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**EXTRATERRITORIALITY WITH A SMILE?
NEGOTIATING COMPETITION LAWS CO-OPERATION
AGREEMENTS**

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BRENDAN KIRWAN



1996

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For we are made for co-operation, like feet, like hands, like eyelids, like the rows of upper and lower teeth. To act against one another is contrary to nature: and it is as acting against one another to be vexed and to turn away.

Marcus Aurelius

Meditations II,1

Taken in a purely national context, the goals of competition law should be technically achievable. Such goals include the best possible functioning of the market by protecting the competitive system from distorting practices or restraints. In theory, the consumer is thus ensured the best choice of goods and services at the best price, and firms are forced to become industrially competitive if they wish to survive. Competition rules may be applied to relatively homogenous enterprises, all trading within the same geographically delimited area and all subject to a common competition policy. Difficulties arise when other markets are involved, however. Practices which may be acceptable, even encouraged, on one market might affect another market and may be prohibited outright on that second market. Courts must, in such a situation, tackle the problem which will arise of what laws should be applied

1. The first part of the report is a general introduction to the project.

2. The second part of the report is a detailed description of the methodology used.

3. The third part of the report is a discussion of the results obtained.

4. The fourth part of the report is a conclusion and recommendations.

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to such conduct: should the laws of one country or bloc be imbued with extraterritorial effect, the jurisdiction of one entity extended to embrace another? If this approach is adopted, it is obvious that issues such as sovereignty will come into focus; few countries are likely to tolerate what they would perceive to be an unjustifiable intrusion upon their laws and regulations by another country. Whereas most laws will be naturally imbued with elements of extraterritorial effect, the problem is one of degree. This is highlighted by two recent pieces of American legislation: the Helms-Burton Act and the d'Amato Act.¹ The anger provoked by such moves has led the Commission to suggest that European companies will be obliged to compile a 'watch list' of US companies filing lawsuits against them. Failure to do so, or co-operation with the US courts, will lead to 'proportional, effective and dissuasive sanctions'.²

As the interdependence of economies has augmented, so too increased effort has been devoted to fostering understanding, co-operation and, in some cases, harmonisation. While it appears almost superfluous to suggest that there is a need for co-operation and co-ordination if jurisdictional conflicts are to be avoided, a

¹ The former act allows US companies to sue foreign ones for 'trafficking' in assets taken over by Cuba; the latter authorises sanctions against foreign investors in the oil and gas sectors in Iran and Libya.

² The Times 31 July 1996, p.9

headlong rush towards a unified set of world competition rules may seem over-ambitious. This paper does not purport to prophesise what might be; when there will be, if ever, a uniform international competition law code. Rather, it seeks to deal with the present situation. As matters stand, world trading blocs have their own competition rules, related to underlying and differing policies which, when they come into conflict, give rise to issues of extraterritoriality. It has been suggested that even economies which have as their foundations a substantive set of competition principles 'reserve the right to decide when and how they will deviate from the norms of competition. Such deviations - which vary with each nation's size, level of development, and socio-economic traditions - often include government owned and operated enterprises, natural monopolies, regulated industries, 'crisis cartels', and exemptions for export activities. Each nation...reserves the right to deviate from the norm of competition when it perceives that such action is in its own self interest'.³ In order to maximise the interests of different nations, the issue could be considered in terms of conflict of laws, aiming to minimize friction by constructing common rules that advance

³ Griffin, Joseph P. *EC and US Extraterritoriality: Activism and Co-operation* (1993-94) Fordham International Law Journal 353

shared policies and preferences.⁴ A simpler variant on this, however, is to identify commonly-shared policies and approaches and to construct an agreement which at best facilitates these, at worst softens the blow of their extraterritorial reach through the creation of a climate of understanding. This could be done by facilitating transfers of information, fostering understanding and co-operation, but leaving open the possibility of advancing a more unified set of rules in due course. This paper sets out from the premise that resolving the issues mentioned through such competition laws co-operation agreements is desirable.

If such agreements can be satisfactorily concluded, only then can a move be made on to other options, for example 'multilateralizing' such agreements, or creating world competition codes.⁵ Such agreements could go a long way towards filling the lacuna created by the division of trade and competition policies into separately regulated fields: there appears to be increasing emphasis on the fact that competition policy and trade liberalisation should serve the same objective, namely protecting competition among firms from both private as well as

⁴ For a more detailed discussion, see **Kramer, Larry** *Rethinking Choice of Law* (1990) 90 Colum. L. Rev. 277

⁵ In relation to the formulation of such harmonised world codes, see, for example, Competition Elements in International Instruments Joint Roundtable of the Committee on Competition Law and Policy and Trade Paris 15 April 1994, p.3 COM/Daffe/CLP/TD(94)35

governmental distortions.⁶ Fostering understanding and co-operation is the first step towards this position. It is submitted that it would be premature to develop a unified world competition code without first developing such a spirit of co-operation and understanding through negotiated competition laws co-operation agreements. This paper seeks to analyse this first step.

The focus of the paper is the 1991 EC/US Competition Laws Co-operation Agreement. The importance of this Agreement derives from the fact that it was the first such agreement between two powers who are among each other's largest trading partners and, as such, is worthy of examination in its own right, as well as acting as a model on which to base future agreements.⁷

The paper is divided into two sections. The first provides a background to the 1991 Agreement. It examines the various theories of jurisdiction, as seen primarily through the eyes of the courts, both in the US and in the EC. Thus, not only does the first section fill in some of the theoretical background, it also proffers at look a how courts are interpreting their laws in terms of jurisdictional

⁶ See Vermulst, Edwin A. *A European Practitioner's View of the GATT System* (1993) Journal of World Trade 55, 57

⁷ The EC and Canada, for example, are presently negotiating such an agreement. The 1995 US-Canada Agreement regarding the Application of Competition and Deceptive Marketing Practices Law ((1995) 69 ATRR 177) bears a striking resemblance to the 1991 EC/US Text.

reach. Competition law co-operation agreements have as their underpinning theory, of course, the whole concept of the extraterritorial dimension to competition law and practices.

The second section focuses on the actual Agreement itself. It examines its provisions, the ideas underlying them and the consequences - theoretical and practical - of having negotiated such an agreement. An added consideration arises from the fact that, due to the case of *French Republic v Commission*⁸, in which the European Court of Justice declared void the act concluding the Agreement, the Council's signature now sits at the foot of the text. As a result, the re-signed Agreement can override EC rules and regulations in force, and has thus acquired an added dimension.

Having considered the actual text, suggestions for adaptations and improvements will be advanced. Ultimately, however, it should be borne in mind that such agreements are not a panacea to the problems identified in relation to world competition and the rules regulating such competition. That a document such as

⁸ Case 327/91 *French Republic v Commission of the European Communities* [1994] 5 CMLR 517

the 1991 Agreement could foster co-operation, understanding and a degree of harmony would in itself represent a significant achievement.

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CHAPTER 1

'All legislation is *prima facie* territorial.' Characterised as one of the most celebrated in relation to territoriality¹, the foregoing dictum of Justice Oliver Wendell Holmes is taken from an early US case dealing with the extraterritorial reach of antitrust law, *American Banana*.² Territoriality is not the only basis for delimiting and limiting jurisdiction, however. To it may be added the doctrines of nationality and effects.³ It is the objective of this section to trace the development of extraterritorial jurisdiction through an examination of the jurisprudence of the US and the EC. The purpose of this is to analyse how courts apply their domestic competition laws extraterritorially, to highlight the problems caused by such application, to consider what reactions thereto have been, and to lay the foundations for an understanding of why co-operation agreements, in particular the 1991 EC/US Competition Laws Co-operation Agreement, are deemed beneficial.

¹ Advocate General Darmon in Cases 89/85, 104/85, 116-117/85 and 125-129/85 *A. Ahlstrom Osakeyhtio v Commission (Woodpulp)* [1988] 4 CMLR 901; [1988] ECR 5193, Opinion of the Advocate General, para.32

² *American Banana Co. v United Fruit Co.* 213 US 347 (1909)

³ Two further bases do exist, namely the protective principle and the principle of universality. The former concerns acts which threaten a state's security, the latter concerns exceptionally grave crimes, such as war crimes. As such, they are not immediately relevant to the discussion in hand.

Jurisdiction and Territoriality

A consideration of jurisdiction itself, concerned with the allocation of competencies between states⁴, is important, for the assumption of jurisdiction leads to the regulation of the conduct in question. Jurisdiction can be divided into two forms, namely legislative/prescriptive and enforcement/prerogative. The former concerns the power of a state to enact laws and regulations, the latter involves enforcement of those laws. Within these subdivisions lie the three most important theories of jurisdiction. The first is the territoriality principle, which essentially concedes to states the competence to 'prescribe the laws that shall apply to resources and persons within their own territory'.⁵ This encompasses simple presence within the state, or constituent elements of the impugned practice taking place in that state. The second, nationality jurisdiction, is self-explanatory, in that it concerns the ability of states to regulate the conduct of their own nationals, although the weaknesses of the principle are highlighted when dealing with the 'nationality' of companies, particularly in situations involving the 'Delaware effect', whereby companies register in one state yet effectively operate in another.

⁴ Higgins, Rosalyn in *Extra-Territorial Application of Laws and Responses Thereto* Olmstead, Cecil J. (ed.) Oxford, 1984, p.3

⁵ Higgins, *ibid*, p.5

The Courts: The US

It is the third theory of jurisdiction, the effects theory, which has caused most controversy: the basis of the theory is that jurisdiction may be exercised over conduct which takes place outside the borders of a state, yet produces effects within that state, which then seeks to impose liability.⁶ Thirty six years after Justice Holmes' statement in *American Banana*, the move away from a territorial basis for jurisdiction towards the effects doctrine was completed when Judge Learned Hand handed down the 'watershed decision'⁷ of the Second Circuit in *United States v Aluminium Co. of America (Alcoa)*, a case which explicitly adopted the effects doctrine of extraterritoriality: US antitrust law could be applied to the conduct of foreign persons abroad so long as such conduct had 'effects' within the territory of the US.⁸ The case, concerning an international aluminium cartel, was witness to a non-American defendant being held liable in relation to the violation of US antitrust laws, but by a cartel formed and executed

⁶ For a more detailed discussion on the bases of jurisdiction, see Lange, Dieter F.; Sandage, John Byron *The Wood Pulp Decision and its Implications for the Scope of EC Competition Law* (1989) 26 CMLR 137, 138-140

⁷ per Born, Gary B. *A Reappraisal of the Extraterritorial Reach of US Law* (1992) 24 Law & Pol'y Int'l Bus.1

⁸ *United States v Aluminium Co. of America (Alcoa)* 148 F.2d 416 (2d. Cir.1945) The Second Court was sitting as the court of last resort due to the Supreme Court's failure to muster a quorum.

abroad.⁹ The court reasoned that contemporary conflict-of-laws and state practices permitted a state '[to] impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends'. The Court cited the Restatement of Conflict of Laws and three prior Supreme Court decisions in holding that Congress must have intended to adopt an effects doctrine, under which the Sherman Act would be held applicable to conduct that was: 1. intended to affect US commerce and 2. actually did affect US commerce.¹⁰ This development was preceded, however, by the observation of the court that general words, such as those in the Act, were not to be read without regard to the limitations customarily observed by nations upon the exercise of their powers. Indeed, Judge Hand observed that the scope of the Sherman Act did not extend to agreements not intending to affect US commerce; nor did it apply to those agreements which did intend to affect US commerce but did not actually do so.

⁹ The Canadian affiliate of Alcoa, a US company which was found not to be party to the cartel, was treated as separate from Alcoa.

¹⁰ Fifty one years on, that view was echoed by Assistant Attorney General Anne Bingaman, who claimed that: 'when Congress passed the Sherman Act 106 years ago, it had the foresight (reaffirmed in clarifying legislation in 1992 [the Foreign Trade Antitrust Improvements Act 1982 HR Rep.No.686, 97th Cong. 2d. Sess. 5235 (1982)]) to give the US courts jurisdiction, not merely over purely domestic conduct that harms US consumers and exporters, but also over anticompetitive conduct occurring abroad that has the requisite effects on US domestic or export commerce'. Bingaman, Anne K. *International Co-operation and the Future of US Antitrust Enforcement* Address Before the American Law Institute Washington 16 May 1996

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The *Alcoa* doctrine was seized upon by the lower courts and regulatory agencies in the light of the Supreme Court effectively giving it its *imprimatur* during the next few years.¹¹ Yet the acceptance of the effects doctrine by the US courts was causing much dismay elsewhere: unmoderated, apart from the necessity for intent and actual effect, such a doctrine provided no limits - at least no logical limits - to the jurisdictional reach of the American courts, particularly given that no mention of a particular magnitude or character of effect in order to support jurisdiction was made. That international hostility would run high was a predictable consequence, particularly as the expansion of jurisdiction on the part of the US brought in its wake the prospect of wide-ranging discovery orders¹², class actions and the possibility of treble damages¹³. Indeed, by 1958, Kingman Brewster was

¹¹ See, for example, *Steele v Bulova Watch Co.* 344 US 280, 288 (1952)

¹² For a discussion as to the US rules of discovery, see Roth, PM *Reasonable Extraterritoriality: Correcting the 'Balance of Interests'* (1992) 41 ICLQ 245, 249 Roth cites the reporters of the Restatement (Third) of Foreign Relations Law of the United States, who claim that 'No aspect of the extension of American legal system beyond the territorial frontier of the United States has given rise to so much friction as the request for documents in investigation and litigation in the United States'

¹³ For a discussion as to the role of treble damages in US litigation, see Rosenthal, D; Knighton, W. *National Laws and International Commerce: the Problem of Extraterritoriality* London, 1982. In the legislative history of the proposed US Foreign Antitrust Improvement Act, 1985, it was noted that 'One of the aspects of US antitrust law that our foreign partners find most objectionable is our imposition of treble damages. To our minds such multiple damages may be appropriate to encourage the bringing of actions or to punish wrongdoers; to other governments, however, it is an abhorrent delegation of criminal prosecutory authority to private litigants without any effective check on how it is exercised'. 131 Cong.Rec. S1151-01 (6 February 1985) This is exemplified by a diplomatic note to the US from the United Kingdom, in which the latter protested, in relation to treble damages, that 'it has been adopted as a complement to government enforcement, that it provides an incentive to private parties to act as 'private Attorneys-General', that such a system of enforcement is inappropriate and in many respects objectionable in its

enunciating a form of 'jurisdictional rule of reason'.¹⁴ That such modification was deemed necessary is evident from the international hostility which was to lead to the promulgation of what are popularly called 'blocking and clawback' statutes¹⁵. Yet it must be observed that the judgment, if considered in its temporal context, was perhaps not so radical or provocative as may first appear: as observed by Kramer, by 1945 'traditional choice of law theory had been thoroughly dismantled by a realist critique demonstrating (among other things) that the territoriality principle reflected neither what states do nor what they should want in multistate situations. Learned Hand was simply doing what great judges have always done: reshaping the law to preserve its sense and rationality in light of evolving understandings'.¹⁶

The first significant reaction against the espousal of the effects doctrine was to appear in the American Law Institute's 1965 Restatement (Second) of the Foreign

application to international trade'. United Kingdom Diplomatic Note No.225, at 4 (27 November 1979), reprinted in Lowe, AV *Extraterritorial Jurisdiction* Cambridge, 1983, p.183

¹⁴ Brewster, Kingman *Antitrust and American Business Abroad* (1st ed., 1958) esp. pp.446-448

¹⁵ Such as, for example, the UK's Protection of Trading Interests Act 1980, which allows the antitrust defendant to 'recover from the party in whose favour the judgment was given so much of the amount...as exceeds the part attributable to compensation'. (s.6(2)) See further Lowe, AV *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980* 75 AJIL 257; Collins, Laurence *Blocking and Clawback Statutes: The United Kingdom Approach* (1986) JBL 372 & 452

¹⁶ Kramer, Larry *Vestiges of Beale: Extraterritorial Application of American Law* (1991) Supreme Court Review 179, citing, *inter alia*, Wheeler Cook, Walter *Logical and Legal Bases for the Conflict of Laws* Harvard, 1942

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Relations Law of the United States. This qualified the effects test with regard to companies operating outside the US by a condition that the effects within the territory must be substantial and the direct and foreseeable result of the conduct outside the territory.¹⁷ Kingman Brewster's concept of interest balancing was also being developed within the framework of the Restatement: in situations where another state's laws required inconsistent conduct by the person to whom the US court's orders would be directed, each state was encouraged to consider moderating the enforcement of its laws, having regard to such matters as the extent of the hardship on the individual, the place where the required conduct would be carried out and the 'vital national interests of each of the states'.¹⁸

That the US courts were also aware of the reactions being provoked by their effects doctrine, however, was evident from cases such as *Watchmakers of Switzerland*¹⁹ and *National Bank of Canada v Interbank Card Ass'n*²⁰, in which

¹⁷ The Restatements are drawn up by the American Law Institute (ALI), which is a non-official, but nonetheless influential, body composed of leading practitioners and academics. As such, it is a forum which accurately represents and reflects current legal thinking and developments.

¹⁸ Second Restatement, para.40

¹⁹ *United States v Watchmakers of Switzerland Information Center Inc.* 1965 Trade Cases (CCH), para.71, 352; 1963 Trade Cases (CCH), para.70, 600 The case concerned an alleged infringement under the Sherman Act, as the Swiss government, from at least 1951 on, had authorized and encouraged the formation of a watch export cartel involving US and Swiss companies. In the judgment, it was held that the effects in the US had to be 'substantial' to attract penalties. Such qualifications were also inserted into the Foreign Trade Antitrust Improvements Act 1982, *supra*, note 10, in which it is stated, *inter alia*, that:

'This Act [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless-

the courts read into *Alcoa* the requirement that effects of conduct within the United States be of a specified magnitude and character.

Nonetheless, it was not until 1976 and the *Timberlane* decision that the US courts explicitly modified the effects test by adopting a framework for limiting jurisdiction in order to accommodate foreign interests, invoking reasonableness and balancing.²¹ The *Timberlane* case involved an alleged American-Honduran conspiracy to prevent the plaintiff, Timberlane, from operating a lumber mill, from which it was planned to export to the US. What had to be considered was whether the Sherman Act was applicable: the defendants included the Bank of America, but also Honduran firms and Honduran officials. Judge Choy in the Court of Appeals claimed that the failure to actively take account of foreign interests was the main problem with the *Alcoa* test. He thus formulated a tripartite approach to the assertion of jurisdiction:

- does the conduct in question have some effect - either actual or intended - on American foreign commerce?

- is such an effect sufficiently large?

(1) such conduct has a direct, substantial and reasonably foreseeable effect-...'

²⁰ *National Bank of Canada v Interbank Card Association* 666 F.2d 6 (2d Cir.1981)

²¹ *Timberlane Lumber Co. v Bank of America* 549 F.2d 597 (9th Cir. 1977)

- if there is a violation of antitrust laws, are the links between the conduct and the effects on American commerce *vis-à-vis* the interests of other nations sufficiently strong in order to justify an assertion of extraterritorial jurisdiction?²²

All three questions had to be answered in the affirmative before jurisdiction could be exercised.

It is the third leg of this test which is effectively a rule of reason style test. The reasoning underlying such a test was explained by Judge Choy: 'at some point the interests of the United States are too weak and the foreign harmony incentive for restraint too strong to justify an extraterritorial assertion of jurisdiction'.²³

Two years later, *Mannington Mills* followed the lead given in *Timberlane*, and built upon the latter's approach.²⁴ A claim concerning the allegation that a dominant competitor of the eponymous company had fraudulently secured foreign

²² In order to establish the interests of the US relative to foreign nations, the following seven factors to be taken into consideration were enunciated:

1. the degree of conflict with foreign law or policy
2. the nationality or allegiance of the parties and the location or principal places of business of corporations
3. the extent to which enforcement by either state can be expected to achieve compliance
4. the relative significance of effects on the United States as compared to those elsewhere
5. the extent to which there is an explicit purpose to harm or affect American commerce
6. the foreseeability of such effect
7. the relative importance to the violations charged of conduct within the United States as compared with conduct abroad

²³ *Timberlane*, *supra*, note 19

²⁴ *Mannington Mills Inc. v Congoleum Corp.*, 595 F.2d 1287 (1979)

patents in an attempt to block Mannington Mills from the relevant foreign markets led to a two step analysis by the Court of Appeals for the Third Circuit: did jurisdiction exist and, if so, should it be exercised? The former having been answered in the affirmative, the court then identified ten factors in assisting the determination of the latter. These should be recited, for they formed the basis of a significant part of what was to become the Restatement (Third) of the Foreign Relations Law of the United States. The factors for consideration are:

- '1. The degree of conflict with foreign law or policy.
2. The nationality of the parties.
3. The relative importance of the alleged violation or conduct in the US compared to that abroad.
4. The availability of a remedy abroad and the pendency of litigation in the US.
5. The existence of intent to harm or affect American commerce and its foreseeability.
6. The possible effect upon foreign relations if the court were to exercise jurisdiction and grant relief.
7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries.

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8. Whether the court can make its order effective.
9. Whether an order for relief would be acceptable in the US if made by the foreign country under similar circumstances.
10. Whether a treaty with the affected nation has addressed the issue.'

From the perspective of foreign interests, such an approach is obviously to be welcomed, though there are limitations inherent in a balancing test. There is an obvious lack of predictability as to the outcome of weighing the various factors, a task which some have questioned should be carried out by the courts in the first place.²⁵ Furthermore, in the US context, the various states will all have different interests, which will be reflected in the status and weight given to the various elements of the test in different courts. On an international level, it is questionable to what extent the US courts would, on their own, be able to establish and assess the interests of foreign parties, a consideration discussed in the *Laker* case, in which the court went so far as to reject the balancing test for the reasons enunciated, with the added consideration that courts tend to decide in favour of domestic law or custom.²⁶ Judge Wilkey in the course of his judgment

²⁵ Weintraub, Russell J. *The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the 'Choice of Law' Approach* (1992) Tex. L. Rev. 1801-2

²⁶ *Laker Airways v Sabena, Belgian World Airlines* 731 F. 2d 909 (D.C. Cir. 1984) The case involved the liquidators of Laker Airways, who sued IATA member airlines in relation to a predatory cartel that allegedly had driven Laker Airways out of business. The British courts had ordered Laker not to proceed against the British defendants, and Laker moved to enjoin Sabena

1. The first part of the document is a list of names and addresses of the members of the committee.

claimed that '[j]udges are not politicians. The courts are not organs of political compromise'. Interest balancing is, of course, effectively a political device, and courts must be careful when treading the line between deciding a case on its merits and effectively usurping the role of the legislator; courts have little experience or expertise in the field of international relations and politics. The balancing test has also been criticised for its lack of precision: courts have no guidance as to how much weight to give to each of the balancing factors relative to each other, nor is it entirely clear how interests are to be balanced.²⁷ Indeed, it has been suggested that the US courts should not engage in comity analysis; any protests resulting from the extraterritorial application of US laws 'must be dealt with at the governmental level by changes in the United States or foreign law and by intergovernmental agreement'.²⁸

One further problem, upon which the *Hartford Fire Insurance* case was later to turn, was the question of at which point the balancing factors should be

and KLM from coat-tailing on the British court action. Judge Wilkey found that the various interests involved were unbalanceable and granted Laker's motion for an injunction against Sabena and KLM on the grounds that important interests of US consumers were at stake, thus the US court was held to have prescriptive jurisdiction and ought to exercise it (see pp.945-952)

²⁷ Rholl, Edward L. *The Maligned Effects Test* (1990) 73 Marquette Law Review 435, 469

²⁸ St.John, Mary Claire *Extraterritorial Application of Title VII. The Foreign Compulsion Defense and Principles of International Comity* (1994) Vanderbilt Journal of Transnational Law 869, 895

considered.²⁹ The question remained open as to whether jurisdiction should first be assumed, with the balancing factors then considered, or whether a consideration of the balancing factors would inform the assumption of jurisdiction. The former approach would effectively be more likely to lead to an application of US law. Thereunder, a court could first determine subject matter jurisdiction *i.e.* that it has an interest in the subject of the suit, and then proceed to the question of legislative jurisdiction, namely how far its interest actually extends. It is at this point that the interests of the foreign government would be considered.³⁰ The inverse of the test - the consideration of the balancing factors in order to inform the assumption of jurisdiction - would lead to the primacy of the balancing test, subject to all the problems inherent in its application, as discussed above. Of course, the first approach does not circumvent this, but it does postpone a not entirely satisfactory test. When the balancing test is the latter factor in the jurisdictional analysis, it may already have been established that US interest in the case is minimal. When the test is accorded the primary role, its application is subject to the perils of determining weight, and may lead to a situation whereby the US courts would - unnecessarily - assume jurisdiction to

²⁹ *Hartford Fire Insurance Co. and other Petitioners v California and Others and Merrett Underwriting Agency Management Ltd. and Other Petitioners v California and Others* 113 S.Ct.2891 (1993)

³⁰ See Slaughter, Anne Marie *Interdisciplinary Approaches to International Economic Law: Liberal International Relations Theory and International Economic Law* (1995) 10 Am. U.J. Int'l L & Pol'y 717, 736

determine the case. Neither approach is ideal, but it is submitted that the latter - that jurisdiction should be assumed, then the balancing factors considered - is better.

From a judicial perspective, this was effectively the position in which the US courts found themselves at the time of negotiating a competition laws co-operation agreement with the EC between 1990 and 1991. It was thus never exactly clear to what extent *Timberlane* represented a real move towards international conciliation. Certainly the decision apparently espoused a more conciliatory approach, though its application caused some confusion and appears to have excluded jurisdiction in very few cases.³¹ Indeed, one commentator has gone so far as to suggest that 'In this new age of reason...US courts have been no less aggressive in exercising extraterritorial jurisdiction'.³²

³¹ Demetriou, Marie; Robertson, Aidan *US Extra-territorial Jurisdiction in Antitrust Matters: Recent Developments* [1995] 8 ECLR 461, 463

³² Fox, Eleanor *Extraterritoriality and Antitrust: Is 'Reasonableness' the Answer?* (1986) Fordham Corporate Law Institute 49, citing the examples of *Industrial Development Corp. v Mitsui & Co.* 671 F.2d 867 (5th Cir.1982); *Daishowa International v North Coast Export Co.* 1982-2 Trade Cas (CCH) 64, 774 (N.D. Cal.1982); *Dominicus American Bohio v Gulf & Western* 473 F.Supp. 680 (S.D.N.Y. 1979) She concludes (pre-*Hartford Fire Insurance*) that 'there is no clear, single principle applied by the US courts'.

The Courts: The EC

The claim that *Woodpulp* was 'one of the most important decisions ever rendered by the European Court in the antitrust field'³³ is probably somewhat wide of the mark, for despite the fact that its pronouncements are certainly significant, the Court at no point actually espoused any radical new doctrine or resurrected any older controversial ideas. In fact, in contrast to its US counterparts, the ECJ has never explicitly adopted an effects test in relation to extraterritorial jurisdiction.

Béguelin was the first major case concerning the extraterritorial effect of antitrust laws to come before the ECJ, and concerned a claim by the plaintiff for infringement by the defendant of the plaintiff's exclusive French distribution rights to Japanese-made lighters.³⁴ While the case apparently offers oblique support for the effects test - the Court stated *obiter* that '[t]he fact that one of the undertakings which are parties to the agreement is situated in a third country does not prevent the application of [Article 85] since the agreement is operative on the

³³ Christoforou, Theofanis; Rockwell, David B. *European Economic Community Law: The Territorial Scope of Application of EEC Antitrust Law* (1989) 36 Harvard International Law Journal 195, 203

³⁴ Case 22/71 *Béguelin Import Co. v SA GL Import Export* [1971] ECR 949

territory of the common market'³⁵ - there is ultimately no substantive discussion of the claims to jurisdiction or the effects doctrine in the case.

In *ICI*, aniline dye manufacturers, including two Swiss companies, Sandoz and Geigy, and a British company, ICI, were found to have fixed prices for dyestuffs sold in the Common Market between 1964 and 1968.³⁶ However, the adoption of an effects test in order to impose liability, based on a requirement of 'direct and immediate, reasonably foreseeable and substantial effect', as suggested by Advocate General Mayras³⁷, was declined by the ECJ on the basis that the foreign companies in question had subsidiaries within the EC, and were thus part of an economic unit. By attributing the acts of a subsidiary to a foreign parent company, and finding such acts to have taken place within the Common Market, the Court circumnavigated the necessity of dealing directly with the effects question.³⁸ The Advocate General was more explicit in his views, and argued

³⁵ *ibid.*, p.949 See Lange, Dieter G.F.; Sandage, John Byron *supra*, note 6, p.144

³⁶ Case 48/69 *Imperial Chemical Industries Ltd. v Commission (Dyestuffs)* [1973] ECR 619; [1972] 11 CMLR 537

³⁷ The Advocate General analysed the problem in the following terms: 'Surely the Commission would be disarmed if, faced with a concerted practice, the initiative for which was taken and the responsibility for which was assumed exclusively outside the Common Market, it was deprived of the power to take any decision against them? This would also mean giving up a way of defending the Common Market and one necessary for bringing about the major objectives of the European Economic Community'. CMLR, at 604

³⁸ The same approach was adopted by the Court in Cases 6,7/73 *Istituto Chemioterapico Italiano and Commercial Solvents Corp. v E.C. Commission (Commercial Solvents)* [1974] ECR 223; [1974] 1 CMLR 309

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that the language of Articles 85 and 86EC implied the application of an effects doctrine: 'Article 85 indisputably gives as the sole criteria the anti-competitive effect on the Common Market, without taking into account either nationality or the locality of the headquarters of the undertakings responsible for the breaches of competition. The same applies under Article 86 as regards abusive exploitation of a dominant position'.³⁹

It was not until the case of *Woodpulp* that the ECJ ventured to present a more explicit view in relation to extraterritorial effect.⁴⁰ However, the essential point to note about the case is that while the Court expanded the jurisdictional reach of European competition law, it declined to adopt an explicit effects test for jurisdiction.

The facts of *Woodpulp* were that forty one non-EC producers of woodpulp, together with two of their non-EC trade associations, one American, the other Finnish, were held by the Commission to have engaged in concerted practices to fix the price of woodpulp sales to buyers within the Common market. In order to establish jurisdiction over the undertakings concerned, the Commission argued for

³⁹ CMLR, at 601

⁴⁰ *Woodpulp*, *supra*, note 1

laws: 1. that the effect of sales to buyers within the EC was intended; 2. that such effect was of sufficient magnitude; and 3. that before EC competition laws could be held applicable, there should be some form of implementation in the Community in relation to the alleged offences. This notion of implementation was meant to provide a sufficient territorial nexus to differentiate the test from the traditional effects test. The definition of implementation as 'trading directly into the Community' represents the critical departure from previous case law.⁴¹ As a result, the focus of any investigation would be the alleged victim in the Community, not the alleged conspirator without, the territorial link coming from the fact that the buyer would be in the EC, and it would be that buyer who would pay a price fixed as a result of concerted conduct.

Advocate General Darmon nailed his colours firmly to the mast in claiming that '[t]erritoriality, as a connecting factor, does not make it possible to resolve all the problems connected with the scale and nature of contemporary international trade...[a]n inflexible territoriality principle is no longer suited to the modern

⁴¹ *ibid.* 'According to the Commission, the effects doctrine does not correctly reflect the basis of the Community's jurisdiction. In fact, what is at issue is the jurisdiction of the Community over undertakings which implement a concerted practice directly, intentionally and appreciably affecting competition within the Community and trade between Member States, either by trading directly into the Community or by using agents or sales offices within the Community...[I]n considering what constitutes the relevant conduct for the purposes of Article 85, the Commission must determine how the agreement, decision or concerted practice has been implemented'. Report for the Hearing, ECR, pp.5207-5211.

trade...[a]n inflexible territoriality principle is no longer suited to the modern world'.⁴² Following in the footsteps of Advocate General Mayras in *ICI*, the Advocate General also opted for a form of moderated effects test, which he referred to as the 'criterion of qualified effect'. The test was predicated upon conduct having a 'direct and immediate, reasonably foreseeable and substantial' effect within the EC, though it did not incorporate the notion of implementation.⁴³

Nonetheless, the requirement of implementation suggested by the Commission was adopted by the ECJ in its judgment: 'If the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. The decisive factor is therefore the place where it is implemented. The producers in this case implemented their pricing arrangement within the Common Market...Accordingly the Community's jurisdiction to apply its competition rules

⁴² *Woodpulp*, *supra*, note 1, Opinion of the Advocate General, para.47

⁴³ Underlying this was the view of the Advocate General that 'the wording of Article 85 of the Treaty offers general support for the proposition that Community competition law is applicable, by its very essence, whenever anti-competitive effects have been produced within the territory of the Community. The effect on trade between Member States constitutes the demarcating criterion between Community jurisdiction and national jurisdiction in the matter. It is agreements, decisions and concerted practices which have 'as their object or effect the prevention, restriction or distortion of competition within the common market' that are prohibited and declared incompatible with the Treaty'. ECR, Opinion of the Advocate General, para.8

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to such conduct is covered by the territoriality principle as universally recognised in public international law'.⁴⁴ Thus the ECJ held that it had jurisdiction over agreements, decisions or concerted practices which have as their object or effect the restriction of competition within the EC, as long as such agreement or practice was 'implemented' within the EC. The key factor is implementation, apparently conflated with the principle of territoriality in order to confer jurisdiction⁴⁵: the buyers/alleged victims were located within the EC. Hence the Court did not actually explicitly adopt the effects test. A qualification to the Court's test, however, is that the non-EC undertaking must have some direct involvement with the restrictive agreement, a factor evident from the fact that the decision against KEA, the US trade association, was voided, even though KEA had to a degree facilitated the concerted conduct.

Whether or not the ECJ has adopted an effects test in all but name is open to debate. It has been suggested that in dealing with KEA, the Court effectively removed from its notice facts which would have required a direct consideration of the effects doctrine.⁴⁶ On this basis, it can be queried whether the Court effectively has a negative disposition towards such an effects doctrine. Griffin, on

⁴⁴ ECR, Judgment of the Court, paras.16 & 17

⁴⁵ Demetriou, *supra*, note 31, p.465

⁴⁶ Christoforou, *supra*, note 33, p.203

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the other hand, suggests that the practical importance of the distinction between 'implemented' and 'effect' is limited to a few, rare situations, for example a concerted refusal to buy from, or export to, the EC, or an agreement to create a scarcity outside the EC that would raise prices within the EC.⁴⁷ The then Assistant Attorney General in charge of the Antitrust Division in the US claimed that the decision in *Woodpulp* was 'very close to, if not indistinguishable from, the so-called 'effects' test as applied in US courts⁴⁸, a charge rejected, however, by the then incumbent Commissioner in charge of EC competition policy⁴⁹. The concept of implementation does appear to represent an effort not to stray too far from the boundaries of objective territoriality, and suggests a degree of restraint. It should be remembered as well that the requirement of an effect on trade between Member States, as required under both Articles 85 and 86EC, means that an effect on the EC as a single entity is seemingly insufficient to attract the extraterritorial application of EC competition laws.⁵⁰ It is submitted that despite

⁴⁷ Griffin, Joseph P. *EC and US Extraterritoriality: Activism and Co-operation* (1993-94) *Fordham International Law Journal* 353, 379

⁴⁸ Rule, Charles F. *The Justice Department's Antitrust Enforcement Guidelines for International Operations - A Competition Policy for the 1990's* Address Before the International Trade Section and Antitrust Committee of the District of Columbia (see Griffin, *ibid*, p.378)

⁴⁹ Brittan, Leon *Jurisdictional Issues in EEC Competition Law* Hirsch Lauterpacht Memorial Lectures Cambridge, 8 February 1990 Grotius, 1991

⁵⁰ There does exist some debate in relation to this point which remains, however, unresolved. See, for example, Van Bael, I; Bellis, J.F. *Competition Law of the EEC* Oxford 1990, notes 254, 255

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the various contentions that *Woodpulp* is a 'seminal case'⁵¹, and one of the more important in the field of EC competition law, it is not definitive. The Court singularly failed to tackle all the issues presented head on and, contrary to the considerable comment witnessed in the US, devoted little time to a discussion as to the role of comity.

Woodpulp was the last major case decided by the ECJ prior to the signing of the US/EC Agreement in 1991 and, as is evidenced by Assistant Attorney General Charles Rule's comment above, evidently gave the Americans pause for thought in relation to the assumption of jurisdiction and the extraterritorial application of laws by the ECJ and the Court of First Instance (CFI). As will be seen in Chapter 2, the US had in addition their own extra-judicial agenda which furthered the desire to conclude some form of agreement.

That the development of a qualified effects doctrine was in part responsible for the eventual signing of the 1991 Agreement should not be surprising. As already alluded to⁵², a persuasive argument can be made extolling the benefits of an

⁵¹ Christoforou, *supra*, note 36 Other relevant literature dealing with the *Woodpulp* case includes Lange, Dieter G.F: Sandage, John Byron, *supra*, note 6; Van Gerven, Walter *EC Jurisdiction in Antitrust Matters. The Woodpulp Judgment* (1989) Fordham Corporate Law Institute 451

⁵² *supra*, note 16

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'effects' approach to extraterritorial application of law, particularly in the modern world, with increased globalisation and penetration of markets, for the effects doctrine recognises international economic dependence⁵³. The validity of such an argument is accentuated when it is considered that the territorial basis of jurisdiction can be traced back to the 16th century, when it emerged as a defining characteristic of sovereignty. The stature of territoriality grew, the argument being that 'since only the sovereign can control what happens in its territory, no state can have any interest or legitimate concern in such matters'.⁵⁴ The move away from such a doctrine was further emphasised subsequent to the signing of the 1991 Agreement, when the US Supreme Court delivered its judgment in the *Hartford Fire Insurance* case.⁵⁵ It is proposed to examine this case in some detail, for its potential impact heightens the importance of some form of negotiated agreement.

⁵³ See Rholl, *supra*, note 27, p.469

⁵⁴ Kramer, *supra*, note 16, p.208 Kramer continues: 'the post-realist understanding of prescriptive and adjudicatory jurisdiction is based on recognition that limits on state power vis-à-vis other states are a function of practice and convention. The legitimate grounds for exercising power, in other words, are those that states recognize as legitimate, and this includes grounds other than controlling acts within one's borders' (p.210)

⁵⁵ *Hartford Fire Insurance*, *supra*, note 29

The Courts: The US Post-1991

Hartford Fire Insurance involved a claim brought by 19 US states and a group of private plaintiffs against a group of, *inter alia*, reinsurers based in London. It was claimed that the defendants had conspired to boycott non-conforming insurers in order to force all insurers to abandon products such as long-tail and pollution insurance, and had thus violated the Sherman Act. In considering whether to apply the Sherman Act against the London-based reinsurers, Justice Souter for the majority of the Supreme Court adopted the approach that the balancing test expounded in *Mannington Mills* and codified in the Third Restatement should only be applied once jurisdiction had been assumed. Foreign law would be deferred to in the event of a 'true conflict' between domestic and foreign law, such a true conflict apparently being predicated upon an act being 'compelled' by a foreign government. The balancing test was thus 'conflated with the established defence of foreign sovereign compulsion'.⁵⁶ That jurisdiction is established depends upon whether the conduct 'was meant to produce and did in fact produce some substantial effect in the US'. Effectively the US courts have thus reduced the status of the balancing test and have moved towards a more explicitly untempered effects test.

⁵⁶ Demetriou, *supra*, note 31, p.465

The Court in *Hartford* could have opted for an alternative interpretation, namely that the balancing factors informed the assumption of jurisdiction rather than tempering it in certain, limited situations, and that such a test was not dependent upon foreign sovereign compulsion. Indeed, Justice Scalia in his dissent suggested that to assert that no true conflict counselling non-application of US law exists unless compliance with US law would constitute a violation of another country's law is a 'breathtakingly broad proposition'. A debate as to whether the balancing factors should be introduced once jurisdiction has been assumed, or should rather inform the assumption of jurisdiction, is subject to a problem common to both approaches, namely the difficulties inherent in a balancing approach *per se*, which have already been discussed. It is contended that the greater problem with the *Hartford* decision is not so much that it effectively chose to apply the effects doctrine of jurisdiction by default - given that the balancing test is relegated to second position, the likelihood of laws being applied territorially is correspondingly greater, particularly so given the compulsion element - rather the problem lies in the fact that the court's attempts to justify its choice appear somewhat cumbersome and contrived: one of the major problems with *Hartford* is its handling of the Third Restatement (it should be remembered, however, that the Restatement is not actually binding on the courts, though of

course its balancing provisions are based on the balancing factors enunciated in the *Mannington Mills* case). Section 403(2) of the Restatement sets out the list of balancing factors to be considered when the establishment of jurisdiction is in issue, this apparently acting as a threshold to s403(3), the latter dealing with situations where two states could reasonably claim entitlement to exercise jurisdiction. Yet Justice Souter for the majority appears to have bypassed s403(2) and proceeded directly to s403(3). The English reinsurers concerned had not been ordered to act as they did and hence, to Justice Souter and his colleagues in the majority, there was no conflict.

Apart from these technical considerations, an interesting comment about the *Hartford* case has been made by Kramer in relation to the rationale underlying the decision.⁵⁷ He feels that the intent element of *Hartford* means that the Sherman Act is applicable to cases wherein US interests are probably strongest relative to those of other countries in any case. Indeed, it is currently unclear exactly what effect *Hartford* is going to have, despite perfunctory accusations of its representing a 'considerable setback to the evolution of American antitrust law to

⁵⁷ Kramer, Larry *Extraterritorial Application of American Antitrust Law After the Insurance Litigation Case: A Reply to Professors Lowenfeld and Trimble* (1995) 89 American JIL 750, 755

the activities of non-US defendants outside the US'.⁵⁸ However, Assistant Attorney General Anne Bingaman has made it clear that she will use the *Hartford* decision to vigorously enforce the effects theory of jurisdiction.⁵⁹

It thus appears that both the US courts and the ECJ/CFI are now operating to roughly the same principles in relation to extraterritorial effect, despite differing formulations and wordings. Essentially the EC has moved forward from its strict objective territoriality principles, the US back from an unqualified effects doctrine, with both meeting at roughly the same point; a point which, it is submitted, is much nearer the 'pure effects' extreme. From the point of view of competition laws co-operation agreements this is a useful development. Aspects peculiar to the American system such as treble damages and extensive search

⁵⁸ Roth, PM *Jurisdiction, British Public Policy and the United States Supreme Court* (1994) 110 LQR 194 To a degree, of course, most theories of jurisdiction, regardless of form or presentation, are going to conform to the statement that '[A]ny extraterritorial Sherman Act jurisdictional test must reflect a judicial commitment to preserve Congress' intent to protect our markets, businesses and citizens from anticompetitive practices, whatever their source'. Rholl, *supra*, note 27, pp.464-5

⁵⁹ Bingaman, Anne K. *Change and Continuity in Antitrust Enforcement* (1991) Fordham Corporate Law Institute 1, 4 However, the Joint Antitrust Enforcement Guidelines for International Operations 1995 (the Guidelines, drawn up partly as a reaction to *Hartford*) may partly circumscribe the reach of an effects doctrine. ((1995) 68 ATRR 462 and 5-1) In indicating how they intend to apply the *Hartford Fire Insurance* decision, the Department of Justice and the Federal Trade Commission state that in deciding whether or not to take proceedings against foreign conduct, they would make a comity analysis and, in so doing, would consider the role played by a country in dictating or encouraging various forms of conduct. Relevant factors are then listed which could be used in a comity analysis. However, the reluctance of the Guidelines to spell out exactly how the provisions would be used detracts somewhat from their immediate usefulness.

other could potentially result in virulent retaliatory measures.⁶⁰ With this background knowledge of the problems and issues raised by the extraterritorial application of competition laws, it is now proposed to turn to the 1991 EC/US Competition Laws Co-operation Agreement.

⁶⁰ Perversely, however, in the aftermath of the *Hartford Fire Insurance* judgment, an official of the British Embassy in Washington observed that: '[o]ne result of the judgment may be to reduce the incentive of other foreign states to co-operate with the US regulatory authorities, and, in certain circumstances, to give them no option but to make use of blocking statutes'. Hosker, Edmund *International Bar takes Aim at US Litigation Practices* Nat'l L.J. 1 November 1993, at 17. Of course, were states to co-operate, the US authorities could be persuaded not to take judicial action on the basis of the comity doctrine enunciated in the Joint Antitrust Enforcement Guidelines for International Operations, 1995.

CHAPTER 2

In order to understand the circumstances which gave rise to the signing of the 1991 EC/US Competition Laws Co-operation Agreement¹, a brief look at the relevant non-judicial historical background is proposed. To put the Agreement into context is to better understand its provisions and the thought processes behind them, and to encourage debate as to whether such provisions simply reinforce existing co-operation agreements or add to them, in both a theoretical and practical sense. The examination begins with a perusal of prior agreements and guidelines, coupled with a consideration of the circumstances which gave rise to their promulgation. This will lead to a summary of the background to the negotiation of the Agreement itself, followed by a detailed study of the provisions of the Agreement.

Before 1991: International Practice

With the gradual globalisation of world trade and competition, and the increasing accessibility of heretofore impenetrable markets due to the lowering, and in some cases removal, of tariff and non-tariff barriers, non-EC firms have gradually established themselves on the Common Market and, as such, their activities have

¹ The text of the Agreement is reproduced in [1991] 4 CMLR 823

begun to impact upon the market. Not all their actions are either competitive or legitimate, however. The same is true for EC firms which have established a presence on foreign markets. Thus some form of understanding and co-operation is necessary if international tension and potential retaliatory measures are to be avoided, particularly if courts choose to apply the effects doctrine of extraterritoriality, or approximations thereto. Indeed, a certain measure of selfishness could be said to pervade such co-operation, a view perhaps best expressed by Justice Jackson in *The Bremen v Zapata Off-Shore Co.*, in which he claimed that 'our national interests are advanced by fostering amicable and workable commercial relations' with foreign nations; 'in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided'.² Despite *dicta* such as that in the House of Lords to the effect that there are some forms of restrictive business practice which are in the economic interests of the country from which they originate, despite the injurious effects in another country³, certain anti-competitive practices affect all nations concerned. Even potentially non-injurious practices such as mergers can

² *The Bremen v Zapata Off-Shore Co.* 407 US 1, 9 (1972)

³ See *Rio Tinto Zinc Corp. v Westinghouse Electric Corp.* [1978] 1 AllER 434 Anti-competitive practices, the effects of which are felt in more than one country, include practices such as secret bid-rigging and the unsanctioned division of markets.

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affect more than one country to a similar degree, be this adversely or otherwise.⁴

Co-operation and understanding could facilitate the obtaining of evidence and information in investigations, leading to a reduction in costs and greater efficiency.

Multilateral Efforts

While bilateral agreements were later to come into vogue in order to promote such co-operation, initially bodies such as the Organisation for Economic Co-operation and Development (OECD) were seen as a medium through which problems such as the unwanted territorial impact of other countries' laws could be discussed and possibly averted or resolved.⁵ It can be said that the development of competition laws co-operation agreements is a result of a perceived need to 'devise a way of withdrawing what are international political questions from the judiciary and to develop a machinery by which they can be resolved by the executive arms of

⁴ See, for example, the UK Mergers and Monopolies Commission (MMC) merger investigation in *Stora Koppabergs Bergslags AB/Swedish Match N1* and *Stora Koppabergs Bergslags AB/The Gillette Co.* Cm. 1473/1991

⁵ Other efforts to promote co-operation in general were evidenced by, *inter alia*, the 1927 League of Nations discussion on the control of business practices, the 1945 Havana Charter, a 1959 GATT Report on control of 'Restrictive Business Practices' and the discussions within UNCTAD between 1968-1980, also on restrictive business practices. In 1980, the UN adopted the UNCTAD Code on Restrictive Business Practices which, while reflecting a shared view on anti-competitive conduct, is non-binding and does not address the problem of jurisdiction.

government. This requires a process of intergovernmental consultation'.⁶ 1967 witnessed the promulgation of guidelines by the OECD concerning, *inter alia*, procedures for notification, consultation and exchange of information between the relevant national competition authorities⁷. A conciliation procedure was introduced in a 1973 Recommendation by the same body⁸, with the 1967 and 1973 texts being merged into one in 1979⁹. These guidelines were revised and enhanced in 1986, with the publication of the OECD Council Recommendation Concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade¹⁰. The 1986 Recommendation is indeed cited in the preamble to the 1991 Co-operation Agreement, which in itself suggests that the purpose of the recommendations is not only to provide a guiding set of rules and code of conduct with which to ensure co-operation, but also to act as a model on which to base future co-operation agreements.

⁶ Durack, Peter *Australia: 'Extraterritorial Application of United States Law'* Address to the American Bar Association 12 August 1981 Reprinted in Lowe, AV *Extraterritorial Jurisdiction* Cambridge 1983, p.90, 95

⁷ OECD Council Recommendation Concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade 5 October 1967

⁸ Recommendation of the Council 3 July 1973

⁹ Recommendation of the Council 25 September 1979. A flavour of the Recommendation is evidenced by the two following extracts: 'before initiating investigations, Member States should consult with other Member States whose 'important interests' would be affected'. (s.3) During consultations, the investigating state 'should give full and sympathetic consideration' to the views of the affected states, and the states concerned should 'endeavour to find a mutually acceptable solution in the light of the respective interests involved'.

¹⁰ Recommendation of the Council 21 May 1986

The 1986 OECD Recommendation can be divided into two parts: the first deals with provisions of notification, exchange of information, consultation and conciliation. The second deals with 'guiding principles'. Such an arrangement and categorisation of sections is not dissimilar to that of the 1991 EC/US Agreement although, as will be seen, the latter Agreement goes further than the OECD recommendations.

Bilateral Efforts

Contemporaneously, from 1976 on, a series of bilateral agreements was also being ratified by various states. It is worth listing these agreements chronologically in order to appreciate what existed pre-1991, and to establish whether these prior agreements are comparable to, and whether they acted as a guide - if at all - for, the EC/US Agreement.

Whilst the US and Canada had already negotiated simple bilateral understandings in 1959 and 1969, it was the oil crises of the 1970's, in particular the competition investigations into multinational oil companies at the time, which could be said to

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have provoked the signing of the 1976 US-FRG Agreement.¹¹ The benefits of such an agreement were that not only did it allow for co-operation in the obtaining of evidence and information, it also spared unpleasant, and in many ways, unnecessary, diplomatic incidents and retaliation. 1982 witnessed a US-Australia Co-operation Agreement, triggered by litigation concerning the Westinghouse Electric Corporation¹², an agreement which 'emphasises a general policy of co-operation and consultation'¹³. However, in contrast to that between the US and the EC, the US-Australia Agreement came about due to the fear that Australian sovereignty was endangered by the extraterritorial reach of US antitrust laws, with no corresponding fears of such magnitude on the part of the US; the parties concerned were thus not negotiating at parity.¹⁴ The next year, 1984, proved to a busy one on the negotiation front as first France and Germany concluded an agreement in light of the prohibition by the German Federal Cartel Office of a merger between Bayer France SA (a French subsidiary of a German parent) and

¹¹ US-FRG Agreement Relating to Mutual Co-operation Regarding Restrictive Business Practices 23 June 1976 Reprinted in Lowe, *supra*, note 6

¹² US-Australia Agreement Relating to Co-operation on Antitrust Matters 29 June 1982 Reprinted in Lowe *ibid.* pp.233-237

¹³ Jardine *The Extraterritorial Enforcement of Australian Antitrust Legislation* (1990) 12 Sydney LR 652, 668

¹⁴ Chronologically next in sequence, competition laws also underlay the 1983 Australia-New Zealand Agreement (ANZCERTA), as enhanced in 1988. It should be borne in mind, however, that the aims of the 1988 review were somewhat different to those of other bilateral agreements, in that harmonised national antitrust laws were involved. Under the terms of the Agreement, Australia and New Zealand decided to create a system of 'overlapping jurisdiction', rather than mutually exclusive jurisdiction. The Australian Trade Practices Commission and the New

Firestone France SA.¹⁵ On the other side of the Atlantic, the US was busy negotiating another memorandum of understanding, again with Canada, another consequence of litigation involving the Westinghouse Electric Corporation¹⁶.

Chronologically separated, the agreements are all united by a common thread running through them, namely the fact that they were all signed as a reaction to specific circumstances. Their provisions obviously reflect this, and must be read accordingly.¹⁷ The 1991 Agreement, on the other hand, was not the result of any one particular event or circumstance, and was thus able to look forwards, not backwards.

Zealand Commerce Commission were together empowered to enforce their harmonised antitrust laws against anticompetitive practices in the whole trans-Tasman market.

¹⁵ France-FRG Agreement Concerning Co-operation on Restrictive Business Practices 28 May 1984 (1987) 26 ILM 531

¹⁶ US-Canada Memorandum of Understanding as to Notification, Consultation and Co-operation with Respect to the Application of National Antitrust Laws 9 March 1984 (1984) 23 ILM 275 Reprinted in Griffin, Joseph P. *US International Antitrust Enforcement: A Practical Guide to the Justice Department Guidelines* Corporate Practice Series No.53 The Bureau of National Affairs, Inc. Washington, 1989 B-901 (Memorandum replaced on 3 August 1995 by an Agreement regarding the Application of Competition and Deceptive Marketing Practices Law (1995) 69 ATRR 177)

¹⁷ For example, the US-FRG Agreement was concluded chiefly in order to address the issue of blocking legislation (albeit that it has been claimed that it singularly failed to do so. See King, James W. *A Comparative Analysis of the Efficacy of Bilateral Agreements in Resolving Disputes Between Sovereigns Arising from Extraterritorial Application of Antitrust Law: The Australian Agreement* (1983) 13 Georgia J.Int'l & Comp. L. 49, 67)

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1990 - 1991: Negotiating the EC/US Agreement

There had already been a degree of co-operation between Washington and Brussels prior to 1991. Since the mid-1960's, officials of the relevant competition authorities had held consultations on a bilateral basis, such consultations developing into annual autumn meetings¹⁸. Such contacts were important, given that the EC and the US are among each other's most significant trading partners, and both operate active competition policies. For various political reasons, however, the climate was not right to conclude any formal agreement: in so doing, the EC would be implicitly accepting the possibility of extraterritorial application of US competition laws as a matter of principle, while the US felt that such application of their laws was not violating any sovereign rights of the EC.¹⁹

However in 1990, Leon Brittan, the then EC Commissioner for Competition called for an agreement between the EC and the US.²⁰ The Brittan proposal called for 'consultation, exchanges of non-confidential information, mutual

¹⁸ The aim of such consultations was to 'discuss restrictive business practices liable to affect international trade. Co-operation has mainly taken the form of exchange of non-confidential information' *per* VIIth Report on Competition Policy (1977) para. 74

¹⁹ See further Haagsma, Auke *International Competition Policy Issues: The EC-US Agreement of September 23, 1991* in Slot, Piet Jan; McDonnell, Alison *Procedure and Enforcement in EC and US Competition Law* London, 1993 Chapter 28, p.229

²⁰ Brittan, Leon *Jurisdictional Issues in EEC Competition Law* Hersch Lauterpacht Memorial Lectures Cambridge 8 February 1990 Grotius 1991

assistance, and best endeavours to co-operate in enforcement where policies coincide and to resolve disputes where they do not. Disagreements would be discussed frankly and, wherever possible, only one party should exercise jurisdiction over the same set of facts. To make that possible, a party with jurisdiction would be ready not to exercise it in certain defined circumstances, while the other party, in its exercise of jurisdiction, would agree to take full account of the interests and views of its partner...'. Three factors can be said to have contributed such a call:

1. An increasingly international business environment, with a consequent increase in the volume of global trade and penetration of international markets, was an important factor.²¹
2. The promulgation in 1991 of the Merger Control Regulation (MCR) by the EC also contrived to ensure that the reach of EC law would be felt beyond the boundaries of the then Community.²²

²¹ For example, in relation to the US, 'today...nearly one quarter of our GDP is comprised of export and import trade; that's double what it was in 1945' *per* Bingaman, Anne K. *International Co-operation and the Future of US Antitrust Enforcement* Address Before the American Law Institute Washington 16 May 1996

²² Regulation 4064/89 OJ 1989 L395.1

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3. The adoption by the European Court of Justice (ECJ) of an apparently qualified effects doctrine in the *Woodpulp* decision heightened US awareness of, and interest in, the activities of the EC authorities.²³

The US Perspective

It was in the interest of the US to subscribe to a document which at the very least would give them some form of input, however limited, into such developments. The further benefits of signing such an agreement from an American perspective were that it was proposed at a time when the US had thus begun to feel the effects of the reach of the EC Treaty and EC regulations. It had also linked its own competition policy to its trade strategy in light of its trade deficit with Japan, manifested by the US Structural Impediments Initiative (SII).²⁴

²³ Cases 114/85 and 125-129/85, *re Woodpulp Cartel: A. Ahlstrom Oy and others v EC Commission* [1988] 4 CMLR 901; [1988] ECR 5193. Whether this case does in fact bequeath an effects doctrine to EC jurisprudence concerning extraterritorial application of competition laws has given rise to much comment, and has been examined in the preceding chapter, page 25 *et seq.*

²⁴ A similar policy was subsequently enunciated by the incumbent Commissioner for Competition in 1993, who claimed that 'Companies and especially multinational ones increasingly operate at world level and there needs to be an adequate Community response. The Commission will not hesitate to use its powers where necessary to preserve undistorted competition inside the EC and market access outside where genuine cases are brought to its attention. It goes without saying that a close co-ordination between trade and competition policies is necessary in order to ensure success.' Van Miert, Karel *Analysis and Guidelines on Competition Policy*. Address Before the Royal Institute of International Affairs, London 11 May 1993.

It has also been suggested that pressure from American commercial interests in the aftermath of *Woodpulp* provided the impetus in the US for the conclusion of a co-operation agreement with the EC²⁵.

Given these concerns, it is at this juncture that the juxtaposition of the *Woodpulp* decision with the Merger Control Regulation must be considered, for there is an argument that the two are not wholly consistent in their approach to extraterritorial effect²⁶. According to Art. 5(1) of the Regulation, turnover - which determines whether a concentration has a Community dimension - is calculated according to the value of products sold and services provided in the Community. Physical presence in the Community is not specifically required, thus an extra-EC company can meet the relevant thresholds of Art. 1 of the Regulation simply by making a sufficient level of sales in the EC. Two non-EC undertakings which merge may therefore be caught by the provisions of the Merger Control Regulation, which can thus be said to be extraterritorial in character. On one reading, this approach would appear to be consistent with that adopted in *Woodpulp*: as has been seen, the key factor in that case was the notion

²⁵ Roth, PM *Reasonable Extraterritoriality: Correcting the 'Balance of Interests'* (1992) 41 ICLQ 245, 271. From an American perspective, it was felt that 'our rich domestic market is the most open in the world to international trade - and accordingly, the most attractive and potentially the most vulnerable to international cartels'. Bingaman, *supra*, note 21.

²⁶ See O'Keeffe, Siun *Merger Regulation Thresholds: An Analysis of the Community-dimension Thresholds in Regulation 4064/89* [1994] 1 ECLR 21, 28.

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of implementation, conflated with the principle of territoriality, the latter arising from the fact that the buyers/alleged victims were located within the EC. Notwithstanding the arguments as to whether this represents an effects test in all but name, some restraint does appear evident in the *Woodpulp* judgment, as discussed. Yet under the MCR, it is possible for non-EC undertakings to fall within the scope of the Regulation under the thresholds contained in Art.1(2), even if the undertakings concerned are mainly active outside the EC. Indeed, in a multiple merger situation, it is not impossible that one or more of the entities concerned would have no dealings at all within the EC. Such firms are thus effectively being penalised as a result of their size. It certainly appears that the approach of the MCR is extremely broad in relation to its extraterritorial reach, and appears to demonstrate less restraint than the ECJ in *Woodpulp*. Much of course depends on how the judgment of the ECJ in the case is read: as already mentioned, it has been argued that it effectively represents an effects test, in which case it finds a closer parallel with the provisions of the MCR. While the question itself may appear somewhat academic, what the preceding discussion does demonstrate is that between them, the *Woodpulp* decision and the MCR both represent significant additions to the EC's approach to extraterritoriality, causing the US to take note of developments.

The EC Perspective

From an EC perspective, such an agreement would represent an opportunity to exploit some aspects of the US courts' approach to the extraterritorial application of their competition laws: both the *Timberlane*²⁷ and *Mannington Mills*²⁸ cases had, as seen, been witness to the US courts invoking 'principles of international comity' and the 'realities of international commerce' in modifying their prior *Alcoa*-style pure effects doctrine²⁹; *Hartford Fire Insurance* was not decided until 1993³⁰, two years after the signing of what was to become the 1991 EC/US Competition Laws Co-operation Agreement. Thus the American courts were tempering the extraterritorial reach of their laws, confining cases in many situations to their own jurisdiction, yet the EC authorities would be able to gain access to heretofore unavailable information, and would be able to put forward their perspectives on competition. Most particularly (and possibly somewhat unexpectedly, as it did not feature in Leon Brittan's original proposal), the EC would have the means to request the Americans to invoke the principle of what became known as positive comity in order to tackle American issues and

²⁷ *Timberlane Lumber Co. v Bank of America* 549 F.2d 597 (3rd Cir. 1977)

²⁸ *Mannington Mills v Congoleum Corp.* 595 F.2d 1287 (3rd Cir. 1979)

²⁹ *US v Aluminium Company of America (Alcoa)* 148 F.2d 416 (2d Cir. 1945)

³⁰ *Hartford Fire Insurance Co. and other Petitioners v California and Others and Merrett Underwriting Agency Management Ltd. and Other Petitioners v California and Others* 113 S.Ct.2891 (1993)

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situations which the EC felt adversely affected their own interests. The Agreement was thus potentially of considerable benefit to the EC authorities. Indeed, at the time, US antitrust was being 'transmogrified from policy that, among other things, preferred open markets and a 'fair opportunity to try' to law narrowly focused on improving US consumer welfare by proscribing (only) output-limiting conduct or transactions that hurt US consumers.³¹ Footnote 159, contained in the 1988 Department of Justice Guidelines on International Operations, stated: 'The Department is concerned only with adverse effects on competition that would harm US consumers by reducing output or raising prices'. The footnote was later withdrawn in April 1992 - after the signing of the Agreement - the Department announcing that US antitrust laws apply 'to US and foreign commerce' and thus ostensibly apply to harm suffered by US exporters, a situation brought about chiefly by the development of the SII.³²

³¹ Fox, Eleanor *Market Access, Antitrust and the World Trading System: En route to TRIMS - Trade Related Antitrust Measures* Italian Antitrust Authority Rome 20 November 1995, p.18

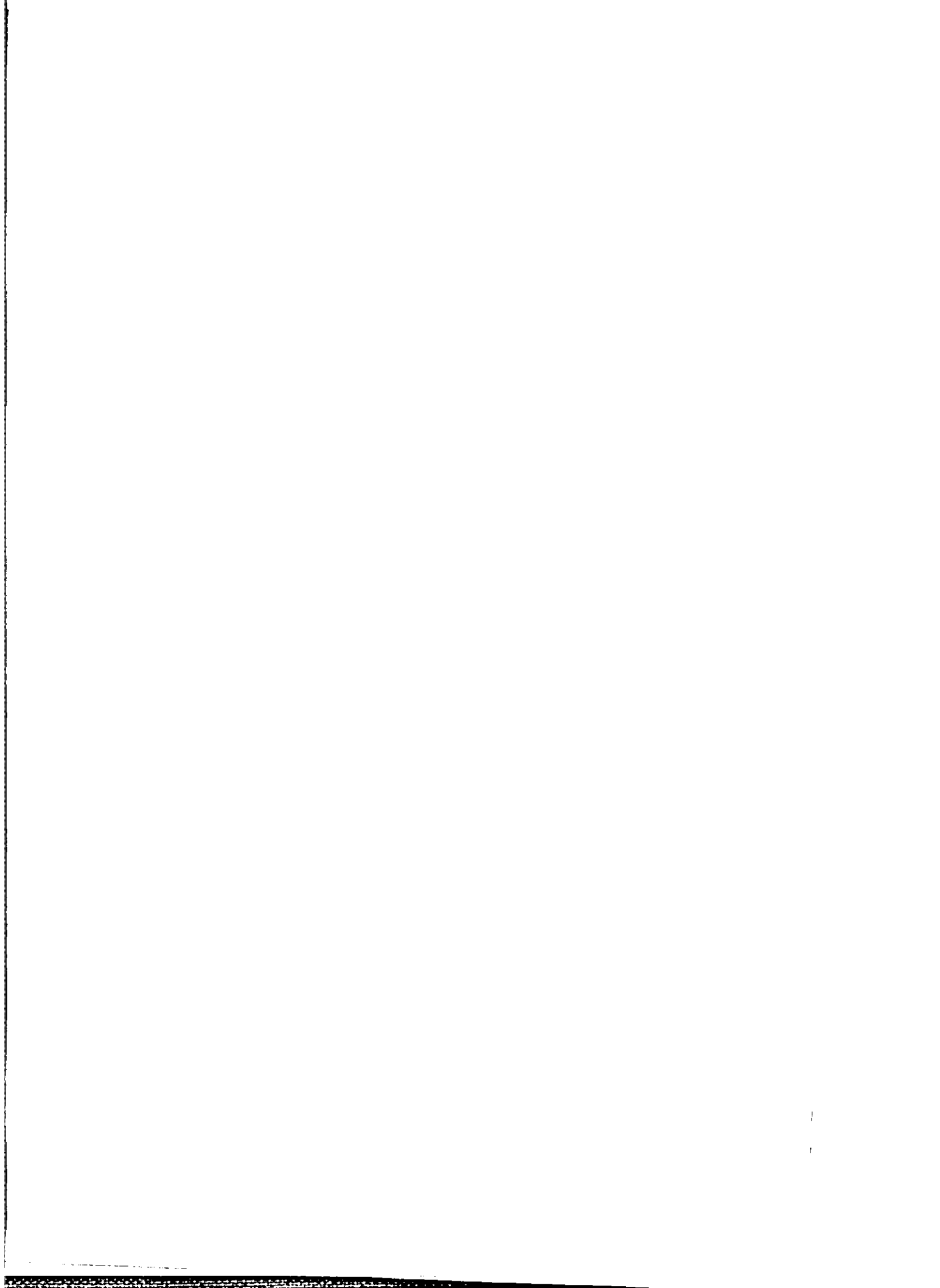
³² By the terms of this development, antitrust enforcement action would now be taken against conduct occurring overseas that restrained US exports, regardless of whether or not there was direct harm to US consumers. This would be so in cases where:

'1. The conduct has a direct, substantial and reasonably foreseeable effect on exports of goods or services from the United States;

2. the conduct involves anticompetitive activities which violate the US antitrust laws - in most cases, group boycotts, collusive pricing and other exclusionary activities; and

3. US courts have jurisdiction over foreign persons or corporations engaged in such conduct.'

Justice Department's April 3 Statement of Enforcement Policy: Department of Justice Policy Regarding Anticompetitive Conduct that Restricts US Exports 62 Antitrust & Trade Reg. Rep. (BNA) No. 1560, at 483 (9 April 1992). See also *Justice Department Will Challenge Foreign Restraints on US Exports Under Antitrust Laws* 7 Trade Reg. Rep. (CCH) para. 50, 084 3 April 1992



The relevant authorities decided to conclude a competition laws co-operation agreement, the purpose of which was to 'promote co-operation and co-ordination and lessen the possibility or impact of differences between parties in the application of their competition laws'.³³ As already observed, such an agreement was to act as a form of prevention rather than resolution, although in many ways it simply formalised practices which had been occurring for a number of years.³⁴

The agreement was explicitly intended to go beyond the 1986 OECD Recommendations, by providing for fixed forms of legally binding conduct, based on more far reaching forms of co-operation and co-ordination. Indeed, as mentioned, the Agreement was eventually to go beyond Leon Brittan's original suggestions in at least one respect, with the insertion of the provision on 'positive comity' contained in Article V. In this way, the Agreement would incorporate, but go beyond, the notions of notification, consultation, exchanges of non-confidential information and mutual assistance contained in previous bilateral

³³ See Article I.1 of the Agreement. That a bilateral agreement with the US, as opposed to a multilateral arrangement, was chosen as the measure with which to respond to the problems arising from extraterritorial application of laws was explained by the Commission's then Director General for Competition as follows: 'Although multilateral rules would provide the broadest coverage and, therefore, deal with the issue in the most comprehensive manner possible, their negotiation would be...a complicated and time consuming process.' Ehlermann, Claus Dieter (1993-94) 17 Fordham ILJ 833, 835

³⁴ XIth Report on Competition Policy (1981) para.163

treaties. For example, the agreement was 'the first of its kind to consolidate the rules on comity in a legal instrument'.³⁵ A written text was also highly symbolic in its own right, for it represented an act of good faith. In the words of one commentator, 'The Agreement should cause business people to consider carefully their strategies regarding mergers, acquisitions, and joint ventures that may not meet one Party's reporting requirements, and should cause them to re-examine conduct that they previously may have believed to be beyond the reach of local competition enforcement authorities'.³⁶

The 1991 EC/US Competition Laws Co-operation Agreement was initially negotiated as an 'administrative arrangement' (or 'executive agreement' in American parlance). It thus did not supersede any laws then in force, and came below secondary Community legislation in the legal hierarchy. This situation was to change, however. The initial success of the 1991 Agreement - taking notification alone, in a four year period, 103 notices were sent westwards, 128 received from the US³⁷ - was tempered by the judgment of the ECJ in *French*

³⁵ Commission communication to the Council concerning co-operation with the United States of America regarding the application of their competition rules COM (94) 430 final 12 October 1994 Annex I, p.5

³⁶ Griffin, Joseph P. *EC/US Antitrust Co-operation Agreement: Impact on Transnational Business* (1992-93) 24 Law and Policy in International Business 1051, 1065

³⁷ Competition Policy Newsletter, Vol.1, No.5, Summer 1995, p.58

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*Republic v Commission*³⁸, on the foot of an application by the French Republic for annulment of the Agreement. Effectively accepting the case put forward by the French Republic, the Court held that the Agreement was outside the powers of the Commission to conclude, and that instead it should have been approved by the Council (although under Art. 46 of the Vienna Convention on the Law of Treaties, the Agreement apparently remained valid in international law, as only its enabling act was ruled invalid by the ECJ³⁹). While co-operation continued to a degree within the OECD framework, the situation with respect to the Agreement was rectified on 10 April 1995 by the Council of Ministers and the Commission, with the adoption of the text in substantially the same form as before, though this time with the written approval of the Council.

³⁸ Case C-327/91 *French Republic v Commission of the European Communities* [1994] 5 CMLR 517

³⁹ There is actually some debate as to whether the Agreement remained valid, as Art. 46 provides that such agreements are binding if concluded by an authority which is not manifestly incompetent. Riley feels that incompetence in this case was manifest, as evidenced by the arguments of the Advocate General and the Court in the case (See Riley, Alan J. *The Jellyfish Nailed? The Annulment of the EC/US Competition Co-operation Agreement* [1995] 3 ECLR 185, 194.) The Commission argues (*supra*, note 32) that the reference to the ECJ, and the three years of procedure involved in order to find the Commission incompetent, meant that it was not established as 'manifestly' so. While the former argument certainly carries more conviction, it has been superseded by the re-signing of the Agreement in 1995.

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1994-1995: An Embarrassing Interregnum

Between the delivery of the Court's judgment in *French Republic v Commission* on 9 August 1994 and the subsequent re-signing of the Agreement on 10 April 1995, behind the scenes negotiations were necessary in order to determine the fate of the Agreement. Although it was seemingly still valid internationally, various questions had to be determined due to the status of the Agreement in the EC. Did the experience already garnered by the functioning of the Agreement, and the problems encountered, necessitate fundamental changes to its text? Would the best course of action be to get the Council to add its signature to the document, leaving the text substantially unaltered? Or should the Agreement be simply consigned to the legal scrapheap?

On the day of judgment, 9 August 1994, the Commission claimed in a press release that it was 'convinced that the Agreement has so far proved beneficial in enhancing good co-operation between the relevant competition authorities on an international level. It will therefore take the appropriate steps to ensure that the formal requirements for a correct conclusion of the Agreement will be put in place as quickly as possible'.⁴⁰ Thus, on 12 October of the same year a Commission

⁴⁰ See Bulletin Quotidien Europe No.629 (n.s.) 10 August 1994

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communication was sent to the Council setting out the proposed changes to the Agreement, which were to be purely formal in nature, with no changes to the provisions of the Agreement itself. The reasoning underlying this was that 'the Commission considers that for the Council to sign the Agreement would in no way alter the scope of the commitments previously entered into. Although the Council may, by concluding an international agreement, derogate explicitly or implicitly from the regulations it has adopted, the Commission believes it is not appropriate to do so at this stage by amending the text of the Agreement'.⁴¹

It is not specified why the Commission 'believes it is not appropriate' to derogate from any of the regulations already adopted for, as will be seen, provisions such as Article 20 of Regulation 17, dealing with confidentiality, have given rise to much contention in this context. Of course, it could be suggested that, to a degree, political expediency necessitated the re-signing of the Agreement without significant changes. It would have been easier to re-sign rather than to enter into complicated negotiations potentially leading to significant changes. More fundamentally, the decision of *French Republic v Commission* was very embarrassing politically from a European perspective: despite the fact that the Agreement could still apparently function under the Vienna Convention, politically

⁴¹ Commission communication to the Council, *supra*, note 35, p.3

the *French Republic* case was crippling, spurring the necessity for a quick, easy solution. A re-signing without substantive changes avoided the possibility of having to negotiate the complicated, potentially treacherous, labyrinth of Member State policies and priorities in order to secure their assent.

Parliament debated the matter on 20 January 1995, and gave a favourable opinion in the light of the report made by the Committee on External Economic Relations.⁴² A similar outcome succeeded the European parliamentary debate of 17 March 1995.⁴³ The Council group on economic questions then decided, on 28 March 1995, to recommend to the Council 'to approve and conclude the Agreement in the form in which it was originally signed on 23 September 1991'.⁴⁴

By 10 April 1995, the Council had approved the Agreement.⁴⁵ An exchange of interpretative letters confirmed the primacy of Regulation 17 and made clear the conditions under which the Commission would inform the Member States on the implementation of the Agreement.⁴⁶ The Agreement was thus effectively re-signed in substantially the same form as before. A statement by the Commission

⁴² European Parliament Debates of the European Parliament No.4-456/244

⁴³ European Parliament Debates of the European Parliament No.4-460/217

⁴⁴ Competition Policy Newsletter, Spring 1995, Vol.1, no.4, p.54

⁴⁵ OJ L95/45 of 27 April 1995

⁴⁶ OJ 134/25 of 20 June 1995

was appended, however, in which it expressed its intention to 'notify the Member State or Member States whose interests are affected by information sent to, or received from, the US competition authorities'. Further, 'at the meetings of government competition specialists to be held twice a year, the Commission will notify all the Member States of the information exchanged under the Agreement'. Whether - despite political considerations - the measures taken were the best course of action from a legal perspective can be judged from an examination of the provisions of the Agreement.⁴⁷

The 1991 EC/US Competition Co-operation Agreement in Detail

It is proposed to conduct a detailed examination of the provisions of the 1991 Agreement. The purpose of this is:

- to examine the key provisions of the text, their wording, their failings - if any -, and potential improvements.
- in conducting such an examination, to consider how the Agreement represented a progression from the OECD recommendations and prior intergovernmental

⁴⁷ What should be borne in mind is the fact that the Council's signature at the foot of the re-signed Agreement means that the Agreement is now more than simply an administrative agreement, and may override EC legislation. Its potential scope is thus expanded.

bilateral agreements, with the emphasis in this respect on the doctrine of positive comity, the first time that such a principle was introduced into a competition laws co-operation agreement

- to consider whether the Agreement could, or indeed should, be enhanced and if so, whether this should be through deepening or deletion. In this regard, what must be considered is whether or not the Agreement went far enough and if not, in what respects it could be more ambitious.

It is proposed to examine the Agreement by concept rather than numerical section. In doing so, it is hoped to encompass the main provisions of the text, but also to broaden the reach of the discussion.

By its own terms, the purpose of the Agreement is to:

'promote co-operation and co-ordination and lessen the possibility or impact of differences between the Parties in the application of their competition laws',

the relevant laws being those contained in Article 1.⁴⁸ A former Associate Attorney General of the Antitrust Division of the US Department of Justice, who was involved in the negotiation of the Agreement, explained the Agreement thus: 'Instead of requiring a signatory to abdicate its antitrust enforcement, and for that matter, investigatory jurisdiction to the other, the EC/US Agreement attempts to provide a mechanism for each party to reinforce the other's competition policies while simultaneously effectuating the goal of keeping the markets of both sides open and efficient through sound antitrust enforcement, for the benefit of both US and EC consumers and industries'.⁴⁹ This reflects the words of the Commission, which claimed that the principal purpose of such an agreement '...is not so much to create a framework within which conflicts between the Commission...and the US Department of Justice and Federal Trade Commission can be resolved. Rather, it is to prevent such conflicts happening in the first place'.⁵⁰

The Agreement is designed to implement the general principles of sovereignty, comity (both negative and positive) and non-intervention in matters of domestic

⁴⁸ With respect to the EC, the Agreement covers Articles 85, 86, 89 and 90 EC, Regulation 4064/89 (the Merger Control Regulation), Articles 65 and 66 ECSC and their implementing regulations. In relation to US law, the Agreement covers the Sherman Act, the Wilson Tariff Act and Art. 1.2ii of the Federal Trade Commission Act.

⁴⁹ Rill, James F; Metallo, Virginia R. *The Next Step: Convergence of Procedure and Enforcement* (1992) Fordham Corporate Law Institute 15, 23

⁵⁰ Commission communication to the Council, *supra*, note 35, Annex 1, p.2

jurisdiction.⁵¹ It can be divided into five significant aspects: notification, exchange of information, co-ordination of action, co-operation / positive comity and conciliation / negative comity. These will be examined in turn. It should first be noted, however, that the order of the substantive provisions of the Agreement highlights the role of the Agreement as enhancing or facilitating the application of competition rules, as opposed to being an exercise in limit enforcement.

Notification

The notification procedure is contained in Article II of the Agreement, and is encapsulated in section 1:

'Each Party shall notify the other whenever its competition authorities become aware that their enforcement activities may affect important interests of the other Party.'

⁵¹ It should be borne in mind when considering such agreements, however, that they cannot take account of practices which, although anti-competitive, are nonetheless tolerated, such as, for example, liner conferences eg Code of Conduct for Liner Conferences Geneva, 6 April 1974. See also Regulation 4056/86 OJ 1986 L 378/14

Such a provision facilitates the application of the later provisions concerning co-operation and positive and negative comity, with notifications to be made, when possible, far enough in advance to allow the other Party's views to be taken into account. This represents a similar provision to those of the US-Australia Agreement 1982 (article 1), the 1984 US-Canada Memorandum of Understanding (sections 2 & 3) and the 1986 OECD Recommendation (section 2). There follows a list of enforcement activities covered by the Article II.1 provision. It should be noted that there is no definition of 'important interests' in the Article. The Commission communication to the Council of 12 October 1994 is instructive in this regard, however:

'[the concept 'important interests'] must be understood in terms of the purpose of the Agreement, which is the establishment of effective co-operation in the competition sphere. The interests referred to must therefore be important by reference to that objective.'⁵²

The main points of interest concerning the notification procedure which are worthy of consideration are the actions of private parties and the use of *amicus curiae* briefs.

⁵² Commission communication to the Council, *supra*, note 35, Annex 1, p.5

Private Parties / Amicus Curiae

The bringing of actions by private parties is particularly important in the US, a fact highlighted by the case of *Consolidated Gold Mines PLC v Minorco SA*, in which both the Department of Justice in the US and the Mergers and Monopolies Commission (MMC) in the UK had respectively closed their investigation and viewed the proposed merger as not operating against the public interest before the case came to court on a private suit.⁵³ The importance of the point is that the involvement of the courts rather than administrative authorities in matters of antitrust enforcement potentially leads to a situation whereby a private suit can effectively render otiose the results of intergovernmental negotiation and co-operation. Both the US-Australia Agreement (Article 6) and the US-Canada Understanding (section 11) took cognisance of this fact in allowing for the request of *amicus curiae* style approaches by the US government if so desired by the foreign government, so that the US government could present its views to the court in light of the negotiated position.⁵⁴ There is no such explicit provision in

⁵³ *Consolidated Gold Fields PLC v Minorco SA* 492 US 939 (1989)

⁵⁴ For example, Article 6 of the US-Australia Agreement reads:

'When it appears to the Government of Australia that private antitrust proceedings are pending in a United States court relating to conduct, or conduct pursuant to a policy of the Government of Australia, that has been the subject of notification and consultations under this Agreement, the Government of Australia may request the Government of the United States to participate in the litigation. The Government of the United States shall in the event of such request report to the court on the substance and outcome of the consultations.'

the EC/US Agreement. However, Art.II.5 does provide for a form of notification in the event of an *amicus curiae* intervention:

'Each Party shall also notify the other whenever its competition authorities intervene or otherwise participate in a regulatory or judicial proceeding that does not arise from its enforcement activities, if the issues addressed in the intervention or participation may affect the other Party's important interests.'

According to the 1994 Commission communication to the Council concerning co-operation, section 5

'...was inserted at the Commission's request in order to rectify the...imbalance, which derives from the wide-ranging scope of Articles 85 and 86 of the EC Treaty. Articles 85 and 86 apply to all sectors of the economy, whereas in the United States different sectors are supervised by separate regulatory bodies.'⁵⁵

⁵⁵ Commission communication to the Council, *supra*, note 35, Annex 1, p.3 Entities regulating industries which do not form part of the Agreement include the Federal Communications Commission, the Department of Transportation, the Federal Reserve Board and the Interstate Commerce Commission.

Unlike the Commission, the US authorities cannot use antitrust rules against what are known as 'regulated industries', although such an imbalance does not necessarily detract from such a competition laws co-operation agreement. The provision does, at the same time, place a substantial burden on the Commission as the latter body intervenes in most Art. 177EC references before the court.

'Vicarious' Amicus Curiae Interventions

There is no immediately apparent reason why, however, under Art.II.5, linked to the co-operation provisions of Art. IV.1, the authorities of each party would not be prepared to entertain a request for an *amicus curiae* intervention, similar to those of the US-Australia Agreement and the US-Canada Understanding, in which an *amicus curiae* is effectively brought vicariously, by the requested party. Art.IV.1 reads:

'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 reasonably available resources.'

The advantage of this is, of course, that it gets around any difficulties involving rules of procedure, specifically as to who is entitled to intervene before the relevant courts. Thus the EC would use the relevant US authority as its mouthpiece in an action before the US courts, and *vice versa*. The scale of such an operation would not be overwhelming if the co-operation of all involved was to be ensured: as already mentioned, in the aftermath of the signing into law of the Helms-Burton Act by the US, there were suggestions that EC companies would be required to compile a 'watch list' of lawsuits being filed against them by US companies, thus enabling the Commission to monitor such activity. Of course, as was evidenced in *In re Uranium Antitrust Litigation*⁵⁶, there is no guarantee that an intervention by the authorities will necessarily produce the desired results. The courts in that case refused to give any weight to balancing test arguments offered in *amicus curiae* briefs filed by the home governments of the defaulting firms. Indeed, the Court of Appeal went so far as to characterise the governments as acting as surrogates for the defaulting companies.

⁵⁶ *In re Uranium Antitrust Litigation* 617 F.2d 1248 (7th Cir. 1980). Fox describes the problem as follows: 'Judge Prentice Marshall, faced with American policy favouring discovery against alleged cartellists and with Canadian...policy to obstruct disclosure, found it 'simply impossible to judicially 'balance' these totally contradictory and mutually negating actions', and ordered protection of Canadian documents. An appellate court affirmed default judgments against foreign defendants who allegedly joined the uranium cartel abroad, despite the foreign governments' *amici* briefs asserting that the home countries had strong policies in favour of the cartel.' Fox, Eleanor *Extraterritoriality and Antitrust - Is 'Reasonableness' the Answer?* (1986) Fordham Corporate Law Institute 49, 58

Amicus curiae interventions are, of course, a step beyond what the Agreement seeks to achieve. It is an administrative agreement and, as such, is not concerned with actual judicial proceedings. Rather, it attempts to iron out differences and facilitate investigations before a case is brought to court. There appears to be little way that a private party can be subjected to such a competition co-operation agreement. Nonetheless, the importance of *amicus curiae* provisions stems from the fact that their use can potentially act as a means of dissuading a court from overriding the provisions of a co-operation agreement in certain situations, in the sense of ignoring a party's views on a given matter.

Information Sharing and Exchange

At first blush, the provision dealing with exchange of information, Article III, incorporating a system of biennial meetings between the signatory parties, appears unexceptional, and indeed is a provision common to all the prior bilateral agreements, for 'antitrust enforcement is a very fact-intensive exercise'.⁵⁷ The

⁵⁷ Bingaman, *supra*, note 21

concept of information sharing and exchange moves a step beyond simple notification as, according to Art.III.1:

'The Parties agree that it is in their common interest to share information that will (a) facilitate effective application of their respective competition laws, or (b) promote better understanding by them of economic conditions and theories relevant to their competition authorities' enforcement activities and interventions...'

The benefits of such a provision were evident in the *Shell* case, in which an explanation by Commission staff of an EC decision assisted the US antitrust authorities in framing a remedy which would not conflict with that prescribed by the EC itself.⁵⁸

Two comments need to be made, however. The first is relatively simple, in that it is a call for particular infringements to be cited in requesting information; if this is not done, there is a considerable risk that 'fishing expeditions' will occur. The second point concerns the important issue of confidentiality.

⁵⁸ *Shell/Montecatini* Case IV/M.269 OJ 1994 C8/4 2 R-38 See Stark, Roscoe B. *New Commission/New Merger Policies* FTC Reports 4th Annual Symposium on EU Mergers and Joint Ventures Brussels 17 March 1995, p.13

Confidentiality

The Article VIII provision on confidentiality overarches the rest of the Agreement. Under its terms, in section 1:

'...neither Party is required to provide information to the other Party if disclosure of that information to the other Party (a) is prohibited by the law of the Party in possession of the information, or (b) would be incompatible with important interests of the Party possessing the information.'

It is Art.VIII.1(a), as laid out above, which stimulates discussion. The relevant law in an EC context is Article 20 of Regulation 17. As observed by Advocate General Tesauro in *French Republic v Commission*, Article 20 imposes a dual obligation on the Commission to ensure that information acquired by it is covered by the obligation of professional secrecy and may furthermore only be used for the purpose of the relevant request or investigation.⁵⁹ The relevant provisions of Article 20 of Regulation 17 read:

⁵⁹ *French Republic v Commission*, *supra*, note 38, para.42

'20(1) Information acquired as a result of the application of Articles 11, 12, 13 and 14 shall be used only for the purpose of the relevant request or investigation.

20(2) Without prejudice to the provisions of Articles 19 and 21 the Commission and the competent authorities of the Member States, their officials and other servants shall not disclose information acquired by them as a result of the application of this Regulation and of the kind covered by the obligation of professional secrecy.'

This being the case, much information acquired by the Commission cannot be passed on to the US authorities. Likewise, the US authorities are subject to similar restrictions.⁶⁰ The Advocate General went so far as to suggest that Article IX, which safeguards the position of Regulation 17⁶¹, if complied with 'would lead to the non-application of the Agreement as far as the major provisions are concerned, ultimately emptying it of the whole of its substance'.⁶²

⁶⁰ The relevant US law in this regard is the Anti-trust Civil Process Act (15 USC 46(f)), the Federal Trade Commission Act (15 USC 57 b-2) and the Hart-Scott-Rodino Anti-trust Improvements Act (15 USC 7A(h))

⁶¹ The Article IX provision on existing laws states that:

'Nothing in this Agreement shall be interpreted in a manner inconsistent with the existing laws, or as requiring any change in the laws, of the United States of America or the European Communities or of their respective states or Member States.'

⁶² From his preceding comments in paragraph 42 of his opinion, it appears that when talking of 'major provisions', Articles II, III and V were envisaged by the Advocate General.

That Article IX effectively duplicates Article VIII by default is not a confirmation of the importance of confidentiality. Rather it is the result of the fact that the original EC signatory, the Commission, was not empowered to derogate from the existing regulations, as evidenced by a

Before examining how valid the statement by the Advocate General is, however, the importance of the issue of confidentiality must be discussed. One of the major concerns underlying the debate in relation to the issue of confidentiality is that of sanctions (though admittedly this is more closely related to actual enforcement activities). Exchanges of information, particularly confidential information, could lead to a situation whereby US criminal sanctions could be imposed on an EC enterprise, or the same enterprise be held liable for triple damages, a sanction referred to as the 'rogue elephant' of US antitrust law⁶³. Thus the confidentiality provision was inserted presumably to protect enterprises, particularly those of EC origin, from such sanctions. This is a slightly misleading argument, however, for it must again be stressed that the EC/US Agreement is an administrative one. Such information as would be transferred would be used in antitrust investigations, and as such, would not inevitably lead to a prosecution, conviction and fines. It is important to separate what is purely an administrative procedure from the different question of the legitimacy, in EC eyes, of US judicial sanctions.

declaration to this effect in the 1994 Commission communication to the Council: *supra*, note 35, annex 1, p.6

⁶³ *per Rosenthal, D; Knighton, W National Laws and International Commerce: the Problem of Extraterritoriality* London, 1982, p.87

There is a more fundamental concern, of course, in that businesses have an interest in preventing what they perceive to be confidential information getting into the hands of their competitors. This is a not uncommon theme in EC legislation: witness Art.17.2 and Art.20.2 of the Merger Control Regulation.⁶⁴

While the confidentiality of information represents a very strong interest in a national sense, it is counterbalanced, it is contended, by an equally strong necessity for confidential information to be passed on internationally if the Agreement is to be truly effective. It is submitted that it is very difficult to render assistance and give advice if such actions are tempered by confidentiality considerations. How could the provisions of Regulation 17 be reconciled, if at all, with the ability to pass on information? Or does the safeguarding of the Regulation by Article IX of the Agreement really leach the latter of all substance?

In the aftermath of the judgment in *French Republic v Commission*, the Commission claimed that Agreement was mainly of 'symbolic value' and that it

⁶⁴ Article 17.2 reads:

Without prejudice to Arts.4(3), 18 and 20, the Commission and the competent authorities of the Member States, their officials and other servants shall not disclose information they have acquired through the application of this Regulation of the kind covered by the obligation of professional secrecy..'

Article 20.2 reads:

'The publication...shall have regard to the legitimate interest of undertakings in the protection of their business secrets.'

[the Commission] was restricted by the Regulation [Regulation 17] adopted by the Council⁶⁵. This of course is still the case notwithstanding the Council's signature at the foot of the Agreement as of 1995, due to Article IX thereof. In the exchange of interpretative letters prior to the re-signing of Agreement, the impact of Regulation 17 on the Agreement was set out in an interpretative statement:

'In the light of Article IX of the Agreement, Article VIII(1) should be understood to mean that the information covered by the provisions of Article 20 of Council Regulation 17/62 or by equivalent provisions in other regulations in the field of competition may not under any circumstances be communicated by the Commission to the US authorities, save with the express agreement of the source concerned.'⁶⁶

Similarly, the information referred to in Articles II(6) and III of the Agreement may not include information covered by Article 20 of Regulation 17/62 nor by equivalent provisions in other regulations in the field of competition, save with the express agreement of the source concerned.'

⁶⁵ Commission communication to the Council, *supra*, note 35, p.2

⁶⁶ Exchange of Interpretative Letters, *supra*, note 46

The implications of Regulation 17 with respect to the Agreement are obviously serious but, it is contended, not fatal. The Commission evidently appears satisfied that sufficient information will continue to be transferred. In the 1994 communication to the Council it claimed that the 'Commission frequently comes into possession of information which has not been acquired on the basis of Regulation No.17, and it may be that such information can usefully be exchanged with the US competition authorities'.⁶⁷ Furthermore, Advocate General Tesauro's statement that the Agreement is to be emptied of the whole of its substance is too broad. Certainly a lot of information will be withheld, both because it is confidential and because it is acquired in the course of specific investigations under Arts.11, 12, 13 and 14 of Regulation 17. However, there are other benefits to the Agreement: the *Shell* case being in point.⁶⁸ Indeed, the novel provision on negative comity should not be affected by the considerations relating to Regulation 17 as discussed, a fact which should not be overlooked.

At a more fundamental level, such agreements foster a sense of mutual understanding and friendliness, as exemplified by the comment in relation to the US-Australia Agreement that it 'brought about a sea change in our antitrust

⁶⁷ Commission communication to the Council, *supra*, note 35, Annex 1, p.5

⁶⁸ *Shell*, *supra*, note 58

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relations. In an intangible but unmistakable way our governments moved from an atmosphere of wariness over extraterritoriality issues to one of trust and co-operation in antitrust'.⁶⁹

Nevertheless, the Advocate General's comments are valid to a degree. There is the risk that the Agreement could be perceived to do little more than formalise extant arrangements. It is submitted that should the relevant authorities decide to conclude a second generation agreement, two courses of action are open in relation to the issue of confidential information:

1. The first is to leave Art.VIII untouched, coupled with a deletion of Article IX, thus maintaining confidentiality in situations other than those covered by the Agreement. The deletion of Article IX would not in itself resolve the conflict between Article VIII and Regulation 17, for the Agreement, taking the form of a Council Decision, would simply override Regulation 17.
2. The second is to redraft the Agreement, eliminating Art.VIII and replacing it with a provision allowing for the exchange of confidential information. As an act of Council, such a provision would override Regulation 17. In both cases, of

⁶⁹ Rill, James F. *International Antitrust Policy. A Justice Department Perspective.* (1991) Fordham Corporate Law Institute 29, 35-5

course, it would be legally precise to amend Article 20 of Regulation 17 appropriately as well.

If such an option were selected, what would have to be considered is whether Article 20 of Regulation 17 should be amended *in toto*, thus encompassing the relationship between the Commission and the Member States, or simply with respect to international relations, this being at the discretion of the relevant authorities. In either case, a clause would presumably have to be inserted in order to account for maintaining the confidentiality of information sent from the US authorities to their EC counterparts, should a reciprocal arrangement for the exchange of confidential information be agreed. Indeed, on the US side, the provisions of the International Antitrust Enforcement Assistance Act 1994 (IAEAA), allow for the negotiation and conclusion of agreements by the US through which confidential information could be shared, with assurances necessary in relation to maintaining the confidentiality of such information.⁷⁰ The IAEAA creates exceptions to the disclosure requirements in the Antitrust Civil Process Act and the Federal Trade Commission Act, and expressly allows the US agencies to offer reciprocal assistance in their anti-trust investigations. It is worth reciting the inbuilt safeguards, for they could prove useful as a model

⁷⁰ (1994) 67 ATRR 523

should, by the terms of a second generation agreement, it be decided that confidential information could be passed on. Such safeguards, incorporated in section 12, include:

(A) An assurance that the foreign antitrust authority will provide...assistance that is comparable in scope to the assistance the Attorney General and Commission provide under such agreement or such memorandum.

(B) An assurance that the foreign antitrust authority is subject to the laws and procedures that are adequate to maintain securely the confidentiality of antitrust evidence that may be received...and will give protection to antitrust evidence received under such section that is not less than the protection provided under the laws of the United States to such antitrust evidence.

(E) Terms and conditions that specifically require using, disclosing, or permitting the use or disclosure of, antitrust evidence received under such agreement or such memorandum only-

(i) for the purpose of administering or enforcing the foreign antitrust laws involved...

(F) An assurance that evidence received...will be returned...at the conclusion of the foreign investigation or proceeding with respect to which such evidence was so received.

(G) Terms and conditions that specifically provide that such agreement or such memorandum will be terminated if-

(i) the confidentiality required under such agreement or such memorandum is violated with respect to antitrust evidence, and

(ii) adequate action is not taken both to minimize any harm resulting from the violation and to ensure that the confidentiality required...is not violated again.'

If the US is prepared to take such a lead, there appears to be no reason why the EC should not follow suit. Indeed, a 1995 EC report by a group of experts recommended the elimination of obstacles relating to the rules of confidentiality applicable to exchanges of information.⁷¹

As already observed, the drafting of the Merger Control Regulation took account of the issue of confidential information and how to deal with it, through the insertion of Art.17.2 and Art.20.2. There is thus no reason to doubt the ability of the EC to be able to deal with the handling of confidential information. As presently exists in Art.VIII, however, some provision which allows for discretion

⁷¹ Report on Competition Policy: the New Trade Order: Strengthening International Co-operation and Rules 1995. Interestingly, in view of the discussion concerning the appropriate course of action in relation to Art.20 of Regulation 17 and whether to amend it or not, despite the guarantee of confidentiality by the Regulation, the report observes that 'the European Communities are entitled nonetheless to conclude an international agreement which...derogates from the internal rules they have laid down'. Report, pp.19-20

on the part of the relevant authorities would be important, as there is always the possibility that certain information could prove too sensitive to pass on. Indeed, somewhat ironically, were the confidentiality clause to be removed in the interests of co-operation, the EC authorities might find firms less willing to yield information voluntarily, if the firm concerned perceived that yielding confidential information would result in its potentially being subjected to even harsher US penalties, should those authorities decide to prosecute the EC firm. Dawn raids provide a solution to a degree of unwillingness to yield information but are, it is submitted, unsatisfactory in the long run given the attendant disruption and inevitable suspicion attached to such actions. Perhaps some form of independent bilateral body could be established to handle the passing on of confidential information. It could be made up of independent experts who would adjudicate on whether the information was of such a sensitive nature so as to deem it worthy of withholding or otherwise. Two considerations mitigate against this, however. The first is that the Agreement is ultimately about discretionary co-operation. Independent arbitration panels would thus remove some of the attraction of the Agreement. Secondly, adding another administrative/quasi-judicial layer to an already burgeoning structure seems less than desirable. Indeed, there is an argument that judicial protection adequately extends to the protection of

confidential information⁷², thus obviating the need for an independent board, though of course the latter would have the attraction of being bilateral. It should also be recognised, of course, that competition can be over-regulated, leading to its suffocation, a situation which is presumably not sought after by the Agreement.

As an alternative, it has been suggested that US officials could be 'pointed in the right direction' by the Commission as a result of information received but this, it is submitted, is unsatisfactory.⁷³ In the *Spanish Banks* case, it was held that information obtained by the Commission from notifications and requests for negative clearance using Form A/B, and from requests for information under Regulation 17, Art.11, may not be used by national authorities in order to prove infringements of EC law or national law, though such information may be used to justify the commencement of proceedings.⁷⁴ This does not properly address the issue of confidentiality, however. Certainly the US could be given 'clues', in much the same way that the Member States have their compasses set for them by the Commission. However, unlike the relationship between the Commission and

⁷² See, for example, cases such as *Case 374/87 Orkem v Commission* [1989] ECR 3283; *Cases 46/87, 227/88 Hoechst v Commission* [1989] ECR 2859, in which the Court read into Regulation 17 rights for undertakings which were not explicitly granted.

⁷³ *Riley, supra*, note 39, p.195

⁷⁴ *Case C-67/91 Direccion General de la Defensa de la Competencia v AEPB* 16 July 1992 See *Shaw, Josephine The Use of Information in Competition Proceedings* (1993) 18 ELR 154

the Member States which the *Spanish Banks* case discussed, such promptings could not be predicated on a precondition of respecting the philosophy of EC antitrust rules. The US authorities would not be bound to respect the Court's distinction as to the use of information in proving infringements and commencing proceedings. It would thus make more sense to insert a clause into the Agreement explicitly allowing for the transfer of confidential information, while also spelling out the necessary safeguards.

One other solution furnished was that evidenced in the *Microsoft* investigation⁷⁵, in which, in order to save time and cost, the eponymous company agreed to a trans-Atlantic exchange of confidential information, leading to the negotiation of a part settlement in relation to the company's licensing practices for its MS-DOS and Windows software. The 1994 Report on Competition Policy observes that in *Microsoft*, 'there was real collaboration between competition authorities, including the exchange of confidential information on the basis of specific authorisation given by the firm'.⁷⁶ Of course, it is unlikely that every company would be so disposed. *Microsoft*, it is contended, represented an unusual investigation, in that the global nature of the firm and its pre-eminent position on the world markets

⁷⁵ Settlement dated 15 July 1994 See Commission Press Release IP/94/653

⁷⁶ XXIVth Report on Competition Policy (1994), para.22

meant that a speedy and efficient resolution of the investigation was decidedly in its interests.⁷⁷ A firm with a less extensive grip on world markets may not prove to be as enthusiastic in this respect. Subsequent developments in the investigation may also dissuade firms from adopting such a course of action: with the Commission already having settled the matter with Microsoft, the US District Court Judge at first refused to accept the consent decree which had been entered by the Department of Justice (though this was later to be overturned).⁷⁸

As already suggested, if the parties are genuine about co-operation, the better view is that Article VIII should have been deleted and replaced before the re-signing of the Agreement in 1995.

The other issue relating to the exchange of information and confidentiality is that of what happens to confidential information once it has been provided to the other authorities. There is some concern that information provided in confidence could nevertheless escape into the public domain, particularly as such information may form a key part of the regulator's assessment, which will obviously form part of

⁷⁷ According to Assistant Attorney General Anne Bingaman, Microsoft agreed to waive confidentiality restrictions because 'it judged its own commercial interests as best served by a single, world-wide set of licensing rules - underscoring the importance to business of meaningful co-operation by international enforcement agencies'. Bingaman, *supra*, note 21

⁷⁸ (1995) 69 ATRR 268

the final decision.⁷⁹ There is also an increased risk in relation to information transmitted to the US, in that more than one antitrust authority will be dealing with such information. However, at the risk of repetition, if an agreement is really about co-operation, confidential information could and should be exchangeable. If it is felt - particularly in the EC due to the prospect of US criminal sanctions - that this is unduly harsh and unnecessary, a form of appeal to an independent body could be established. The firm concerned could be invited to explain why such information should not be transmitted to the investigating US authorities. If the substantial reason is a fear of what are perceived as disproportionately harsh penalties, then perhaps the US authorities could request their EC counterparts to initiate an investigation under the positive comity provision of Art.V of the Agreement. Indeed, the development of such a proviso circumnavigates many of the problems encountered in relation to confidentiality. Before considering positive comity, however, the concept of co-operation and co-ordination will be examined, as it precedes the positive comity provision in the scheme of the Agreement.

⁷⁹ This is notwithstanding the fact that information transmitted in confidence may sometimes act simply as a springboard from which to launch further investigations, leading to the discovery and use by the recipient authority of other sensitive information.

Co-ordination in Enforcement Activities

Article IV concerns co-operation and co-ordination in enforcement activities.

Section 1 is a simple statement of principle, taking the following form:

'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.'

Allocation of Jurisdiction / 'Who Goes First'

Section 2, a novel concept in bilateral competition agreements, is of more interest:

'In cases where both Parties have an interest in pursuing enforcement activities with regard to related situations, they may agree that it is in their mutual interest to co-ordinate their enforcement activities.'

The 'who goes first' procedure is a diluted version of Leon Brittan's call in the course of a speech in 1990 for an accommodation whereby 'whenever possible,

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only one party should exercise jurisdiction over the same set of facts'⁸⁰, in other words, an allocation of jurisdiction clause. Put another way, 'negotiations between two states interested in a transboundary transaction are most likely to lead to the optimal allocation of property rights'.⁸¹ However, the analysis continues with the observation that 'Negotiations between states seem to be too cumbersome and, apparently, too slow and costly to warrant intervention in specific cases. At best, states assist each other in the production of documents or evidence in pursuance of existing memoranda of understanding or treaties for mutual assistance in criminal matters. In these instances, however, the assisting state does not dispute the requesting state's jurisdiction'.

To this concept of assistance can now be added the idea of a 'who goes first' procedure. The rationale underlying this provision was explained by the then Competition Commissioner as follows: 'this provision is sufficiently flexible to allow the parties to co-ordinate their actions by one party assuming the lead responsibility for a specific enforcement activity of common interest of both parties. Through this procedure, the parties would co-ordinate their investigative efforts so as to gain the maximum benefits of their enforcement powers, and avoid

⁸⁰ Brittan, *supra*, note 20

⁸¹ Schuster, Gunnar *Extraterritoriality of Securities Laws: An Economic Analysis of Jurisdictional Conflicts* (1994) 26 *Law and Policy in International Business* 165, 191

duplication of effort'.⁸² The article itself allows for a degree of flexibility on the part of the enforcement authorities, with terms such as 'may agree...to co-ordinate', and by providing a list of factors which shall be taken into account. Furthermore, paragraph 4 of Art.IV states specifically that the authorities may

'limit or terminate their participation in a co-ordinated arrangement and pursue their enforcement activities independently'.

Other than in monetary and temporal terms, the primary benefits of Article IV are presumably to be found in the field of mergers, although the nature of the time constraints involved means that should there be scope to use such a clause, it will effectively become an 'EC goes first' clause⁸³: by the terms of Regulation 4064/89, specifically Articles 9 and 10, the Commission must take a decision within specific time frames.

As the law stands, Art.IV.1 appears perfectly acceptable in providing for assistance with respect to the enforcement activities of the other party. What must be queried, however, is what the situation would be were, for example, the ECJ to

⁸² Commission Press Release IP(91)848, 23 September 1991

⁸³ Haagsma, *supra*, note 19, p.237

pull back from its apparently qualified effects doctrine of *Woodpulp*, the US courts to consolidate the apparent retrenchment evidenced in *Hartford Fire Insurance*. In such a situation, the Commission could find itself co-operating by default to a large degree with the US in an effort to see EC firms prosecuted, with little corresponding assistance in the other direction due to the subsequent decrease in the number of companies liable to be investigated, remaining untouched by the extraterritorial reach of the law concerned. While it is not suggested that co-operation should only take place on a strictly reciprocal basis, there would doubtless be some resentment in the EC were such a situation to arise. Such debates could well be overtaken if the novel proposal of the concept of positive comity realises its full potential.

Co-operation

'The Parties note that anti-competitive activities may occur within the territory of one party that, in addition to violating that Party's competition laws, adversely affect important interests of the other Party. The Parties agree that it is in both their interests to address anti-competitive activities of this nature.'

The 1991 Agreement introduces the principle of comity thus, in Article V.1. Indeed, the Agreement is the first example of the insertion of comity into such a text. That this occurred was a result of the nature of the Agreement being proactive rather than reactive. The principle of comity has been described by Brownlie as 'a species of accommodation not unrelated to morality but to be distinguished from it nevertheless. Neighbourliness, mutual respect, and the friendly waiver of technicalities are involved...'.⁸⁴ The development of comity in a judicial environment has already been examined. What should be noted is that the concept formerly known as comity, as exercised in cases such as *Mannington Mills*, has now been re-labelled 'negative comity' in deference to the new principle of positive comity detailed in Art.V of the 1991 Agreement.

Positive Comity

'Positive comity deals with the situation where one government, in deference to the interests of the other, might affirmatively undertake enforcement action it

⁸⁴ Brownlie, Ian *Principles of International Law* 4th.ed. Oxford 1990, p.29 For further discussion as to the role of comity, including a debate as to whether it can be considered a principle of international law, see, *inter alia*, Van Gerven, Walter *EC Jurisdiction in Antitrust Matters: The Wood Pulp Judgment* (1989) Fordham Corporate Law Institute 451, 478 and Meessen, KM *Conflicts of Jurisdiction Under the New Restatement* 50 Law & Contemporary Problems 47 (1987)

might not otherwise have taken.⁸⁵ Thus if country A feels that an anti-competitive activity in country B is affecting A's interests, it may request country B to apply its own, *i.e.* B's, laws in relation to such activity. There is no extraterritorial application of laws involved, even though the eventual results might approximate. While a form of positive comity - somewhat less formal in structure - existed in the 1986 OECD Recommendation, the 1991 Agreement is the first bilateral Agreement on competition co-operation to incorporate such a provision.⁸⁶ What must be considered in relation to positive comity is whether the host government would be prepared to assist the requesting government by initiating proceedings, or be perceived to be responding to, and being motivated by, foreign pressure, a concern expressed by, amongst others, Atwood. However, the important point to note about positive comity in relation to the EC/US Agreement is that it applies only where the anti-competitive conduct in question violates the antitrust laws of the host country as well as affecting the interests of

⁸⁵ Atwood, James *Positive Comity-is it a Positive Step?* (1992) Fordham Corporate Law Institute 79, 83

⁸⁶ The concept of positive comity was also included in the Uruguay round of the GATT. It has now also found its way into the 1995 US-Canada Agreement, Art.V.2, the wording of which is identical to that of the EC/US Agreement:

'If a Party believes that anticompetitive activities carried out in the territory of the other Party adversely affect its important interests, the first Party may request that the other Party's competition authorities initiate appropriate enforcement activities. The request shall be as specific as possible about the nature of the anticompetitive activities and their effects on the interests of the Party, and shall include an offer of such further information and other co-operation as the requesting Party's competition authorities are able to provide.'

The other three sections, concerning the mechanics of the operation, also bear a striking resemblance to the comparable provisions of the 1991 Agreement.

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the requesting government: no government is being asked to sacrifice its companies and interests at the altar of the Agreement simply because of a request by a foreign government. Ultimately these same companies and interests are breaking the laws of their own host countries, thus the home authorities should have an interest in enforcing their own laws, or at least considering the matter, whether or not they are already aware of such violations. This overcomes the difficulties experienced in relation to negative comity that 'laws are written and enforced to protect national interests'.⁸⁷

There is a further argument that the host authorities may not pursue the matter as vigorously as the requesting country would wish, either at the investigatory or, if it comes to it, prosecutory stage. Alternatively, it may be felt that the host authority has accepted a compromise on relief which satisfies it but is not to the liking of the requesting authority for, ultimately, each government will seek to further its own agenda, such as the integration of the single market in the EC.⁸⁸ However, the requesting authority may still initiate proceedings itself, the consequence of which could be the extraterritorial application of that authority's

⁸⁷ Atwood, *supra*, note 85, p.87

⁸⁸ *ibid.*, p.89

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laws. It is precisely to avoid situations like this that the Agreement was drafted, and the host authority will be well aware of this in taking any action or otherwise.

Taking the example of a cartel involving both EC and US concerns, the Commission could ask the US authorities to investigate the matter under US law. Contemporaneously, the Commission could suspend its own investigative activities in relation to the cartel, exercising the Art.IV provision on co-operation and co-ordination, to await the outcome of the US investigation. Of course, the US authorities could come to the conclusion that they should apply their laws extraterritorially due to the actions of the other concerns in the cartel, which could impact upon EC concerns, thus undoing the benefits of the Agreement. Indeed, should the positive comity provision be revised in any future agreements, it would be worth considering the adoption of a form of 'selective' positive comity *i.e.* in the situation described above, the US authorities would confine their enforcement activities to the US concern, leaving the EC authorities to investigate the firms under their jurisdiction. Such a procedure would of course be subject to the perils of, *inter alia*, deciding how one firm in a cartel could be investigated without condemning the others, and how remedies could be allocated in such a case. Such activity would require much greater degrees of co-ordination than exist at present, possibly with a separation of investigatory and punitive powers.

As already alluded to, however, the real issue at stake is whether positive comity could be used to supplant extraterritorial application of competition laws. While such a development would limit the range and freedom provided by an effects doctrine, in that it would depend on a violation of the laws of the host country, it would achieve what the *Timberlane*-style rule of reason has sought to: diminishing the risks of international hostility and promoting co-operation, two of the stated aims of the 1991 Co-operation Agreement. The other advantage of positive comity is that it would circumnavigate the problems raised and examined in relation to confidentiality, in that confidential information would not have to traverse the Atlantic.

The reluctance to embrace positive comity as a panacea to the problems created by the extraterritorial application of competition laws stems from certain disadvantages: from the perspective of the US, the application of a system of positive comity is tempered somewhat by the necessity of an effect on trade between Member States, *per* Art.85(1)EC. The anticompetitive activity thus has to affect trade in a more specific way: a simple effect on the overall trade figures and patterns of the EC is apparently insufficient; rather, a more specific instance of distortion of trade must be cited for the ECJ/CFI to be satisfied as to the

application of Article 85.1EC⁸⁹. This obviously makes it slightly more difficult to bring a prosecution compared to the prevailing situation in the US. Again, while this is not to suggest that strict reciprocity pervades the Agreement, realism dictates that such a situation could be perceived as politically unacceptable. Of course, the discretionary element of Art.V.4 takes account of this:

'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 anti-competitive activities, or precludes the notifying Party from undertaking enforcement activities with respect to such anti-competitive activities.'⁹⁰

However, further problems exist. It appears that - *prima facie* at least - pure export cartels in the EC, for example, could not be brought under the provisions of Art.V, as they would not be violating EC laws on the basis that there would be

⁸⁹ See, for example, *Papiers peints de Belgique v Commission* [1975] ECR 1491. Therein, the Court stated that: 'With regard to the finding in the decision of the territorial protection arising from the restrictive practice and the closing off of the national market, the decision does not clearly set forth the grounds on which the Commission found them to exist, the mere reference to an earlier case constituting insufficient explanation'.

⁹⁰ Such a provision, which effectively tempers the positive comity provision, was made necessary by clauses such as Art.2.3 of Regulation 4064/89, which provides that:

'3. A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or a substantial part of it shall be declared incompatible with the common market.'

no effect on trade between Member States. Likewise, export activity permitted under US law would not be covered.⁹¹ Whether the abolition of such legislation would be entertained in the spirit of co-operation is debatable. It would certainly remedy one of the defects inherent in the positive comity provision. Such a suggestion is not totally spurious, for such commitments have already been undertaken in UN documents such as, for example, the UN Restrictive Business Practices Code.⁹² Other problems which need to be tackled before positive comity could effectively be used to supplant extraterritorial application of laws include the role of private party actions in the US. Should such an action be initiated, the court choosing to apply the relevant competition laws extraterritorially, the EC authorities are powerless to avoid such a conclusion, apart from making an *amicus curiae* representation, or requesting the US authorities to intervene, during the judicial proceedings. In the same way, should the CFI or ECJ interpret EC law as being applicable to a mixed-nationality cartel involving non-EC concerns - as indeed was the case in *Woodpulp* - US companies could be adversely affected.

⁹¹ e.g. under the US Webb Pomerene Export Trade Act 1918 (15 USC 61-65) and the Export Trading Company Act 1982 (Pub L. 97-290 96 Stat.1234, immunity is granted from US antitrust laws to export associations insofar as their activities affect only foreign markets.

⁹² General Assembly Resolution 35/63 (5 December 1980) adopting the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (1980) 19 ILM 813. It should be noted in passing, however, that the reverse was effectively implemented by Article II, s.6(b)(4) of the US-Australia Agreement, wherein the US foreign sovereign compulsion defence was extended to authorisation or other official collusion, thus protecting Australian export cartels (though again, the reactionary nature of that particular agreement should be emphasised).

Thus, for positive comity to supplant extraterritorial effect, it is contended that amendments would have to be made to the relevant laws of the EC and the US, effectively preventing the extraterritorial application of their competition laws, to be replaced by positive comity. In the case of the EC, this could either be done by an amendment to the Treaty or, less drastically, by the promulgation of a regulation or directive under Art.87EC. Likewise, Congress in the US would have to approve an amendment to the relevant acts listed in Article 1 of the 1991 Agreement. While such considerations are chiefly political, a lawyer's pragmatism would dictate that they are not realistic options, at least not in the foreseeable future. It is submitted that it is unrealistic at present to expect positive comity to displace extraterritorial application of competition laws. It may certainly assist in diminishing its effect, and can be used to circumnavigate some of the problems related to confidentiality should the EC in particular not be prepared to pass on confidential information to the US authorities, in that under the provision, it would be the US authorities themselves investigating the firms concerned. Of course at present, the ability of the US to request action under the positive comity provision is hindered by the lack of information which it can receive about the relevant party's activities due to Article 20 of Regulation 17; this is important in that a degree of co-ordination is necessary under Art.V.2 and 3 in

order to take action: the notification of the requesting party is to be 'as specific as possible about the nature of the anticompetitive activities' (Art.V.2), yet the provisions of Regulation 17 could mean that the potential notifying party either has no information or very little thereof which it can impart. Positive comity is certainly a worthwhile introduction in the domain of bilateral agreements, but is by no means a solution in itself to the problems of extraterritorial application of competition laws.

Conciliation / Avoidance of Conflicts

Negative Comity

The notions of conciliation / avoidance of conflicts is perhaps better understood as negative comity, whereby a party, in enforcing its own law, takes account of the interests of another party. Again, this is the first time that negative comity has been explicitly set out in a bilateral competition laws co-operation agreement, although in Article 6 of the US-Canada Memorandum of Understanding there is a reference to the 'important interests of each Party'. The relevant article of the EC/US Agreement is Art.VI, a section of which reads:

'...Each Party shall consider important interests of the other Party in decisions as to whether or not to initiate an investigation or proceeding, the scope of an investigation or proceeding, the nature of the remedies or penalties sought, and in other ways, as appropriate.'

There follows another novel development in the form of a list of six factors which should be taken account of 'in considering one another's important interests in the course of their enforcement activities'. The concept of negative comity could be said to pervade generic co-operation agreements: they are a formal manifestation of, to again quote Brownlie, 'neighbourliness, mutual respect, and the friendly waiver of technicalities...'.⁹³ The insertion of a provision on negative comity is an administrative reflection of what the courts sought to achieve, as already noted, in cases such as *Timberlane* and *Mannington Mills*. Indeed, this trend is carried through in the case of the US in the form of the joint Antitrust Enforcement Guidelines for International Operations, 1995, wherein the agencies list the relevant factors which they would use in a comity analysis.⁹⁴ In indicating how they intend to apply the *Hartford Fire Insurance* decision⁹⁵, the Department of

⁹³ Brownlie, *supra*, note 84

⁹⁴ (1995) 68 ATRR 462 and S-1. See Chapter 1, note 59

⁹⁵ *Hartford Fire Insurance*, *supra*, note 30

Justice and Federal Trade Commission state that in deciding whether or not to take proceedings against foreign conduct, they would make a comity analysis and, in so doing, would consider the role played by a country in dictating or encouraging various forms of conduct. Relevant factors are then listed which could be used in a comity analysis. However, the reluctance of the Guidelines to spell out exactly how the provisions would be used detracts somewhat from their immediate usefulness.

The advantages and disadvantages inherent in a principle of negative comity are both encompassed by its discretionary nature, as expressed in the Agreement: '...to the extent compatible with its own important interests...'. As such, it is acceptable to the signatory parties in that it does not commit them to respecting each other's views and entertaining each other's requests at all times. This is of course the nature of negative comity, but it does create the impression of a form of variable, unpredictable co-operation. Indeed, it is recognised that in practice, despite the application of negative comity, 'home town' decisions often prevail.⁹⁶ Of course, negative comity should not be readily dismissed in that the sentiments of mutual respect and co-operation which underline it pervade the whole Agreement.

⁹⁶ Cutler, Lloyd N. *Restrictive Business Practices or Antitrust: 'Effects' Doctrine and Territorial Approach* in Olmstead, Cecil J. (ed.) *Extra-territorial Application of Laws and Responses Thereto* Oxford 1994, p 73.

Other provisions

It should be noted that Article VII provides for a consultation procedure which is in itself unremarkable, and indeed hardly looks equipped to deal with serious disputes by providing that:

'1. Each Party agrees to consult promptly with the other Party in response to a request by the other Party for consultations regarding any matter related to this Agreement and to attempt to conclude consultations expeditiously with a view to reaching mutually satisfactory conclusions.'

The noteworthiness of this clause derives from the fact that it is the provision which appears to have taken the place of the arbitration clause hinted at by Leon Brittan in his 1990 speech. It may well be fully tested by the EC's negative reaction to the Helms-Burton and d'Amato legislation in the US, as indeed to a degree will the functioning of the entire Agreement if bellicose talk of a return to the world of blocking and clawbacks is to be believed⁹⁷.

⁹⁷ The Times, 31 July 1996, p.9

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 3, 1862. It is a very important document, as it contains the President's views on the state of the Union and the progress of the war.

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3. The third part of the document is a report from the Secretary of the Navy, dated January 15, 1862. It contains a detailed account of the naval operations of the Navy during the year 1861.

4. The fourth part of the document is a report from the Secretary of the Interior, dated January 20, 1862. It contains a detailed account of the operations of the Department during the year 1861.

5. The fifth part of the document is a report from the Secretary of the Treasury, dated January 25, 1862. It contains a detailed account of the operations of the Department during the year 1861.

6. The sixth part of the document is a report from the Secretary of the War, dated January 30, 1862. It contains a detailed account of the operations of the Department during the year 1861.

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8. The eighth part of the document is a report from the Secretary of the Interior, dated February 10, 1862. It contains a detailed account of the operations of the Department during the year 1861.

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11. The eleventh part of the document is a report from the Secretary of the Navy, dated February 25, 1862. It contains a detailed account of the operations of the Department during the year 1861.

12. The twelfth part of the document is a report from the Secretary of the Interior, dated March 1, 1862. It contains a detailed account of the operations of the Department during the year 1861.

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14. The fourteenth part of the document is a report from the Secretary of the War, dated March 10, 1862. It contains a detailed account of the operations of the Department during the year 1861.

15. The fifteenth part of the document is a report from the Secretary of the Navy, dated March 15, 1862. It contains a detailed account of the operations of the Department during the year 1861.

As has been examined, it is not only the Article VII consultation procedure which is in need of revision. It is proposed in the following chapter to summarise the suggestions for the development and improvement of the EC/US Agreement, as already laid out.

CHAPTER 3

Summary

The development of a plurilateral agreement, as called for by the independent group of experts in their report¹, does not preclude the development of present bilateral accords. Indeed, the group specifically lists as a priority a 'second generation' agreement between the EC and the US. What then are the areas to be targeted in such an operation?

The most controversial aspect of the Agreement at present appears to be the Art. VIII provision on confidentiality, a provision which pervades and affects the whole Agreement. The better view would be that an agreement such as the one at hand is not fully effective unless there is a much greater degree of transfer of confidential information. Again, while it is not wholly irrelevant, the issue of US criminal sanctions is not one with which such co-operation agreements are directly concerned. Indeed, it could be argued that the criminalization at EC level of the illicit actions of large steel and cement cartels, for example, would be a positive development. The US, under the terms of the IAEAA 1994, is prepared to negotiate an agreement under which confidential information could be shared, a point reinforced by the US Transatlantic Agenda of 3 December 1995. There is no apparent reason why

¹ Report on Competition Policy: the New Trade Order: Strengthening International Co-operation and Rules 1995, pp. 26-27

the EC is not in a position to reciprocate in principle, once the technical difficulties concerning Regulation 17 have been negotiated, by an amendment to the Agreement as suggested, possibly coupled with an amendment to Regulation 17 itself. Safeguards could be built in similar to those of the IAEA 1994. As suggested, if these are deemed insufficient, an independent bilateral body could be called upon to adjudicate in contentious cases, prior to the intended transfer of such information. Alternatively, the extant degree of protection afforded by the judiciary could be deemed adequate.

The issue of the transfer of confidential information becomes less taxing if linked to the novel feature of positive comity. The latter mechanism does have its deficiencies, chief amongst which is that it appears not to encompass export cartels - though the abolition of legislation protecting these is not wholly unrealistic. Furthermore, it cannot account for the actions of private parties, and detracts somewhat from the degree of freedom and choice furnished by a co-operation agreement. Indeed, to be fully effective, any positive comity provision would have to be developed in tandem with an explicit block on the extraterritorial effect of laws, something which appears hard to countenance, particularly given the increasing interdependence of world economies and trade. The benefits of at least an increased use of the positive comity provision is that ultimately each government would be investigating its own

businesses and industries, and confidential information acquired in the course of such investigations would not have to undergo, in such a case, a transatlantic voyage.

Until such time as a more global positive comity provision is developed, however, reliance must still be placed on provisions such as the Art.IV co-ordination procedure, effectively a 'who goes first' procedure, a scaled down version of Leon Brittan's original suggestion for an allocation of jurisdiction clause. Whether the latter clause is really necessary, and indeed possible, is debatable. Given the sensitivities of various Member States in the EC, the discretionary 'who goes first' procedure is probably preferable to a fixed allocation of jurisdiction provision. The 'who goes first' procedure could be developed, however, in order to take account of the provisions of the Merger Control Regulation. In addition, it would be helpful if the Agreement specified what exactly is understood by 'an interest' in Article IV.2. This indeed could lead much nearer an allocation of jurisdiction clause, although for the reasons suggested, an element of discretion would still have to be factored in. The 'who goes first' procedure could also be linked to the issue of exchange of confidential information. It has been suggested that companies

may welcome an exchange of information in order to avoid a situation where each authority asks for a different remedy to solve the same problem.²

Finally, the other issue which bears consideration is that of *amicus curiae* applications. It is submitted that any future agreement should contain an explicit provision allowing for 'vicarious' *amicus curiae* interventions - effectively those provided for in both the US-Australia Agreement and the US-Canada Understanding. That the Commission, for example, would be able to monitor the activities of the US courts is evident from the threatened introduction of the concept of a 'watch list' of US lawsuits. Presumably American companies could engage in the same activity, even though the notion of *amicus curiae* interventions, whatever their form, are a step beyond a simple administrative co-operation agreement.

In the final analysis, it must be remembered that the 1991 Agreement was a product of its time. The fact that, unlike prior bilateral agreements, it was not developed as a reaction to any one circumstance or development means that it could, indeed should, be developed as appropriate. Of course, with the Council's assent now necessary for any future agreements, any developments

² Haagsma, Auke *International Competition Policy Issues: The EC-US Agreement of September 23, 1991* in Slot, Piet Jan; McDonnell, Alison *Procedure and Enforcement in EC and US Competition Law* London, 1993 Chapter 28, p.229, 237

must be considered within the framework of the necessity of garnering the support of the Member States of the EC.

However, the importance of a properly functioning co-operation agreement is augmented by calls for a move to a multilateral or even global system of co-operation and promulgation of co-operation rules.³ Such a system cannot realistically be expected to take root until countries have developed an understanding and appreciation of each other's laws and positions, and have established the limits to which they are prepared to go, and are able to go, in the interests of co-operation. Ultimately, of course, learning from experience is the only currency that can purchase real progress.

³ See, for example, Joint Roundtable of the Committee on Competition Law and Policy and Trade Competition Elements in International Law Paris 15 April 1995 COM/Daffe/CLP/TD(94)35



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**AGREEMENT
BETWEEN
THE EUROPEAN COMMUNITIES AND THE GOVERNMENT OF THE UNITED
STATES OF AMERICA REGARDING THE APPLICATION OF THEIR COMPETITION
LAWS**

*The European Coal and Steel Community, and the European Community on the one hand,
(hereinafter "the European Communities")*

and

The Government of the United States of America, on the other hand,

Recognizing that the world's economies are becoming increasingly interrelated, and in particular that this is true of the economies of the European Communities and the United States of America;

Noting that the European Communities and the Government of the United States of America share the view that the sound and effective enforcement of competition law is a matter of importance to the efficient operation of their respective markets and to trade between them;

Noting that the sound and effective enforcement of the Parties' competition laws would be enhanced by cooperation and, in appropriate cases, coordination between them in the application of those laws;

Noting further that from time to time differences may arise between the Parties concerning the application of their competition laws to conduct or transactions that implicate significant interests of both Parties;

Having regard to the Recommendation of the Council of the Organization for Economic Cooperation and Development Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade, adopted on June 5, 1986;

and

Having regard to the Declaration on US-EC Relations adopted on November 23, 1990;

Have agreed as follows:

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Article I

PURPOSE AND DEFINITIONS

1. *The purpose of this Agreement is to promote cooperation and coordination and lessen the possibility or impact of differences between the Parties in the application of their competition laws.*
2. *For the purposes of this Agreement, the following terms shall have the following definitions:*
 - A. *"Competition law(s)" shall mean*
 - (i) *for the European Communities, Articles 85; 86, 89 and 90 of the Treaty establishing the European Economic Community, Regulation (EEC) no. 4064/89 on the control of concentrations between undertakings, Articles 65 and 66 of the Treaty establishing the European Coal and Steel Community (ECSC), and their implementing Regulations including High Authority Decision no. 24-54, and*
 - (ii) *for the United States of America, the Sherman Act (15 U.S.C. §§ 1-7), the Clayton Act (15 U.S.C. §§ 12-27), the Wilson Tariff Act (15 U.S.C. §§ 8-11), and the Federal Trade Commission Act (15 U.S.C. §§ 41-68, except as these sections relate to consumer protection functions),*

as well as such other laws or regulations as the Parties shall jointly agree in writing to be a "competition law" for purposes of this Agreement;
 - B. *"Competition authorities" shall mean (i) for the European Communities, the Commission of the European Communities, as to its responsibilities pursuant to the competition laws of the European Communities, and (ii) for the United States, the Antitrust Division of the United States Department of Justice and the Federal Trade Commission;*
 - C. *"Enforcement activities" shall mean any application of competition law by way of investigation or proceeding conducted by the competition authorities of a Party;*

and
 - D. *"Anticompetitive activities" shall mean any conduct or transaction that is impermissible under the competition laws of a Party.*

Article II

NOTIFICATION

1. *Each Party shall notify the other whenever its competition authorities become aware that their enforcement activities may affect important interests of the other Party.*
2. *Enforcement activities as to which notification ordinarily will be appropriate include those that:*
 - a) *Are relevant to enforcement activities of the other Party;*
 - b) *Involve anticompetitive activities (other than a merger or acquisition) carried out in significant part in the other Party's territory;*
 - c) *Involve a merger or acquisition in which one or more of the parties to the transaction, or a company controlling one or more of the parties to the transaction, is a company incorporated or organized under the laws of the other Party or one of its states or member states;*
 - d) *Involve conduct believed to have been required, encouraged or approved by the other Party; or*
 - e) *Involve remedies that would, in significant respects, require or prohibit conduct in the other Party's territory.*
3. *With respect to mergers or acquisitions required by law to be reported to the competition authorities, notification under this Article shall be made:*
 - a) *In the case of the Government of the United States of America,*
 - (i) *not later than the time its competition authorities request, pursuant to 15 U.S.C. § 18a(e), additional information or documentary material concerning the proposed transaction,*
 - (ii) *when its competition authorities decide to file a complaint challenging the transaction, and*
 - (iii) *where this is possible, far enough in advance of the entry of a consent decree to enable the other Party's views to be taken into account; and*
 - b) *In the case of the Commission of the European Communities,*
 - (i) *when notice of the transaction is published in the Official Journal, pursuant to Article 4(3) of Council Regulation no. 4064/89, or when notice of the transaction is received under*

Article 66 of the ECSC Treaty and a prior authorization from the Commission is required under that provision,

- (ii) when its competition authorities decide to initiate proceedings with respect to the proposed transaction, pursuant to Article 6(1)(c) of Council Regulation no. 4064/89, and*
- (iii) far enough in advance of the adoption of a decision in the case to enable the other Party's views to be taken into account.*

4. With respect to other matters, notification shall ordinarily be provided at the stage in an investigation when it becomes evident that notifiable circumstances are present, and in any event far enough in advance of

- (a) the issuance of a statement of objections in the case of the Commission of the European Communities, or a complaint or indictment in the case of the Government of the United States of America, and*
- (b) the adoption of a decision or settlement in the case of the Commission of the European Communities, or the entry of a consent decree in the case of the Government of the United States of America,*

to enable the other Party's views to be taken into account.

5. Each Party shall also notify the other whenever its competition authorities intervene or otherwise participate in a regulatory or judicial proceeding that does not arise from its enforcement activities, if the issues addressed in the intervention or participation may affect the other Party's important interests. Notification under this paragraph shall apply only to

- a) regulatory or judicial proceedings that are public,*
- b) intervention or participation that is public and pursuant to formal procedures, and*
- c) in the case of regulatory proceedings in the United States, only proceedings before federal agencies.*

Notification shall be made at the time of the intervention or participation or as soon thereafter as possible.

6. Notifications under this Article shall include sufficient information to permit an initial evaluation by the recipient Party of any effects on its interests.

Article III

EXCHANGE OF INFORMATION

1. *The Parties agree that it is in their common interest to share information that will (a) facilitate effective application of their respective competition laws, or (b) promote better understanding by them of economic conditions and theories relevant to their competition authorities' enforcement activities and interventions or participation of the kind described in Article II, paragraph 5.*
2. *In furtherance of this common interest, appropriate officials from the competition authorities of each Party shall meet at least twice each year, unless otherwise agreed, to (a) exchange information on their current enforcement activities and priorities, (b) exchange information on economic sectors of common interest, (c) discuss policy changes which they are considering, and (d) discuss other matters of mutual interest relating to the application of competition laws.*
3. *Each Party will provide the other Party with any significant information that comes to the attention of its competition authorities about anticompetitive activities that its competition authorities believe is relevant to, or may warrant, enforcement activity by the other Party's competition authorities.*
4. *Upon receiving a request from the other Party, and within the limits of Articles VIII and IX, a Party will provide to the requesting Party such information within its possession as the requesting Party may describe that is relevant to an enforcement activity being considered or conducted by the requesting Party's competition authorities.*

Article IV

COOPERATION AND COORDINATION IN ENFORCEMENT ACTIVITIES

1. *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.*
2. *In cases where both Parties have an interest in pursuing enforcement activities with regard to related situations, they may agree that it is in their mutual interest to coordinate their enforcement activities. In considering whether particular enforcement activities should be coordinated, the Parties shall take account of the following factors, among others:*
 - a) *the opportunity to make more efficient use of their resources devoted to the enforcement activities;*
 - b) *the relative abilities of the Parties' competition authorities to obtain information necessary to conduct the enforcement activities;*
 - c) *the effect of such coordination on the ability of both Parties to achieve the objectives of their enforcement activities; and*
 - d) *the possibility of reducing costs incurred by persons subject to the enforcement activities.*
3. *In any coordination arrangement, each Party shall conduct its enforcement activities expeditiously and, insofar as possible, consistently with the enforcement objectives of the other Party.*
4. *Subject to appropriate notice to the other Party, the competition authorities of either Party may limit or terminate their participation in a coordination arrangement and pursue their enforcement activities independently.*

Article V

COOPERATION REGARDING ANTICOMPETITIVE ACTIVITIES IN THE TERRITORY OF ONE PARTY THAT ADVERSELY AFFECT THE INTERESTS OF THE OTHER PARTY

1. *The Parties note that anticompetitive activities may occur within the territory of one Party that, in addition to violating that Party's competition laws, adversely affect important interests of the other Party. The Parties agree that it is in both their interests to address anticompetitive activities of this nature.*
2. *If a Party believes that anticompetitive activities carried out on the territory of the other Party are adversely affecting its important interests, the first Party may notify the other Party and may request that the other Party's competition authorities initiate appropriate enforcement activities. The notification shall be as specific as possible about the nature of the anticompetitive activities and their effects on the interests of the notifying Party, and shall include an offer of such further information and other cooperation as the notifying Party is able to provide.*
3. *Upon receipt of a notification under paragraph 2, and after such other discussion between the Parties as may be appropriate and useful in the circumstances, the competition authorities of the notified Party will consider whether or not to initiate enforcement activities, or to expand ongoing enforcement activities, with respect to the anticompetitive activities identified in the notification. The notified Party will advise the notifying Party of its decision. If enforcement activities are initiated, the notified Party will advise the notifying Party of their outcome and, to the extent possible, of significant interim developments.*
4. *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.*

Article VI

AVOIDANCE OF CONFLICTS OVER ENFORCEMENT ACTIVITIES

Within the framework of its own laws and to the extent compatible with its important interests, each Party will seek, at all stages in its enforcement activities, to take into account the important interests of the other Party. Each Party shall consider important interests of the other Party in decisions as to whether or not to initiate an investigation or proceeding, the scope of an investigation or proceeding, the nature of the remedies or penalties sought, and in other ways, as appropriate. In considering one another's important interests in the course of their enforcement activities, the Parties will take account of, but will not be limited to, the following principles:

- 1. While an important interest of a Party may exist in the absence of official involvement by the Party with the activity in question, it is recognized that such interests would normally be reflected in antecedent laws, decisions or statements of policy by its competent authorities.*
- 2. A Party's important interests may be affected at any stage of enforcement activity by the other Party. The Parties recognize, however, that as a general matter the potential for adverse impact on one Party's important interests arising from enforcement activity by the other Party is less at the investigative stage and greater at the stage at which conduct is prohibited or penalized, or at which other forms of remedial orders are imposed.*
- 3. Where it appears that one Party's enforcement activities may adversely affect important interests of the other Party, the Parties will consider the following factors, in addition to any other factors that appear relevant in the circumstances, in seeking an appropriate accommodation of the competing interests:*
 - a) the relative significance to the anticompetitive activities involved of conduct within the enforcing Party's territory as compared to conduct within the other Party's territory;*
 - b) the presence or absence of a purpose on the part of those engaged in the anticompetitive activities to affect consumers, suppliers, or competitors within the enforcing Party's territory;*
 - c) the relative significance of the effects of the anticompetitive activities on the enforcing Party's interests as compared to the effects on the other Party's interests;*
 - d) the existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities;*
 - e) the degree of conflict or consistency between the enforcement activities and the other Party's laws or articulated economic policies; and*

- f) *the extent to which enforcement activities of the other Party with respect to the same persons, including judgments or undertakings resulting from such activities, may be affected.*

Article VII

CONSULTATION

1. *Each Party agrees to consult promptly with the other Party in response to a request by the other Party for consultations regarding any matter related to this Agreement and to attempt to conclude consultations expeditiously with a view to reaching mutually satisfactory conclusions. Any request for consultations shall include the reasons therefor and shall state whether procedural time limits or other considerations require the consultations to be expedited. These consultations shall take place at the appropriate level, which may include consultations between the heads of the competition authorities concerned.*
2. *In each consultation under paragraph 1, each Party shall take into account the principles of cooperation set forth in this Agreement and shall be prepared to explain to the other Party the specific results of its application of those principles to the issue that is the subject of consultation.*

Article VIII

CONFIDENTIALITY OF INFORMATION

1. *Notwithstanding any other provision of this Agreement, neither Party is required to provide information to the other Party if disclosure of that information to the requesting Party (a) is prohibited by the law of the Party possessing the information, or (b) would be incompatible with important interests of the Party possessing the information.*

2. *Each Party agrees to maintain, to the fullest extent possible, the confidentiality of any information provided to it in confidence by the other Party under this Agreement and to oppose, to the fullest extent possible, any application for disclosure of such information by a third party that is not authorized by the Party that supplied the information.*

Article IX

EXISTING LAW

Nothing in this Agreement shall be interpreted in a manner inconsistent with the existing laws, or as requiring any change in the laws, of the United States of America or the European Communities or of their respective states or member states.

Article X

COMMUNICATIONS UNDER THIS AGREEMENT

Communications under this Agreement, including notifications under Articles II and V, may be carried out by direct oral, telephonic, written or facsimile communication from one Party's competition authority to the other Party's authority. Notifications under Articles II, V and XI, and requests under Article VII, shall be confirmed promptly in writing through diplomatic channels.

Article XI

ENTRY INTO FORCE, TERMINATION AND REVIEW

1. *This Agreement shall be approved by the Parties in accordance with their respective internal procedures.*
The Parties shall notify one another of the completion of those procedures.
2. *This Agreement shall remain in force until 60 days after the date on which either Party notifies the other Party in writing that it wishes to terminate the Agreement.*

3. *The Parties shall review the operation of this Agreement not more than 24 months from the date of its entry into force, with a view to assessing their cooperative activities, identifying additional areas in which they could usefully cooperate and identifying any other ways in which the Agreement could be improved. The Parties agree that this review will include, among other things, an analysis of actual or potential cases to determine whether their interests could be better served through closer cooperation.*

The undersigned, being duly authorized, have signed this Agreement.

Done at Washington, in duplicate, this twenty-third day of September 1991, in the English language

**FOR THE COUNCIL OF THE EUROPEAN
UNION**

**FOR THE GOVERNMENT OF
THE UNITED STATES OF AMERICA:**

**FOR THE COMMISSION OF:
THE EUROPEAN COMMUNITIES :**

