiction, which has its impact on other markets in different jurisdictions, due to its significant market share in world sales.

Global merger and acquisition activity increased from \$100 billion in 1987 to \$720 billion in 1999, an annual rate of increase was 42 per cent.⁷⁴ According to the ICPAC⁷⁵ report, the percentage of all matters reviewed by the Antitrust Division and possessing an international aspect had grown from two to three percent in the early 1990s to almost forty percent in 1998.⁷⁶

Anti-competitive mergers are prohibited according to the laws of member countries of NAFTA and the E.U.; therefore, their respective laws provide for notification of mergers and pre-merger review.⁷⁷ This means that merging companies should notify their intent to merge to the competition agencies before the merger become effective. Competition agency will assess the pro-competitive and anti-competitive impact of the merger based on many factors that vary across jurisdictions, including but not limited to, the market share of the merging companies, the possible market share after the merger, efficiencies that the merger might bring, the merger's harm to small and medium sized companies, etc.

⁷³ *Ibid.* at 34

⁷⁴ K. Kennedy, *Competition Law and the World Trade Organization: the Limits of Multilateralism* (London: Sweet & Maxwell, 2001), at 240, citing Daniel Pruzin & Diana I. Gregg, "UNCTAD Cites Merger, Acquisition Boom as Global FDI Expected to Hit \$1 Trillion" (October 12, 2000) 17 Int'l Trade Rep. (BNA) 1551.

⁷⁶ ICPAC Final Report, *supra* note 26 at Ch 2.

⁷⁷ Kennedy, *supra* note 74 at 242.

Treatment of mergers with an international dimension can be observed in the E.U. A merger which meets a “community dimension” has a duty to notify the Commission within one week of the signing of the merger or acquisition agreement; under an initial test, if a merger meets the following monetary thresholds, that merger is regarded as having a community dimension: a) the undertaking concerned has combined worldwide sales of five billion Euros, and b) at least two of the undertakings concerned each has sales in the E.U. of 250 million Euros.⁷⁸

However, there are cases where merging companies have significant share of world sales or assets equal to a certain amount. In this case, even though these merging companies reside in one country, other countries require notification to their antitrust agencies by the merging companies. For example, when the *Boeing/McDonnell Douglas* merger was proposed in the U.S., where both merging companies reside, the U.S. cleared the merger; however, because the merger had direct impact on the E.U. market economically, the merging companies had to notify the Commission in order to be cleared so that they could trade within the E.U. market.⁷⁹

In 2000, sixty countries of the world had competition laws with pre-merger notification requirement.⁸⁰ These notification and pre-merger review standards differ depending on the policy goals of each county; therefore, there are differing substantive standards of review and divergence about the meaning of anti-competitiveness and

⁷⁸ Council Reg. 139/2004, [2004] O.J. L 24/1 Art. 1(2)

⁷⁹ *ICPAC Final Report*, *supra* note 26 at Ch 2, n. 48.

See also D.A. Valentine “Building a Cooperative Framework for Oversight in Mergers - The Answers to Extraterritorial Issues in Merger Review” George Mason Law Review’s Antitrust Symposium, Arlington, VA, 10 October 1997) online: U.S. Federal Trade Commission

<<http://www.ftc.gov/speeches/other/boegmaso.htm>> (date accessed: 22 June 2006);

See also Decision 13/65 on *Boeing/McDonnell Douglas*, July 30, 1997, Bulletin EU 7/8-1997(en).

⁸⁰ *ICPAC Final Report*, *supra* note 26 at Ch 2, n. 22.

For the list of countries with merger control system see Annex 2 C of this document.

dominance, according to the ICPAC report.⁸¹ For example, the European Commission considers fifty percent and sometimes forty percent of a market share as a dominance, especially if the next largest company is far behind, whereas, the United States antitrust agency measures market power and its possible increase micro economically, by considering the various relevant factors in the specific context; in the *Eastman Kodak Co. v. Image Technical Servs. Inc.*, the U.S. Supreme Court ruled that eighty per cent of market share could be considered as market dominance.⁸² Furthermore, the ICPAC reports that, according to the statistics from several jurisdictions including the U.S., only cases ranging from one to five per cent of all notified mergers came under investigation, resulting in prohibition or being restructured by competition authorities. From that follows the argument of several practitioners and academics: in spite of the rarity of anti-competitive mergers, merger control policies of countries impose unnecessary transaction costs and bureaucratic roadblocks related to the notification process for mergers in many jurisdictions.⁸³ The issue is not about cancellation of merger control, but rather it is necessary to require companies to notify in advance of their plans, as pre-merger notification. The reason for such argument is, for example, that transaction costs exist for notification, for timing in merger review and for predictions about future anti-competitive effects of the merger. In terms of transaction costs for notification, such as determining in which jurisdiction a particular transaction must be notified, preparing and filing the required notifications, further correspondence, *i.e.*, producing documents, and visiting the

⁸¹ *Ibid.* at Ch 2, n. 22

⁸² *Ibid.* at Ch 2, n. 22

See also *supra* note 39 at 229, citing *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992).

⁸³ Ky P. Ewing Jr., *Competition Rules for 21st Century: Principles from America's Experience* (Hague: Kluwer Law International, 2003) at 34.

agencies, the legal fees make up a significant portion of total costs, including the obtaining sometimes of twenty or thirty opinions from local counsels of different countries.⁸⁴ An investigation period for notified mergers in the E.C. is maximum four months, for the U.S. it is fifty days, and Canada five months.

The reason for policing anti-competitive mergers prior to, rather than, post-merger, is because of its relative easiness. It is bureaucratically more convenient for an enforcement agency to get notification beforehand and to make predictions about the future impact of the merger, rather than to undo a merger later.⁸⁵

Both sides have advantages and disadvantages. Pre-merger notification allows competition authorities to examine all merger cases at the beginning; whereas, if there were no such control, competition authorities have to uncover an anti-competitive merger after it has harmed consumers and competitors, in some cases long after the merger. Furthermore, pre-merger notification allows competition agencies to prohibit mergers that show an anti-competitive effect in the future before they merged, rather than undoing the merger long after members have unified their structure and invested their finances. On the other hand, in the pre-notification case, competition authorities have to predict future conduct of the merger and its effects, regarding the merger's efficiency or its anti-competitiveness (predictions in many cases will not match actual future results). The four or five months waiting period may result in losses of money that would otherwise produce gains.

It can also be argued, as mentioned above, that only one to five per cent of all notified mergers are challenged according to statistics of several jurisdictions including

⁸⁴ *Ibid.* at 33, 38

⁸⁵ *Ibid.* at 34

the U.S.: why, then, is a complicated merger control system needed? However, it should also be taken into consideration that only those mergers having significant market share are usually challenged, for example, *Boeing/McDonnell* or *GE/Honeywell*. These mergers, when they obtain market power, have anti-competitive effects to the detriment of consumers.

2.2.5 Abuse of Dominant Position

Abuse of dominance position is termed differently by competition laws of many countries, as “monopolization” or “abuse of dominant position”. It is defined as “unfair conduct through which a firm achieves or maintains a monopoly, primarily by excluding other efficient competitors”.⁸⁶ For example according to the U.S. antitrust laws, abuse of dominant position is defined as “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony ...”.⁸⁷ There is consensus that being a monopolist is not prohibited; but achieving and abusing a monopoly position through anti-competitive acts like price discrimination (*e.g.*, different charges, loyalty discounts), market foreclosure, reduction of competition, refusal to deal, and anti-competitive use of intellectual property rights, are regarded as abuse of the dominant position. If achievement of market domination is through innovation or superior production and distribution methods, then it is not a breach of competition laws, at least in the U.S.

First, when investigating abuse of dominant position, is defining the relevant market; secondly, identifying the market share in order to find out whether the firm is

⁸⁶ Kennedy, *supra* note 39 at 227.

⁸⁷ 15 U.S.C. § 2 (1994).

dominant; thirdly, identifying specific practices that are harmful to competition and its effect in the relevant market.⁸⁸

The relevant market in competition law is defined according to product market and geographical market: product market is defined as including all those products and services regarded as interchangeable or substitutable by the consumer, by product characteristics, their prices and intended use; whereas, the relevant geographical market is defined as the area where concerned companies are involved, in which conditions of competition are sufficiently homogeneous and differ from a neighboring area due to its different conditions of competition.⁸⁹

Secondly, investigations of cases regarding abuse of dominant position require identification of market share of the concerned company. In this regard, the E.C. considers 40-45 percent of the market share as a dominant position; whereas, the U.S. considers it to be 80 percent or more.⁹⁰

The third step in investigations of the abuse of dominant position is the identification of anti-competitive conduct and its effects. Anti-competitive practices such as price discrimination (different charges, loyalty discounts), market foreclosure, reduction of competition, refusal to deal, anti-competitive use of intellectual property rights, are peculiar to the abuse of dominant position. Among them market foreclosure is one of the most effective for international trade. Vertical agreements such as exclusive dealing agreements by the dominant company will lead to market closure for new entrants. As discussed with vertical agreement types of anti-competitive activities,

⁸⁸ *Framework, supra* note 22 at 69,

⁸⁹ Kennedy, *supra* note 39 at 228.

⁹⁰ OECD, Committee on Competition Law and Policy, *Abuse of Dominance and Monopolization*, 9 September 1996, OCDE/GD(96)131, at 8.

manufacturers conclude exclusive distribution agreements with distributing firms, to prevent competitors to enter channels of distribution in the market.

An example of abuse of dominant position that has international dimension is the *EC v. Microsoft* case. According to the European Commission decision of 24 March 2004:

Microsoft abused its market power by deliberately restricting interoperability between Windows PCs and non-Microsoft work group servers, and by tying its Windows Media Player (WMP), a product where it faced competition, with its ubiquitous Windows operating system.

The ongoing abuses act as a brake on innovation and harm the competitive process and consumers, who ultimately end up with less choice and facing higher prices.⁹¹

In its decision, the E.C. clarified two restrictive business practices representing abuse of dominant position, including deliberately making the Windows operating system operable only with Microsoft's own software, resulting in market foreclosure for new entrants; secondly, tying Windows Media Player with its Windows operating system as a bundle for Microsoft's offers to PC manufacturers and end users, thus, restricting competition. According to the above mentioned decision, "Microsoft's conduct has significantly weakened competition on the media player market".

The European Commission qualified the conduct of Microsoft Corporation as a breach of Article 82 of the *EU Treaty (Treaty of Rome)* that prohibits abuse of dominant position by undertakings and clarifies that such conduct consists of the following:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (or)

⁹¹ *European Commission Decision on Microsoft Investigation*, IP/04/382 (Brussels: European Commission Press Release, March 2004), [hereinafter *EC Decision on Microsoft*].

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.⁹²

Subsections (a) and (b) qualify the conduct of Microsoft because the Commission, in its March 2004 decision, stated that “the ongoing abuses act as a brake on innovation and harm the competitive process and consumers, who ultimately end up with less choice and facing higher prices.”⁹³ According to subsection (a) “unfair trading conditions” and according to subsection (b) “limiting technical development to the prejudice of consumers” match the qualification of the Commission decision.

The Commission imposed a fine of € 497.2 million for Microsoft’s conduct, as an abuse of dominant position, during five and a half years.

We have analyzed the interaction of competition and trade issues. Additionally, we examined the types of anti-competitive activities that affect both competition and trade. This will refer us to the examination of existing tools for the deterrence of cartels, their efficacy, and factors that hinder their workability. These issues will be the subject matter of the next chapter.

⁹² Treaty Establishing the European Community (2002), OJEC C 325/33, Art.82.

⁹³ *EC Decision on Microsoft*, *supra* note 91.

CHAPTER THREE

EXISTING TOOLS FOR THE DETERRENCE OF CARTELS AND FACTORS THAT HINDER IT

3.1 Remedy: Criminal vs. Civil vs. Administrative Responsibility for Cartelization Activity

Remedying cartel behavior is one of the important tools for the deterrence of cartels.

There are several categories of controversies relating to the cartel remedy. The first category of issues consists of criminal, civil or administrative liability for cartel behavior. For example, Australian competition law relies on the civil remedy for cartelization⁹⁴, whereas, the US, Canada, and several other countries have already criminalized the sanctions against cartels.⁹⁵ Japan, for example, relies heavily on administrative sanctions.⁹⁶

The second category of issues consists of private and public enforcement. In this regard private enforcement is when private parties, rather than a government agency, are seeking coverage of damages. It can be instituted individually or on behalf of classes, and it can be brought on behalf of consumers or rivals, direct or indirect purchasers. In this case, the question arises whether it is too excessive for the government to charge cartel

⁹⁴ J. Clarke, "Criminal Penalties for Contraventions of Part IV of the Trade Practices Act" (2005) Deakin Law Review 8.

⁹⁵ *OECD Report on Impact of Cartels*, *supra* note 20 at 10.

⁹⁶ T. Homma, "Where Do We Go from Here" (American Bar Association Advanced International Cartel Workshop, Plaza Hotel, New York, 15-16 February 2001), online: American Bar Association <<http://www.abanet.org/antitrust/remedies/remediesintro.doc>> (date accessed: 1 June 2006).

members large fines while, at the same time, private parties, which are direct or indirect purchasers of cartelized product, are seeking coverage of damages in the state or federal courts. Furthermore, especially in the U.S., it was observed in recent cases that actions were initiated by foreign purchasers.⁹⁷

Regarding the issue of whether cartels should be remedied by civil, criminal, or administrative sanctions, the trend nowadays is going towards strengthening (severing) punishments. In its 1998 recommendations against hard core cartels, OECD calls its member countries to impose “effective sanctions, of a kind and at a level adequate to deter firms and individuals from participating in such cartels.”⁹⁸ From this perspective, many countries impose criminal sanctions against cartel members, specifically, imprisonment for natural persons. These countries include: Canada (5 years per count), Germany (5 years for collusive tendering), Ireland (2 years), Japan (3 years), Korea (3 years), Mexico (sanction determined by the judicial authority), Norway (6 years), Slovak Republic (5 years), the United States (3 years).⁹⁹ Furthermore, the size of fine has also increased over the past several decades. For example, in the U.S. in the 1970s, the maximum corporate fine for a *Sherman Act* violation was \$50,000. Later on, in 1974, it was increased to \$1 million, then \$10 million in 1990, and under the alternative maximum fine of “the greater of twice the gross gain or twice the gross loss” utilized since late 1996, it could easily run into the hundreds of millions, if not billions of dollars today.¹⁰⁰

⁹⁷ A. I. Gavil, “Access and Procedure” (Antitrust Remedies Forum, American Bar Association, Section of Antitrust Law, Washington D.C., 2 April 2003) online: American Bar Association <<http://www.abanet.org/antitrust/remedies/remediesintro.doc>> (date accessed 30 May 2006).

⁹⁸ *OECD Recommendations against Cartels*, *supra* note 6.

⁹⁹ *OECD Report on Impact of Cartels*, *supra* note 20 at 10.

¹⁰⁰ Gavil, *supra* note 97 at 3.

On the one hand, we don't want excessive fines leading to bankruptcy or the destruction of the business operation, because it will affect international trade, especially if the companies under consideration are large multinationals. On the other hand, small fines or administrative remedies contribute little to the deterrence of cartel agreements; therefore, a balance is required between two ends.

Regarding the second category of issues, that is public and private enforcement, the matter of balancing pops out as well; balancing deterrence, compensation, and institutional matters. The number of private litigants is big because there might be direct and indirect purchasers across the country. For example, in the *Vitamins* case, vitamin producing companies account for a significant share of the raise in global sales prices. Cartelized product occupied all the vitamin sales markets of the U.S.; obviously, wholesalers and consumers across the country were affected. In these kinds of cases, after or during public enforcement, private litigants also might decide to sue to cover their damages, and in this regard, many critics raised the issue of avoiding a pay out of "duplicative" and "excessive" damages.¹⁰¹ Another issue related to public-private enforcement is litigation in many state courts at the same time. In this case, there is criminal enforcement by the government, civil litigation across the country, and related costs: the institutional costs of courts, the costs related to hiring lawyers, etc. Moreover, trials in state and/or federal courts across the country are another issue related to the federal type of countries.

To sum up, with the increase of globalization, an increase in international anticompetitive activities is also being observed. The complicated nature of cartel

¹⁰¹ J.D. Graubert, "Too much or Too Little" (Antitrust Remedies Forum, American Bar Association, Section of Antitrust Law, Washington D.C., 2 April 2003) at 7, online: American Bar Association <<http://www.abanet.org/antitrust/remedies/remediesintro.doc>> (date accessed 30 May 2006).

enforcement at the same time requires a balance among deterrence, compensation, and institutional matters. While protecting national interests, maintaining protectionist policies in the national economy, a soft remedy or the tolerance of anticompetitive activities of a country's own national companies is not compatible with both liberal trade goals and competition law principles.

On the other hand, we don't want to charge too severe criminal sanctions and fines, but we want to impose sanctions which will deter cartel activities in general and compensate injured parties, which are not duplicative nor excessive (remedies).

3.2 Assessing the Efficacy of Leniency Programs against Cartels

Leniency programs are defined as "all programs that provide for any reduction in sanction in exchange for information and cooperation"¹⁰² by members of the cartel. Some other terms that are sometimes used for leniency programs are amnesty or immunity programs. The term "amnesty" in antitrust means "a program that promises no penalty to the first party to come forward to the enforcement agency and comply with the agency's requirements."¹⁰³ The term amnesty is used within the leniency program because the first firm among cartel members comes forward to cooperate with enforcement agency and if agency has not opened a case against this cartel, the latter firm gets amnesty from prosecution and remedy, *i.e.* zero sanctions; however, if the enforcement agency had already opened a case against that cartel before the cartel member comes forward for cooperation, the late company gets more lenient sanctions, *i.e.*, decreased fines. Though, different countries of the world adopted leniency programs with different conditions for giving amnesty or other lenient treatment.

¹⁰² OECD, Competition Law and Policy Committee, *Report on Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programs*, February 2001, DAF/CLP(2001)13 at 5.

¹⁰³ *Ibid.* at 5.

Leniency program is one of the effective tools for the fight against cartels. One of the challenges is the secrecy of the operation of cartels. Factors that motivate cartel members to come forward and take advantage of the leniency programs are the seriousness of the penalties and the risk of personal liability.¹⁰⁴ This can be expressed in one of the examples of the application of leniency program in the U.S. practice. During the investigation of the *Graphite Electrodes* cartel, an amnesty applicant (the first cartel member that came forward to cooperate with the enforcement agency) received no penalty, but the next firm to come in was fined \$32.5 million, the third company \$110 million, and the last one, \$135 million.

Leniency programs do not exist in all countries that have competition laws. For example, the U.S., the E.C., Canada, Korea, the UK, and Germany have leniency programs; however, France, Sweden and several other countries are adopting such program. The other countries do not have one even though they have competition laws.

Let's consider one of the country's leniency program.

The U.S. leniency program began in 1978, and then it was amended due to its ineffectiveness. The 1993 amendments to the program offered: (a) automatic amnesty if no investigation is underway before the applicant comes forward, (b) the possibility of amnesty even after an investigation has begun, and (c) granting amnesty to individual officers, directors, and employees of the applicant who co-operate with the investigation.¹⁰⁵

A company that reports illegal activity before an investigation has begun should meet the following six conditions in order for leniency to be granted:

¹⁰⁴ *Ibid.* at 5.

¹⁰⁵ *Ibid.* at 5.

1. At the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;
2. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;
3. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation;
4. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;
5. Where possible, the corporation makes restitution to injured parties; and
6. The corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.¹⁰⁶

However, in the case of not meeting the above six conditions, a company that comes forward still has the chance to take advantage of the leniency program if the following seven conditions are met, regardless of whether or not it comes forward before or after an investigation:

1. The corporation is the first one to come forward and qualify for leniency with respect to the illegal activity being reported;
2. The Division, at the time the corporation comes in, does not yet have evidence against the company that is likely to result in a sustainable conviction;
3. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;
4. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation that advances the Division in its investigation;
5. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;
6. Where possible, the corporation makes restitution to injured parties; and
7. The Division determines that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation's role in it, and when the corporation comes forward.¹⁰⁷

¹⁰⁶ The U.S. Department of Justice, *Corporate Leniency Policy*, Section A, 10 August 1993, online: U.S. Department of Justice <<http://www.usdoj.gov/atr/public/guidelines/0091.htm>> (date accessed: 22 June 2006).

¹⁰⁷ *Ibid.* at s. A.

Thus, the most successful cartel member that comes forward to cooperate with the investigation is that which came first and the investigating agency was unaware or has not opened a case against the same cartel.

Consideration of the advantages and disadvantages of the leniency program reveals several points.

First of all, a country with a leniency program uncovers more cartels than a country without such a program. If we compared two countries, one with a leniency program and another without, the former would outnumber the latter in prosecuted cartel cases. The reason is that both countries have competition laws, but the former has one extra mechanism that helps it to advance faster. For example, in the U.S., since 1993 applications for leniency from cartel members rate roughly two per month after the U.S. introduced its revised program; whereas, before revision, application rate was one per year.¹⁰⁸ This fact shows that the U.S. is being able to uncover extra two cartel cases per month but without leniency program this would not be possible. Cartel activity usually lasts longer than other violations of the law, which stresses the secret nature of the operation of cartels. According to a study done for the World Bank report, the average period that cartel activity lasts is approximately five years.¹⁰⁹ Some cartels have lasted longer; for example, a cement cartel in the E.C. market lasted as long as 11 years and (Central West African) shipping cartel lasted 20 years and affected Zaire, Angola, and the Northern part of Continental Europe, excluding the UK.¹¹⁰

¹⁰⁸ S.D. Hammond, "An Overview of Recent Developments in the Antitrust Division's Criminal Enforcement Program" (ABA Midwinter Leadership Meeting, Kona, Hawaii, 10 January 2005) online: U.S. Department of Justice <<http://www.usdoj.gov/atr/public/speeches/207226.htm>> (date accessed: 20 February 2006).

¹⁰⁹ Levenstain, *supra* note 19 at 63.

¹¹⁰ *Ibid.* at 63.

However, a leniency program can only be useful in countries where severe punishment for cartels exists. It is clear that cartel members are under pressure to disclose their operations if there are criminal sanctions rather than weak civil or administrative remedies. In this regard, criminalization of cartel activity is very important for the workability of leniency programs, especially the criminal punishments of imprisonment and large fines.

There is concern about the injustice of letting the violator go unpunished in connection with a leniency program.¹¹¹ However, when all issues are considered, the deterrence of existing cartels and enforcement effectiveness outweigh the injustice of giving amnesty to one of the cartel members. There are two reasons for such a conclusion: firstly, even though one of the members of the cartel will not get its punishment, the other members will be prosecuted and punished accordingly; secondly, if there was no leniency program, no cartel member would come forward to inform the prosecuting agency about the violation of competition laws and the harm from the cartel would continue, to the detriment of consumers who would have to pay artificially raised prices. The harm from the cartel is not only to consumers, but also to non-cartel producers who are blocked from markets where cartel products/services are sold or provided. A Cartelized market will lead to high prices, less choices, and restricted innovation which would otherwise be possible.

Furthermore, some argue that leniency programs might actually encourage collusion because they decrease the expected cost of misbehavior as a result of reducing

¹¹¹ OECD, Competition Law and Policy Committee, *Report on Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programs*, February 2001, DAF/CLP(2001)13 at 15.

penalties to at least some participants.¹¹² From my point of view, it is an exaggeration to consider that leniency might encourage cartel behavior. I support the OECD council's reply in this regard that only the first member of the cartel who comes forward will get some type of leniency through a decreased fine or amnesty.¹¹³

3.3 Immunities and Exemptions for Cartels from Antitrust Laws and How They Negatively Affect International Trade

Although many countries have been strengthening (severing) sanctions against cartels with the purpose of deterring them, at the same time, these countries have been granting immunity to some types of cartel activities that do not contradict national interests.

Export cartels are exempted from the application of national competition laws according in many jurisdictions. For example, according to the s. 45(5) of the *Competition Act*, a conspiracy (or cartel) will not be punished if it is only related to the export of products from Canada.¹¹⁴ However there are several limitations to this rule. Section 45(5) will not apply if this cartel: a) reduces or limits the real value of exports; b) restricts any person from exporting or expanding its export business; c) prevents or lessens competition unduly in the supply of services facilitating the export.¹¹⁵

In this example, we can clearly observe that Canada pursues its own interests, even though this immunized cartel might harm foreign markets. Such exemptions exist not only in Canada, but also in many other jurisdictions, including: Australia, Germany, Japan, the United States, Mexico, etc. In the EU, the decision of the Court of Justice

¹¹² *Ibid* at 16.

¹¹³ *Ibid* at 16.

¹¹⁴ *Competition Act*, R.S.C., 1985, C-34, s. 45 (5).

¹¹⁵ *Ibid.* at s. 45 (5),

approved the effects doctrine in the *Wood Pulp* case, it was stated that an export cartel which exports from the EU market “to non-member market is not likely to restrict or distort competition within the common market.”¹¹⁶ Therefore, the European Commission is also likely to tolerate anticompetitive activity as soon as it does not affect the domestic market.

From an antitrust perspective, if an export cartel accounts for a large share of domestic industry output, the possibility of exercising market power in foreign markets will increase, this will result in output restrictions to raise prices in the export market and engagement in collusive pricing in the domestic market.¹¹⁷ A similar conclusion was offered by the ABA Special Committee on International Antitrust based on the study of export cartels. It concluded that any benefits from export cartels may be outweighed by welfare losses to the country’s consumers resulting from the export cartels directed against that country by its trading partners. Therefore, mutual elimination of export cartel immunity confers net welfare benefits on the countries in the trading system.¹¹⁸ For example, in response to the U.S. cartel of sulphur exporters (SULEXCO) which consisted of 75 per cent of the world’s sulphur supply, import cartels were established in Australia, New Zealand and the United Kingdom to negotiate lower price increases than those desired by the members of the export cartel.¹¹⁹

There are many industries that countries exempt from the application of competition laws. Even the US, whose economy is based on the free market economy

¹¹⁶ M. Dolmans & J. Grierson “Arbitration and the Modernization of EC Antitrust Law: New Opportunities and New Responsibilities” (2003) ICC International Court of Arbitration Bulletin vol.14/No. 2, at 45-46.

¹¹⁷ *Report on Interaction*, *supra* note 44 at 27.

¹¹⁸ ABA, Section of Antitrust Law, *Report of Special Committee on International Antitrust*, submitted to the Committee on Competition Law and Policy, Organization for Economic Cooperation and Development (Paris, 1991) (DAFFE/CLP/WD(91)14) at 209.

¹¹⁹ *Report on Interaction*, *supra* note 44 at 27.

principles, excludes many industries from competition laws. The study group of the Antitrust Modernization Commission has listed 31 exemptions and immunities in different sectors of the U.S. economy.¹²⁰ These exemptions are in the following statutes: *The Agricultural Marketing Agreement Act*, Baseball exemption, the *Capper-Volstead Act*, the *Defense Production Act*, the *Export Trading Company Act*, the *Fishermen's Collective Marketing Act*, the *Health Care Quality Improvement Act*, the Railroad Transportation exemption, the *Shipping Act*, the *Small Business Act*, the *Sports Broadcasting Act*, etc.

How do these kinds of exemptions and immunities from competition laws negatively affect international trade?

In our answer to this question, we will elaborate on both effects, *i.e.* on international trade and domestic markets.

We have already seen one of the effects in the example of sulphur exporters and how import cartels were allowed to establish to counteract them.

One of the foremost effects is that which can be observed from the purpose of every cartel. The first purpose of a cartel is to remove competition from the relevant sector. This is accomplished either by involving or incorporating competitors in the cartel or blocking the market for non-cartel producers. After the cartel has achieved its first purpose, it will move to the second purpose, which is output restriction in order to raise prices while blocking the foreign competitors. The third purpose is to raise prices to the

¹²⁰ U.S. Antitrust Modernization Commission, Immunities and Exemptions Study Group, *Memorandum from Immunities and Exemptions Study Group to AMC Commissioners* (2005), online: Antitrust Modernization Commission <<http://www.amc.gov/pdf/meetings/ImmunitiesExemptionsStudyPlan.pdf>> (date accessed: 3 June 2006).

detriment of consumers. All of these restrictions to competitors and competition in the market itself negatively affect the domestic economy and international trade.

Let's try to understand this from a different perspective. Basic economic theory teaches that an unregulated competitive market generally leads to an economically efficient level of output.¹²¹ In contrast, in exempted sectors, producers freely restrain competition and raise prices above the competitive level. From an antitrust perspective, this means that by trying to be protectionist, countries actually hold themselves back from economic development.

Another point is that if we compare previously sheltered industries to the situation after deregulation, we can observe that the development rate in that sector is much faster than before and effective prices decrease as a result of competition.

The issue of exemption can be illustrated in an example of the *European shipping* case.

According to the Regulations 4056/86 and 823/2000, European liner shipping is exempted from the application of competition related provisions of the Treaty of Rome. Reasons for exemption were the worsening state of the EU's maritime fleet and the effects that this situation would purportedly have on jobs and manufacturing within the European Union; entry into force of the UNCTAD Liner Code which offered favorable conditions for its members, especially developing countries' shipping companies.¹²²

More specifically, the emphasis of the Regulation 823/2000 was placed on the incentives

¹²¹ A.F. Abbott, "Statutory Immunities and Exemptions" (Antitrust Modernization Commission, 1 December 2005) at 3, online: U.S. Federal Trade Commission <<http://www.ftc.gov/os/2005/12/051202statutory.pdf>> (date accessed: 3 June 2006), citing Robert S. Pindyck & Daniel L. Rubinfeld, MICROECONOMICS 294 (5th ed. 2001).

¹²² Chris Townley, "The Liner Shipping Block Exemptions in European Law: Has the Tide Turned?" (2004) 27(1) World Competition Kluwer Law International, at 112.

which will enable shipping companies of the EU to group themselves into consortia which would encourage ship-owners to invest in the industry, for example in containerization and modern working practices.¹²³ In antitrust language both Regulations encourage horizontal cartels. An analysis of the data on EEA fleet reveals that it (EEA fleet) has significantly shrunk since 1985. Then there were 38,048 liner vessels, over 100 GT., worldwide. This compared to 9,742 vessels in the EEA fleet, 27.7 percent of world tonnage. By 2003, the number of liner ships worldwide had grown to 46,308. Meanwhile, the EEA fleet had shrunk to 7,036 (although this was a marginal increase on 2002 (6,795)), and is now only 17.8 percent of world tonnage.¹²⁴

Furthermore, one of the aims of the block exemption regulations was to develop more job opportunities in the European shipping industry. However the analysis of the job market of the area, after the Regulations was adopted, shows that it went down rather than up. For example, in 1983, EEA vessels employed roughly 230,830 EEA nationals, and only 13 percent of their crews were non-EEA nationals. By 2003, EEA vessels employed just 134,585 EEA nationals, while the proportion of non-EEA nationals employed aboard had risen to 41.1 percent.¹²⁵

All these deteriorations are the results of price-fixing, restricting supply and market sharing activities that are exempted from the application of competition laws. Therefore, such exemptions and immunity rights from the application of competition laws only lead to the distortion of economies and international trade because of the

¹²³ *Ibid.* at 115.

¹²⁴ *Ibid.* at 135, citing online: European Community Ship-owners' Associations <<http://www.ecsa.be/ar/Statistical%20Tables.pdf>>;

However, EEA ship-owners control some 40 percent of the world fleet if one includes non-EEA registered ships.

¹²⁵ Townley, *supra* note 122 at 139, citing online: EEA <<http://www.ecsa.be/ar/Statistical%20Tables.pdf>>

reduced pressure for efficient services by introduction of new technology, unreasonable high prices by cartel members, and low quality of services because of uncompetitive market which was blocked from foreign rivals by formed cartels.

We analyzed the domestic efforts for the deterrence of international cartels, whereas our next chapter will cover international efforts on this issue.

CHAPTER FOUR

COOPERATION AMONG COUNTRIES FOR THE INVESTIGATION OF CARTELS

4.1 Subject Matter of Cooperation in Antitrust

The cooperation of countries is important to the investigation of international cartels, in particular, since their members reside in many jurisdictions and anticompetitive activity in one country adversely affects the interests of other countries. The importance of cooperation reveals itself in cases where the national competition agency is in need of information, evidence, and foreign defendants located outside the jurisdiction of the enforcement agency. Cooperation on antitrust issues is not limited only to cartelization cases, but also to cases involving international mergers and abuse of dominant position (or monopolization). What types of efforts does the cooperation involve?

It involves notification, coordination, and cooperation during the investigations, consultations, and conciliation. Zanettin divides these actions into two groups during the process of bilateral cooperation: a) discussion and identification of the competitive effects of a concentration or business practice; b) coordination of actions and enforcement measures in joint investigations.¹²⁶

The existing forms of cooperation include bilateral and regional agreements and other multilateral instruments of a non-binding nature.

¹²⁶ Zanettin, *supra* note 69 at 85.

Most of the bilateral agreements include notification, coordination, and cooperation during the investigations and consultations, whereas regional agreements and multilateral non-binding agreements include the latter types of cooperation and additionally, conciliation.

Notification is required when the investigations or proceedings involve important interests of another country. Such circumstances include: when the information will be sought from another country; when it concerns a practice wholly or partly carried out in another country; when the investigation (previously notified) might lead to another enforcement action that may affect important interests of another country; when it involves a remedy that would prohibit behavior or require conduct in another country; during the investigation of a merger that was incorporated in another country.¹²⁷

Notification is made as soon as the investigating agency finds that important interests of another country are concerned. The notification statement should contain: the names of the persons or enterprises involved in the activities under investigation; the legal provisions concerned; and other relevant information. If a merger case is under review, a description of the issues of interest to the notifying country is included, such as the relevant markets affected, jurisdictional issues, or remedial concerns.¹²⁸

Coordination and cooperation between countries includes: coordinating investigations within the agreed time periods; sharing factual and analytical information and material or assisting in obtaining information in the form of testimony or documents; and discussions and negotiations regarding the remedial actions, especially when it

¹²⁷ OECD, Competition Law and Policy Committee, *Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade*, 27 July 1995, C(95)130/FINAL, [hereinafter *OECD Recommendation on Anticompetitive Practices Affecting International Trade*].

¹²⁸ *Ibid.*

requires the conduct of another country. All of these efforts should be consistent with national laws on confidentiality of information unless the involved countries have obliged themselves to perform those activities or to assist in obtaining the information in their bilateral agreement for cooperation in antitrust cases.

Consultations are usually employed to avoid possible conflicts when the interests of two or more countries are concerned with the investigation of an anticompetitive act. After notification, the notified country usually expresses its views on the case where its national interests are concerned, in detail, if possible. The investigating country should try to take those concerns into consideration during its remedial actions.

In cases where the consultations do not satisfy the countries involved, they might prefer to use the good offices offered by international organizations such as OECD. This is considered a conciliatory procedure. The OECD's Competition Law and Policy Committee is vested with the authority to provide good offices in the settlement of a case.¹²⁹

4.2 Existing Forms of Cooperation and Their Usefulness

4.2.1 Bilateral Cooperation

In many scholarly books, bilateral agreements on antitrust are divided into the first generation of agreements, which go up until 1991, and the second generation agreements, concluded after 1991. Some academics also consider the third generation of agreements. These agreements generally do not depend on the year of adoption, but on the issues covered. From this perspective, bilateral agreements that were concluded in the early 1990s accepted new forms of activities undertaken by the signatories and these rules were more developed than the provisions of agreements signed before the 1990s.

¹²⁹ *Ibid.*

The first generation of bilateral agreements is considered weak, in terms of the cooperation and enforcement of the agreement. Among the first generation agreements is the U.S.-Australian Cooperation Agreement on Antitrust Issues (1982). It consists of seven articles regulating the following issues: notification; consultations; confidentiality of information provided during the notification and consultation; cooperation in the investigation if it does not affect national interests, laws, and policies; and in cases where private antitrust suits were brought, a party to the agreement should raise the requesting party's concerns before the court.¹³⁰

Another example is the U.S.-Germany agreement of 1976. In this agreement, the parties emphasized the communication of information and other related documents or evidence during the investigation of international anticompetitive activities, according to art. 2. There is a condition for such assistance, which is compatibility with domestic laws, policies, public order, and important national interests, according to art. 4.¹³¹

The second generation agreements are characterized as being more actively used; and as having more developed provisions, especially those concerning comity. The comity principle implies giving more consideration to the important interests of the parties to the agreement and avoiding conflicts in the enforcement of competition laws. For example, the European Communities-Canada cooperation agreement lists several factors that need to be taken into consideration if the investigation of the case concerns important interests of the other party. These are: the relative significance and foreseeability of the effects of the anticompetitive activities on one party's important

¹³⁰ *Agreement between the Government of the United States of America and the Government of Australia Relating to Cooperation on Antitrust Matters*, 29 June 1982, T.I.A.S. No. 10365.

¹³¹ *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*, June 23, 1976, United States-Federal Republic of Germany, 27 U.S.T. 1956, T.I.A.S. No. 8291.

interests as compared to the other party's; the degree of conflict or consistency between the enforcement activities and the other party's laws; the location of relevant assets; the need to minimize the negative effects on the other party's important interests, particularly when implementing remedies, etc.¹³²

Some academics consider only two generations of bilateral agreements, incorporating the positive comity principle into the second generation, whereas the others consider three, by separating the positive comity provisions from the second generation and incorporating them into the third.¹³³

The positive comity principle "entitles a contracting party to request the other contracting party to take enforcement actions against anti-competitive activity that was carried out on the territory of the requested state but had effects on competition in the requesting state."¹³⁴ For example, the U.S.-E.C. cooperation agreement of 1998 was fully dedicated to the use of positive comity rules. Another example is the cooperation agreement between the US and Japan, which contains provisions on positive comity in art. 5. The idea of positive comity looks great, as if it solves the conflicts regarding jurisdiction. Countries used to unilaterally extend their laws to acts and persons abroad, but with positive comity, countries ask the country where the anticompetitive act is occurring, to intervene and stop it. However, there exist many obstacles for Country A in whose territory the anticompetitive act is committed, to prosecute on behalf of the

¹³² *Agreement between the Government of Canada and the European Communities Regarding the Application of their Competition Laws*, 17 June 2003, Art. VI, [unpublished], online: Competition Bureau <<http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1593&lg=e>> (date accessed: 8 June 2006), [hereinafter *Canada-EC antitrust agreement 2003*].

¹³³ Zanettin, *supra* note 69 at 53.

See also *supra* note 1 at 97-98.

¹³⁴ Weinrauch, *supra* note 1 at 98.

Country B, which is requesting the prosecution. The usefulness of the positive comity principle will be discussed in more detail later in this chapter.

Based on our examination we can conclude that bilateral agreements in antitrust apply unless they contradict national laws, public order, and important national interests. However, Zanettin approaches to this issue from different perspective. Several factors affect the workability of bilateral agreements. These factors are subject and object of a given case, *i.e.* competition agencies and firms' behavior is subject and characteristics of the case is object.¹³⁵ With regards to subjects, competition agencies would be less cooperative if they or the government's trade policy is characterized as promoting the national champions (*i.e.* large companies like Microsoft), and assistance provided to foreign agency to prosecute national champions or firms has adverse effects.¹³⁶ Furthermore, firms would not be willing, especially in cartelization cases, to waive their confidentiality rights to the information that they provided.¹³⁷ On the other hand, in merger cases, firms would be willing to cooperate with a competition agency in order to get faster clearance.¹³⁸ In international merger cases where they have to notify multiple jurisdictions where they operate or affect due to their significant share of sales, merging firms are willing to waive the confidentiality of their information to facilitate cooperation between two or more competition agencies in their review and to avoid the duplication of effort or documents.¹³⁹ Additionally, they benefit from the harmonization and coordination of remedies.¹⁴⁰ For example, the first *Microsoft* case of 1995 was

¹³⁵ Zanettin, *supra* note 69 at 103-115.

¹³⁶ *Ibid.* at 103-115.

¹³⁷ *Ibid.* at 103-115.

¹³⁸ *Ibid.* at 103-115.

¹³⁹ *Ibid.* at 103-115.

¹⁴⁰ *Ibid.* at 106.

investigated and remedied jointly by the U.S. and E.C. competition agencies from 1993 to 1995. Microsoft decided to waive the confidentiality of its information so that to take advantage from leniency program of the U.S. Afterwards, the U.S. competition agency could transfer the information concerning this case to its counterpart, the European Commission.¹⁴¹

In terms of the object of the case parallel investigation timing and procedure are among the factors that affect the success of the investigation with regards to international cases.¹⁴² For example, in merger cases, two or more agencies may agree on the timing of their decision, procedures of cooperation, and on similar criteria defining the geographical market, types anticompetitive acts involved, etc. These factors are useful in both international cartel and merger cases. This was observed in *Shell/Montedison*, (first) *Microsoft* case, *WorldCom/MCI*, *Boeing/McDonnell Douglas*, *General Electric/Honeywell* and other cases.¹⁴³

4.2.2 Regional Cooperation

Regional trade arrangements contribute to antitrust cooperation among member countries. Among them the EU, ANZCERTA, NAFTA, MERCOSUR, FTAA, and CARICOM have competition-related provisions in their agreements.

4.2.2.1 EU

Articles 81, 82, 83, and 86 of the Treaty of Rome deal with competition matters. These provisions prohibit price fixing, market allocating, output restriction, discriminating conditions for equivalent transactions, and abuse of a dominant position.

¹⁴¹ *United States v. Microsoft Corp.*, 159F.R.D. 318 (D.C. Cir.1995)

¹⁴² *Zanettin*, *supra* note 69 at 109-113.

¹⁴³ *Ibid.* at 103-115.

The EU's competition policy is regarded as one of the most developed policies because of the rules set out in its major agreement, the *Treaty of Rome*, and the existence of a supranational body, the European Commission, enforcing the competition policy of the EU.

Harmonization of competition laws is one of the objectives and requirements of the competition policy of the EU. Candidate countries should approximate their competition legislation to that of the European Communities.¹⁴⁴

In order for anticompetitive conduct to be prosecuted under the provisions of the European agreements, it should meet certain thresholds. These thresholds are based upon the size of the business and its effect on trade between member states. According to the Commission Notice on agreements of minor importance, the E.C. provisions on competition do not apply to the following anticompetitive activities: a) if the market share of an arrangement between competitors does not exceed 10% of the relevant market affected by the restrictive practice; b) if the market share held by each of the parties to the arrangement of non-competitors does not exceed 15% on the relevant market affected by the restrictive practice; c) anticompetitive arrangements between small and medium-sized business enterprises which have fewer than 250 employees and have either an annual turnover not exceeding EUR 40 million or an annual balance-sheet total not exceeding EUR 27 million.¹⁴⁵

¹⁴⁴ Weinrauch, *supra* note 1 at 102.

¹⁴⁵ EC, Commission, *Commission Notice on Agreements of Minor Importance Which Do Not Appreciably Restrict Competition under Article 81(1) of the Treaty Establishing the European Community*, 2001/C 368/072001.

The reason for not prosecuting these anticompetitive activities under the EU agreements by the European Commission is that these undertakings do not affect trade between member countries or the effects are insignificant.

However, this does not mean that these anticompetitive practices will be left without prosecution. They fall under the jurisdiction of national antitrust agencies and it is in their interests enforce their competition laws.¹⁴⁶

4.2.2.2 The Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA)

The free trade agreement of Australia and New Zealand has achieved a very developed level of cooperation in the antitrust area. According to art.12 of the free trade agreement, both countries are required to harmonize their laws and regulations relating to competition issues.¹⁴⁷ This agreement came into force in 1983, and since that time, Australia and New Zealand have reformed their competition laws with the goal of harmonizing their laws and they signed a memorandum on the harmonization of business law, where competition issues formed a part. The powers of Australian and New Zealand competition agencies are extended to the point that they are authorized to issue subpoenas to companies in each other's territory. Furthermore, the 1988 Protocol and its subsidiary agreements allow the enforcement of competition laws in the other country, including the

¹⁴⁶ For example, in order for a merger to fall under the jurisdiction of the European Commission to investigate, it needs to meet the community dimension, according to the merger regulation 139/2004 of the EC. According to art.1, merging firms have a community dimension if: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million; and, (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million;

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

See Council Regulation, EC, (EC) No 139/2004 of 20 January 2004 *on the Control of Concentrations between Undertakings*, OJ L 133/1, 30 April 2004, Art. 1.

¹⁴⁷ *Australia-New Zealand Closer Economic Relations Trade Agreement*, 28 March 1983 (entry into force: 1 January 1983), 1983 No. 2, Art. 12.

ability to hold hearings, compel evidence, and have its orders enforced in the other country if that restrictive conduct affect markets in the enforcing country.¹⁴⁸

Within the framework of the free trade arrangements, a supranational body dealing with anticompetitive activities was not established. Maybe that is because there are only two members of the free trade agreement. Then they will be able to tackle anticompetitive issues bilaterally without complicating the enforcement. However, the competition policy of both countries is directed to the harmonization of both countries' competition laws to decrease any contradictions in the provisions. At the same time, with harmonization both members have vested in their competition agencies broad authority, allowing them to tackle anticompetitive acts occurring in the other member's territory but affecting trade and the market in its own territory.

4.2.2.3 NAFTA

With the formation of a free trade area in 1994, member countries of NAFTA addressed competition issues to a certain extent in their founding agreement on free trade.

Chapter 15 of NAFTA is devoted to the issue of competition. It needs to be stressed that this free trade agreement does not call for the harmonization of competition laws, or any other advanced level cooperation, such as the removal of barriers to the exchange of information in antitrust, or the accomplishment of antitrust requests, or the establishment of a supranational body in the antitrust area. According to the art.1501 of NAFTA, each member party is required to adopt and maintain measures against

¹⁴⁸ Kennedy, *supra* note 39 at 66.

See for further information on cooperation agreements between Australia and New Zealand, online: Global Competition Forum <<http://www.globalcompetitionforum.org/oceania.htm#australia>>

anticompetitive business practices. Member parties have recognized according to the same article that such measures will enhance the fulfillment of NAFTA.¹⁴⁹

Furthermore, according to the s. 2 of art.1501, member parties should cooperate in competition law enforcement through mutual legal assistance, notification, consultation, and exchange of information. However, parties failed to specify the framework for cooperation, *i.e.* conditions, criteria, form of cooperation, when they are eligible to make request, what are the conditions that need to be met, etc. Therefore, active cooperation within the framework of NAFTA has not yet been realized in practice. Additionally, s. 3 of art.1501, states that: “[n]o Party may have recourse to dispute settlement under this Agreement for any matter arising under this Article”. This section further strengthens our view that cooperation is only happening in theory.

Nevertheless, we should not ignore that cooperation in antitrust was established by bilateral agreements, even after the formation of NAFTA in 1994. For example, the U.S.-Canada bilateral agreements were concluded in 1995 and 2004, and the U.S.-Mexico agreement was concluded in 2000. However, some argue that antitrust cooperation among the NAFTA partners was not a new idea when NAFTA was formed, because the U.S. and Canada have antitrust history that goes back to more than a century, but Mexico’s antitrust regime is newer.¹⁵⁰ Therefore, members of NAFTA preferred to cooperate on antitrust issues not within the framework of NAFTA, but outside of it, through bilateral agreements.

¹⁴⁹ *North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, December 17, 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter *NAFTA*]

¹⁵⁰ Kennedy, *supra* note 39 at 85, citing ABA, *The Competition Laws of NAFTA, Canada, Mexico, and the United States: A Practitioner’s Guide* (1997).

The other competition provisions of NAFTA deals with state run enterprises and enterprises whom the government designated monopoly power. These provisions establish similar rules to those in art.18 of GATT and require state run or state supported enterprises to act according to the commercial considerations of the market in their purchase, sale, transportation, or distribution.¹⁵¹

Although according to art.1504, there was established a Working Group for the study of the relationship between competition laws and policies and trade, and afterwards, to make recommendations on further work on competition issues in the free trade area. However, the work of the group was not very successful and in January 1999, the Working Group's mandate expired. According to the interim report of the Working Group issued in 1996, it produced three general types of discussion papers devoted to the issues of (i) contextual framework, (ii) comparison of competition laws, (iii) specific issues on competition.¹⁵²

To sum up, cooperation in antitrust according to and within NAFTA has not occurred, firstly, because it was left as the responsibility of each member country to maintain measures against anticompetitive acts, and secondly, although areas of cooperation in antitrust were set in NAFTA, there are not any specific rules or requirements for active cooperation. Nevertheless, cooperation in antitrust is much more developed at the bilateral level, and there were many antitrust cases where parties notified each other, exchanged information concerning the case, and jointly prosecuted in cases when both countries are affected by the same anticompetitive act.

¹⁵¹ NAFTA, *supra* note 149, Art. 1502 and 1503,

¹⁵² NAFTA, Working Group on Trade and Competition (1997), "Interim Report of the NAFTA 1504 Working Group to the NAFTA Commission" [unpublished], online: Department of Foreign Affairs and International Trade of Canada <<http://www.dfait-maeci.gc.ca/nafta-alena/report9-en.asp>> (date accessed: 15 May 2006).

4.2.2.4 MERCOSUR

Addressing the competition issues within the Common Market of the Southern Cone (in Spanish, “Mercado Comun del Sur” (MERCOSUR)) is regulated according to the Protocol of the Defense of Competition in MERCOSUR which was adopted on 17 December 1997.

Within the framework of MERCOSUR, member countries established a supranational body for the enforcement of competition laws against anticompetitive acts that limit or in any way cause prejudice to free trade.

According to the art.8 of the Protocol, two bodies- Trade Commission and Committee for the Defense of Competition are charged with enforcement of competition rules and they act as MERCOSUR organs of an intergovernmental nature. The prosecution and remedying of an anticompetitive act is conducted at three levels: the initial investigation by the national organs, the investigation by the Committee for the Defense of Competition, and adjudication by the Trade Commission. Finally, on application of sanctions is done by the national organs.¹⁵³

Another important feature of competition within the framework of MERCOSUR is that according to the art.7 of the Protocol, member countries are required to adopt harmonized rules to control anticompetitive acts within two years from the adoption of Protocol.

However, we should give an objective assessment as to the workableness of these rules established in the Protocol for the Defense of Competition. It has been nine years since the adoption of the Protocol. However, it hardly ever was possible to find

¹⁵³ *Protocol of the Defense of Competition in MERCOSUR*, MERCOSUR/CMC/DEC No. 2/97, the Decision 17/96 (17 Dec 1997), Articles 10-21.

information on prosecuted cases. The reason for this may be language barrier also, because the official languages of the MERCOSUR are Spanish and Portuguese; therefore, most of the resources available are in these two languages. Although there several articles were written concerning competition issues within the MERCOSUR in English language, they did not provide any practical examples from prosecuted cases, according to the Protocol.¹⁵⁴

It could also be that those intergovernmental organs haven't been established yet, and for this reason there is no data on prosecuted antitrust cases available. Such organizational issues take longer time than planned due to many reasons, including financial, bureaucratic, etc.

4.2.2.5 The FTAA and CARICOM

The Free Trade Area of the Americas (FTAA) negotiations was launched in 1994, with the goal to complete negotiations by 2005. In 1996, several additional working groups were established, according to the Ministerial Declaration of Cartagena, for the study of certain issues and preparation for negotiations. Among them, there was a working group on competition policy whose mandate was to identify cooperation mechanisms in antitrust, make recommendations on the application of ways to assist member countries in establishing or improving competition regimes, to exchange views, and make recommendations on how to proceed in the construction of the FTAA on competition issues.¹⁵⁵

¹⁵⁴ Jose Tavares de Araujo Jr. & Luis Tineo, "The Harmonization of Competition Policies Among Mercosur Countries", (1998) 24 Brooklyn J. Int'l L. 441.

¹⁵⁵ FTAA, *Joint Declaration of the Second Ministerial Meeting* (21 March 1996), online: FTAA<http://www.ftaa-alca.org/Ministerials/Cartagena/Cartagena_e.asp> (date accessed: 16 May 2006).

The working group, which was later renamed the Negotiating Group on Competition Policy, held several meetings in 1996 and 1997. During its meetings, the Negotiating Group clarified its goals, including: educating countries that do not have competition regimes among the 34 countries of North and South America and coordinating as much as possible, the competition policies and enforcement actions of countries which have or will develop competition laws in the future. Therefore, now the Negotiating Group is working on the development of recommendations in the competition area that match the purposes of the FTAA. Although the Negotiating Group on Competition Policy has made several recommendations,¹⁵⁶ it will be a matter of time to put them into practice. For now, it has not been decided whether there will be a supranational body on competition issues that deals with the enforcement or prosecution of cross-border anticompetitive activities. These issues will be left to each member's discretion, and any other mechanisms for cooperation in the competition area.

The members of the Caribbean Community (CARICOM) established the Competition Commission on 14 March 2000 according to Protocol VIII of the Treaty establishing the Caribbean Community.¹⁵⁷ According to the art.30 (e), one of the functions of the Competition Commission is to enforce the rules of competition to cross-border anticompetitive practices by monitoring, investigating, and arbitrating cross-border disputes.

Although the member countries declared in Protocol VIII, which amends the Treaty establishing Caribbean Community, that "... there is hereby established a

¹⁵⁶ For further information on recommendations of the Negotiating Group visit online: FTAA <http://www.ftaa-alca.org/ngroups/ngcomp_e.asp>

¹⁵⁷ *Protocol VIII: Competition Policy, Consumer Protection, Dumping and Subsidies* (14 March 2000), CARICOM, Art. 30(c), online: CARICOM <<http://www.caricom.org/jsp/archives/protocolviii.htm>> (date accessed: 15 May 2006).

Competition Commission ... having the composition, functions and powers hereinafter set forth.”¹⁵⁸, till now the establishment has not been realized.¹⁵⁹ The reason, according to some academics, is challenges faced during the establishment are formidable for developing countries, especially when many of them are considered poor countries. These challenges include financial resources to administer and implement competition legislation and training lawyers and economists to staff national competition authorities and the CARICOM Competition Commission.

However, CARICOM members’ commitment to the formation of a supranational investigating and adjudicating body in the antitrust area is very sophisticated and will promote the objectives of the free trade agreement among members. Nevertheless, there needs to be independent and strong national competition agencies and a higher number of harmonized competition policies and laws among member countries with a more of integrated economies.

4.3.1 The Efficacy of the “Positive Comity” Principle to the Cartel Enforcement

It is considered that the term “positive comity” was first coined in the US-EC antitrust cooperation agreement of 1991.¹⁶⁰

In international cartel cases, positive comity can be useful in two cases, including when international export cartels affect both exporting and importing countries, and when export cartels affect only the importing country.¹⁶¹ In the former case, because of the

¹⁵⁸ *Ibid.*, art. 30(c),

¹⁵⁹ See CARICOM organs and bodies, online: CARICOM <http://www.caricom.org/jsp/community_organ/community_organ_index.jsp?menu=cob>

¹⁶⁰ *Agreement between the Government of the United States of America and the Commission of the European Communities regarding the Application of their Competition Laws*, 23 September 1991, 30 I.L.M. 1491 (Nov. 1991), art. 5. [hereinafter *U.S.-EC antitrust agreement 1991*].

¹⁶¹ Zanettin, *supra* note 69 at 205.

illegality of the act according to antitrust laws,¹⁶² it is in their interest to fight against them and use positive comity. However, in the latter case, when cartels only affect importing countries, it contradicts the interests of the exporting country, because the exporting country doesn't want to decrease its export potential and prosecute its own nationals and firms for the sake of other countries. There are also import cartel and domestic cartel cases which have effects on exports from other countries coming into this country. In such cases, cartels can foreclose imports from foreign countries, thereby limiting competition from foreign firms and raising prices in the domestic market to the detriment of their own consumers. For example, Sabre, a computer reservation system of the U.S., complained that Amadeus, the dominant computer reservation system in Europe, maintained dominance by refusing to give certain U.S. computer reservation system air fares on a timely basis, or by denying them the ability to perform certain ticketing functions, while these restrictions were not employed to Amadeus, a European company. Sabre was owned by American Airlines, whereas Amadeus was owned by Air France, Iberia Airlines and Lufthansa. Upon receiving complaints, the US competition agency asked its European Union counterpart to investigate and remedy the restrictive act in 1997. This request was based on positive comity. When the EC closed the case on 25 July 2000, the only result was that Air France agreed to sign a code of conduct which guarantees similar conditions to all computer reservation systems.¹⁶³

¹⁶² For example, Section 1 of the U.S. *Sherman Act* states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

15 U.S.C. § 1 (1994);

Section 45 of the *Competition Act* of Canada states: "Every one who conspires, combines, agrees, or arranges with another person: ... (d) to otherwise restrain or injure competition unduly, is guilty of an indictable offence..."

Competition Act, R.S.C., 1985, C-34.

¹⁶³ *ICPAC Final Report*, *supra* note 26, Ch. 5.

As another example; in 1970, an export cartel of canned mandarin oranges directed to the British market was prosecuted and deterred by the Japanese Fair Trade Commission upon the official request of the British Fair Trade Commission.¹⁶⁴ This a clear example of the positive comity principle, because in a request regarding positive comity, Country A requests Country B to prosecute and remedy anticompetitive conduct occurring in the latter's territory but affecting the former's market, because country B is in a better position for prosecution of the case.

Another example shows that positive comity is not always successful for many reasons, including the requirement of dual infringement, insufficient proof of the anticompetitive act, etc. For example, the Swiss Competition Commission brought a complaint to the EC on the anticompetitive activities of Volkswagen in the Swiss market, thus affecting its consumers. The Swiss Competition Commission suspected that Volkswagen was restricting its EC dealers to sell its cars to Swiss consumers so that prices in the Swiss market could be maintained at a high level.

There are several benefits from the application of the positive comity principle.

Firstly, it resolves sovereignty concerns resulting from the extraterritorial application of domestic laws.¹⁶⁵ The use of positive comity increases cooperation and decreases conflicts because formerly, competition agency used to extend its jurisdiction unilaterally to foreign nationals and information such as evidence and witnesses, located abroad under the jurisdiction of foreign countries.

Secondly, it will promote or facilitate increased convergence of domestic antitrust laws between parties to the bilateral agreement because increased cooperation will lead to

See also *supra* note 69 at 188.

¹⁶⁴ Zanettin, *supra* note 69 at 187.

¹⁶⁵ ICPAC Final Report, *supra* note 26, Ch. 5.

an increased awareness of each other's laws and potentially minimize the possibility of divergent outcomes from any investigations.¹⁶⁶

Thirdly, it gives a new opportunity to antitrust agencies to prosecute cross-border anticompetitive acts, which was not possible due to jurisdictional/territorial barriers.

There are also limitations of the positive comity.

Antitrust agencies might be unwilling to prosecute domestic firms if it would decrease foreign firms' ability to compete because of the national trade policies.

One of the important limitations of positive comity is the illegality of the conduct under the antitrust law of the requested country.¹⁶⁷ The obvious example of such a dilemma is the legality of export cartels, which has anticompetitive effects on importing countries' markets.

According to the bilateral agreement provisions on positive comity, fulfilling the request is conditioned upon the important interests of parties, laws, and policies of parties. For example, the U.S.-E.C. antitrust agreement states:

Nothing in this Article limits the discretion of the notified Party under its competition laws and enforcement policies as to whether or not to undertake enforcement activities with respect to the notified anticompetitive activities, or precludes the notifying Party from undertaking enforcement activities with respect to such anticompetitive activities.¹⁶⁸

As we see, even though it is an international agreement, it doesn't supersede the national laws. Therefore, positive comity is currently in its development stage; it is becoming obligatory as cross-border trade increases, resulting in more

¹⁶⁶ *Ibid.* Ch. 5, citing Mitsuo Matsushita, "United States-Japan Trade Issues and a Possible Bilateral Antitrust Agreement Between the United States and Japan", 16 *Ariz. J. Int'l & Comp. Law* 249, 253 (Winter 1999).

¹⁶⁷ OECD, Committee on Competition Law and Policy, *Report on Positive Comity—Making International Markets More Efficient Through 'Positive Comity' in Competition Law Enforcement*, 7 May 1999, OECD DAF/CLP(99)19, at 12. [hereinafter *OECD Report on Positive Comity*].

¹⁶⁸ *U.S.-EC antitrust agreement 1991*, *supra* note 160, art. 5.

anticompetitive activities having international character. The voluntary nature of positive comity enforcement gives rise to the following shortcomings or limitations.

However, from another perspective, opportunities not to investigate requested case are beneficial to requested countries. It is in a sense that requested countries "do not lose control of their enforcement agendas" by rejecting requests that are not in their best interests.¹⁶⁹

Delays associated with commitments to requests to prosecute. In the above mentioned dispute between American and European airlines regarding computer reservation systems, it took more than two years to start investigations according to the request. After the US antitrust agencies filed a formal complaint in 1997, the EC issued a statement of objection against Air France. Such delays might be due to the failure of establishment of a time limit in the bilateral agreement between the US and EC. Secondly, it might be because of the protectionism policies of national producers or companies.

Positive comity is not an appropriate tool in cross-border merger cases because of the time limits for merger review established in merger control statutes and regulations.¹⁷⁰ Therefore, it is limited to market access and restrictions of trade cases involving international cartels, abuse of dominant position, and others.

These factors are the result of the rare application of the provisions of positive comity.

¹⁶⁹ OECD Report on Positive Comity, *supra* note 167.

¹⁷⁰ ICPAC Final Report, *supra* note 26, Ch. 5.

4.4 The Effects of Divergent Competition Policies and Laws on Cooperation.

This part of our paper will involve primarily the examination and analysis of divergences in the laws and policies against cartels. However, initially, we will briefly cover generally divergent policies and laws and their effects on the enforcement of cooperation in antitrust because divergent anti-cartel rules and regulations depend on these policies.

According to the report of the International Competition Policy Advisory Committee, in 2000, more than 80 countries had national competition laws.¹⁷¹ The various economic, political, cultural, and social backgrounds of these countries shape their competition policies and laws. Therefore, it is not surprising to receive different rulings by different competition agencies on the same issue; for example, the merger of *Boeing/McDonnell* or *GE/Honeywell*.¹⁷²

For example, for the past two decades the objective of the competition policies of many countries, especially the U.S., has become attaining economic efficiency, so as to maximize consumer welfare.¹⁷³ If a company has significant market share, but in spite of this, it is achieving or will achieve a decrease in prices, has more resources to innovate, and is achieving other efficiencies, then competition agencies in the U.S. are not usually concerned about the effect on small and medium-sized businesses. Canadian and E.C. competition policies care more about small and medium-sized businesses. According to the *Competition Act* of Canada, “[t]he purpose of this Act is to maintain and encourage competition ...” among others “... to ensure that small and medium-sized enterprises

¹⁷¹ *ICPAC Final Report*, *supra* note 26, Ch. 2.

¹⁷² T.J. Muris, “Merger Enforcement in a World of Multiple Arbiters” (Brookings Institution Roundtable on Trade and Investment Policy, 21 December 2001), online: U.S. Federal Trade Commission <<http://www.ftc.gov/speeches/muris/brookings.pdf>> (date accessed 25 May 2006).

¹⁷³ *Framework*, *supra* note 22 at 3.

have an equitable opportunity to participate in the Canadian economy.”¹⁷⁴ The E.C. competition laws and policies are focused on removing private trade barriers, opening up markets, and fostering effective economic integration.¹⁷⁵ This analysis concerns the approval of mergers and companies acquiring a dominant position. At the same time, we should not forget that the U.S. has the *Robinson-Patman Act*,¹⁷⁶ which protects small and medium-sized businesses from dominant firms abusing their positions, specifically when large retailers use their market power to extract price concessions from manufacturers and other sellers that were unavailable to smaller competitors.¹⁷⁷

In addressing the question of the effects of different competition laws and policies on cooperation, our main point is that as national competition policies and laws diverge significantly, they will prevent cooperation. For example, if Country A exempted its export cartels from the application of its antitrust laws, when Country B applied to Country A in the cooperation for prosecution of cartel activity in Country A because it was affecting Country B’s consumers and producers, Country A obviously would not cooperate because export cartels are legal in its territory. The reason for the exemption of export cartels is that it helps strengthen export potential, and it does not affect the domestic market, but rather it is directed to the market of the importing country.

Cartelization practices, including price fixing, output restriction, bid rigging, volume, customer, and market allocation, are prohibited according to the competition legislation of the majority of countries. However, export cartels are exempted from the

¹⁷⁴ *Competition Act*, R.S.C., 1985, c. C-34.

¹⁷⁵ Weinrauch, *supra* note 1 at 47.

¹⁷⁶ *Robinson-Patman Act* of 19 June 1936, Ch. 592, 49 Stat. 1526 (codified at 15 U.S.C. §§ 13, 13b, and 21a).

¹⁷⁷ D.S. Clark, “Robinson-Patman Act: General Principles, Commission Proceedings and Selected Issues” (Ambit Group Retail Channel Conference for the Computer Industry, San Jose, California June 7, 1995), online: U.S. Federal Trade Commission <<http://www.ftc.gov/speeches/other/patman.htm>> (date accessed: 30 May 2006).

competition laws of many countries. For example, in the *Hartford Fire* case, U.K. and U.S.-based insurance companies conspired to offer restrictive insurance contracts to U.S. customers.¹⁷⁸ In this case, the cartel-like behavior of the U.K. firm affected U.S. consumers; therefore the U.K. market didn't suffer from that cartel.

In the case of international cartelization, where the markets of all the countries are affected, regardless in which country members of the cartel reside, opportunities for cooperation in order to prosecute exist, since we know that the prohibition of cartel activity and its prosecution has become a priority for many competition agencies, including those in the E.C., the U.S., Canada, Australia, Japan, etc. It is difficult to examine the antitrust legislation all of the countries, however, there is consensus among countries and it was recognized by multilateral fora that cartels are the most harmful anticompetitive acts and effective action against them is necessary. For examples, see the 1998 OECD "Recommendation of the Council Concerning Effective Action against Hard Core Cartels" and the 1980 "Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices" of the United Nations Conference on Trade and Development (UNCTAD).¹⁷⁹

In sum, closer antitrust laws form the basis for increased cooperation; in turn, increased cooperation for prosecution is a solution to private barriers to trade among nations. Therefore, in our review of the rules and regulations of regional free trade

¹⁷⁸ *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993).

London based re-insurers along with U.S. primary re-insurers engaged in various conspiracies aimed at forcing certain other primary insurers to change the terms of their standard (U.S.) domestic commercial general liability insurance policies. We may note that several London based insurance companies' anticompetitive conduct wasn't directed to UK itself, rather to U.S. only.

¹⁷⁹ UNCTAD, *The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, 5 December 1980, UN GA Resolution 35/63, UN Doc. TD/RBP/CONF/10 (1980);

See also *supra* note 6.

agreements, it was observed that almost all of them require harmonization of the competition laws of the member countries. Harmonization of the national competition laws is one of the main pre-conditions of future multilateral agreement in the antitrust area.

4.5.1 Enforcement of Competition Laws against International Cartels in Canada

It has been more than 100 years since Canada enacted its competition law in 1889.¹⁸⁰ Cartel activity is per se illegal under s. 45 of the Competition Act, which states: "Every one who conspires, combines, agrees or arranges with another person ... to prevent or lessen, unduly, competition ... is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both."¹⁸¹ Section 45 defines cartels activity that lessens competition with respect to: price, quantity or quantity of production, market or customer, channel or method of distribution.¹⁸² Furthermore, bid-rigging in s. 47, price maintenance in s. 61, and foreign-directed conspiracies in s. 46 are other forms of prohibited cartel practices.

Cartelization practices in many cases involve foreign jurisdictions as well. Therefore, international cooperation is essential for the finalization of cartel investigation. Canada has entered into several bilateral agreements in antitrust area, including agreements with: the U.S. (1995 and 2004), the E.C. (2003), Mexico (signed in 2001, entered into force 2003), New Zealand (2000), the Memorandum of Understanding with Chile (2001), the U.K. (2003), Japan (2005), and the Republic of Korea (2006).

¹⁸⁰ S. Scott, "Cartel Enforcement: International and Canadian Developments" by S. Scott (Fordham Corporate Law Institute Conference on International Antitrust Law & Policy, October 7, 2004), online: Competition Bureau <<http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1871&lg=e>> (date accessed: 3 June 2006).

¹⁸¹ *Competition Act*, R.S.C., 1985, c. C-34, s. 45.

¹⁸² *Ibid.*, s. 45.

Furthermore, another important set of tools in cartel enforcement are the Mutual Legal Assistance Treaties (MLAT) of Canada. The MLATs are important for gathering information from abroad, though the MLATs are useful in criminal cases only.

Although the prosecution of cartelization cases is the responsibility of the Competition Bureau, criminal violations of the Act are the responsibility of the Attorney General of Canada. The Competition Bureau should refer criminal matters to the Attorney General to be prosecuted in the criminal courts. However, the Bureau will work closely with the counsel for the Attorney General throughout the prosecution process.¹⁸³ Furthermore, the Department of Justice plays an important role when it comes to the use of MLAT to collect evidence or produce witness testimony regarding international cartel cases when these case materials are located abroad. Since 1995, the Bureau has obtained over 40 convictions in international cartel cases (mostly through plea agreements) with fines in excess of C\$150 million, and the conviction of several executives.¹⁸⁴

The *Competition Act* does not explicitly limit its jurisdiction to Canadian territory. Therefore, Canadian courts in several cases ruled for the extraterritorial extension of the Act to foreign conduct and defendants. For example, in the *Libman* case,¹⁸⁵ the Supreme Court of Canada ruled that extraterritorial jurisdiction may be asserted over parties and conduct whenever there is a “real and substantial link”¹⁸⁶ between the offending act and Canada. In the *Thermal Fax Paper*, *Citric Acid* and *Bulk Vitamins* cases, although the

¹⁸³ Mark C. Katz, Richard D. Elliott & Elisa K. Kearney “Canada: Cartel Enforcement in Canada”, 18 May 2006, “Mondaq”-Legal News Network, [published online], online: Mondaq http://www.mondaq.com/i_article.asp_Q_articleid_E_39826_A_rss_E_0_A_shownav_E_0 (date accessed: 4 June 2006).

¹⁸⁴ D. Martin Low, QC & Casey W. Halladay, “Cartel Enforcement in Canada”, prepared for The *Global Competition Forum*, “Competition Law and Policy in a Global Context” Seoul, Korea April 23, 2004, online: lexpert <<http://www.lexpert.ca/antitrust/links.php>> (date accessed: 5 June 2006).

¹⁸⁵ *R. v. Libman*, [1985] 2 S.C.R. 178; see also *Morguard v. De Savoye*, [1990] 3 S.C.R. 1088.

¹⁸⁶ *Ibid.*

price-fixing agreements were made outside of Canada by foreign companies, they were made for the purpose of selling products, including thermal fax paper, food additives of citric acid, and vitamins, in the Canadian market.¹⁸⁷

However, according to the report of the International Bar Association, to date, all of the prosecutions of international cartels in Canada have been resolved by way of guilty pleas, which have involved foreign parties voluntarily coming to Canada in return for more lenient treatment.¹⁸⁸

Among the international cartelization cases which were successfully prosecuted is the *Thermal Fax Paper* case, which was prosecuted in 1996 and 1997. In this case, Japanese manufacturers and trading houses conspired to sell manufacturer's products to the Canadian market, in addition to the markets of the U.S. and many other countries. Even though, the cartel agreement took place in Japan, Canadian competition agencies also participated in the international investigation of the cartel because the Canadian market was also affected. Mitsubishi Paper Mills Ltd. pleaded guilty to s. 45 and 61 offences of the Act and the company was fined \$850,000 and a prohibition order was issued. New Oji Paper Co. Ltd was also involved and pleaded guilty to a paragraph 45(1) (c) offence. It was fined \$600,000 and issued a prohibition order. This international cartel involved firms located in Canada, the U.S., Japan, and Hong Kong. In total, the fines amounted to \$3.4 million after prosecution.¹⁸⁹

¹⁸⁷ Calvin S. Goldman, Q.C., R. Kwinter, C. Witterick, "International Cartel Enforcement: A Canadian Perspective" (Canada, address before International Bar Association, Tokyo, Japan, 20-21 April 2005), Toronto: Blake, Cassels & Graydon LLP, 2005, online: Blake, Cassels & Graydon LLP <<http://www.blakes.com/pdf/IntCartel.pdf>> (date accessed: 5 June 2006).

¹⁸⁸ *Ibid.* at 4

¹⁸⁹ Competition Bureau of Canada, *Annual Report of the Director of Investigation and Research for the Year Ending March 31, 1997*, online: Competition Bureau of Canada <<http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1324&lg=e>> (date accessed: 30 May 2006).

We have examined the existing international tools to fight against cross-border cartels. The exchange of information is the key point for the investigation of such international cartels which, will be the subject matter of the following chapter.

CHAPTER FIVE

EXCHANGE OF INFORMATION IN THE ENFORCEMENT OF ANTITRUST LAWS

5.1 Introduction

The GATT negotiation of 1947 and subsequent trade rounds has significantly increased trade among nations, in goods and services. Integration of economies and globalization has resulted in interdependence among economies, exposing many domestic issues to international arenas, including competition issues. Unveiling barriers to trade has given an opportunity to companies to compete internationally in an open market. Anti-competitive practices to fix prices, make rigged bids, establish output restrictions or quotas, share or divide markets by allocating customers, suppliers, territories or lines of commerce, anticompetitive mergers and monopolizing the market and others affect not only one country's market and consumers, but also other markets at the same time.

In the current world trade system, there is no multilateral international agreement on anti-competitive practices, leaving the fight against them to the individual discretion of each country. Nevertheless, prosecution of anti-competitive activities having a cross-border dimension has been addressed to some extent by bilateral treaties on competition.¹⁹⁰ Laws on confidentiality of information, however, undermine the communication of information in the hands of antitrust agencies of countries.

¹⁹⁰ Some examples of bilateral agreements are: US – Australia cooperation agreement of 1982 and mutual antitrust enforcement assistance agreement of 1999; US-Canada cooperation agreement of 1995 and agreement on the application of positive comity principles to the enforcement of their competition laws of

The issues that I am going to address in this part of the thesis are: what is the permissible degree for exchange of confidential information according to antitrust laws? What roles for addressing the issue by international legal mechanisms? And what are the obstacles to the formation of international agreements (bilateral or multilateral) on the exchange of information in antitrust cases.¹⁹¹

5.1.1 The Essence of the Problem

There are many types of anti-competitive practices having cross-border effects; these include international cartels, international mergers, domestic export cartels having impacts on importing countries, import cartels, vertical market restraints (*i.e.*, excluding foreign firms from distribution networks), and abuses of dominant positions. As Frederic Jenny concluded, for long periods of time international markets for goods as diverse as steel products, industrial diamonds, heavy electrical equipment, graphite electrodes, lysine, food additives, and vitamins were subject to established quotas of production or export or fixed prices, which meant that importing countries were rationed and had to pay artificially inflated prices for their imports.¹⁹²

During the investigation of these types of anti-competitive activities, antitrust agencies need information including evidence and witnesses from different countries; but laws on confidentiality of information often can prevent communication of information by the antitrust agency.

2004; Canada-EC Agreement regarding the application of their competition laws; US – Commission agreement of the European Communities cooperation agreement of 1991 and 1998.

¹⁹¹ International agreement whether it is bilateral or multilateral does not have to be exclusively on the exchange of information, it can be on competition issues generally and within this agreement there might be a clause or a chapter of articles dealing with issue of exchange of information.

¹⁹² Frederic Jenny, "Globalization, Competition and Trade Policy: Issues and Challenges", in Roger Zach ed., *Towards WTO Competition Rules* (Berne: Stampfli Publishers Ltd. (Kluwer Law International), 1999) at 23

For example, in 1994, the U.S. Attorney General, Antitrust Division, brought criminal charges against General Electric (GE), alleging that it conspired to fix prices of industrial diamonds with DeBeers Centenary Co. (DeBeers). Investigation of the case was largely circumstantial, due in part to the inability to obtain discovery abroad. The district court granted GE's motion for a judgment of acquittal, finding that the government failed to establish the existence of a conspiracy. De Beers Centenary AG was a Swiss corporation headquartered in Lucerne, Switzerland; it had linked corporate ownership with De Beers Consolidated Mines, Ltd., a South African corporation. General Electric was a Delaware corporation headquartered in Fairfield, Connecticut. Industrial diamonds were used to make cutting and polishing tools for many kinds of manufacturing and construction equipment.¹⁹³

Because laws of Switzerland and the U.S. prohibited exchange of information in antitrust cases and agreement between the two countries existed allowing communication of information, such international anti-competitive activities were left undeterred. Not stopping those international anti-competitive activities meant allowing private barriers into the market in terms of coordination of price, quantity, or consumer allocation.

Another example was *United States v. Nippon Paper Industries Co. Ltd.*, where the district court of Massachusetts had dismissed in 1999, the antitrust suit against Japanese companies for fixing the price of thermal fax paper imported into the United States.¹⁹⁴

¹⁹³ *United States v. General Electric & DeBeers Centenary Co.*, 869 F. Supp. 1285 (SD Ohio 1994).

¹⁹⁴ *United States v. Nippon Paper Indus. Co., Ltd.*, 62 F. Supp. 2d 173 (D. Mass. 1999).

5.1.2 The Emergence of the Problem

Increased integration of economies and open markets, and increases in the volume of trade between countries, has resulted in the internationalization of domestic competition issues. In cases where anti-competitive practices occur in one country and affect another country, one country can attempt to protect domestic consumers and fight against anti-competitive practices, by extending their jurisdictional reach into a foreign country's jurisdiction. Application of domestic laws extraterritorially, under the doctrines of "effects" and "enterprise unity" has evolved in the U.S., E.C., Japan and Canada.

Effects doctrine was developed by U.S. courts, by which antitrust laws (*e.g.*, the *Sherman Act*) may be applied against a foreign anti-competitive act affecting the U.S. market, even though that anti-competitive act did not occur in the territory of the U.S. This doctrine was first articulated in the *Alcoa* case in 1945.¹⁹⁵

According to the "enterprise unity doctrine", antitrust laws of a country can be applied to foreign-based entities for the acts of their affiliates present in the national territory. In the E.C., the European Court of Justice first developed this doctrine in the *Dyestuffs* case.¹⁹⁶

In a more broad view, the primary concern is the breach of sovereignty when the laws of one country are being extended to conduct occurring abroad and by national firms and individuals of another country; hence the jurisdiction of law enforcement agencies are also being extended.

In response to such extraterritoriality, objections have been raised with practical implications. The negative reaction from the international community, especially for the

¹⁹⁵ *United States v. Aluminium Company of America*, 148 F. 2d 416 (2d Cir. 1945).

¹⁹⁶ *Weinrauch*, *supra* note 1 at 79.

extension of U.S. antitrust laws (especially the *Sherman Act*) extraterritorially in light of the “effects doctrine” can be seen in the adoption of blocking statutes, claw back statutes and diplomatic notes of protest; for example, the British *Shipping Contracts and Commercial Documents Act 1964*, the British *Protection of Trading Interests Act 1980*, the Australian *Foreign Proceedings (Excess of Jurisdiction) Act 1984* and the Canadian *Foreign Extraterritorial Measures Act 1984*.¹⁹⁷

These reactions prompted countries to investigate anti-competitive activities of enterprises by way of co-operation among antitrust agencies. This co-operation was pursued through bilateral agreements in antitrust actions.

However, these agreements do not obligate either country to communicate information concerning anticompetitive activities of firms and they leave the issue of exchange of information subject to domestic laws regarding confidentiality of the parties. Exchange of confidentiality clauses in bilateral agreements will be covered in more detail in the third part of this paper.

5.2 Laws on Confidentiality: Can Information Be Shared with Foreign Entities?

As antitrust laws deal with trade related activities of all forms of entrepreneurs, confidential information includes: commercially sensitive information and business secrets; all other information collected during the investigation.¹⁹⁸ The former includes data on sales and production costs, information on suppliers and customers, as well as future business plans, technical characteristics of a product, etc.; whereas the latter

¹⁹⁷ Claw back statutes allow a foreign defendant to sue in its domestic courts to recover two-third's the damages, paid as a result of a judgment in a U.S. court; *Shipping Contracts and Commercial Documents Act 1964* (U.K.), c.87; *Protection of Trading Interests Act 1980* (U.K.), c. 11; *Foreign Extraterritorial Measures Act*, R.S.C., c. F-29, (1984) (Can.); *Foreign Proceedings (Excess of Jurisdiction) Act*, No. 3 (1984) (Austl.).

¹⁹⁸ Zanettin, *supra* note 69 at 121.

includes information collected during the process of investigation, covering details beyond the scope of commercially sensitive information such as witness testimonies, written interrogations of the parties involved in the case and other documents and materials pertaining to the case under investigation.

In addressing the question of international exchange of information in antitrust cases, I will look at the antitrust laws of several countries representing different continents of the world; these include Canada, U.S. (the major player in international antitrust law) and the E.C.

A starting point in understanding the exchange of information in the process of enforcing competition laws is confidentiality of information according to the laws of the countries.

5.2.1 Canada.

In Canada, the *Competition Act* of 1985 regulates the communication of information.¹⁹⁹ Section 29 specifically deals with issues of confidentiality of information and exchange of information. Section 29 (1) declares that no person in the enforcement of this Act shall communicate any obtained information; however, there are two exceptions: first, it can be provided to Canadian law enforcement agency and, secondly, for purposes of the administration or enforcement of this *Competition Act*. The first exception is only for the favor of domestic law enforcement agencies, but we might argue that the second exception would allow communication of the information (because it is not limited to national agencies only) when the Canadian Bureau of Competition also has already started an investigatory process in the same case. For example, one of the members of a cartel for a certain product resides in Canada and that product affects the Canadian

¹⁹⁹ *Competition Act*, R.S.C., 1985, C-34.

market.²⁰⁰ In response to such arguments the Canadian Bureau of Competition has issued a statement with regards to communication of confidential information under the *Competition Act* on May 1995.²⁰¹ According to this statement, under the exception of “administration and enforcement” of the Act, the Director²⁰² is allowed to communicate with foreign counterparts for purposes of advancing a specific investigation being carried out pursuant to the Act; and such communication should be reciprocal, *i.e.*, for the purposes of receiving the assistance of that agency regarding a Canadian investigation.

To sum up, the Canadian law does not allow exchange of confidential information in antitrust cases unless the Canadian Bureau of Competition is also investigating the same case as its foreign counterpart requesting the information and then only for the purpose of advancing its own investigation.

5.2.2 The U.S.A.

Antitrust laws in the U.S. are well developed for prosecution of both domestic and international anti-competitive activities. There are two ways for the exchange of confidential information during the investigatory process. First is through the “Antitrust Mutual Assistance Agreement” according to the *International Antitrust Enforcement Assistance Act* of 1994 (IAEAA). Only a limited number of countries may take advantage of this option because there needs to be a bilateral agreement on “Antitrust Mutual

²⁰⁰ In many international antitrust cases in order to prosecute an international cartel antitrust agencies have exchanged confidential information because otherwise it wouldn't be possible to prosecute; for example, vitamins case of late 1990s, that involved cartelization of worldwide production of vitamins and food additives, and cartel members involved from Canada, US, Japan, Switzerland, Germany. This case was prosecuted jointly by EC and US agencies.

²⁰¹ Competition Bureau of Canada, *Communication of confidential information under the Competition Act*, May 1995, [unpublished], online: Competition Bureau <<http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1277&lg=e>> (date accessed: 7 June 2006).

²⁰² According to Competition Act chief executive of criminal investigation division holds a position of Director of criminal investigation; See *Competition Act*, R.S.C., 1985, C-34.

Assistance” with the U.S. antitrust agency.²⁰³ The second option for information sharing is through the *Antitrust Civil Process Act*.²⁰⁴ According to the *Antitrust Civil Process Act*:

[...] no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, so produced shall be available for examination, without the consent of the person who produced such material, answers, or transcripts [...].²⁰⁵

Also, according to paragraph 57b-2 (3) (C) of the *Federal Trade Commission Act*, no investigation documents will be disclosed, including documentary material, tangible items, answers to questions, reports, transcripts of oral testimony without the consent of the person who produced those things, except to either House of the Congress or to any committee or subcommittee of the Congress.²⁰⁶

Paragraph 46 (f) of the Act provides that the Commission shall not have any authority to make public any trade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential, except that the Commission may disclose such information to officers and employees of appropriate federal law enforcement agencies or to any officer or employee of any State law enforcement agency, upon prior certification of an officer of any such federal or state law enforcement agency that such information will be maintained in confidence and will be used only for official law enforcement purposes.²⁰⁷

²⁰³ Since the adoption of the IAEAA in 1994, only Australia concluded an agreement with the US; *Agreement between the Government of Australia and the Government of the United States of America on Mutual Antitrust Enforcement Assistance*, Washington, 27 April 1999, A.T.S. 1999 No. 22 (entry into force: 5 November 1999).

²⁰⁴ *Antitrust Civil Process Act*, 15 U.S.C. § 1311-1314 (1994).

²⁰⁵ *Ibid.* at § 1313 (c) (3).

²⁰⁶ *Federal Trade Commission Act*, 15 U.S.C. § 57b-2 (1994).

²⁰⁷ *Ibid.* at § 46 (f).

Another prohibition for disclosure of any information by both Department of Justice and Federal Trade Commission is under the pre-notification procedure set up by the *Hart-Scott-Rodino Antitrust Improvement Act*.²⁰⁸

The disclosure of information by antitrust agencies of the U.S. is restricted only for its law enforcement agencies and the Congress, rather than the antitrust agency of another country for the purpose of fighting against anti-competitive activities of firms. The exception is the Antitrust Mutual Assistance Agreement according to the *International Antitrust Enforcement Assistance Act* of 1994 (IAEAA),²⁰⁹ currently only with Australia.²¹⁰

5.2.3 The EC

Antitrust laws of the E.C. are distinct from North American countries. E.C. competition laws are more concerned with opening markets among member countries.

Disclosure of any information covered by the obligation of professional secrecy is prohibited to all officials and servants of the institutions of the community, according to the Article 287 (ex. Article 214) of the *Treaty of Rome*.²¹¹

The Council adopted 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 of Rome*.²¹² This regulation came into force on the 1st of May 2004 and replaced Regulation 17/62. According to Article 28 of this Regulation, information collected

²⁰⁸ *Hart-Scott-Rodino Antitrust Improvement Act*, 15 U.S.C. § 18a (1994).

²⁰⁹ *International Antitrust Enforcement Assistance Act*, 15 U.S.C. §§ 6201-6212 (1994).

²¹⁰ *Agreement between the Government of Australia and the Government of the United States of America on Mutual Antitrust Enforcement Assistance*, Washington, 27 April 1999, A.T.S. 1999 No. 22 (entry into force: 5 November 1999).

²¹¹ *Treaty Establishing the European Community (Treaty of Rome) 1957*, OJEC C 325/33 December 2002, Art. 287.

²¹² 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 of Rome*, 1/2003 OJ 2003 L 1.

pursuant to an investigation of anti-competitive activity should be used only for this purpose; and again, this Regulation also prohibits the disclosure of any information pursuant to the case, because officials are under the obligation of professional secrecy.

According to Article 12 of the Regulation, the Commission and the competition authorities of a member state have the power to provide one another with confidential information. But this fails to address the issue of international exchange of information between antitrust agencies of different countries when investigating cases having cross-border dimensions.

The same rules of professional secrecy are imposed on antitrust agency officials, according to Article 17 of the EC Merger Regulation 139/2004.²¹³

5.3 International Non-antitrust Legal Mechanisms to Address the Problem

5.3.1 The Hague Evidence Convention of 1970 and Its Use in International Antitrust Cases

Our review of the antitrust laws of several countries answers the question of exchange of confidential information internationally in the negative (form).

Even though every antitrust agency must obey the confidentiality of communicated information between enterprises and itself, it would be wrong to conclude that communication of confidential information is not taking place.

One way to exchange information is through The Hague Evidence Convention.²¹⁴ The other way is through Mutual Legal Assistance Treaties. However, due to the fact that these options were not specifically designed to meet the specific needs of antitrust issues, the degree of usefulness of these two options is limited.

²¹³ Council Regulation (EC) No 139/2004 of 20 January 2004, *on the Control of Concentrations between Undertakings*, (2004) O.J. L 24/1.

²¹⁴ *Hague Evidence Convention on Taking of Evidence Abroad in Civil or Commercial Matters*, 18 March 1970, 847 U.N.T.S. 231.

Under Article 1 of the Hague Evidence Convention a judicial authority in the signatory countries is entitled to request evidence or to perform other judicial acts abroad in civil and commercial matters. However, due to the criminal nature of antitrust laws in some countries, such as the U.S. and Canada, these countries are prevented from taking full advantage of this Convention. Furthermore, a letter of request from the antitrust agency is unacceptable under The Hague Convention because Article 1 clearly states that only judicial authority is entitled to make requests. This does not mean that antitrust cases cannot use the mechanism established by this Convention, in obtaining evidence from abroad; only that, when an antitrust agency brings the case before a court, it is possible to make requests according to the convention.

An evaluation of the usefulness of The Hague Convention in antitrust cases reveals the following concerns. The convention is limited to civil and commercial matters. The types of anti-competitive activities with international dimensions primarily include international cartelization. That is criminally punishable by antitrust laws in a number of countries.²¹⁵ The serious nature of international cartels has been accepted by most countries of the world. From this perspective, The Hague Convention would be irrelevant in such criminal cases because of the civil and commercial matters that the Convention deals with.

Another concern related to matters civil or commercial under The Hague Convention is the antitrust laws of countries like the U.S. and Canada, where many anti-competitive acts prescribe criminal punishment.²¹⁶ Since the U.S. is a major player in

²¹⁵ *OECD Report on Impact of Cartels*, *supra* note 20 at 10.

²¹⁶ *Ibid*, at 10.

international trade with its thousands of multinational companies, it must be considered in order to fight international anti-competitive activities.

Another concern is that only judicial authorities may make requests according to the Convention. In antitrust cases, antitrust agencies are the main bodies which investigate each case. If only a court may make requests, then an antitrust agency, which is in the process of investigation, needs help from the judicial authority. This process prolongs the investigatory process and puts an extra barrier before the antitrust agency. Furthermore, under Article 23 of The Hague Convention the execution of letters of request issued for the purpose of obtaining pre-trial discovery of documents can be refused.²¹⁷ Therefore, letters of request to obtain evidence for successful prosecution of an international anti-competitive act is limited to the period of actual trial process of the court.

These concerns reveal inadequacies of the Hague Evidence Convention in most antitrust cases. As a proof to this may serve that fact that none of the U.S. or the E.C. antitrust agencies has ever used this Convention in antitrust cases.²¹⁸

5.3.2 The Use of MLAT(s) in Cases of International Anti-competitive Acts

Another way that allows antitrust enforcement to some limited degree is the Mutual Legal Assistance Agreement (MLAT). These agreements are in the area of criminal law. According to these MLATs, the request for assistance is made by the central enforcement authority of the government to the same counterpart authority of another country; usually it is through a ministry of justice. Under MLATs, any state enforcement agency may make its request through the central authority.

²¹⁷ States must declare about this at the time of signature, ratification or accession to the convention.

²¹⁸ Zanettin, *supra* note 69 at 148.

The fact that MLATs only cover criminal matters prevents civil antitrust cases from being successfully prosecuted. According to most European countries, anti-competitive acts in antitrust laws are not criminal offences. Therefore, for example, France cannot use its MLATs with other countries to obtain evidence or other information to enforce its antitrust laws.

Furthermore, MLATs work through courts, for example, interviewing witnesses and analyzing documents are performed according to ordered subpoenas.²¹⁹ In this way the process of obtaining useful information regarding international anti-competitive act becomes very complicated.

It is fair enough to recognize that MLATs were not specifically designed for international antitrust cases. The new developments in international anti-competitive practices require a distinct approach.

If MLATs are not relevant for antitrust cases then what about bilateral agreements on cooperation in antitrust cases? Why do countries not use bilateral agreements that are specifically designed for such cooperation? In the next section of the paper we will analyze bilateral cooperation in antitrust.

5.4 International Antitrust Legal Mechanisms to Address the Problem

5.4.1 Bilateral Antitrust Cooperation Agreements: Issues of Exchange of Information

Bilateral agreements for cooperation in the antitrust area do not resolve the issue of exchange of information between antitrust agencies. The exchange of confidential

²¹⁹ *Ibid*, at 154.

information requires a further and more fundamental step, in the commitment to international antitrust cooperation.²²⁰

The answer requires an analysis of the information sharing clause of some of these agreements.

Article 7 of the bilateral agreement between the U.S. and E.C. of 1991 on cooperation in antitrust areas provides:

The competition authorities of each Party will render assistance to the competition authorities of the other Party in their enforcement activities, to the extent compatible with the assisting Party's laws and important interests, and within its reasonably available resources.²²¹

This means that if there is a law in the U.S. generally prohibiting an exchange of information, then this bilateral agreement is subordinated to it and cannot change that existing law.

Because of the similar nature of antitrust bilateral agreements, in terms of the regulation of exchanges of information, it is not necessary to examine them all. Current bilateral agreements allow exchange of information to the degree that is permitted according to domestic laws on confidentiality of information; however, because we examined domestic laws of several countries in our chapter two, such laws generally prohibit exchange of information with foreign antitrust authority.

²²⁰ *Ibid*, at 119

²²¹ *U.S.-EC antitrust agreement 1991*, *supra* note 160.

5.4.2 U.S. Antitrust Mutual Assistance Agreement, pursuant to Its International Antitrust Enforcement Assistance Act.

In 1994 the U.S. adopted its *International Antitrust Enforcement Assistance Act*.²²² The purpose was to facilitate the work of its antitrust agencies, the Antitrust Division of the Department of Justice and the Federal Trade Commission, in prosecution of anti-competitive activities having international dimensions. According to this Act a new form of bilateral antitrust agreement was allowed to conclude which permits the exchange of information between antitrust agencies.²²³ These agreements are called Antitrust Mutual Assistance Agreements (AMAA).

One important feature of the Act is, in accordance with AMAA, that U.S. antitrust authorities are entitled to use their power to obtain evidence and to hand it over to a foreign antitrust agency regardless whether the conduct investigated violates any Federal antitrust laws.²²⁴ Section 3 of the Act describes the procedure to get a testimony or a statement and other related documents; this process is conducted through a district court where the person resides; and if such an order to obtain evidence does not contain otherwise, the evidence must be obtained according to the Federal Rules of Civil Procedure. However, previously, according to the s. 6(f) of the Antitrust Civil Procedure Act, the U.S. antitrust agencies were prohibited from communicating antitrust information to any other agency, except U.S. federal or state agencies. This is one important advantage of the AMAA which was not possible before.

However, according to Section 12 of the Act, U.S. antitrust agencies are authorized to receive a reimbursement from a foreign antitrust agency for the costs

²²² *International Antitrust Enforcement Assistance Act*, 15 U.S.C. §§ 6201-6212 (1994).

²²³ 15 U.S.C. § 6201 (1994).

²²⁴ *Ibid.* at § 6202.

incurred by U.S. agencies in conducting an investigation requested by the foreign antitrust authority.

There are limitations for the exchange of information pursuant to this Act.

It is argued that the Act does not provide clear criteria on search and seizure warrants, even though these two tools are important in international cartel investigations.²²⁵ Furthermore, according to Section 7, the U.S. antitrust authorities are prohibited from transferring the evidence or other information to a foreign antitrust authority if doing so is not consistent with the public interest of the U.S. This provision seems broad and not so clear. In defining consistency with the public interest of the U.S., antitrust authorities should consider:

... among other factors, whether ...the foreign antitrust authority holds any proprietary interest that could benefit or otherwise be affected by such investigation, by the granting of such order, or by the provision of such antitrust evidence.²²⁶

Zanettin interprets this provision as related to the concern expressed by the U.S. business community that information communicated to foreign agencies might be used to favor a foreign state-owned competitor.²²⁷ This is a reasonable concern that the business community may have. In any case, international treaties often contain a provision about conformity with public interests, out of concerns for sovereignty and security of the country; therefore, it is not unnatural that this rule exists in US bilateral agreements too.

Furthermore, Section 4 of the Act prohibits disclosure of two types of information: that obtained under the pre-merger notification procedure; and antitrust evidence concerning a case before a grand jury. However, the second type of evidence is

²²⁵ Zanettin, *supra* note 69 at 160.

²²⁶ 15 U.S.C. § 6207 (1994).

²²⁷ Zanettin, *supra* note 69 at 161.

not wholly prohibited, but allowed in limited occasions when a foreign antitrust authority shows a "...particularized need for such antitrust evidence..."²²⁸

The third banned evidence is, according to Section 4 (3), antitrust evidence that is to be kept secret in the interest of national defense or foreign policy.

This Act addresses concerns about the use of obtained information strictly for those purposes for which it was obtained, not for other cases or any other purpose.²²⁹

5.4.3 Soft Cooperation in Antitrust: International Documents of OECD and UNCTAD of a Non-binding Nature.

The issue of anticompetitive activities affecting international trade has actively been addressed by such international organizations as the Organization for Economic Cooperation and Development, as well as the United Nations Conference on Trade and Development. However, these organizations' documents are of a non-binding nature and this is the reason for qualifying their cooperation efforts as "soft". Although documents adopted by them have a non-binding nature, they have been playing an important role for technical assistance to countries in antitrust areas, including help in the formulation of antitrust laws, in efforts leading to convergence of differences among national antitrust laws, in serving as a forum for consultations, recommendations and best practices in information exchange, in notification and other forms of cooperation.

a) The OECD

The Organization for Economic Cooperation and Development (OECD) has adopted several recommendations to its member countries, including 1967, 1973, 1979, 1986 and 1995 recommendations concerning cooperation between member countries on

²²⁸ 15 U.S.C. § 6204 (2) (A) (1994).

²²⁹ *Ibid*, at 6207 (b).

anticompetitive practices affecting international trade. The 1998 recommendations concern effective actions against hard core cartels; in 2005, best practices for the formal exchange of information between competition authorities in hard core cartel investigations; and, 2005 recommendations concerning merger review.

The 1995 recommendations concerning anticompetitive practices affecting international trade call for member countries to co-operate in international antitrust cases; particularly, Section A (3) specifies that members should supply each other with relevant information on the following three conditions: a) as their legitimate interests permit them to disclose; b) subject to appropriate safeguards, including those related to confidentiality; and, c) unless such cooperation would be contrary to significant national interests.²³⁰

Sharing factual and analytical information is subject to laws on confidentiality among participating member countries, according to Section 10 of the guiding principles for exchange of information in the 1995 recommendations.²³¹ According to the same Section of the 1995 Recommendations, a requested state may specify protection and put limitations to the use of provided information; this limits use of communicated information to that specified purpose and no disclosure to any other agency or case, if revealed. Section 10 of the Recommendations also gives a right to decline a request in cases when the requesting country is unable to observe those protections and limitations on the use of requested information.

²³⁰ *OECD Recommendation on Anticompetitive Practices Affecting International Trade*, *supra* note 127, Section A (3),

²³¹ OECD, *Appendix to the Recommendations Concerning Cooperation between Member Countries on Anticompetitive Practices Affecting International Trade*, 28 July 1995 - C(95)130/FINAL1995, Section 10.

Section B of the 1998 Recommendations against hard core cartels encourages cooperation among member countries, specifically the sharing of documents and information, as well as the gathering of documents and information on behalf of foreign competition authorities, to an extent consistent with their laws and important interests, subject to effective safeguards to protect commercially sensitive and other confidential information.²³² These 1998 Recommendations against hard core cartels gives even more grounds to decline a request on information-sharing than did the 1995 Recommendations regarding anticompetitive practices affecting international trade. These include a competition authority's resource constraints or the absence of a mutual interest in the investigation in question.²³³

OECD Recommendations encourage member countries to enter into bilateral or multilateral agreements, in order to fight effectively against anticompetitive activities having international dimension.²³⁴

OECD *Best Practices for the Exchange of Information* (2005) identifies its jurisdiction and excludes from it the following three:

- a) information that is not subject to domestic law restrictions, *i.e.*, information which has already become public and there are no restrictions in terms of confidentiality concerns;
- b) information exchanges among members of regional organizations (this is the same as GATT offers by its exception to members of regional economic organizations on the application of the Most Favored Nation (MFN) principle); and,
- c) information exchanges in the context of private litigation.²³⁵

²³² OECD *Recommendations against Cartels*, *supra* note 6, section B.

²³³ *Ibid*, section B.

²³⁴ *Ibid*, section B.

²³⁵ OECD, *Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations*, OECD 16 November 2005, DAF/COMP(2005)25/FINAL, Section I (C), [hereinafter *OECD Best Practices*].

These *Best Practices* are more detailed to include certain safeguards for the exchange of information, under which Section A provides reasons for declining to provide information (these *Best Practices* also have condition of compliance with laws on confidentiality);²³⁶ Section B provides rules on maintenance of confidentiality for the communicated information and non-disclosure of this information to third parties, unless the requested country agrees to it; Section C provides protection of the legal profession privilege meaning that the requesting country should not require and the requested country should not obtain information that is under the protection of laws on legal profession privilege; and, Section D provides that a requested country should not give notice to the source of information unless it is required under its domestic laws or international treaties.²³⁷

The requirement for keeping laws on the confidentiality of information publicly available indicates transparency and development in competition laws regulating international anticompetitive activities.²³⁸

b) UNCTAD

The United Nations Conference on Trade and Development has developed a Code on Restrictive Business Practices, adopted by the UN General Assembly in its Resolution

²³⁶ Reasons for declining to provide the requested information might include, but are not limited to: (i) the requesting jurisdiction's investigation relates to conduct that would not be deemed hard core cartel conduct by the requested jurisdiction; (ii) honoring the request would be unduly burdensome for the requested jurisdiction or might undermine an ongoing investigation; (iii) the requested jurisdiction believes that confidential information may not be sufficiently safeguarded in the requesting jurisdiction; (iv) the execution of the request would not be authorized by the domestic law of the requested jurisdiction; or (v) honoring the request would be contrary to the public interest of the requested jurisdiction.

²³⁷ *OECD Best Practices*, *supra* note 235, Section II.

²³⁸ *Ibid*, Section III.

35/63 in 1980.²³⁹ The Code on restrictive business practices clearly states, in its Part IV Section B, that it applies to restrictive business practices, including those of transnational corporations adversely affecting international trade, particularly in developing countries.²⁴⁰ This Code was more designed to prevent anticompetitive activities of transnational companies and their impact on developing countries.

The confidentiality clause of the Code is simple and follows the same ideas as *OECD Recommendations* to its member states. According to paragraph 7, Section E, the Code calls upon states to institute or improve procedures for obtaining information from enterprises, necessary for their effective control or restrictive practices; paragraph 8 calls upon states to establish appropriate mechanisms at the regional and sub-regional levels to promote exchange of information on restrictive business practices.²⁴¹

The Code also addresses the issue of exchange of information, but it is subjected to national laws on confidentiality, according to its paragraph 9 of Section E.

However, U.N. General Assembly resolutions are non-binding; but, the Code has played an important role towards developing competition regimes among developing countries, especially for convergence of antitrust laws and policies, which in its turn can make possible the negotiating of international agreement in antitrust area without obstacles and frictions among the antitrust policies of different countries.

²³⁹ UNCTAD, *The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, 5 December 1980, UN GA Resolution 35/63, UN Doc. TD/RBP/CONF/10 (1980);

UNCTAD, in application of its mandate according to the latter Resolution, holds the Intergovernmental Groups of Experts on Competition Law and Policy annually, and a Review Conference at ministerial levels every five years. The last Review Conference was held in Antalya, Turkey in 2005.

²⁴⁰ *Ibid*, Part IV Section B

²⁴¹ *Ibid*, Part IV Section B

5.5 Did Singapore and Doha Ministerial Meetings Address the Problem?

International competition law has already become an important political issue on the agenda of the WTO; this issue appeared on the agenda of the WTO beginning with its first ministerial meeting in Singapore. At the Singapore Ministerial meeting, in 1996, participants decided to establish a working group to study issues of interaction between trade and competition policies.²⁴²

However, the Singapore Ministerial Declaration made clear that future negotiations in this area “will take place only after an explicit consensus decision is taken among WTO Members regarding such negotiations”²⁴³. At this stage, competition laws and policies of countries are very divergent because they are based on different approaches to competition policy. For example, E.C. laws are more oriented to opening up markets, U.S. laws have as their objective efficiency and consumer protection; furthermore, there are gaps in competition laws and in their enforcement between developed and developing countries.

The issue of international competition law has gained recognition in terms of its importance during the Doha Ministerial Conference in 2001. Participants to the Doha Ministerial Meeting showed their readiness for commitments leading to an international agreement; its Declaration states:

Recognizing the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 24, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations.²⁴⁴

²⁴² This Working Group had started to report its conducted research each year beginning 1997 to 2003.

²⁴³ *Singapore Ministerial Declaration*, 13 December 1996, WT/MIN(96)/DEC, para. 20.

²⁴⁴ *Doha Ministerial Declaration*, 14 November 2001, WT/MIN(01)/DEC/1, para. 23.

Furthermore, in accord with para. 24 of the Declaration, member countries recognize the needs of developing and least-developed countries for support for technical assistance and capacity building in this area. They decided to cooperate with international organizations and other regional organizations to address the problem.

An analysis of approaches of the Singapore and Doha Declarations on competition policies reveals an interest of member countries to regulate the issue at the WTO level. As we saw above, participants at the Singapore Meeting only decided to launch a working group to study the interaction between trade and competition policies and conditioned further negotiations only after members of the WTO reach an explicit consensus regarding such negotiations. At the Doha meeting participants recognized that a multilateral framework will enhance the contribution of competition policy to international trade and development. Recognizing the role of competition policy (in international trade) ministers thus decided on further steps in this area.

Participants agreed for negotiation commitments to take place after the Fifth Session of the Ministerial Conference (2003), on the basis of an explicit consensus on modalities for negotiations at the session, according to the Doha Declaration. However, this Ministerial Conference (2003 in Cancun) did not reach consensus; and a post Cancun meeting of the General Council on 1 of August 2004 came to a decision that competition policy issues will not form part of the work program of the Doha Round and no negotiations will take place during this round.²⁴⁵

The General Council on 1 August 2004 decided on the status of the competition issues, drawing the conclusion that it was too early to talk about the problem of exchange of information in international antitrust cases within the framework of WTO. This does

²⁴⁵ *The General Council's Post Cancun Decision*, 1 August 2004, WT/L/579.

not mean that the issue of exchange of information between antitrust agencies has lost its importance for international trade, after so many years of discussion and research.

Consensus of the sovereign members of the WTO is important to start any negotiations, but without filling the gap in competition laws and structures in order to enforce them in both developing and developed countries, it is hard to move along; making competition policies of developed and developing countries closer to each other is important to start negotiations on the modalities of any global competition policy.

Although consensus has not been reached, initially according to para. 25 of the Doha Declaration, clarification of the following issues were consigned for the Working Group: 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. Including hard core cartels as one area for further clarification will more likely raise the issue of exchange of information in order to restrict international cartels successfully in future negotiations.

The reason for failure of consensus was caused for many concerns most of which belong to the developing countries. These concerns should be paid relevant attention, given the huge number of developing countries among the members of the WTO, if an international agreement in this antitrust area will be binding on all members. Major sources of reluctance for launching negotiations on antitrust issues were that many developing countries do not feel sufficiently prepared to enter into negotiations with highly expert counterparts; additionally, developing countries wanted to maintain sufficient "policy space" in order to exempt certain industries from powerful and large

external competitors.²⁴⁶ Scarcity of resources and insufficient personnel in the least developed countries who understand competition policy issues are among the technical sides of the issue being addressed in developing countries, letting alone the fact that whether or not they have domestic competition laws and effective policies in this area.

5.6 Obstacles to Exchange of Information and to an International Agreement

Although this type of information is crucial for finalization of cases with international dimensions, and to establish criminal or civil responsibility, there are several obstacles hampering exchange of information between competition agencies of different countries.

5.6.1 Defending the Interests of Smaller and Developing Countries

One concern in the communication of confidential information whether through bilateral or multilateral agreement, is that the interests of smaller and developing countries will be imbalanced in favor of developed countries.²⁴⁷ These developed countries include the U.S., members of the European Communities with a high level of antitrust laws, experience and sufficient financial and (expert) staff resources. These developed countries are more likely to make more requests than smaller or developing countries do. This paper suggests that the concern of smaller and developing countries depends on the size of the economies of each country and whether it is an open or closed economy. A country like the U.S., with one of the biggest economies and a great number of production enterprises, as well as large distribution and sales, naturally gives rise to multiple numbers of incidents of anti-competitive practices among participants in the world market. This is the outcome of the open and free market economy that the U.S. has.

²⁴⁶ UNCTAD, Intergovernmental Group of Experts on Competition Law and Policy, *Preliminary Assessment of the Set*, 13 October 2004, UNCTAD TD/B/COM.2/CLP/45, para. 35.

²⁴⁷ Zanettin, *supra* note 69 at 131.

However, B. Zanettin, argues that the imbalanced advantage of the most developed countries like the U.S. will disappear in the long term as countries sign international treaties on information exchange, as long as these agreements foster the international enforcement of their signatories' antitrust laws.²⁴⁸ Still, if smaller countries do not have big economies and not many incidents of anti-competitive practices such as cartelization and fixing prices, monopolization and putting private barriers to entry into markets, allocation of customers, tying sales with limited number of distributors, then it is clearly understandable that countries with big economies make more requests for exchanges of information.

5.6.2 Adversarial and Litigious Nature of Antitrust Laws

Another objection in the formation of international agreement for exchange of information is the adversarial and litigious nature of antitrust laws in a number of countries.²⁴⁹ These countries have advanced antitrust laws, sufficient experience and resources, especially in the U.S., where the prosecution of antitrust cases is characterized by confrontation rather than cooperation between antitrust agencies and firms. For example, Section 1 of the Sherman Act expresses the illegality of conspiracy in restraint of commerce and, as a punishment, sets a fine and imprisonment.²⁵⁰ Furthermore, a private suit can result in treble damages to be paid to the suing party.²⁵¹ Such penalties

²⁴⁸ *Ibid*, at 132; Under international treaties the author basically supposes bilateral agreement on exchange of information, rather than multilateral.

²⁴⁹ *Ibid*, at 134.

²⁵⁰ *Sherman Act*, 15 U.S.C. § 1 (1994).

According to s. 1 of the Act: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

²⁵¹ *OECD Report on Impact of Cartels*, *supra* note 20, at 15.

are not relevant in the case of European countries and other developing countries, where antitrust laws have been adopted and enforced. This paper suggests that such different approaches of countries to punishment of anti-competitive practices by firms also depend on cultures of interaction between law enforcement agencies and private business companies developed over time. Different political, cultural, and historical backgrounds of countries result in divergent attitudes towards economic power, freedom of contract, freedom of trade, efficiency, fairness, equity and welfare. To be more specific, there are common law system and abstract codifications in the west, U.S. extraterritorial jurisdictional claims, Japanese extra-legal measures, Chinese “ritus-prudence” within a “spiritual civilization”, Islamic principles of social justice, equality and modesty, and poor social security in transition economies, all of which will influence negotiations of international agreements.²⁵² For example, most western European countries prosecute anti-competitive practices of businesses as civil and administrative liabilities, whereas the U.S. and Canada have criminal sanctions.²⁵³

5.6.3 Use of the Communicated Information for Other Purposes

Another concern is the use of communicated information for other purposes too,²⁵⁴ meaning that it can get to the hands of other law enforcement agencies; or to other private, treble damage litigants or that it will somehow be leaked. In fact, transferred information can be used in other cases or reveal new infringements that result in criminal

²⁵² Weinrauch, *supra* note 1, at 46.

²⁵³ *Ibid*, at 47.

²⁵⁴ Minutes of the meeting of the International Competition Policy Advisory Committee of 11 September 1998, at 65, [unpublished] online: U.S. Department of Justice <<http://www.usdoj.gov/art/icpac/2046.htm>> (date accessed: 17 March 2006), [hereinafter *Minutes of ICPAC*]

indictments.²⁵⁵ This has not produced a case in practice yet, according to the Antitrust Division of the U.S. Department of Justice.²⁵⁶

The fear that transferred confidential information containing trade secrets may leak into the hands of state-owned companies also falls under the group concerns the usage of information for other purposes.

5.7 Assessing Options for Communication of Information: One International Agreement vs. Multiple Bilateral and Regional Agreements

The current status of information exchange in antitrust is generally limited to a low priority. Although addressed at regional and bilateral levels, by means of cooperation agreements in antitrust matters, an exchange of information clause in such agreements is subject to national laws on confidentiality of information. This means that sharing investigation documents, witness testimonies, and other kinds of evidences between antitrust agencies is not allowed because of the obligation of professional secrecy, according to E.C. agreements and regulations and because of prohibitions to communicate information under the laws of the U.S. and Canada, except their domestic agencies.

This urges a quest for other options, for better ways to address the problem effectively. We have three possible options: bilateral agreements, regional agreements, and multilateral agreements.

Bilateral agreements have several limitations. First, bilateral agreements on antitrust actions (see Subchapter Three) make exchange of information subject to national laws on confidentiality. For example, the U.S.-E.C. antitrust cooperation agreement of

²⁵⁵ Zanettin, *supra* note 69 at 137.

²⁵⁶ *Minutes of ICPAC*, *supra* note 254 at 65.

1998 states, in Article 7, that nothing in the agreement shall be interpreted “as requiring any change in the laws” of both parties.

Another example is Article 10 of the agreement between Canada and Mexico:

Notwithstanding any other provision of this Agreement, 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.²⁵⁷

The laws on confidentiality in different countries (see heading 5.2) indicate that domestic laws prohibit disclosure of information by antitrust agencies to any other foreign agencies.

Another limitation is that bilateral agreements are available only to the countries which have such agreements; therefore, in order to address the worldwide problem sufficiently, all other countries must conclude such agreements with each other, which is hard to expect. Till now, countries with the most advanced antitrust laws, practices, and resources like the U.S. and Canada, have few bilateral agreements in antitrust; for example, Canada has seven and the U.S. has eight.²⁵⁸

Considering the fact that most developing countries do not have such bilateral agreements, almost all prosecuted cases of international anticompetitive conduct belong to developed countries, though exchange of information is not allowed even among such countries. In addition to such insufficient tools, multinational companies with the goal of profit maximization would tend to operate their businesses in countries where there are

²⁵⁷ *Agreement between the Government of Canada and the Government of the United Mexican States Regarding the Application of their Competition Laws*, 2001, [unpublished], online: Competition Bureau <<http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1594&lg=e> - X> (date accessed: 20 March 2006).

²⁵⁸ Canada's bilateral agreements in antitrust area, online: Competition Bureau <<http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=141&lg=e>>; US bilateral agreements in antitrust area, online: USDOJ <http://www.usdoj.gov/atr/public/international/int_arrangements.htm>

no antitrust laws or their enforcement is weak because of a lack of trained personnel, scarcity of financial resources, and lack of experience. Often, corruption exists within the governmental structures. Furthermore, according to reports made in the OECD conference in 2004, the public and policymakers in some developing countries think, that merger control may harm investment; however, in the long run, not preventing anti-competitive mergers is more likely to inhibit new investment.²⁵⁹

Despite such limitations with bilateral agreements, (bilateral) cooperation is more effective, based on the confidence among the parties to each other. The more intense and regular relations that countries have with each other in business, legal issues, social issues and close political approaches to many issues makes both countries more reliable partners (for example, U.S.-Canada relations). This can lead to lowering the obstacles usually found in international relations such as contradictions in public policy, security and national interests as obstacles to the exchange of information in antitrust matters. As a result, countries can cooperate in prosecuting international anticompetitive activities more willingly because it is in the mutual interests of both parties. From that point, multilateral agreements with binding rules cannot be based on common confidence; and a requested country may rely less on a requesting country to transmit confidential information, by using excuse for not communicating that information under the cover of “inconsistency with its public order”. This is especially may be a case between, for example, China and the U.S. or Russia and the U.S. antitrust agencies.

²⁵⁹ OECD Global Forum on Competition, *Preventing Market Abuses and Promoting Economic Efficiency, Growth and Opportunity*, 4th meeting, February 12-13, 2004, at 72, online: OECD <<http://www.oecd.org/dataoecd/13/42/27892500.pdf>> (date accessed: 27 March 2006), [hereinafter *OECD Preventing Market Abuses*].

See also OECD, "Preventing Market Abuses and Promoting Economic Efficiency, Growth and Opportunity - Executive Summary" *OECD Journal of Competition Law and Policy*; 6, No.'s 1 & 2; 2004.

Regional agreements are another option when addressing the problem of exchange of information in antitrust cases. Initially, we might think that international cartelization and mergers that monopolize markets tend to occur more often within a region, and that negotiation of an agreement that allows exchange of information is easier than that of the multilateral level, for example within the framework of the WTO.

However, this is not always the case. For example, international cartelization cases within the NAFTA, in research prepared for the World Bank, show that among thirty-nine international cartel cases prosecuted by the U.S., only seven involved Canadian and Mexican companies.²⁶⁰ This undermines the assumption that international cartelization tends to occur more within a region than globally.

Para. 1, Article 1501 of the NAFTA imposes an obligation on parties to adopt and take appropriate action to fight against anti-competitive business conduct within their jurisdictions; and para. 2 of the same Article states that parties shall cooperate on issues of competition law enforcement, including among others, exchange of information.²⁶¹ However, this vague statement neither clarifies how to deal with domestic confidentiality laws nor indicates the procedure for such exchange of information. As a result, no international antitrust enforcement cases based on the rules of NAFTA have been reported. All member countries are using their bilateral agreements in antitrust and in criminal matters to the extent that is permitted for exchange of information which means exchange of non-confidential or publicly available information.

²⁶⁰ *Levenstain, supra* note 19.

²⁶¹ *North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, December 17, 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 (entered into force 1 January 1994) Article 1501.

The only regional agreement for exchange of confidential information in antitrust matters is in the European Community.

As examined in the Subchapter Two Regulation (EC) No 1/2003 (16 December 2002) was adopted on the implementation of rules on competition laid down in Articles 81 and 82 of the *Treaty of Rome*.²⁶² According to Article 12 of that Regulation, the Commission and competition authorities of member states have the power to provide one another with confidential information. This is exceptional and based on their level of integration.

Based on the limited area of coverage of this paper²⁶³, we are limited to the examination of US, Canada and EC competition policies.

This chapter is limited to assessing generally the advantages and disadvantages of international agreements, in comparison to bilateral and regional agreements. Approaches based on the modalities and nature of such agreements, for example, a minimum rules option, the TRIPS approach option, and a plurilateral agreement option will be out of the scope of this chapter.

Negotiation of an international agreement on antitrust issues has a number of advantages and solves many concerns and obstacles that bilateral and regional agreements are not able to address; most likely such negotiation will take place within the WTO framework.

Advantages:

²⁶² 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 of Rome, 1/2003 OJ 2003 L 1.

²⁶³ In the introduction, we limited the area of coverage by this paper to US, Canada and EC laws on exchange of information in antitrust area.

a) WTO provides a well-established institutional framework, with almost universal membership. The problem for most developing countries is that they do not have bilateral agreements in antitrust matters. This can be resolved by the WTO agreement. Many developing countries are member of the WTO and, thus familiar with the WTO and have permanent delegations in Geneva, which may contribute to making the WTO option more acceptable and less costly for them.²⁶⁴

b) Existence of dispute settlement mechanism and related experience. Many concerns related to the confidentiality of information find their best solution within the international agreement option. The WTO antitrust agreement with its dispute settlement body can provide, first, neutrality of the investigation body and its investigation procedure, and secondly, confidential information will be kept in the hands of an independent body.

c) An international agreement is binding, unlike existing “soft” cooperation. It can be argued that, in the current situation where many developing and least developed countries do not have antitrust laws, adoption of an agreement can cause frictions related to fulfillment of obligations under the new agreement. Furthermore, it seems logical to proceed first with national legislation, then regional arrangements, and finally with a multilateral agreement. However, law enactment and effective enforcement are slow processes; and some experts have suggested that adopting a multilateral competition framework can induce many countries to give the competition issue higher priority, which might accelerate the adoption of domestic legislation and effective control anti-

²⁶⁴ Zanettin, *supra* note 69 at 240.

competitive practices.²⁶⁵ Furthermore, how urgent the matter is can be evaluated by the following fact: the annual loss for developing countries from a few known international cartels has been about 1.7 per cent of these countries' GDP; and, as the study stresses, this estimate is probably conservative, given that it covers data from only fourteen of thirty-nine known international cartels.²⁶⁶ Furthermore, according to Para. 24 of the Doha Declaration, ministers recognized the needs of developing and least-developed countries for enhanced support for technical assistance; and they decided to address the problem with intergovernmental organizations, including UNCTAD (*i.e.*, one of its activities is to help draft competition laws), and through regional and bilateral channels. Therefore, binding international agreement can contribute to enactment and maintenance of sound competition policy for developing countries.

However, there are difficulties and disadvantages for adoption of international agreement in this antitrust area.

Existing substantive differences in competition laws make it difficult to negotiate an international agreement. For example, U.S. and Canadian antitrust laws even impose imprisonment as a punishment for cartel activity of businesses, whereas almost all European countries' antitrust laws are limited to imposition civil and administrative liabilities; U.S. antitrust laws are more "efficiency" oriented, while E.C. laws are more concerned with market integration, for example, in the *General Electric/Honeywell* merger case, the U.S. had cleared the merger but the E.C. blocked it.²⁶⁷ The U.S.'s

²⁶⁵ UNCTAD, *Closer Multilateral Cooperation on Competition Policy: The Development Dimension. Consolidated Report of Issues Discussed during the Panama, Tunis, Hong Kong and Odessa Regional Post-Doha Seminars on Competition Policy* held between 21 March and 26 April 2002, at 17, online: UNCTAD <<http://r0.unctad.org/en/subsites/cpolicy/gvaJuly/docs/DohaFinal-en.pdf>> (date accessed: 3 April 2006), [hereinafter *UNCTAD Consolidated Report*].

²⁶⁶ *Ibid.*, at 16.

²⁶⁷ Weinrauch, *supra* note 1 at 150.

approach is that they prefer case-by-case analysis and bilateral co-operation in antitrust law.²⁶⁸ Furthermore they do not want to transfer dispute settlement power to any other organization or third party. It is true that there exist many differences in antitrust laws based on the political, economic, social and cultural policies of countries; however, most countries' antitrust laws generally prohibit anti-competitive horizontal and vertical agreements and abuses of a dominant position. Furthermore, this paper suggests that enforcement of these laws is an issue which makes us think that countries have totally divergent laws, although prohibiting the same kinds of anti-competitive activities of businesses. For example, the U.S. enforces their antitrust laws vigorously and in order to do so they adopt many guidelines to investigate successfully anti-competitive activities including international anti-competitive practices, merger reviews, and price discrimination. Therefore, high and low levels of enforcement of competition laws give the impression that national laws are divergent. As a matter of fact, it might be a wrong assumption, because antitrust laws of many countries contain the same rules against certain anticompetitive acts. Thus, national antitrust laws are not totally different from each other.

For some developing countries' adoption of an international agreement may put them at a disadvantage, because they are concerned to keep their "policy space" in antitrust area, for example, to exclude national export cartels from competition laws in order to develop their own export potential and protect themselves from foreign multinationals. By giving exclusive rights to some domestic monopolies, and closing markets in order to protect their own economy from foreign competition, these countries may suffer both in the long and short terms. In the long term, for example, not preventing

²⁶⁸ *Ibid*, at 152.

anti-competitive mergers will inhibit new investments by these monopolies. In the short term, population or business members of countries in transition and developing countries: first, do not have access to finance for investment, and financial institutions in these countries have limited resources to finance businesses; secondly, they do not have relevant skills for a market economy and they need new technology, skills and practice in order to allocate resources properly and work efficiently. This is what is happening, for example, in Uzbekistan. It is a former Soviet Union country and now, after independence, it is in transition from a government planned economy into a free market economy. It is characterized as a closed economy with an average 70% tariff on imports coming into the country; which means that there is limited foreign trade. At the same time, its financial institutions are limited and its business members do not have relevant skills or experience for implementing new free market principles.

Although it is difficult to predict the effects of any international agreement, what is obvious is that its advantages can outweigh its disadvantages; and it is more beneficial than current bilateral and regional agreements, in terms of the number of participants and addressing the issue of international anti-competitive activities, both in developing and developed countries.

5.8 Conclusion

Evidence for this topic is limited, both for primary and secondary sources. The issue of exchange of information for the prosecution of international anti-competitive activities is one that is gaining more importance as international cartelization, monopolization, merger, exclusive dealing arrangements and other international anti-

competitive practices are increasing in number in the current process of economical globalization.

The need for evidence and other kinds of information in order to prosecute international cartels, international mergers, monopolizing markets, domestic export cartels, exclusive distribution agreements (called vertical market restraints) is essential to put an end to anti-competitive activities; and putting an end to them will result in several benefits: opening up markets to international trade which were blocked by private barriers of enterprises; proper allocation of resources for production; cheaper prices and more choices for consumers; more opportunities for medium and small size businesses to compete and develop; and overall development of the economy of a given country.

The problem of exchange of information has been successfully overcome in other areas such as securities and tax control, for example, in the U.S., after reform of the *Securities Exchange Act* in 1995, under which seventeen bilateral agreements have been concluded, allowing exchange of information.²⁶⁹ Exchange of information in antitrust area is also approaching that stage of development as in securities and tax control, in the U.S., based on its *International Antitrust Enforcement Act*, which allows exchange of information with foreign authorities. However, it is too early, to assess its results because the U.S. has concluded only one bilateral agreement, with Australia, according to this Act.

Both bilateral and regional agreements are hampered by domestic confidentiality of information laws.

International cartels, *i.e.*, several producers combining large market shares globally in conspiring to raise prices and limit output, are one of the most harmful and

²⁶⁹ Zanettin, *supra* note 69 at 130.

dangerous anti-competitive practices. According to the OECD study, much of the evidence needed to prove conspiracy (*e.g.*, travel and telephone records) is not commercially sensitive in the way that trade secrets, business plans, and other documents are often reviewed in merger cases.²⁷⁰ The fact that international antitrust activities of businesses is a new dimension and it has not become one of the important policy issues for many countries, makes the issue of fighting against it neglected, except when those countries such as in the E.C., the U.S., and Australia. These countries having understood the importance of the issue are raising it to the agenda of international organizations, in order to address this problem globally.

Most concerns in negotiating a multilateral agreement are not based on any thorough study of the issue. A concern in smaller and developing countries, that developed countries can make more requests for information than they do, causing imbalance of the advantage from the international agreement; as a matter of fact, international anti-competitive conduct affects developing countries in significant amounts. The annual loss for developing countries from a few known international cartels is about 1.7 per cent of these countries' GDP; and, as the study stresses, this estimate is probably conservative, given that it covers data from only fourteen of thirty-nine known international cartels.²⁷¹ Therefore, it would be in the interests of those developing countries to address the problem by means of international agreements in antitrust area.

If a dispute settlement body (DSB) is independent from the parties, for example, DSB within some international organizations, this would offer a better solution among existing ones. Without independent DSB many concerns (including using transferred

²⁷⁰ *OECD Preventing Market Abuses*, *supra* note 259 at 68.

²⁷¹ *UNCTAD Consolidated Report*, *supra* note 265 at 16.

information for other cases, or to transfer to another agency, or to make available to private civil litigants) are likely to be obstacle joint investigations.

The issue of addressing international anti-competitive activities was raised in 1949, by Clair Wilcox, one drafter of the Havana Charter (International Trade Organization): “the efforts to expand trade by reducing tariffs and eliminating quotas might well be defeated if no actions were taken to prevent the erection of private tariffs and quota systems by international cartels.”²⁷² It has been recognized by best practices and recommendations of the OECD, UNCTAD and other organizations that “effective application of competition policy plays a vital role in promoting world trade by ensuring dynamic national markets and encouraging the lowering or reducing of entry barriers to imports”.²⁷³ They also recognize that continued growth in internationalization of business activities correspondingly increases the anti-competitive practices in one country or in more than one country, which may adversely affect the markets and customers in other countries. Therefore, more active cooperation in antitrust area, especially multilateral cooperation, is needed in order to address the problem of exchange of information effectively.

Our earlier chapters and the examination of the issue of the exchange of information revealed that the existing tools and forms of cooperation in the investigation against cross-border cartels are limited. Thus, our next chapter will analyze the proposed solutions.

²⁷² *Weinrauch*, *supra* note 1 at 15, citing Clair Wilcox, A Charter for World Trade 105 (1949).

²⁷³ *OECD Recommendations against Cartels 1998*, *supra* note 6.

CHAPTER SIX

ASSESSING THE OPTIONS FOR COOPERATION

6.1 Bilateral Arrangements vs. Regional Arrangements vs. Multilateral Agreement

6.1.1 Introduction

We have three forms of cooperation: bilateral, regional and multilateral. Assessing these options and making a decision to proceed with is important. This is because no member of the world community wants private barriers that are anticompetitive activities to undermine the fruits of trade liberalization which began in the 1947 General Agreement on Tariffs and Trade (GATT). Based on an examination of the advantages and disadvantages of these three options for antitrust cooperation, international antitrust and trade community need to focus on one of them to pursue in the future. One might argue that members of the world community have already decided that they need an international agreement to address the increasing number of international antitrust issues because they are affecting international trade and causing frictions between trading parties. However, due regard needs to be given to bilateral and regional arrangements, because in some cases they might address the issue better than multilateral agreement. Furthermore, countries have experience in addressing antitrust issues at the bilateral and regional levels, but the multilateral level for antitrust cooperation has not been tested yet, therefore it is difficult to predict its outcome. Additionally, it might be

better to continue with the current options, including bilateral and regional, since WTO members could not reach a consensus over the multilateral cooperation agreement.

All of these questions will be easier to address and compare when we examine their advantages and disadvantages.

6.1.2 Bilateral Cooperation

Bilateral cooperation agreements in antitrust have become one of the tools to address antitrust cases. As we examined the existing bilateral agreements and their history in heading 5.4, we learned that there are two (or three according to some authors) generations of agreements. The first generation agreements are characterized with traditional comity, insufficient cooperation, whereas second generation with positive comity and active cooperation.

There are several limitations of these bilateral agreements in addressing international antitrust issues. The clearest limitation is that its benefits are limited only to those countries which have concluded the agreement. In order to address international anticompetitive practices in full countries of the world need to conclude bilateral agreements with each other, which are unlikely to occur. For example, in *Shipping* (North Atlantic), *Lysine* cases, involved cartel members resided in 29 different countries in the former and 5 in the latter. In such cases it is unlikely that all of these countries have antitrust bilateral agreements with each other in order to investigate cartel successfully. The evidence and other information needed for the investigation is located in so many countries. To illustrate this in an example, only 29 members of the OECD would have to

negotiate 406 agreements in order for them to have bilateral agreements with each other.²⁷⁴ Such complicated efforts would not be required for a multilateral agreement.

The second limitation of bilateral agreements is that they do not permit the exchange of information for the investigation of anticompetitive acts. As international trade is growing as a result of lowered barriers to trade, anticompetitive activities are also occurring outside the national boundaries mostly in two cases: a) lowered barriers to trade make possible the expansion of enterprises internationally; b) an anticompetitive act in one country is affecting the interests/markets of other countries. In all of these cases, when anticompetitive conduct is international in scope, the competition agencies of affected countries need evidence, witness testimonies, and other investigation information. In such cases, even though countries have bilateral agreements, they are of no use when it comes to the exchange of information. However, there are exceptional examples, such as Australia-New Zealand, US-Australia, and EU agreements, where the exchange of information in antitrust cases is allowed according to their bilateral and free trade area agreements, which are the strongest forms of bilateral agreements of nowadays.²⁷⁵ Nevertheless, today, all other antitrust bilateral agreements that exist today among trade partners subject the application of their agreement to national laws. To give an example, art. 7 of the bilateral agreement between the U.S. and the EC of 1991 on cooperation in antitrust areas provides:

The competition authorities of each Party will render assistance to the competition authorities of the other Party in their enforcement activities, to the extent compatible with the assisting Party's laws and important interests, and within its reasonably available resources.²⁷⁶

²⁷⁴ Weinrauch, *supra* note 1 at 100.

²⁷⁵ OECD, *Competition Policy: What Chance for International Rules* by J. R. Shelton, OECD (2006) at 8-9, online: OECD <<http://www.oecd.org/dataoecd/34/39/1919969.pdf>> (date accessed 5 April 2006).

²⁷⁶ *U.S.-EC antitrust agreement 1991*, *supra* note 160.

As we know exchange of information is essential for the prosecution of international cartels, mergers, abuse of dominance, exclusive dealing agreements, and other types of anticompetitive agreements.

A lack of confidence between antitrust agencies might cause a less cooperative attitude and undermine bilateral cooperation, especially in positive comity cases. This might be another limitation of bilateral cooperation based on agreement. One of the reasons for a lack of confidence might be the fear of disclosure of communicated information. Another reason may be the fear of the use of communicated information for purposes other than it was originally obtained. Experience shows that confidence between antitrust agencies exchanging information is an important factor.²⁷⁷ Close economic partners like the U.S. and E.U., Australia and the U.S. or the U.S. and Canada have more confidence in each other because of their shared economic interests and the regular interaction between antitrust agencies; whereas, for example, the US-Russia, or Canada-India relationships might be less active due to various reasons, including economic development, insufficient enforcement of competition laws, and others.

Another shortcoming of bilateral agreements is related to developing countries. In order for a bilateral agreement to be concluded, both countries should already have competition laws.²⁷⁸ Furthermore, each of these countries needs to have a well-organized competition agency which will cooperate when a request from another partner comes from their antitrust bilateral agreement. Therefore, so far, antitrust bilateral cooperation

²⁷⁷ Zanettin, *supra* note 69 at 230.

²⁷⁸ Weinrauch, *supra* note 1 at 100.

has taken place among developed countries, and among few developing countries, like Mexico and Brazil, which have bilateral agreements with the U.S.²⁷⁹

Not providing a mechanism for resolving disputes is considered one of the limitations of antitrust bilateral agreements.²⁸⁰ However, several bilateral agreements contain provisions on consultations for cases of conflicts of interests or other problems arising from the application of the provisions of the agreement. For example, art. 7 of the U.S.-E.C. cooperation agreement contains consultation provisions.²⁸¹

There are several advantages to antitrust bilateral agreements as a bilateral form of cooperation in comparison to regional and multilateral agreements.

Firstly, it is a more confidence-based framework than the regional and multilateral framework. The commitment of countries to conclude a bilateral agreement is usually the result of close, intensive economic relations; therefore, countries have more confidence. Confidence is crucial, especially, for the exchange of information in antitrust. When there is confidence, a competition agency is more likely to provide case file information rather than rejecting the request based on the pretext of contradiction to public order or important interests.

Secondly, bilateral antitrust cooperation is less complicated in comparison to regional or multilateral agreements. One reason for the complication is that usually in regional and multilateral agreements, several supranational organs will be formed to successfully manage tasks and address problems arising from all of its members. This is a

²⁷⁹ *Supra* note 69 at 231.

²⁸⁰ *Supra* note 1 at 101 citing Merit E Janow "Transatlantic Regulatory Cooperation in Competition Policy: the Case for 'Soft Harmonization' and Multilateralism over New Bilateral US-EU Institutions, in Transatlantic Regulatory Cooperation, Legal Problems and Political Prospects" 254-255 (George A. Bermann et al., 2000)

²⁸¹ *U.S.-EC antitrust agreement 1991, supra* note 160, art. 5.

two-tiered system, as addressing many issues comes to the supranational body through national bodies. However, bilateral antitrust agreements usually do not have any supranational bodies; instead, the competition agencies of both countries cooperate and coordinate directly.

6.1.3 Regional Cooperation

Advantages of the regional form of cooperation in the area of antitrust include:

a) The number of benefiting countries in regional cooperation is greater than bilateral cooperation. For example, EU, NAFTA, MERCOSUR, FTAA, CARICOM, and other regional arrangements that address the issue of competition.

b) Similar competition laws and culture make it easier to cooperate in addressing anticompetitive acts. For example, the level of economic development is similar among the members of the Caribbean Community (CARICOM). Furthermore, countries in a close geographical area will develop similar ideas, principles, and rules of conduct from the perspective of historical, cultural, political, economical social perspectives and their culture of competition issues is no exception. This will lead to cooperation with fewer barriers. On the other hand, there have been many cases where the competition policies of two geographically distant countries conflicted with each other. For example, in the *Boeing/McDonnell Douglas*²⁸² merger case, two competition agencies reached two different decisions on the same issue.

c) One of the important competition policies of the regional organization is that they require harmonization of the competition laws of member countries. Harmonization is important to the goals of free trade within the region. One example of policies and laws

²⁸² U.S. Federal Trade Commission, *Statement in the Matters of the Boeing/McDonnell Douglas corporation* by R. Pitovsky *et al.*, File No.971-005, (Washington D.C.: 1997).

that are not harmonized is when an export cartel is exempted by Member Country A, this country will not take action against it, even though it will restrict competition or practice anticompetitive acts that affect foreign jurisdictions, because according to the competition laws of the country of origin, such activity is legal. As a result of such friction between two members of a regional organization anticompetitive conduct will continue to raise private barriers to trade, even though public barriers were set at the lowest point for the purpose of a free trade area. Therefore, maintaining sound competition enforcement is a complementary and necessary factor for the removal of any barriers to free trade.

Harmonization within a regional free trade area is difficult to accomplish on a global scale for a multilateral agreement. Therefore, it is one of the best advantages of a regional arrangement.

d) Almost all of the regional organizations establish a supranational body for the enforcement of competition laws. Within the European Union, the European Council is responsible for the enforcement of Arts. 85 and 86 of the *Treaty of Rome* and other regulations which deal with competition issues. In the MERCOSUR area, two supranational bodies, the Trade Commission and the Committee for the Defense of Competition, are charged with the enforcement of competition rules according to art. 8 of the Protocol.²⁸³ However, there are few regional organizations that do not establish supranational bodies. One of them is NAFTA; when the member countries formed NAFTA they decided to establish a working group for the study of competition-related issues and to make recommendations on the future steps of the NAFTA. Thus, we can

²⁸³ "Protocol of the Defense of Competition in MERCOSUR", MERCOSUR/CMC/DEC No. 2/97, the Decision 17/96 (17 Dec 1997), Articles 10-21, [hereinafter MERCOSUR Protocol 2/97].

understand that the NAFTA policy towards competition issues is not settled yet, and there is a possibility for further steps and even the establishment of a supranational body in antitrust. Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) is another regional organization without a supranational body of antitrust. However, member countries are actively addressing the issue, because they harmonized their laws to the extent that they would be able to avoid conflicts and, they granted broad powers to their competition agencies, including: complaints against abuse of dominance acts can be brought in either country's territory; the competition offices of member countries are allowed to hold hearings in either country and to issue subpoenas and remedial orders enforceable in the other country; furthermore, they replaced antidumping laws with competition law provisions.²⁸⁴ This is one of the strongest forms of cooperation in antitrust within the current free trade agreement. Many other regional organizations are in the process of developing their competition policies and institutions. This is peculiar to the free trade areas of many developing countries, because this is the first stage before they proceed on active cooperation for the enforcement of competition laws within the framework of their regional organization. In this first stage, certain developing countries are in need of technical assistance in the form of training its competition officials, establishing national competition institutions. Also, a certain number of the least-developed countries and developing countries need to adopt competition laws. The following are some of the disadvantages of regional arrangements that regulate competition issues:

e) With the exception of a few regional arrangements, most of them do not involve intensive cooperation to allow the exchange of information in antitrust cases. The

²⁸⁴ Shelton, *supra* note 275 at 8.

exceptions are the EU and ANZCERTA. Although several regional arrangements have documented their commitment to active cooperation through their regional agreements, these provisions are enforced to the extent permitted by national laws, including the exchange of information. Members of several other regional organizations like MERCOSUR even committed to the exchange of information, but these provisions need to be enforced in practice, which has yet to occur.²⁸⁵

f) The benefits of antitrust cooperation are limited to the number of countries which are the members of that regional arrangement. For example, if the cartel case countries that are not also other than members of the regional arrangement, then the competition mechanisms of the regional organization will not be able to continue its investigations unless that regional entity has a cooperation agreements with those countries. For example, the European Commission has concluded several bilateral cooperation agreements in antitrust on behalf of the European Communities.²⁸⁶ Apart from this option of agreement between the regional entity and other countries, members of the regional arrangement may have bilateral agreements with other countries which are not members; thus, they may be able to successfully prosecute cartels, both outside and inside the jurisdiction of the regional arrangement, which was not possible for regional arrangement. For example, in the far eastern *Shipping* case cartel members involved were from Denmark, France, Germany, Ireland, and the U.K. from the E.U. and other countries like Japan, Korea, Malaysia, Singapore, and Taiwan.²⁸⁷

²⁸⁵ MERCOSUR Protocol 2/97, *supra* note 284, art.16.

²⁸⁶ *Canada-EC antitrust agreement 2003*, *supra* note 132;
See also *U.S.-EC antitrust agreement 1991*, *supra* note 160.

²⁸⁷ Levenstain, *supra* note 19 at 65.

6.1.4 Multilateral Agreement/Arrangement

There are many advantages of a multilateral form of agreement for in antitrust cooperation. One of the foremost advantages is the binding nature of agreement which replaces the existing non-binding soft cooperation within the framework of different international organizations and forums, such as the OECD, UNCTAD, ICN, WTO, etc.

Another important advantage is the existence of a supranational enforcement body if it is signed within the framework of the WTO, OECD, or UNCTAD, which are the most probable venues for international agreements in antitrust. Unlike bilateral and regional agreement, number of participants in the multilateral agreement is not limited. This gives an opportunity to prosecute international cartels without limitation to two or several member countries as in bilateral and regional agreements.

Another advantage of international agreement is that it is an appropriate tool for harmonization of national competition laws. An international agreement would serve as a tool that quickens the process of adoption of competition laws in countries that do not have competition laws. This thesis suggests that antitrust agreement is a tool that quickens introduction of competition control rules and mechanisms in developing countries in the same way as intellectual property regime under the WTO.

Furthermore, international agreement decreases the level of conflicts and frictions in competition law enforcement among national agencies. The reason for this is that whenever any kind of anticompetitive act originating abroad but affecting the domestic market occurs, the affected countries may resolve it without causing friction by referring it to the supranational body. Friction is usually caused by the unilateral extension of the

reach of their competition laws extraterritorially, which was the case during the many investigations of anticompetitive acts having an international dimension.

However, along with advantages there are several disadvantages as well. At the current stage, it is hard to predict what the exact disadvantages are, because there is no international agreement; thus, countries cannot draw conclusions from an international competition agreement. However, we will try to illustrate some of the drawbacks, based on our knowledge.

One of the disadvantages is that there is less confidence within the multilateral framework in comparison to a bilateral or regional agreement parties because members of the latter two agreements are a few close economic partners. What is the effect of confidence on international competition issues? Cooperation is smoother and there are fewer conflicts when the agreement is based on confidence. Cooperation within the framework of a future international agreement could be less efficient, unless backed up with strong enforcement policies and severe punishments in comparison with bilateral or regional arrangements. The reason for this is when so many countries with different competition policies and laws affected by their political, economic, cultural, and social backgrounds are members of the international agreement, its enforcement will be difficult, even though a supranational body will be concerned only with the provisions of this agreement.

Even though it is difficult to contemplate the disadvantages of the agreement before its conclusion, there are many difficulties or barriers to the conclusion of an international agreement. We will highlight them as much as possible in the following sub-chapter.

6.2 Conflict of Interests towards Multilateral Agreement

6.2.1 The U.S.

The U.S. plays an important role in international antitrust policy due to several factors: its powerful economy with its significant role in the export and import of goods and services, with multinational enterprises, sound competition enforcement policy, etc. Its attitude towards an international antitrust agreement reflects its own national interests. In most of the policy statements and steps, the U.S. opposed the launch of negotiations leading to the conclusion of a binding international agreement; however, there are few cases where its steps indicate a positive attitude towards the formation of an international agreement on antitrust.

In 1998, Douglas Melamed, the Principal Assistant Attorney General for the Antitrust Division of the US Department of Justice, resisted the formation of international agreement:

... our view is that there are real, substantive differences among nations; that many of the theoretical and practical issues involved in international antitrust enforcement are new and unformed; that agreement on rules or principles, beyond the most general and imprecise -- and certainly agreement on sound substantive principles -- is very unlikely in the near future;²⁸⁸

There are several factors that shape the U.S.'s opposition, the first one being related to sovereignty issues. If there was an international agreement backed with an enforcement organ, then members of the agreement would share certain powers in the enforcement of antitrust rules, which the U.S. does not want. Second, the U.S. legal history is based on judge-driven development, including antitrust law, where a case-by-case model is employed. From this perspective, the U.S. wants to enforce its competition

²⁸⁸ A.D. Melamed, "Antitrust Enforcement in a Global Economy" (Annual Conference of the Fordham corporate Law Institute, New York, October 22, 1998), online: U.S. Department of Justice <<http://www.usdoj.gov/atr/public/speeches/2043.htm>> (date accessed 10 June 2006).

policy according to its own approach. Eleanor M. Fox argues that the U.S. prefers unilateralism in international antitrust cases, unlike the western European tradition of community building.²⁸⁹ Proof for such a conclusion is the statement of an official from the U.S. antitrust agency: "... nations are likely to have more success by exchanging views and working together in a common law type of case-by-case process, than by seeking to negotiate multinational rules."²⁹⁰

The U.S. argues that antitrust laws differ in important respects from country to country and it is not clear whether countries that have competition laws have resources and experience to administer their antitrust laws effectively.²⁹¹ At first, this argument seems sound, but there are many counter arguments as well. One of the counter arguments belongs to the E.U., which will be discussed in the examination of the E.U. approach.

In 2001, when the International Competition Network (ICN) was launched with the initiative of the U.S., to some extent it indicated that the U.S. was starting to support the formation of an international agreement. The ICN is a forum for national competition agencies for the exchange of ideas, international cooperation, and the development of guiding principles and best practices which will serve for the convergence of divergent rules in the national competition laws. This is an important step towards an international agreement; however, it is not a guarantee because the final decision is the consensus of the nations. Unfortunately, there is no consensus, at this moment.

²⁸⁹ Weinrauch, *supra* note 1 at 152 citing Eleanor M. Fox, "Towards World Antitrust and Market Access", 91 *Am. J. Int'l L.* 1, (1997) at 15-16.

²⁹⁰ *Supra* note 289.

²⁹¹ *Supra* note 289.

6.2.2 The EC

The EC is primary supporter of an international competition agreement, and if we say that they are the initiators, we will not be mistaken. However, Commissioner Karel Van Miert made it clear that an extension of the European experience of the system of common competition rules would not be realistic to international agreement due to many reasons, including problems of national sovereignty, different economic and legal traditions, etc.; however, the EC's approach towards global competition rules are "prudent, pragmatic and progressive."²⁹² At the same time the EC's approach does not require uniformity in national competition laws; in fact, it is rejecting uniformity as an objective, because the EC recognizes that such an objective would not be realistic.²⁹³

The prudent, pragmatic, and progressive approach of the EC towards global competition rules requires several steps:

First, a working group needs to be established to study certain areas. The EC's program for the working group shows its future plans in global antitrust rules and the ways of achieving them. According to the EC program, the foremost step is that competition law should be applied in all countries, and especially among the WTO members, which is the supposed institution for global competition rules, from the EC's perspective.

The second step is the identification of some common principles on the substance of competition law.

²⁹² K. V. Miert, "What Does a Level Playing Field Mean in the Global Economy?" (World Economic Forum, Davos, 30 January 1998), online: European Commission <http://ec.europa.eu/comm/competition/speeches/text/sp1998_031_en.html> (date accessed 11 June 2006).

²⁹³ *Ibid.*

The third step is the formation of an instrument of cooperation between competition authorities.

The next step is finding the ways of adapting the present dispute settlement mechanism of the WTO to the area of competition law and policy.²⁹⁴

As discussed, the EC is proposing a step-by-step process involving the cooperation of antitrust agencies, the adoption of competition laws by countries which do not have them, and a dispute settlement body; all leading to the formation of an international agreement on the common principles of the competition laws of countries. This approach's is not pursuing the unification of competition laws first, unlike the U.S. approach. The EC understands that it would be unrealistic because of the different economic and legal traditions and divergent competition policies. Furthermore, such an approach might also be taken because it would require a very long time to reach convergence or it may not even be reached. For more than 50 years, different calls and proposals have been initiated for the formation of an international agreement, for example, the Havana Charter. However, consensus has not been reached due to divergent laws, policies, etc. Therefore, the EC is not putting uniformity of laws as the main objective of their proposal.

6.2.3 Developing countries

According to the UNCTAD report for 1997, at the time, 70 countries of the world had competition laws, and half of them were developing countries.²⁹⁵ This half comprised 35 of the developing countries. They did not even represent half of all the developing countries. The multitude of developing countries which do not have competition laws is a

²⁹⁴ *Ibid.*

²⁹⁵ C.M. Correa, "Competition Law and Development Policies" in Roger Zach "Towards WTO Competition Rules" (Berne: Stampfli Publishers Ltd. (Kluwer Law International), 1999) 361 at 366.

big obstacle for the formation of an international agreement in antitrust. The attitude of developing countries towards the formation of such an agreement is not complicated to understand: most of the developing countries do not have competition laws, and even those with such laws lack an active enforcement policy. Thus, they are not ready for a binding international agreement, which would be extra burden.

Several concerns of developing countries were expressed during the UNCTAD regional capacity-building meetings on competition issues in 2002 and 2003. One of the most common concerns is that many issues, including competition policy, its adoption, existing recommendations and best practices, current development of competition issues on the agenda of many international organizations, and efforts for a multilateral arrangement in this area, are new complicated issues for developing and least developed countries.²⁹⁶

Another concern of developing countries related to the adoption of an international agreement is that they are not ready for negotiations because they are unaware of what issues should be made priorities from their perspective and they are not clear about the modalities of future agreements/negotiations.²⁹⁷

Several developing countries want to keep their policy space for their industrial policy and to craft their competition laws accordingly. For example, in April 1996, the ASEAN Chamber of Commerce and Industry Council representing the national chambers of ASEAN countries issued a joint communiqué where it is expressed that “[t]he formulation of competition laws should be a domestic matter that is best left to each

²⁹⁶ UNCTAD Intergovernmental Group of Experts on Competition Law and Policy, *Preliminary Assessment of the Set*, 2004, TD/B/COM.2/CLP/4 (2004), at 5.

²⁹⁷ *Ibid.* at 5.

nation to decide after taking into account its own industrial structure, the degree of protection for consumers and the costs/benefits of the type of business practices.”²⁹⁸

The concerns and difficulties of developing countries are twice as many as those of developed nations; or, even more than that regarding the preconditions of international negotiations for an agreement on competition issues. However, these obstacles were not ignored by the initiators of an international agreement. Special treatment of developing countries was stressed in the Doha declaration: “Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility [shall be] provided to address them.”²⁹⁹ A similar proposal was made during the conference within the framework of UNCTAD devoted to competition issues. It was suggested that those developing countries without national competition laws could still adopt an international antitrust agreement, but it would remain inoperative as long as they did not have national competition laws.³⁰⁰

Nevertheless, the pre-negotiation problems of developing countries appear to be overwhelming from their perspective, and new responsibilities related to a new international agreement would be an extra burden added to their existing difficulties (among others) related to the accession to the WTO.

6.3 Different Initiations for an International Agreement and Related Concerns

6.3.1 Initiations towards international rules.

The UNCTAD, Consolidated Report of Issues was discussed during the Panama, Tunis, Hong Kong, and Odessa Regional Post-Doha Seminars on Competition Policy held from 21 March to 26 April 2002.

²⁹⁸ *Supra* note 296 at 378.

²⁹⁹ WTO, *Doha Ministerial Declaration*, 14 November 2001, WT/MIN(01)/DEC/1, para. 25.

³⁰⁰ UNCTAD *Consolidated Report*, *supra* note 265.

There were several propositions and attempts to negotiate an international agreement on antitrust issues.

One of the first attempts was within the initiatives of the International Trade Organization (ITO). A whole chapter (V) was devoted to the issue of international competition rules, according to the 1948 *Havana Charter*.³⁰¹ Article 46 obliges Members to "... [t]ake appropriate measures against business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control"

Article 48 regulates the investigation procedure. It states that the ITO will serve as a supranational dispute settlement body, where cases affecting international trade are heard based on the information obligatorily provided by the Member parties to the dispute. Based on the decision of the case, the ITO can request concerned members to take appropriate remedial action and may also recommend remedial measures to be carried out according to the laws of concerned Member Country.

In 1993, the *Draft International Antitrust Code*, known as the *Munich Code*, was proposed by antitrust scholars who met in Munich.³⁰² It also proposed the implementation of certain rules of antitrust law embodied in the code into national laws and the task of the supervision of this process was given to an international body, the International Antitrust Authority, which can sue national authorities before national courts or before an International Antitrust Panel if Members violate obligations under the agreement.³⁰³

³⁰¹ UN Conference on Trade and Employment, *Havana Charter for an International Trade Organization and Final Act and Related Documents* (Havana, 21 Nov. 1947—24 Mar. 1948), UN Doc. ICITO/1/4/1948.

³⁰² Roger Zach, *Towards WTO Competition Rules* (Berne: Stampfli Publishers Ltd. (Kluwer Law International), 1999) in the preface.

³⁰³ Zanettin, *supra* note 69 at 234

Also several other members of academia proposed an international agreement under the aegis of the WTO. They include F.M. Scherer,³⁰⁴ R. Weingrauch,³⁰⁵ and others. They also proposed a dispute settlement body, which would be empowered to prosecute international cartelization, international anti-competitive mergers, and other anti-competitive activities having a cross-border effect. There is another group of academics that propose the use of existing WTO agreements to address the issue of international competition. Supporters of this initiative are Robert E. Hudec, Spencer Weber Waller, and others.³⁰⁶ For example, R.E. Hudec argues that the WTO is capable of dealing with competition issues; a recent Reference Paper in the Telecommunication Agreement proves this. Hudec also argues that the WTO needs to continue its efforts towards international competition rules patiently, for even the WTO's best remedies raise serious problems.³⁰⁷ Existing non-discrimination principles could be applied to anticompetitive activities. For example, exclusive distribution agreements could be challenged under the national treatment principle since they are foreclosing domestic markets for foreign enterprises. Supporters of the WTO approach also propose to reform certain existing WTO agreements to make them more applicable to competition issues, along with trade issues.

There is an important initiative by the EC on international agreement. The importance of this initiative is such that the international community proceeded with actual steps on this proposal. These steps started after and in accordance with the 1995

³⁰⁴ *Ibid.*, at 235

³⁰⁵ *Weinrauch*, *supra* note 1.

³⁰⁶ Robert E. Hudec, "A WTO Perspective on Private Anti-Competitive Behavior in World Markets" (2000) 34 *New England Law Review* 1, at 1-100; See also *Weinrauch*, *supra* note 1 at 127-128.

³⁰⁷ *Supra* note 307 at 1-100.

Report of the Group of Experts. The report proposes the reinforcement of existing bilateral antitrust cooperation, the necessity of the adoption of a multilateral agreement (possibly within the framework of the WTO), rules of which would have to be implemented into the national legislations, and a proposal for a dispute settlement mechanism.³⁰⁸

With the call of the EC, a working group on the interaction between trade and competition policies was launched at the WTO Singapore Ministerial Conference.³⁰⁹

Based on the recommendations of the Group of Experts, the EC made its first proposal to the members of the WTO in 1999, which was unsuccessful. Later on, the EC offered a more modest second proposal. According to this proposal the scope of the WTO negotiations should be confined to three issues at this stage:

[F]irstly, agreement on core principles of domestic competition law and policy (transparency of rules and regulations; the removal of nationality-based discrimination between firms based on their nationality; provision of due process and recourse to judicial procedures; prohibition of hard core cartels, bid-rigging etc...); secondly basic cooperation modalities should be put in place and; thirdly, close attention should be paid to ensuring that a development dimension is an integral part of any multilateral framework on competition. On this last point, the introduction of competition law regimes in the least-developed countries would have to be of a progressive and flexible nature.³¹⁰

It proposed to establish a standing WTO Commission on Competition Law Policy to carry on with the educational and analytical work on more complex issues, build consensus for further progress, and encourage countries to introduce competition policies.³¹¹

³⁰⁸ M. Monti, "Cooperation between Competition Authorities – a Vision for the Future" (Japan Foundation Conference, Washington DC, 23 June 2000), online: European Commission <http://ec.europa.eu/comm/competition/speeches/index_speeches_by_the_commissioner.html> (date accessed: 23 June 2006).

³⁰⁹ WTO, *Singapore Ministerial Declaration*, 13 December 1996, WT/MIN(96)/DEC, para. 20.

³¹⁰ *Supra* note 309.

³¹¹ *Ibid.*

Proponents of an international agreement on antitrust agreed that the WTO would be the right place for this task, for reasons such as: a well-established institutional framework with almost universal membership; most of these countries are now familiar with the WTO and have permanent delegations in Geneva, which may contribute to making the WTO option more acceptable and less costly for them; an established dispute settlement mechanism and experience in the resolution of trade-related conflicts.³¹²

No matter how convincing these ideas and proposals sound, there are several concerns related to them and related to the formation of an agreement in general.

6.3.2 Objections against the Adoption of International Agreement.

As mentioned above, one of the opponents to an international agreement is the U.S. One of the arguments they raise is that reaching an agreement on common competition rules nearly impossible because of the differences in the objectives of existing national legislation, which range from the economic aim of the promotion of efficacy, to the more political goals of market integration and the protection of small businesses from excessive market power; this concern is also supported by many in the international business community.³¹³

This is the U.S.'s traditional argument against efforts to adopt an international agreement on antitrust. We should admit that competition laws are very different from country to country, but they are similar in terms of the major rules of competition laws with slight differences. For example, they similarly prohibit cartel activity (though many countries allow export cartels), the abuse of dominant position/monopolization, predatory pricing, and vertical anticompetitive agreements. The EC also admits that proceeding

³¹² Zanettin, *supra* at 240.

³¹³ *Ibid.*, at 247.

with the convergence of the core principles of competition rules is an effective option leading to successful results in the future³¹⁴ rather than failing half way or at the beginning of the negotiations. In its proposal concerning the adoption an agreement on minimum standards, the EC wanted those countries without competition laws (they comprise of almost half of the members of the WTO) to implement those minimum standards of competition law into their national legislatures. The EC wanted those countries that already have competition laws to change them to make them in accordance with the agreement (though national competition laws already contain those minimum standards, maybe with slight differences).³¹⁵ In this regard, there are several relevant points to mention.

From our perspective, this minimum standards proposal would be more effective in terms of the foreseeability of results rather than extensively negotiated rules covering all the details of competition issues for two reasons.

Firstly, total convergence of existing national antitrust laws seems to be impossible.

Secondly, getting those countries which do not have competition laws to adopt them according to the detailed provisions of an international agreement in spite of their economic and legal traditions would be hard to expect.

The U.S. lead group further argues that if such an international agreement on a “minimum” set of rules was reached, it would serve no purpose, because one half of the WTO’s members already have competition laws, and most of these laws already meet the requirements of any minimum substantive rules the WTO could adopt. Furthermore, the

³¹⁴ Miert, *supra* note 293.

³¹⁵ *Ibid.*

“lowest-common-denominator” outcome in the development of competition rules could legitimate weak and ineffective rules, but competition laws and policies and their enforcement are very fact-intensive.³¹⁶ The comment above applies to this argument. Fighting for agreement on extensive rules that cover detailed rules of competition would receive multiple objections, and negotiations would cease right after its launch, because of the different national competition policies and interests. It seems better that the first international agreement would be on minimum standards, then later on, after reaching a higher level of convergence of national laws by means of this agreement, countries may decide to proceed with the next step, by amendments to the agreement or the adoption of a new agreement with more detailed substantive rules on competition which also respond to the new developments of the area. Therefore, the approach would be dynamic rather than static, as it was described in the EC approach towards international rules as “prudent, pragmatic and progressive” by Karel Van Miert (Commissioner).³¹⁷

Another concern related to an international agreement and its enforcement is bureaucracy and more complicated administrative control regarding a dispute settlement system and the other supranational body involved. This concern is one of the usual objections that is raised whenever the international community tries to organize an international organization or agreement or other related efforts. From our point of view, if anything is going to be achieved, then it requires the sacrifice of time, efforts, finances, etc. However, instead of giving up from the beginning, we should weigh the two sides of the problem. Reaching an international antitrust agreement is one side of the problem; if

³¹⁶ J. Klein, “A Note of Caution with Respect to a WTO Agenda on Competition Policy” (address before the Royal Institute of International Affairs, London, 18 November 1996, online: U.S. Department of Justice <<http://www.usdoj.gov/atr/public/speeches/0998.htm>> (date accessed: 13 June 2006).

³¹⁷ Miert, *supra* note 293.

the efforts continue in spite of the short term obstacles, the benefits of such efforts outweigh the risks of the other side, in the long term. The long-term results include contribution to the goals of world welfare based on free and stable economies, by removing private barriers to trade and allocating resources efficiently, whereas public barriers are removed through free trade policies. Although there are differences in trade and competition policies because the former defends the interests of producers whereas the latter protects consumers; trade and competition are complementary regarding the one final objective.

A related concern is the interference of an international agreement with the sovereignty³¹⁸ of the parties. This is especially so in two cases.³¹⁹ The first case is when countries apply their competition laws to anticompetitive conduct that is international in scope. If we consider such an application of law from the perspective of international law, the strict “territoriality principle” of jurisdiction would not allow countries to apply their laws extraterritorially. Especially, when countries apply their laws to foreign nationals and conduct that occurred abroad but economically affected this country along with others. Foreign nationals might be present in its territory through a foreign branch. In another case, countries again might regard it as interference with sovereignty where a supranational dispute settlement body starts reviewing the decisions of domestic competition authorities or courts interfering with their prosecutorial discretion and judicial decision-making. From our perspective, international agreement can solve this problem with its supranational body or without it. If international agreement is not backed by supranational dispute settlement body, it (international agreement) could adopt

³¹⁸ Zanettin, *supra* note 69 at 249.

³¹⁹ *Ibid.* at 249.

“positive comity” principle (see heading 4.3 for more details regarding this principle), where Country A could make request to perform certain investigatory activities from Country B where the anticompetitive act originates or one of the members of the cartel resides. In this way, there will not be need for unilateral extraterritoriality. If international agreement is backed with supranational dispute settlement body then it is one of the best solutions which we examined in our heading 5.7 and 6.1.4.

Several concerns are related to developing countries. The implementation of an agreement, the establishment of a competition agency, and the maintenance of competition policy and its enforcement could add an extra burden because these efforts are costly and developing countries have very limited resources.³²⁰ We have to admit that developing countries, in fact, have these problems; however, to address these problems, it is suggested that developing countries will receive technical assistance and the principle of special and differential treatment will be considered within the framework of a multilateral agreement.³²¹

Some argue that addressing government barriers to trade is more important than addressing private barriers imposed by anticompetitive acts.³²² It is true that there are still high government tariffs and non-tariff barriers, especially in developing countries, but it is equally true that private barriers to trade are not less important. The long and short-term harm that is caused by cartels and the abuse of dominant position are much higher, longer, and capable of distorting international trade in comparison to many governmental barriers to trade. For example, during 1997, the U.S. Antitrust Division prosecuted

³²⁰ WTO, Working Group on the Interaction between Trade and Competition Policies, *Report of the WTO Working Group on the Interaction between Trade and Competition Policies to the General Council on 30 November 2000*, WT/WGTCP/4, (WTO, 2000), at 22.

³²¹ *Ibid.* at 20-22.

³²² Kennedy, *supra* note 39 at 293.

international cartels affecting over \$10 billion in U.S. commerce.³²³ Prices were raised by 70% in the *Lysine* case, 30% in the *Citric Acid* case, and over 60% in the *Graphite Electrodes* case. During the years of 1997-2002, over \$2 billion were imposed as criminal fines and over 90 percent these fines were obtained in connection with the prosecution of international cartel activity.³²⁴

For example, in the *Graphite Electrodes* case,³²⁵ cartel members conspired from 1992 to 1997. During this period the cartel raised prices overall by more than 60% and in some markets (Canada) by more than 90%. It harmed both producers and consumers of developed and developing countries. The market share of the cartel only in the U.S. was \$275 millions per year, and it is not difficult to calculate the increased part of the prices, as it is reported that in some years, it reached more than 60%. This cartel affected not only the U.S., but also Canada, Japan, Germany, and many other developed and developing countries. Fines imposed for cartel activity in the U.S. comprises more than \$200 million. In the *Vitamins* case, it comprised of more than \$1 billion.³²⁶

Fear of subversion of competition goals by trade principles and priorities is one of the arguments of the opponents of an international agreement, especially the U.S.³²⁷ This is a relevant concern. Although some international competition and trade issues overlap, most of them do not regulate the same subjects and objects. The result of framing an international antitrust agreement to comply with international trade issues will be addressed in the following subchapter.

³²³ S. D. Hammond, "A Summary Overview Of The Antitrust Division's Criminal Enforcement Program" (New York State Bar Association Annual Meeting, 23 January 2003) [unpublished] online: U.S. Department of Justice <<http://www.usdoj.gov/atr/public/speeches/200686.htm>> (date accessed: 14 June 2006).

³²⁴ *Ibid.*

³²⁵ Levenstain, *supra* note 19 at 31-40.

³²⁶ *Ibid.* at 78.

³²⁷ Zanettin, *supra* note 69 at 244.

6.4 Assessing the Options for a Multilateral Agreement

6.4.1 Different Approaches to International Competition Rules: Trade Law and Competition Law Approaches

Since international competition issues appeared on the agenda of different international organizations, especially the WTO, trade or competition law approaches for future agreement have been debated. The problem here is whether the substantive rules of an international agreement on antitrust should be shaped under the high influence of trade law principles and objectives or it should be purely competition issues.

The trade law approach was developed, firstly, because of the venue for the international agreement, which is the WTO with its trade agenda. Secondly, the enforcement of certain competition rules accomplishes the same tasks as international trade policy, including market access and advancement in sectors of the economy as a result of increased competition and proper allocation of resources. As mentioned previously, the international community found the WTO more fitting for the negotiations of an international agreement on antitrust issues.

Among the academia and practitioners, there are different points of views concerning the trade and competition approaches.

Proponents of the trade law approach for an international antitrust agreement emphasize market access rules to be one of the principles of this agreement.

For example, the U.S. Trade Representative (USTR) is in favor of an increased role for antitrust in international trade issues.³²⁸ According to some authors, it would give a greater role to the USTR, and trade officials in general, in an area which traditionally

³²⁸ *Ibid*, at 244.

belongs to competition agencies.³²⁹ The evidence for the USTR's position is that its use Section 301 of the *Trade Act* of 1974 (with 1988 amendments) in two cases: the *Auto and auto parts* dispute and the *Kodak/Fuji* dispute. Section 301 authorizes the USTR to address toleration by a foreign government of systematic, anticompetitive practices by private firms that restrict access to the U.S. goods or services to a foreign market.³³⁰

Another proponent of the trade law approach argues that over time, the panel reviewing competition issues according to the competition code will invest the code with quality of trade, rather than a competition policy.³³¹

On the other hand, one of the main opponents of the trade law approach is the U.S. antitrust agency, the Antitrust Division of the Department of Justice. The Antitrust Division is generally against addressing the issue of international competition both by a multilateral agreement and within the framework of the WTO. It argues that antitrust goals might be subverted by trade principles and priorities.³³²

Some argue that competition and trade issues are divergent, since the aim of trade policy is to protect producers' interests, while competition law protects consumers.³³³

In my opinion, it is true that there are several antitrust issues that overlap with trade law issues and several issues contradict. From this perspective, several points are worth mentioning.

The problem is in generalization and mixing. When I read the arguments of both opponents and proponents for the trade law approach, I discovered that writers usually

³²⁹ *Ibid*, at 244.

³³⁰ *Ibid*, at 242.

³³¹ Daniel K. Tarullo, "Norms and Institution in Global Competition Policy", (2000) 94 *Am. J. Int'l Law*, at 493.

³³² Zanettin, *supra* note 69 at 244.

³³³ Weinrauch, *supra* note 1 at 56.

make generalizations based on only one competition issue that is divergent from trade principles and, *vice versa*, if there is one convergent competition issue with trade principles then all competition issues are regarded as such. For example, an exclusive distribution agreement³³⁴ between producers and distributors forecloses markets to the products of other producers; thus, it is condemned according to both competition laws and international trade laws. Referring to this, many proponents of the trade law approach assert that trade and competition rules are complementary; therefore, the trade law approach to a competition agreement is favored by them. However, competition issues such as mergers, cartels, abuse of dominance, and predatory pricing are peculiar to competition laws rather than trade laws, so we cannot remedy them according to (international) trade rules. From this perspective, the trade law approach to an international competition agreement would be irrelevant.

Multiple goals in one agreement might lead to total failure. The issue of the adoption of an international antitrust agreement becomes very complicated because of attempts to address both competition and trade issues in one agreement. Trade and competition include multiple goals, such as: the promotion of efficiency, market integration and market access, the protection of small and medium-sized businesses from excessive market power, etc. In our view, pursuing a single objective will lead to expected results in a more efficient way and time. Pursuing trade and competition goals at the same time might not bring about consensus on actions in the near future, as it was at the Cancun Ministerial conference in 2003 regarding the start of negotiations on competition issues.

³³⁴ Exclusive distribution agreement is considered as one of the vertical restraints, therefore, regarded as anticompetitive (though some countries tend to allow such restraints based on its efficiencies).

Examining available experiences might show some of the ways for dealing with problems. Now on the table, we have several problems related to an international antitrust agreement, including the trade or competition approach or mixed, extensive coverage of issues or minimum principles, special and differential treatment of developing countries, etc. By examining the most relevant experience of the EC, we might find lessons on how they dealt with problems regarding international competition rules. However, caution should be used while considering any EC experience and applying it to WTO agreement problems. There are many reasons for caution; for example, the EC countries have almost an equal level of economic development, and more harmonized competition laws in comparison to the situation among the WTO members, where there is a huge gap in the level of development of economies (developed and developing countries), divergent competition laws, and even zero experience in countries without competition laws.

To sum up, it would be best to narrow down the scope of the problem that is being addressed by an international antitrust agreement. By narrowing down, I mean to address anticompetitive acts with competition rules rather than trade and competition at the same time.

6.4.2 Different Approaches to the Extent of Coverage by the International Agreement: Extensive Rules or Basic Principles of Competition

When it comes to the provisions of the international antitrust agreement, there are active debates on this issue. There are several proposals as to the extent the provisions of the agreement. The EC, ABA, and certain members of the academia, such as Eleanor M. Fox, propose minimum standards; however, there are several initiatives by Professor

F.M. Scherer independently, the group of scholars drafted Munich Code, and several others which propose more extensive rules backed by a supranational antitrust authority.

The minimum standards option suggests a core group of principles on restrictive business practices. This option doesn't require very detailed substantive rules.

On the other hand, the extensive rules option proposes relatively detailed rules with more complicated institutions that supervise, enforce and adjudicate international anticompetitive acts.

This study suggests that minimum standards would be an appropriate option at this stage. From this perspective, national competition policies need to come to a common understanding with regards to the basic principles of competition law. Unfortunately, there are the following differences: the exclusion of export cartels from competition laws, different assessment criteria of dominant position and mergers, toleration of vertical agreements of national firms by the government are all the result of the protectionism of national firms, and the promotion of national champions to occupy international markets.

If an international agreement is going to be negotiated within the WTO, almost all of its members, approximately 150, have different laws or national policies, except for those that do not have competition laws at all.

In sum, when there are such differences concerning the core principles of competition law among the national legislatures, then the more extensive rules option with complicated supranational bodies would be impossible to adopt at this stage. The latter option seems to be more relevant after countries form similar ideas on the core principles and incorporate them into their laws.

The issue of cartels will not be left unaddressed in both of the options. In the minimum standards option, cartels would be the first issue for attention. For several reasons.

Cartelization practice is one of the main institutions of competition law. The structure of competition law is divided into four major institutions, including: a) horizontal agreements which are cartelization practices, b) vertical agreements, c) mergers, and d) abuse of dominant position.

Cartelization activity is considered the most harmful of the anticompetitive activities. For example, the OECD has already declared cartel activity as "... the most egregious violations of competition law."³³⁵ The OECD stresses that fighting against cartels is important from international perspective:

... because their distortion of world trade creates market power, waste, and inefficiency in countries whose markets would otherwise be competitive -- and particularly dependent upon co-operation -- because they generally operate in secret, and relevant evidence may be located in many different countries.³³⁶

Furthermore, the issue of cartels was one of the four issues that appeared in the Doha Declaration for addressing the future based on the consensus of parties.³³⁷

Therefore, fighting against cartelization activity is regarded as one of the foremost issues to address by the international antitrust community.

³³⁵ *OECD Recommendations against Cartels*, *supra* note 6.

³³⁶ *Ibid.*

³³⁷ WTO, *Doha Ministerial Declaration*, 14 November 2001, WT/MIN(01)/DEC/1, para. 23-25.

CONCLUSION

Cartelization practices have already grown beyond the territorial limit of countries. Therefore, its harmful effects are not only from the perspective of competition laws, but also international trade.

According to Joel Klein, there are two factors that have contributed to the internationalization of anticompetitive activities affecting international trade: first, an increasingly globalized economy, making markets throughout the world economically available to previously domestic businesses; second, successive reductions of government-imposed barriers to trade (resulting from the various GATT rounds) which has been opening entry to the markets.³³⁸ Many members of the trade community are of the belief that gains that are being made by the reduction in public barriers to trade might be undermined by the private barriers of enterprises.³³⁹ In the second chapter, we clarified those competition issues that go across the national borders and what is the significance and place of cartelization practices among them.

According to the report reflecting the U.S. antitrust agency's perspective, anticompetitive activities of an international dimension are divided into three categories: First, the tremendous growth in transnational mergers has increasingly led to a pre-merger review of the same transaction by several different countries' competition authorities;

³³⁸ Klein, *supra* note 316.

³³⁹ Weinrauch, *supra* note 1 at 15;

See also Zanettin, *supra* note 69 at 244.

Second, international cartel cases where competitors in various countries get together privately to fix prices or allocate territories on a worldwide basis have assumed increasing prominence;

Third, market-access cases in which anticompetitive horizontal or vertical restraints prevent foreign competitors from being able to compete on a level playing field have also become more prevalent.³⁴⁰

In my opinion, all of these three areas were formulated very accurately and correctly; however, this list should also include several other types of anticompetitive activities. One of them is abuse of a dominant position. For example, there is the ongoing *Microsoft* case in which the company was accused of abusing its dominant position in the European Union markets. Although Microsoft Corporation is a U.S. producer of information technology products, due to its high shares of sales in the E.U. market, the European Commission is challenging Microsoft in the European Courts for anticompetitive activities affecting E.U. producers and consumers. The other types of anticompetitive conduct are export and import cartels. An export cartel may restrict competition in importing countries; whereas, import cartels affect the markets of importing countries. The effect of an import cartel may be international when the importers of two or more countries form a cartel for the importation and sale of the same product.

To sum up, the following anticompetitive activities go beyond national borders and restrict from both the competition and trade law perspectives: 1) anticompetitive mergers, 2) international cartels, 3) vertical restraints, 4) abuse of a dominant position, 5) export cartels, 6) import cartels. Among these six types of anticompetitive conduct, half

³⁴⁰ Klein, *supra* note 316.

of them are cartelization practices. Secondly, cartelization practices are acknowledged as being the most harmful among anticompetitive activities. Among its negative effects are: short and long-term restrictions against non-cartel producers to compete freely, price increases to the detriment of consumers, decrease of technological and better service innovations, and market foreclosure for non-cartel competitors from a trade perspective. For these reasons, the international community needs to address the issue of cartels with joint efforts.

The existing tools that countries have against cartels, such as leniency programs, are very useful but limited. Because it is not up to competition agencies; instead it is up to cartel members to decide to come along and take advantage of the lenient punishments. There are several points to make in this regard. Usually, most of the cartel members think that they will be able to operate in secret from the competition agency. Secondly, there are more incentives to continue cartelization practices because of the high profits from their joint activity. Thirdly, according to a leniency program, although a competition agency discovers a new cartelization practice, its prosecution will still encounter problems of collecting evidences from different jurisdictions which gives rise to sovereignty concerns again. Another point is that currently only few countries have adopted leniency programs, including the U.S., the E.C., Canada, Korea, the U.K., and Germany. On top of these limitations, many countries have exempted export cartels from the application of competition laws if their activities do not affect the domestic market. Therefore, the usage and usefulness of leniency programs is limited.

However, some might argue that the prosecution of international cartels could be overcome through existing antitrust cooperation. The international community has

addressed the issue of cooperation in the prosecution of cartels to certain extent by bilateral and regional agreements, and by following the recommendations and best practices of international organizations known as soft cooperation; however, they do not resolve certain important issues that concern the investigation process. One of such issues is the sharing of information between antitrust agencies, which is subjected to national laws on the confidentiality of information. During the prosecution of international cartelization cases, exchange of information is vital factor for full investigation and finalization of opened cases. The issue of the exchange of information is allowed in a few arrangements, including ANZCERTA, the EC, and the bilateral antitrust agreement between the U.S. and Australia. Unfortunately, these few arrangements resolve the case only when it occurs in these countries. In Chapter five, examining the obstacles to the exchange of information revealed that they could be overcome if every country put their efforts towards one goal. For example, one of the obstacles was the fear of smaller countries that the requests for information by countries with stronger economies, like the U.S., would outnumber those of smaller countries, thus, putting them into disadvantage. This study suggests, firstly, cartelization cases would not involve smaller countries very often. Secondly, because of the small economy, just one cartel would devastate the whole cartelized sector; therefore, it is very important for such a country to deter that anticompetitive conduct. Thirdly, initiatives to resolve the exchange of information issue are also raising the obligation for financial compensation for expenses incurred by the requested agency collecting the material evidence, witness testimonies, and other information. Another obstacle is the use of communicated information for other purposes because antitrust information is at the same time business sensitive information. There

are several solutions: firstly, initiatives on how to deal with this issue are proposing certain measures to warranty the confidentiality of communicated information; secondly, if the exchange of information will be addressed by an international agreement with its dispute settlement body (DSB), then the required information will go to a third (neutral) party which is a DSB rather than a country that needs it for its prosecution. The other concern is that remedying anticompetitive activity is too severe in some countries (which includes criminal imprisonment). From our perspective, this concern is inappropriate and those promoting it are considering the issues from one side and forgetting the other side. Countries that raise this issue are tending to be protective of their national business community. However, long-term studies of international organizations on this issue came to the conclusion that cartels will injure consumers, restrict producers, and distort trade. These organizations are recommending “effective sanctions, of a kind and at a level adequate to deter firms and individuals from participating in such cartels.”³⁴¹

Regarding further steps to address anticompetitive conduct, we came to a conclusion that a multilateral agreement has more advantages than existing bilateral and regional agreements to address the problem. Some of the important benefits of a multilateral agreement include: unrestricted membership, unlike regional or bilateral agreement; as a result of this, addressability of international anticompetitive activities on a global scale; a neutral dispute settlement body, which provides the best solution to the many concerns about bias during prosecution and misuse of communicated sensitive business information.

We need to recognize the different approaches to the future of international antitrust by active parties such as the U.S., the E.C., and developing countries. The U.S.

³⁴¹ *OECD Recommendations against Cartels*, *supra* note 6.

would like to keep the existing bilateral and regional antitrust cooperation instead of negotiating an international agreement, whereas, the E.C. takes the opposite approach. Developing countries are also opposed, because they are not ready from many perspectives for an international agreement. However, not all of them are rejecting the agreement at this stage. When negotiators are promising special treatment for developing countries and full consideration of their needs, developing countries should also come forward to take advantage of this offer and cooperate for the formation of international agreement.

Among the different initiatives for multilateral rules in antitrust, the E.C. approach is responding more to the challenges of this stage. Knowing that currently national competition laws are so diverse, even in some cases in terms of major principles of competition law, we would not be able to negotiate and enforce an agreement with extensive rules covering every detail of the competition issue. It could be a failure from the beginning, because when Country A approves and Country B disapproves the same issue, we will not be able to negotiate an agreement. Therefore, the E.C. proposal calls for minimum rules for an agreement at this stage. Those minimum rules are the major principles of competition law. These principles would be implemented into national legislature at this stage. Later on, when countries make their attitude to competition issues closer to each other, further steps may be initiated. Regarding the issue of resolving disputes, the E.C. is in favor of the introduction of a dispute settlement mechanism. The E.C. considers the WTO as the best venue for the negotiation of an international antitrust agreement, partly because of the dispute settlement mechanism and the experience of the organization in it. This study suggests that after the adoption of an

international agreement on minimum rules, the short-term should be spent supervising how the minimum rules of the international agreement are being implemented into national legislature before the dispute settlement body starts operating. The reason for this is that before bringing closer the national rules, it would be unwise for a supranational body to give its decisions on cases and expect to implement them by national antitrust authorities. Because if an anti-competitive act conducted in Country A is pro-competitive according to its national legislature, but based on a complaint of Country B, the DSB rules out that conduct is anti-competitive and expects/requires this ruling to be implemented in Country A, such steps would only cause friction on competition issues among countries.

However, cartels as one of the core issues of competition laws are prohibited *per se* according to the national legislatures of almost all countries. Therefore, regardless of the E.C. or other approaches, regulation of cartelization practices in an agreement will be relatively easier than other forms of anticompetitive activities. The reason why I used the word relatively but not fully is that in regulating cartelization practices, again national laws are not identical. Some types of cartelization practices, such as export cartels, are legal according to national laws in many jurisdictions. Therefore, they need to be declared illegal by the national legislatures of countries, which is the most probable action of the negotiators of the agreement (although it still depends on the negotiators whether they are going to declare export cartel illegal in an international agreement or give it an exemption).

The maturity of efforts for international competition rules have reached a point where discussions have moved beyond the issue of its adoption up to the different

approaches in shaping its substantive rules. Two different approaches, trade and competition, were proposed towards an international antitrust agreement by academics and specialists of trade and competition issues, including on behalf of official organizations and private initiatives on their own behalf. Some initiators favored the trade approach, partly because the WTO was chosen by them as an organization within which an international antitrust agreement should be negotiated. Additionally, anticompetitive activities that go beyond national borders are affecting competitive processes, as well as international trade. This approach supports an antitrust agreement shaped under the influence of the trade goals of the organization. On the other hand, some initiators favor the competition approach because competition issues have their own agenda independent of trade issues. This thesis supports the competition approach and considers the WTO an appropriate venue for an international antitrust agreement because it is an established institution with a dispute settlement body and experience. This thesis advocates the competition approach because it acknowledges that changing the tasks and goals of the competition agenda would lead to losses and an imbalance of the economy in general. Furthermore, pursuing both trade and competition goals in one agreement would not give the expected results at all. Instead, narrowing the purpose down to only antitrust issues and pursuing one goal through professionally crafted rules would be an appropriate approach. Trade issues have already been addressed by international agreements, such as GATT, GATS, and others within the framework of the WTO. At this time, we do not need to shape international competition rules from a trade perspective. The matters that need to be kept in mind at this stage are resolving competition tasks and reaching competition goals.

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