GLOBALIZATION AND THE LIMITS OF NATIONAL MERGER CONTROL LAWS

Gaps in Global Governance and the Need
for an International Merger Control Regime

by

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To
The Loving Memory of My Father
Cecil Wilson

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When I embarked on this ultimate academic odyssey of mine, my peers informed me that the road leading to commencement could be long, deserted, and at times bumpy. Being cautious of that scenario, I gingerly started the journey, and soon found the road scenic, smooth and alluring. I must hastily add that I enjoyed the journey more than reaching the destination. The pleasant experience I had is indeed attributable to the people who traveled along with me, and made my journey interesting, and enlightening.

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Abstract

From an economic perspective, globalization is dismantling national barriers to entry and is transforming domestic markets into a global market. To meet the challenges posed by the integration of markets, corporations are joining forces with their former competitors to expand their presence in the global market. Rapid growth in transnational mergers to create global corporations is one of the key features of globalization. As multinational corporations are uniting, so should antitrust agencies that regulate them.

Antitrust agencies around the world are realizing that the consumers whom they are mandated to protect are being adversely affected by decisions made beyond their national borders. By using the "effects" test, countries bring within their jurisdiction review of any merger or acquisition involving foreign companies with significant revenue or assets within their jurisdiction.

The proliferation of merger control laws, in the absence of a mechanism to coordinate the transnational merger review, places an unnecessary burden on merging parties, and runs the risk of divergent outcomes, which at times cause friction among nation-states.

Both to alleviate unnecessary burdens imposed on corporations and to reduce inefficiencies produced by the disparate review of a single transnational merger by several countries, this thesis proposes an International Merger Control Regime integrated into the WTO. The proposal focuses on ways to operationalize a "Lead Jurisdiction" model of oversight rather than on the creation of a new supranational decision-making agency. WTO dispute settlement and arbitration would be used to resolve conflicts arising out of the inability of a Lead Jurisdiction to arrive at an outcome satisfactory to other significantly affected jurisdictions.

Résumé

D'un point de vue économique, la mondialisation des marchés abolit les barrières à l'entrée que constituaient les frontières nationales et transforme les marchés nationaux en un seul marché mondial. Afin de relever le défi posé par l'intégration des marchés, les compagnies unissent leurs forces à celles de leurs compétiteurs d'hier dans le but d'augmenter leur présence sur le marché mondial. La mondialisation se caractérise notamment par une croissance rapide des fusions transnationales dont résultent des firmes multinationales. À l'heure où les multinationales réunissent leurs ressources, les organismes antitrust responsables de régir ces puissances mondiales devraient en faire autant.

De plus en plus, les organismes antitrust, dont le mandat est de protéger les consommateurs, réalisent que ces derniers sont souvent lésés par des décisions prises au-delà de leurs frontières. En utilisant le critère « de l'effet d'une transaction », les pays se donnent compétence pour examiner toutes les fusions ou acquisitions impliquant des compagnies qui possèdent des actifs significatifs dans leur juridiction.

La prolifération des lois sur le contrôle des fusions, alors qu'il n'existe aucun mécanisme pour coordonner les divers processus d'examen, impose un fardeau inutile aux parties contractantes qui risquent d'obtenir des résultats différents selon les juridictions, S'ajoutent à cela les inévitables frictions pouvant surgir entre pays concernés.

Afin d'atténuer l'inutile fardeau imposé aux compagnies et dans le but de réduire les inefficacités découlant de la multiplication des procédures d'examen disparates par différents pays, cette thèse propose un Régime international de contrôle des fusions (RICF) qui ferait partie de l'Organisation mondiale du commerce (OMC). Cette proposition favorise l'élaboration de critères types pour l'examen des transactions qui serait mené par la juridiction « la plus appropriée » dans les circonstances, plutôt que d'envisager la création d'un organisme supranational. Les mécanismes de résolution de conflits de l'OMC et d'arbitrage seraient utilisés pour résoudre les différends entre pays affectés qui contesteraient la décision de la juridiction choisie par le RICF.

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Table of Acronyms

ABA	American Bar Association
DoJ	U.S. Department of Justice
E.U.	European Union
EC	European Community
EEA	European Economic Area
EFTA	European Free Trade Agreement
ESA	EFTA Surveillance Authority
FTC	Federal Trade Commission
GATT	General Agreement on Tariffs and Trade
HHI	Herfindahl-Hirschman Index
ICPAC	International Competition Policy Advisory Committee
IMCR:	International Merger Control Regime
M&As:	Mergers and Acquisitions
MEGs:	Merger Enforcement Guidelines
OECD:	Organization for Economic Cooperation and Development
SSNIP:	Small but Significant Non-transitory Increase in Price
WTO:	World Trade Organization

Introduction

We live in an age of international commerce, where decisions reached in one corner of the world can reverberate around the globe in less time than it takes to tell the tale.[1]

This thesis explores the impact of globalization on the legal framework for merger review. Globalization has been quite accurately defined as the "intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa."[2] In other words, geographical boundaries are becoming less and less relevant to relationships between "cause" and "effect." This is true, *inter alia*, of economic, social, cultural, and political relationships.

Our "age of international commerce" has been achieved, *inter alia*, by liberalization of the international trade regime that has featured growth in trade and in many respects has transformed national markets into one single global market. Firms that used to be competitors are now uniting to cope with the requirements of the global markets. One key feature of the new age of international commerce is the swift growth in transnational mergers to create global corporations.[3] In the year 2000, the value of

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[1] United States v. Nippon Paper Indus. Co., 109 F.3d 1, 8 (1st Cir. 1997), *rev'g* 944 F. Supp. 55 (D. Mass. 1996).

[2] Anthony Giddens, quoted in Jan Aart Scholte, *The Globalization of World Politics*, *in* THE GLOBALIZATION OF WORLD POLITICS 14, 15 (John Baylis & Steve Smith eds., 1997).

[3] R. C. Longworth, *Behind Closed Doors Global Regulators Mold Economic Future*, CHICAGO TRIBUNE, Nov. 17, 2000; 2000 WL 3734483.

cross-border mergers and acquisitions grew by nearly 50 percent to $1.14 trillion,[4] while the value of mergers and acquisitions around the world rose 24 percent to a record $3.5 trillion.[5] As transnational corporations are uniting to meet the challenges of globalization, so should the regulators who ensure that the marketplace remains competitive.

Antitrust agencies around the world are realizing that the consumers whom they are mandated to protect are being adversely affected by decisions made beyond their national borders.[6] By using the "effects test" – which has won widespread acceptance[7] – some 60[8] countries conduct review of any merger or acquisition involving companies with significant revenue or assets in their jurisdiction.[9] The number of countries with

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[4] *FDI-Linked Cross-Border M&As Grew Unabated in 2000,* <http://www.unctad.org/en/press/pr0116en.htm>, (last visited on Nov. 28, 2001). (The figures are in US dollars, unless mentioned otherwise). Some of the largest mergers in the history were consummated during the year 2000, for example, Glaxo Welcome/Smith Kline ($182 billion), British Vodafone's/Germany's Mannesmann ($180-billion), AOL/Time Warner (over $100 billion), Pfizer/Warner Lambert ($90 billion), and BP ($27 billion). *See* Evelyn Iritani, *Global Mergers Pushing the Boundaries of Antitrust Law Regulation*, LOS ANGELES TIMES, Nov. 5, 2000, at C1; 2000 WL 25915626; Molly S. Boast, Report from the Bureau of Competition, March 29, 2001, *available at* <http://www.ftc.gov/speeches/other/boastmollys.html>, (visited on April 12, 2001).

[5] Leon Rubis, *Overdue Diligence for M&As*, 46 HRMAGAZINE, Issue 6, June 1, 2001, at 12; 2001 WL 10647015; Liesbeth Evers, *Why the Big Just Keep on Getting Bigger*, NETWORK NEWS, Nov. 1, 2000, at 30; 2000 WL 7834882.

[6] Statement by E.U. Competition Commissioner Mario Monti quoted in *Monti Cites Use of Competition Policy in Integration of EU States' Economies*, BNA ANTITRUST AND TRADE REGULATION DAILY, Nov. 3, 2000, at D5.

For a life time example, consider the following news item appeared in the Chicago Tribune:

When a company in far-away Finland bought the candy factory in Centralia, no one asked the permission of the workers there, or their union, or the other people in the Illinois town.

The acquisition went smoothly, right up to the day in 1996 when the Finnish owners closed the plant and threw 360 Centralia people out of work.

"This was a corporate decision that turned over a community," said Rev. James Gullen, a member of the Centralia delegation that flew to Helsinki to try, vainly, to persuade the president of Huhtamaki Oy to keep the PayDay candy bar factory open. "He could have cared less about the lives of people in a little town like Centralia." R.C. Longworth, *supra* note 3.

[7] James T. Halverson, *Harmonization and Coordination of International Merger Procedures*, 60 ANTITRUST L.J. 531, 533 (1991).

[8] A. Douglas Melamed, Promoting Sound Antitrust Enforcement in the Global Economy, Speech before Fordham Corporate Law Institute, 27th Annual Conference on International Antitrust Law and Policy, New York, New York, (October 19, 2000) *available at* <http://www.usdoj.gov/atr/public/speeches/6785.htm>, (visited on April 25, 2001). *See also* Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U. L. REV. 1781, 1783 (2000); *Enforcement: IBA Conference Participants Focus on Practical Effects of Globalization*, BNA ANTITRUST & TRADE REGULATION DAILY, Nov. 17, 2000. [hereinafter "*Enforcement: IBA Conference*"]; International Competition Policy Advisory Committee, Antitrust Division, US Department of Justice, Final Report, at 33 (2000), *available at* <http://www.usdoj.gov:80/atr/icpac/finalreport.htm>, (visited on Jan. 04, 2001). [hereinafter "ICPAC, Final Report"]; Calvin S. Goldman, Emerging Procedural and Substantive Issues for Mergers with Cross-Border Effects, Remarks before ABA Section of Antitrust Law, Advanced International Antitrust Workshop, at 2 (Washington, D.C. Jan. 1999). (unpublished manuscript on file with the author).

[9] William E. Kovacic, *Merger Enforcement in Transition: Antitrust Controls on Acquisitions in Emerging Economies,* 66 U. CIN. L. REV. 1075, 1084 (1998); Evelyn Iritani, *supra* note 4.

merger control laws is expected to rise to 200 by 2025.[10] It comes as no surprise to a major United States (US) multinational corporation that it has to file premerger notification in Washington, Brussels, Ottawa, and Canberra. However, today premerger filing may also be required in Pretoria, or Jakarta as well.[11] When Alcan Aluminum, a Montreal-based company, proposed a deal (which was never consummated) with France's Pechiney and Switzerland's Alusuisse Lonza Group, it had to file premerger notification in 16 different jurisdictions in eight languages, submit well over 400 boxes of documents, send more than 1 million pages of e-mail, and pay over $100,000 in filing fees.[12] It is obvious that the proliferation of merger control laws, in the absence of an international coordination agreement among the national antitrust agencies, produces serious inefficiencies.

These inefficiencies arise, among other things, from the fact that grounds for merger review differ from jurisdiction to jurisdiction.[13] In Romania, for example, filing fees are linked with the bonuses awarded to antitrust agency employees. This system creates incentives for antitrust officials to cast the premerger notification net broadly, so that every merger should be notified to and approved by the antitrust agency for reasons unrelated to proper application of competition law.[14] Transaction costs are only one side of the "inefficiency coin." The flip side of the coin is the divergence of outcomes of merger review of a single transaction undertaken by multiple antitrust agencies.

The merger between two US-based aerospace companies, Boeing and McDonnell Douglas, in 1997, illustrates current systems inefficiencies that could lead to trade wars. In this case, the European Union (EU) assumed jurisdiction over the merger because the merger met a European effects test, and the merging parties met the EU's premerger notification thresholds. The merger was approved by the US antitrust authorities but faced fierce opposition from the European Commission. Americans perceived EU Commission's opposition as rooted in an attempt to protect the merging parties' chief competitor, government-subsidized Airbus Industrie, rather than to preserve competition

[10] Evelyn Iritani, *Id.*
[11] *Id.*
[12] *Id.; see also* Jeffrey E. Garten, *As Business Goes Global, Antitrust Should, Too*, BUSINESS WEEK, Nov. 13, 2000, at 38; 2000 WL 24486348.
[13] *Enforcement: IBA Conference, supra* note 8.
[14] ICPAC, Final Report, *supra* note 8, at 101.

and protect consumer welfare. During the bitter merger review process, each side accused the other of playing the national favourite.[15] The review process became highly politicized and the possibility of a trade war between the Europeans and the Americans loomed. American politicians, including the President of the United States, waged a war to save the merger from the Europeans.[16] The EU Commission eventually allowed the merger after imposing conditions far short of what had been thought necessary in Europe.

As a matter of fact, a number of other countries could in principle have assumed jurisdiction over the Boeing-McDonnell Douglas merger, following the lead of the EU, based upon the interests of their airlines as customers.[17] Such a scenario would certainly have caused havoc for the merging parties, and could have disrupted international trade between the US and other countries. The Boeing case also brought to light global governance gaps in the international trading regime. Following the row over the Boeing-McDonnell Douglas merger, Sir Leon Brittan, former EU Trade Commissioner, stated that in order to avoid such clashes in the future, an antitrust division must be established within the WTO to deal with the growing number of transnational mergers. [18] He stressed the need for an international agreement on competition rules and smoother cooperation between national competition authorities.[19]

The concerns raised by Sir Leon Brittan proved rather ineffective to persuade the competition authorities of the US and EU to act swiftly to solve the problem of divergent outcomes. Four years later, in July 2001, the EU Commission for the first time blocked a merger between two US-based companies – General Electric Co. (GE) and Honeywell International Inc. – which was approved by the US Department of Justice.[20] The different

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[15] Evelyn Iritani, *supra* note 4.

[16] ICPAC, Final Report, *supra* note 8, at 56; *see also* Eleanor M. Fox, *Lessons from Boeing: A Modest Proposal to Keep Politics Out of Antitrust,* ANTITRUST REPORT, Nov. 1997, at 19. [hereinafter "Fox, *Lessons from Boeing*"].

[17] Douglas H. Ginsburg & Scott H. Angstreich, *Multinational Merger Review: Lessons from Our Federalism*, 68 ANTITRUST L.J. 219, 220 (2000).

[18] *EC Tells US to Heed Future European Antitrust Concerns; Start Up WTO Division*, BNA ANTITRUST & TRADE REGULATION DAILY, July 25, 1997, at d6.

[19] *Id.*

[20] *The Commission Prohibits GE's Acquisition of Honeywell,* Press Release by the E.U. Commission *available at*: <http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/939|0|RAPID&lg=EN>, (visited on July 21, 2001); *see also* Michael A. Taverna, *Failed Mega-Merger Causing Shock Waves*, 155 AVIATION WK. & SPACE TECH., No. 2, July 9, 2001, at 27; 2001 WL 7150775; *see also* Brian M. Carney, *Loggerheads: Mario Monti, Central Planner*, ASIAN WALL ST. J., July 9, 2001, at 6; 2001 WL-WSJA 22052519.

conclusions reached by the EU Commission and the US Department of Justice once again gave rise to political furore and threats of trade war.[21]

Taking the GE-Honeywell case as an opportunity to speed up the work on harmonizing international antitrust law, top antitrust officials from at least thirteen nations decided at a recent conference on international antitrust law and policy to launch a new International Competition Network (ICN).[22] ICN will bring senior antitrust officials from developed and developing countries to work together to form consensus on proposals for procedural and substantive harmonization of antitrust enforcement.[23] It will initially focus on transnational merger review process and on the competition advocacy role of antitrust agencies, particularly in emerging economies.[24]

ICN has indeed set its priorities right. Convergence of the multijurisdictional merger review process – both procedural and substantial – should be the priority. In addition to providing business enterprises with an efficient system to conduct business globally, we also need to provide them with a system that could check the abuse of dominance by emerging global oligopolists and monopolists.[25]

The liberalization of international trade is carried out on an assumption that market forces will cure anticompetitive practices engaged in by market players. Recalling the objectives of antitrust laws, the US Supreme Court noted that the "Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and

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[21] *See, e.g.*, William Drozdiak, *EU Blocks Merger of GE, Honeywell; Trade Tension Rises*, HOUS. CHRON., July 4, 2001, at 1; 2001 WL 23612304; John R. Wilke, *Drumbeat Persists Over Denial of Merger*, Asian Wall St. J., July 6, 2001, at 5; 2001 WL-WSJA 22052407; Michael A. Taverna, *Failed Mega-Merger Causing Shock Waves*, 155 AVIATION WK. & SPACE TECH., No. 2, July 9, 2001, at 27; 2001 WL 7150775; Trans-Atlantic Differences Hurt GE Deal, O'Neill Says, Wall St. J., July 6, 2001, at A2; 2001 WL-WSJA 2868688.

[22] The countries whose officials were present at the conference were: Australia, Canada, the European Union, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, the United Kingdom, United State, and Zambia.

[23] US and Foreign Antitrust Officials Launch International Competition Network, US DoJ, Press release, *available at* <http://www.usdoj.gov/atr/public/press_releases/2001/9400.htm>, (visited on Oct. 30, 2001).

[24] *Id.*

[25] *See, e.g.*, LIMITS TO COMPETITION, THE GROUP OF LISBON xvii, (Cambridge, Mass.: The MIT Press, 1995). [hereinafter "THE GROUP OF LISBON"]. (In a growing number of financial and industrial sectors there is a strong tendency toward oligopolistic structures. For example, in the credit card industry there are two major global players: Visa and MasterCard.); Daniel K. Tarullo, *Norms And Institutions in Global Competition Policy*, 94 AM. J. INT'L L. 478, 480 (2000).; Good Governance in the Public and Private Sectors Against the Background of Globalisation, Introductory remarks by Pascal Lamy, OSCE Seminar, Brussels, January 30, 2001, *available at* <http://europa.eu.int/comm/trade/speeches_articles/spla49_en.htm>, (visited on April 20, 2001).

unfettered competition as the rule of trade."[26] Thus, according to the US Supreme Court the basic "rule of trade" is "free and unfettered competition." This rule is applicable to both domestic and international trade. However, there is no instrument like the Sherman Act to enforce the basic rule of trade at a global level. The liberalization of international trade in the absence of international competition law could be a recipe for global market distortions. Recognizing this lacuna, the World Trade Organization's (WTO) Fourth Ministerial Conference, which met in Doha from November 9-14, 2001, set for the first time ever the objective of establishing a multilateral framework for competition policies.[27] The Doha Declaration, however, failed to include in its agenda for the multilateral framework, the formulation of rules for governing the review of transnational mergers. Although, merger review is among the most complex and controversial features of competition, a global regime that failed to address it would leave out perhaps the most significant set of competition issues. The Doha Declaration, nonetheless, can be welcomed as the most promising step yet towards the globalization of competition law.

Proliferation of merger controls laws, and the growing concentration in global markets require, as recognized by ICN and other fora on global competition, prompt formulation of a multilateral framework for review of transnational mergers. This thesis is intended to contribute to the discussions concerning the formulation of a multilateral framework for merger review within a new global competition regime. It will propose rules, which would form an International Merger Control Regime (hereinafter "IMCR") that would: 1) alleviate unnecessary burdens imposed on businesses by proliferating merger control regimes; 2) reduce inherent inefficiencies in the disparate review of a single merger transaction by several jurisdictions; 3) provide the means to prevent, in its incipiency, global abuse of dominance; and 4) favour global consumer welfare.

The proposed IMCR would give rise to a multilateral cooperative framework for global governance that is socially accountable and politically democratic.[28] It would cover transnational mergers with global impact, and would implement a "Lead Jurisdiction" approach to global merger review. The crux of the proposal lies in enhanced

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[26] Northern Pacific Railway Co. v. United States, 356 US 1, 4-5 (1958).
[27] WTO, Doha Ministerial Declaration, *adopted on* Nov. 14, 2001, WT/MIN(01)/DEC/W/1 (Nov. 14, 2001), *available at* <http://www-heva.wto-ministerial.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm>, (visited on Nov. 24, 2001).

cooperation and coordination among antitrust agencies of the member states led by the agency of the member state that is most affected by the proposed merger. Such member state under the IMCR would be termed the "Lead Jurisdiction." However, such enhanced level of cooperation and coordination among the antitrust agencies can not be achieved in the absence of agreed upon substantive and procedural elements of merger analysis. Thus, there would be a first-tier instrument that would include substantive elements of merger analysis, while the IMCR, second-tier instrument, would include procedural elements, which would be adopted, with necessary adaptations to national context, by individual member states. To facilitate the process of cooperation and coordination and the identification of the Lead Jurisdiction by all affected jurisdictions, the IMCR would provide that a WTO Competition Office be established to act as a facilitator for this process. The Lead Jurisdiction would conduct the merger analysis in close cooperation and coordination with other affected jurisdictions. Such coordination and cooperation would shift the focus of merger analysis from national consumer welfare to global consumer welfare. Where a dispute arises between the affected jurisdiction(s) and the Lead Jurisdiction, or among the affected jurisdictions, the IMCR would allow recourse to WTO Dispute Settlement Body and arbitration as dispute resolution mechanisms. However, the proposed framework would seek to establish only the basis for enhanced coordination among national antitrust authorities and would not attempt to elaborate a complete antitrust code designed to operate under a new independent international agency responsible for oversight.

Before describing briefly the structure of the thesis, it is important to set out a caveat for the reader. Today, there are over 90 countries with competition laws. Of these 90 countries, 52 of them (58%) adopted those laws in the past ten years.[29] Thus, the majority of competition laws are in an embryonic stage, and the countries that have recently enacted them have neither sufficient expertise nor "competition culture" to fully reap the benefits of competition. There is an asymmetric level of development, experience, and institutional structure as between the countries with mature competition regimes and the ones with relatively young competition regimes.

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[28] THE GROUP OF LISBON, *supra* note 25, at xvii.
[29] See references cited at note 8, *supra*.

Such asymmetry may make the countries with young competition regimes reluctant to commit to any multilateral treaty. Indeed, the Doha Declaration has recognized these asymmetries and the needs of developing countries for enhanced support for technical assistance and capacity building in the competition area, "so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives."[30]

Moreover, the difference among economic ideologies of different countries regarding market structure and control would make negotiations complex and time consuming. Negotiating any multilateral trade treaty requires a Herculean effort, and the negotiation of a competition framework, especially pertaining to mergers, will be harder than most trade negotiations.

However, this thesis holds that asymmetric level of development among, and adherence to different economic ideologies by, WTO member states are not insurmountable obstacles. The complexities associated with formulating an IMCR are far fewer than the problems (inefficiencies, divergent outcomes and under-supply of global consumer welfare) prevalent in the absence of an IMCR. It is with this in mind that this thesis attempts to formulate an IMCR, cognizant of the fact that it merely seeks to foster further debate and does not pretend to be anything like a final synthesis.

Chapter I of this thesis sets the stage for our inquiry. Part I attempts to identify what globalization means, as well as the factors that have fanned this phenomenon and the challenges posed by it to nation-states and to their laws. Mergers and acquisitions are a key factor pushing forward the process of globalization. Part 2 of chapter I focuses on why the "urge to merge" is changing in the face of the global markets. It further inquires into why merger control laws are proliferating around the world, and what costs they are imposing on the merging parties, competition authorities, and on the sovereignty of nation-states. It lays the foundation for the hypothesis of this thesis that there is a widening gap in international competition law governance that is adversely affecting the efficiency of global markets.

No international merger control regime can be formulated without first aligning the two principal antitrust regimes of the world: those of the US and the EU. In addition,

[30] Doha Ministerial Declaration, *supra* note 27, ¶ 24.

the US and EU offer unique models for an IMCR, by virtue of the US's federal form of government and of the EU's economic and monetary union among nation-states.[31] Thus, chapters II and III of the thesis review the antitrust and merger control laws of the US and the EU, respectively. By mapping the historical and legal developments that have taken place in these regimes, one can identify factors that gave rise to merger control laws in these jurisdictions and by analogy draw lessons for an eventual IMCR. Chapters II and III will also set the stage for a comparison of the substantive and procedural elements of the US's and EU's merger control laws in Chapter IV. The objective of Chapter IV is to identify the similarities and differences in the two regimes in order to ascertain the breadth of the gulf that needs to be narrowed by an IMCR. Chapter V documents the existing bilateral and multilateral efforts undertaken by countries to overcome the limits of domestic antitrust and merger control laws in addressing transnational anticompetitive business practices.

Since our proposed IMCR would be hosted within the WTO, Chapter VI will review the structure of the WTO and its dispute settlement mechanism. This chapter also highlights the positions taken by the US and EU with respect to the WTO as the custodian of internationalization of competition law principles.

Chapter VII is devoted to the review of proposals hitherto advanced relating to a multilateral merger control regime. After identifying the strengths and shortcomings in these proposals, Chapter VIII offers a proposal for an IMCR and provides justifications therefor.

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[31] Other countries, for example, Canada, also offer interesting models for merger control regimes. However, conducting a comprehensive study of all available merger control regimes is beyond the scope of this thesis. For readers interested in reviewing merger control laws of other countries, see J. W. ROWLEY AND D. I. BAKER, THE INTERNATIONAL MERGERS, THE ANTITRUST PROCESS, (London: Sweet & Maxwell, 2nd ed., 1996).

I
Globalization: How and Impact

This chapter is divided in two parts. In Part One we will explore the meaning of globalization and the way it has limited the capability of nation-states to independently handle the challenges it poses. We will see that globalization is a process that affects global populations and calls for the promotion of global consumer welfare. Next we will attempt to establish that global consumer welfare is a global public good which requires collective action of nation-states to ensure that consumers in any part of the world are not adversely affected by decisions made by competition authorities and/or global corporations in any part of the world.

Recognizing that one of the important features of globalization is the current wave of mergers and acquisitions (M&As) that has spread all across the world, in Part Two we will see why M&As are occurring and how they are changing the face of the global economy. We will notice that M&As are increasing concentration on a world-wide basis and are giving birth to "giga-corporations" which in some cases have the potential to dominate specific industries globally and to harm consumers everywhere. A caveat may be added here that not all M&As result in entities that are harmful for consumers. Next we will see why merger control regimes have proliferated during the last decade and the costs they are imposing on merging parties, competition authorities and the nation-states. This chapter provides us with the basis of our hypothesis that there is a gap in global governance which can be filled, in part, through an International Merger Control Regime as proposed by this thesis.

Part -1

A. What is Globalization?

There is vast contemporary literature on the subject of globalization. One definition of globalization already mentioned in the introduction comes from Anthony Giddens.[1] Similarly, Alfred C. Aman defines globalization[2] as "complex, dynamic legal and social processes that take place within an integrated whole, without regard to geographical boundaries."[3] Globalization is an offshoot of internationalization, which for more than a century has affected matters that were domestic or national and were made subject to bi- or multi-lateral cooperation in an institutionalized framework. To differentiate the process of globalization from internationalization, we will look at the nature of activities carried on under those processes. Global activities differ from international activities in that the latter occur between and among states. By contrast, global activities occur in an "integrated whole," where the "area of integration involved might be the entire globe or it might be a region or portions of regions around the

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[1] *See* Introduction, note 2, *supra*.

[2] *See also* Jost Delbruck, *Globalization of Law, Politics, and Markets-- Implications for Domestic Law--A European Perspective*, 1 IND. J. GLOBAL LEGAL STUD. 9 (1993). [Hereinafter "Delbruck, *Globalization of Law*"]

As early as 1943, Wendell Willkie touched upon the notion of globalization in a farsighted book. WENDELL L. WILLKIE, ONE WORLD (1943). However, the term has become "common coin" after influential institutions such as the Club of Rome called attention to the global challenges posed by the ecological crisis. *See, e.g.*, Dennis L. Meadows, et al., *The Limits to Growth; A Report for the Club of Rome's Project on the Predicament of Mankind* (1972); Gerald O. Barney, *Council On Environmental Quality and the Department of State, The Global 2000 Report to the President* (1981). For a perceptive analysis of processes of globalization of international policies, see DIETER SENGHAAS, WELTINNENPOLITIK--ANSATZE FUR EIN KONZEPT, 47 EUROPA ARCHIV 643, 643-52 (1992). *Id.* n.3.

[3] Alfred C. Aman, Jr., *The Globalizing State: A Future-Oriented Perspective on the Public/Private Distinction, Federalism, and Democracy*, 31 VAND. J. TRANSNAT'L L. 769, 780 (1998) [Hereinafter "Aman, *The Globalizing State*"]. *See also* Delbruck, *Globalization of Law*, *id.*; PETER DICKEN, GLOBAL SHIFT: THE INTERNATIONALIZATION OF ECONOMIC ACTIVITY 1-8 (London: P. Chapman, 2nd ed. 1992). (analyzing the process of globalization resulting from the interactions between states and corporations); WILLIAM GREIDER, ONE WORLD, READY OR NOT (New York: Simon & Schuster, 1997); KENICHI OHMAE, THE BORDERLESS WORLD: POWER AND STRATEGY IN THE INTERLINKED ECONOMY (New York: Harper Business, 1990); SASKIA SASSEN, CITIES IN A WORLD ECONOMY (Thousand Oaks, Calif.: Pine Forge Press, 1994); SASKIA SASSEN, THE GLOBAL CITY: NEW YORK, LONDON, TOKYO (Princeton, N.J.: Princeton University Press, 1991); Alfred C. Aman, Jr., *The Earth as Eggshell Victim: A Global Perspective on Domestic Regulation*, 102 YALE L.J. 2107 (1993); Alfred C. Aman, Jr., *Introduction to Symposium, The Globalization of Law, Politics and Markets*, 1 IND. J. GLOBAL LEGAL STUD. 1 (1993); Saskia Sassen, *Towards a Feminist Analytics of the Global Economy*, 4 IND. J. GLOBAL LEGAL STUD. 7 (1996).

world."[4] The major distinguishing characteristic of global activities from international activities "is that the areas of integration are largely oblivious to state boundaries, and that the processes of globalization usually occur without or with little direct agency of the state."[5] An example of global activities can be found in environmental threats caused by, *e.g.*, ozone layer depletion, which affects mankind everywhere, irrespective of national boundaries. Similarly, anticompetitive conduct engaged in by transnational corporations operating in the global market affects consumers all around the world.

1. Globalization: Factors Contributing to the Phenomenon

As many commentators have noted, globalization has social, cultural, political and economic dimensions. For the purpose of discussion here, the economic dimensions of globalization are of principal concern.

There are two main economic factors that catalyzed the process of globalization, and have in turn sparked transnational M&As. One factor is the liberalization of trade, most clearly accomplished in the General Agreement on Tariffs and Trade (GATT) regime. Under the GATT, member states agreed to reduce trade barriers, such as tariffs and quotas on imports, which in turn increased international trade and allowed companies to sell their products to consumers all over the world. Another factor that contributed to the process of globalization is the rapid development in technology. For instance, in the financial industry, billions of dollars are transferred everyday across the globe at the click of a mouse. These financial transactions facilitated through technology "shattered the boundaries of national systems."[6] Moreover, advances in telecommunications and internet technologies now allow transnational corporations (TNCs) to coordinate and monitor their international activities around the globe and around the clock.[7]

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[4] Aman, *The Globalizing State*, *id.* at 780.
[5] *Id.*
[6] ARMAND MATTELART, NETWORKING THE WORLD 1794-2000, at 75 (London University of Minnesota Press: Minneapolis, 2000) [Hereinafter "MATTELART, NETWORKING THE WORLD"]. *See also* Delbruck, *Globalization of Law*, *supra* note 2, at 10.
[7] *See* Roman Terrill, *What Does 'Globalization' Mean?*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 217, 218 (1999).

2. Globalization as Denationalization

Trade liberalization coupled with technological advances and free flow of capital – factors responsible for globalization – allow transnational corporations to make decisions concerning production, finance, investment, among others, independent of direct state control. TNCs conceptualize markets in a "denationalized way." With a centralized mode of management, TNCs strive for flexibility and take "advantage of favourable conditions – natural, financial, political and legal – prevailing in each host country."[8] They create a web-like network, for their production, assembly, distribution, and research and development activities. Their network of investment and production creates relatively integrated markets that transcend the boundaries of nation-states.[9] Thus, globalization may be referred to as the declining significance of national borders in the operation, among other things, of national economies.

3. Globalization and the Limits of National Laws

The web-like structural make-up of TNCs and the denationalization of economic activities made territorially-centered national law incapable of effectively regulating the conduct of the TNCs. Growth in transnational economic activities is but one facet of globalization. Other global activities that transcend national and regional boundaries and affect all humankind, such as activities touching the global environment, are certainly beyond the ability of any single state to effectively regulate or police. In the words of Professor Aman:

> a state cannot exercise effective authority alone when the problems it is trying to solve or the actors it wishes to regulate are not centered within the state's borders. To the extent that these issues are state-based, such a location usually is only temporary and easily shifted. Thus, the decrease in state-centered regulatory power is a result that flows primarily from the nature of global problems, the global reach of the technologies involved, and the relative mobility and freedom of the transnational actors to which the law would apply.[10]

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[8] MATTELART, NETWORKING THE WORLD, *supra* note 6, at 60. ("multinational" gives the impression that the firm is both the sum of several nationalities and each nationality in particular; in short, that the firm is profoundly rooted in the host country).

[9] *See* Alfred C. Aman, *Proposals for Reforming the Administrative Procedure Act: Globalization, Democracy and the Furtherance of a Global Public Interest*, 6 IND. J. GLOBAL LEGAL STUD. 397, 408 (1999). [Hereinafter "Aman, *Proposals for Reforming*"].

[10] Aman, *The Globalizing State*, *supra* note 3, at 786.

Apart from the inability of national laws to effectively regulate transnational activities and/or actors, there are two other fundamental deficiencies in domestic laws identified by the process of globalization, that is, i) absence of vision; and ii) absence of dispute resolution techniques for transnational activities and/or actors.

a. Absence of Vision

National laws primarily deal with issues that are local in nature. However, most domestic issues are now affected by the integrated global economy in which they arise. The failure to take account of the link between apparently local issues and the global economy in which they arise by politicians and policymakers causes a mismatch of conceptualization of regulatory problems with that of the TNCs, who take a global perspective of their businesses. National goals and legal objectives may be at odds with "the demands of a global market and the global competition faced by certain industries."[11] Thus, "[a]n individual state's reaction to nationally perceived problems cannot create a level playing field for all who do business within its borders, since integrated global markets mean that a variety of other legal regimes are involved in such a company's processes."[12] This inherent "absence of vision" in the domestic laws make these laws run afoul of the non-discrimination principle embedded in the multilateral trade liberalizing regime.

b. Absence of Dispute Resolution Techniques

The seamless fashion in which TNCs conduct their activities has also uncovered the need of TNCs for dispute resolution techniques that are not directly linked to any one country. Although, such need has given rise to the formulation of elaborate and important arbitration procedures privately agreed to by TNCs, there is no such mechanism agreed to by the nation-states. For instance, during the Boeing-McDonnell merger review by the EU Competition Commission, Theodore J. Collins, Senior Vice President and General Counsel of the Boeing Company, expressed the need for and the willingness of the

[11] *Id.* at 784.
[12] *Id.*

Boeing Company to consider any alternative dispute resolution mechanism that offered the likelihood of prompt clearance of the merger.[13]

The structural changes in the global economy have posed limits to the practical range of options available to a nation-state. The transnational nature of activities "*heightens the need for states to share or delegate power and responsibility to other states* and an increasing number of non-state transnational actors, actors that are more powerful than ever before."[14] Thus, a state wishing to solve a transnational problem must seek cooperation of other states, be it informally or through the development of a multilateral framework.

4. Globalization: A Normative Concept that Promotes Global Welfare

Globalization, thus, denotes a "process of denationalization of clusters of political, economic and social activities."[15] It differs from internationalization in that the latter "refers to cooperative activities of national actors, public or private, on a level beyond the nation-state but in the last resort under its control."[16] Internationalization aids a nation-state's efforts to protect the needs of its citizens, *i.e.*, it serves the national interest of the nation-states. In other words, internationalization provides nation-states with the means "to satisfy the national interest in areas where they are incapable of doing so on their own."[17] On the other hand, globalization must serve the common good of humankind, *e.g.*, the preservation of a viable environment or promotion of global consumer welfare. Globalization can thus be cast as a normative concept that promotes the common good over the national good. It also refers to an empirically verifiable set of processes based on the dynamics, *inter alia*, of markets. Professor Jost Delbruck summarized globalization as "the process of denationalization of markets, laws and

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[13] *See* International Competition Policy Advisory Committee, Antitrust Division, US Department of Justice, Final Report, at 58 & n.58 (2000), *available at* <http://www.usdoj.gov:80/atr/icpac/finalreport.htm>, (visited on Jan. 04, 2001) [Hereinafter "ICPAC, Final Report"]; Submission by Theodore J. Collins, Senior Vice President & General Counsel, The Boeing Company, in response to Advisory Committee Multijurisdictional Merger Review Case Study questionnaire re the Boeing/McDonnell Douglas transaction, at 3 (March 19, 1999)*; see also* Submission by Dr. W. Kissling, President, Oerlikon-Bührle, in response to Advisory Committee Multijurisdictional Merger Review Case Study questionnaire re the Oerlikon-Bührle/Leybold transaction (March 17, 1999).
[14] Aman, *The Globalizing State*, *supra* note 3, at 782.
[15] Delbruck, *Globalization of Law*, *supra* note 2, 11.
[16] *Id.*
[17] *Id.*

politics in the sense of interlacing peoples and individuals for the sake of the common good."[18] However, it must be noted that "globalization is neither a universal process nor is the concept universally applied. Nor is globalization involving all states and regions alike, nor is it global in the sense that all major aspects of political, economic, or social life are actually encompassed by the process."[19]

B. Global Consumer Welfare as a Global Public Good

Embedded in the process of globalization is the idea that it is forging global population. If globalization is to serve the common good of humankind, "global consumer welfare" should be substituted for "national consumer welfare." Global consumer welfare, as discussed below, is a global public good.[20] All public goods typically face supply problems. For global public goods, this can lead to a global market failure.[21] However, before we can specify the global public good characteristics of global consumer welfare and therefore make a case for global cooperation to counter the supply problem, we will define what global consumer welfare is and what global public goods are.

1. Defining Global Consumer Welfare

Consumer welfare, a term coined and defined by Judge Robert Bork, means all things that are good for consumers, such as low prices, innovation, and choice among differing products.[22] Under Judge Bork's definition, however, "consumer" includes owners of firms and producers.[23] Drawing on Judge Bork's definition of consumer

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[18] *Id.*
[19] *Id.*
[20] *See* Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust-Retrospective and Prospective: Where are We Coming From? Where are We Going?,* 62 N.Y.U. L. REV. 936, 946-7 (1987) citing R. BORK, THE ANTITRUST PARADOX 90-106 (1978). (the 'public good' has been excised as the generalized goal of antitrust. In its place is a goal called 'consumer welfare,' which is not consumer welfare at all. Consumer welfare is defined as the sum of producer and consumer welfare. According to the Chicagoans, if consumers lose but producers win more than consumers lose, 'consumer welfare' has been increased.).
[21] Inge Kaul et. al., *Defining Global Public Goods, in* GLOBAL PUBLIC GOODS, INTERNATIONAL COOPERATION IN 21ST CENTURY 2, 6 (Inge Kaul et al. eds., New York: Oxford University Press, 1999). [Hereinafter "Kaul, *Defining Global Public Goods*"].
[22] ROBERT H. BORK, THE ANTITRUST PARADOX, 61 (New York: Basic Books Inc., 1978).
[23] *Id.* at 108-110; *see* John R. Morris, *International Trade and Antitrust: Comments*, 61 U. CIN. L. REV. 945, 946 & n.4 (1993).There is, however, some confusion between lawyers and economists over the term "consumer welfare." Judge Bork equated consumer welfare with "economic efficiency."

welfare, we would define "global consumer welfare" to mean the availability to consumers (irrespective of their nationality) of access to low-priced, high quality products, and an option to choose among differing products, and the availability to producers of an internationally stable transactional environment.[24]

Having defined global consumer welfare, in the next two sections we will briefly discuss public goods and global public goods. In section 4, we will establish a link between global consumer welfare and global public goods. The proposition I seek to establish is that globalization promotes global consumer welfare, which is a global public good, and therefore requires a collective action of nation-states to counter the problem of sub-optimal supply of this good.

2. Defining Public Goods

The two main characteristics of public goods usually derived from Samuelson's analysis, are (1) non-excludability, *i.e.*, no member of the community in which the good is produced can be prevented from consuming or enjoying the good – the free rider problem; and (2) nonrivalrousness, *i.e.*, no member's consumption subtracts from the supply available for another's consumption.[25]

a. *Supply Problem*

Because of the nonrivalrous and nonexcludable characters of public goods, they typically face supply problems. They induce a pattern of behaviour producing an outcome which from an individual's viewpoint is quite rational, yet from a collective

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Economists tend to define "economic efficiency" with total welfare, that is the sum of "consumer welfare" (or "consumer surplus" that is benefits of buyers) and "producer welfare" (or "producer welfare" that is benefit of suppliers). The economist's "total welfare" and Judge Bork's "consumer welfare" are, therefore, functionally equivalent. *Id.*

[24] Professor Eleanor Fox is an ardent supporter of global consumer welfare approach. *See, e.g.,* Eleanor M. Fox, *Can We Control Merger Control? – An Experiment, in* POLICY DIRECTIONS FOR GLOBAL MERGER REVIEW 79 (Special Report, Global Forum for Competition and Trade Policy, 1999); Eleanor M. Fox & Janusz A. Ordover, *The Harmonization of Competition and Trade Law, The case of Modest Linkages of Law and the Limits of Parochial State Action, in* COMPETITION POLICY IN THE GLOBAL ECONOMY: MODALITIES FOR COOPERATION 407 (Leonard Waverman et al. eds., London & NY: Routledge, 1997); Eleanor M. Fox, *International Antitrust: Against Minimum Rules; for Cosmopolitan Principles*, ANTITRBUL, March 22, 1998; 1998 WL 16568441;Eleanor M. Fox, *Extraterritoriality and Merger Law: Can All Nations Rule the World*, ANTITRUST REPORT, Dec.1999, at 2.

viewpoint "is sub-optimal and can be disastrous."[26] The two main reasons that hamper the provision of public goods are: "free riding" and the "prisoner's dilemma."

i. The Free-Rider Problem

The free-rider problem was best illustrated by Garret Hardin, in his famous essay "The Tragedy of Commons," by depicting a common pasture where shepherds get "locked into a system that compels (each one) to increase his herd without limit," thereby leading to overgrazing and land degradation.[27] In other words, the free-rider problem may be described as the individual's urge to amass benefit at the expense of others. According to Mancur Olson even "altruism or common purpose would not overcome the powerful incentive to avoid contributing personal resources to common endeavours."[28] People may even fear expressing an interest, say, in a cleaner environment or better roads, for this may oblige them to share the cost of providing a cleaner environment or better roads. The urge, for whatever reason, to avoid contributing or even expressing one's preferences sends out wrong signals to the supplier, which result in attaining dis-equilibrium between supply and demand, meaning under-supply of public goods and sub-optimal allocation of resources.

The free-rider problem associated with the supply of public goods calls for a mechanism for the proper supply of them – other than proper functioning of market, which is good at providing private goods – such as cooperation, or coercion.

ii. The Prisoner's Dilemma

Another problem associated with the supply of a public good is lack of information and coordination among suppliers of it. The economist illustrates such lack of information and coordination by using the "prisoner's dilemma" example.

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[25] Paul A. Samuelson, *Diagrammatic Explanation of a Theory of Public Expenditure*, 376 REV. ECON. & STATISTICS 350 (1955); *see also* BARRY M. MITINICK, THE POLITICAL ECONOMY OF REGULATION 294 (New York: Columbia University Press, 1980); William R. Mureiko, *A Public Goods Approach to Calculating Reasonable Fees Under Attorney Fee Shifting Statutes,* [1989] Duke L.J. 438.
[26] Kaul, *Defining Global Public Goods, supra* note 21, at 6.
[27] G. Hardin, *The Tragedy Of Commons* (1968) SCIENCE 162, at 1244.

The prisoner's dilemma situation arises through two prisoners' inability, because of their confinement in separate cells, to exchange information and collaborate to form a common defense to the accusation that they jointly committed an offence. Each prisoner must therefore independently decide whether to plead guilty or not guilty to the charge. The penalty each prisoner will get, however, is dependent on how the other prisoner pleads. If both prisoners plead not guilty, they will each get a year in prison on a lesser charge that can be proven without a confession. If one pleads guilty and implicates the other, while the other denies the charge, the one pleading guilty will be rewarded (for collaboration with the police) with freedom, while the other will get five years in prison for the crime. If both plead guilty, each will serve a reduced sentence of three years.

		Prisoner A	
		Not Guilty	Guilty
Prisoner B	Not Guilty	A and B each get 1 year	A gets 0 years B gets 5 years
	Guilty	A gets 5 years B gets 0 years	A gets B each serve 3 years

Prisoner A quickly realizes that no matter how prisoner B pleads (guilty or not guilty), he is always better off by confessing to the charge. If prisoner B pleads not guilty, prisoner A will get no punishment. If prisoner B pleads guilty, prisoner A will get three years imprisonment if he also pleads guilty, and five years if he pleads not guilty. Prisoner A will therefore plead guilty. Prisoner B, facing identical choices, will also plead guilty. The result: both prisoners will plead guilty to the crime and each will serve three years in prison.

The prisoner's "dilemma" arises from the fact that both prisoners would improve their position by cooperating – by pleading not guilty – than by defecting, by pleading guilty. If both the prisoners could keep their silence, they would be better off by serving only one year in prison instead of three years. The lack of opportunity to communicate and therefore collaborate for mutual gain, results in loss to both the prisoners; that is, both would serve a total of six years in prison rather than just two. The four extra years in

[28] MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION, 113 (Cambridge, MA: Harvard University Press, 1971).

prison represent a sub-optimal outcome (or cumulative loss) for the two prisoners resulting from the want of a mechanism (framework) for cooperation.

The prisoner's dilemma illustrates "in simple terms many real life situations in which two or more parties face similar incentives to 'defect' from cooperation unless mechanisms are established to facilitate communication and build trust."[29]

3. Defining Global Public Goods

So far, we have identified the characteristics of public goods and the problems that hamper their supply. Kaul, Grunberg and Stern[30] have ventured to extend the concept of public goods at the global level. They have done so by using criteria primarily based on who the beneficiaries of global public good should be. Agreeing that the *Publicum,* or the world's population, should be the beneficiaries, Kaul et al. then divide the *Publicum* in three categories: countries, socio-economic groups, and generations. Thus for a public good to qualify as a global public good, a public good should:

1. cover more that one group of countries. (If a public good were only to apply to one geographic region – say, South America – it would be a regional public good, and possibly a club good (that is, a good with excludable benefits));
2. benefit not only a broad spectrum of countries but also a broad spectrum of the global population, divided in terms of rich and poor, access to knowledge, information and technology; ethnicity, gender, religion, and political affiliations, among others; and
3. meet the needs of the present generation without jeopardizing those of future generations.

Noting that only pure global public good would meet the above criteria, and just as pure public goods are rare and so are pure global public goods, Kaul et al. have also suggested a definition of impure global public good. While, "a pure global public good is marked by universality — that is, it benefits all countries, people and generations. An impure global public good would tend towards universality in that it

[29] Kaul, *Defining Global Public Goods, supra* note 21, at 7-8.
[30] *Id.*

would benefit more than one group of countries, and would not discriminate against any populations segment or set of generations."[31]

a. Intermediate Global Public Goods

Kaul et al. also distinguished global public goods in terms of their place in the production chain. They divided them as Final and Intermediate global public goods:

1. Final global public goods are outcomes rather than "goods" in the standard sense. They may be tangible (such as environment, or the common heritage of mankind) or intangible (such as peace or financial stability).
2. Intermediate global public goods, such as international regimes, contribute towards the provision of final global public goods.[32]

The reason for classifying the global public goods into final and intermediate is to identify intermediate global public goods so as to highlight the area(s) "where international public intervention may be needed to provide a particular global Public good."[33] International regimes provide the most important example of intermediate global public goods. Such regimes, for instance international surveillance systems, provide a foundation for the provision of many other intermediate products with benefits reaching the global public. Furthermore, international regimes may take different forms, such as international agreements,[34] or international organizations,[35] but they are nonetheless closely intertwined.

b. The Supply Problem of Global Public Goods

Just as public goods are defined in terms of the existence of their supply problem, so are global public goods. According to Conybeare "the degree of suboptimality," in the production of public goods, "is normally considered to be a function of the extent to which the qualities of publicness are present and of the number of beneficiaries."[36]

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[31] *Id.* at 11.
[32] *Id.* at 13.
[33] *Id.*
[34] International agreements are statements of commitment typically setting forth policy priorities, principles, norms or standards as well as decision making procedures and obligations. *Id.*
[35] Organizations are bodies or mechanisms, usually resulting from international agreements, intended to, among other things, facilitate consultations and negotiations among member parties, monitor treaty compliance or provide other types of information, or undertake operational activities. *Id.*
[36] John A. C. Conybeare, *Public Goods, Prisoner's Dilemma and the International Political Economy*, INTERNATIONAL STUDIES QUARTERLY 28, at 7 (1984).

The qualities of publicness vary from one good to another. However, global public goods, by definition, must be available to a large number of beneficiaries. Given the large number of beneficiaries (and suppliers or agents who facilitate the production), there exists tremendous uncertainty about their sustained presence, and a significant set of collective action problems, such as free-riding and prisoner's dilemma.

In the international arena, states behave like private actors driven by their national self-interests. A state's tendency to promote its national interest, and the absence of a global sovereign, raise the issue as to who will solve the collective action problem at the global level. The risk that the states will not take action to ensure the proper supply of a global public good prompts us to consider the role of non-state actors. However, despite the absence of *the* actor to cure the collective action problem at the global level, there is an impressive and growing number of international regimes (intermediate global public goods) that foster the production of the final global public good.[37]

4. Global Public Good Qualities of Global Consumer Welfare

Global consumer welfare, the term as defined above deployed in competition law, does exhibit the characteristics of non-excludability and non-rivalrousness. Thus, access by one consumer to an efficient market-place that offers low-price better-quality products does not exclude access to such a market-place by another consumer. Similarly, access by one producer to an internationally harmonized legal framework for transnational business does not exclude access to such a legal framework by another producer. Furthermore, access to an efficient market-place and harmonized legal framework is nonrivalrous, as access to them by market players does not reduce their availability for other market players.

In addition to the basic characteristics of a public good, global consumer welfare also exhibits the additional characteristics required of a global public good, that is, its benefits: i) extend to more than one group of countries, ii) cover a broad spectrum of global population; and iii) meet the needs of the present generation without jeopardizing those of future generations.

[37] Kaul, *Defining Global Public Goods*, *supra* note 21, at 15.

Indeed, in a globalized market, which is formed by dismantling national and regional distinctions, it would be difficult to say that benefits arising from low-priced better-quality products are needed or extended only to consumers living in a certain group of countries. With the growing number of free-trade agreements and trade liberalization under the WTO, a consumer in corner A of the world can have access to products selling in corner B of the world at a comparable price, once shipping and handling costs and customs duties are taken into account.

Moreover, the benefits arising from the efficient working of markets do not extend differentially to various parts of the population. While, some groups may be in an advantageous position (say, for example, because of their purchasing power) allowing them to enjoy the fruits of consumer welfare more than others, these fruits are not forbidden to any group of the population.

Lastly, market systems that promote innovation can benefit not only the present generation but can benefit future generations as well, since the next generation will have access to advanced research and products, which would facilitate further innovation.

a. Supply Problems

In addition to exhibiting basic characteristics of public goods, global consumer welfare also suffers from the supply problems of free-riding and the prisoner's dilemma. Although the complete body of competition law is aimed to ensure the efficient working of markets with the objective of promoting consumer welfare, we will explore the public provision problems using the case of merger law.

i. Free-rider Problem

Disparate national merger control regimes, while taking care of domestic markets and national consumers, promote national champions in the global market and thus exhibit a free-rider problem that undercuts the provision of global consumer welfare. For example, in the Boeing/McDonnell Douglas merger the case was seen as competitiveness issue of the Boeing by the United States and by the European Union as a competitiveness concern of the Airbus. In reviewing the Boeing case, the US antitrust authorities ensured the promotion of US economy rather than the global consumer welfare. Echoing the policy of the US antitrust authorities in the Boeing case, one of the lead economic advisers of the Clinton Administration was quoted as saying:

> From a national point of view, it is preferable to have a single producer [Boeing] earning generous profits competing with a subsidized foreign supplier [Airbus]. The US economy is better off even if consumers of airplane seats [around the globe] are somewhat worse off. [38]

The EU officials commenting on the policy of the United States noted that if US antitrust authorities would have considered the global impact of the merger (and its effect on reducing the global consumer welfare), this would have tipped the balance in favour of prohibition.[39] Professor Fox calls this free-rider problem as "blindered national vision." She noted that "the national-only concern of national law is out of step with the reality that even local transactions have global impacts. If nations are not encouraged and enabled to take a global vision, the day of truly international antitrust will surely arrive with greater speed."[40] She stressed the "need for an international economic order in which at least some players are charged with responsibility to enhance the welfare of the entire community."[41]

ii. Prisoner's Dilemma

Moreover the review of a single merger transaction by multiple jurisdictions, in the absence of any mechanism for cooperation and/or coordination, represents a situation similar to the "prisoner's dilemma" that results in sub-optimal production of global consumer welfare. Like in the "prisoner's dilemma" where the decision of one prisoner has a bearing on the punishment the other prisoner will get, so too the decision of one jurisdiction has bearing on the outcome of review of a transnational merger transaction by other jurisdictions. However, when there are disparate results of transnational merger

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[38] Laura D'Andrea Tyson, *"McBoeing" Should be Cleared for Takeoff*, WALL ST. J., July 22, 1997, at A14.
[39] *See* Eleanor M. Fox, *International Antitrust: Against Minimum Rules; For Cosmopolitan Principles*, ANTITRBUL, March 22, 1998; 1998 WL 16568441. [Hereinafter "Fox, *International Antitrust*"].
[40] *Id.*
[41] Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U. L. REV. 1781, 1801 (2000). [Hereinafter "Fox, *Antitrust and Regulatory Federalism*"].

review, the decision of the jurisdiction which imposes the most restrictive remedy prevails.[42]

In the absence of complete and accurate information available to the reviewing jurisdiction, concerning the global business of the merging parties rather than just information concerning business within its borders, the reviewing jurisdiction will be restricted to assessing the anticompetitive impact of the merger on its domestic markets and consumers and would fail to take into account the impact of the merger on consumers around the globe.

The want of a mechanism for multilaterally sharing information puts nations on the horns of a "prisoner's dilemma," and forces them to operate with "blindered national vision." Although bilateral cooperation agreements do exist between nations, there is no such agreement on a multilateral basis. Thus, to remedy the problem of supply of global consumer welfare posed by the prisoner's dilemma situation in transnational merger review, a multilateral agreement for information sharing, cooperation and coordination is needed. This multilateral agreement – which would form the International Merger Control Regime (IMCR) – would be an intermediate global public good and could be composed both of a treaty and of a new or an existing international organization.

C. Concluding Remarks

In this part we studied the various factors that play a role in the process of globalization and focused on one of those elements, that is, promotion of global consumer welfare. We established that global consumer welfare is a global public good, which requires collective action of nation-states or of a supranational authority to ensure its optimal production.

[42] *See* Fox, *Extraterritoriality and Merger Law, supra* note 24, at 2.

Part-II

D. Why Merge?

Mergers and acquisitions (M&As) emerged in the United States at the turn of the twentieth century when corporations became the major form of business organization.[43] Since the late 1880s, the US has experienced four merger waves and is currently witnessing the fifth wave. Of these five waves, the fourth brought Europe within its territorial scope, whereas the fifth and the current wave has spread all over the globe.

Peter Steiner lists the following, among others, factors as the motives driving firms to merge with or acquire another company:

1. A desire to achieve monopoly profits.
2. A desire to utilize unutilized market power.
3. A response to shrinking opportunities for growth and/or profit in one's own industry due to the shrinking demand or excessive competition.
4. A desire to diversify to reduce the risk of business.
5. A desire to achieve a large enough size to realize an economical scale of production and/or distribution.
6. A desire to overcome critical lacks in one's own company by acquiring the necessary complementary resources, patents, or factors of production.
7. A desire to achieve sufficient size to have efficient access to capital markets or inexpensive advertising.
8. A desire to utilize more fully particular resources or personnel controlled by the firm, with particular applicability to managerial skills.
9. A desire to displace an existing management.
10. A desire to utilize tax loopholes not available without merging.
11. A desire of reap the promotional or speculative gains attendant upon new security issues, or changes price-earning ratios.
12. A desire of managers to create an image of themselves as aggressive managers who recognize a good thing when they see it.
13. A desire of managers to manage an ever-growing set of subordinates.[44]

In addition to the above factors, others include reducing transaction costs associated with arms-length transactions,[45] and entering national markets from which

[43] Abraham Tarasofsky & Ronald Corvari, *Corporate Mergers and Acquisitions, Evidence on Profitability*, A study prepared for the Economic Council of Canada, ix (1991).

foreign players are otherwise excluded by trade barriers. However, the current merger wave is characterized by two additional factors — speed and access to proprietary assets.[46]

M&As are the speediest way of attaining the desired goals when expanding domestically or internationally. For instance, where timing is important in the marketing of a product, the acquisition of an existing firm in a new market with a solid distribution network may be the most time-effective manner in which to set up a new local distribution and marketing company. Moreover, particularly now, when breathtaking technological advances are being made, M&As can offer a latecomer to a market or new field of technology means to catch up rapidly. It is no wonder that the pressure of time and the feeling of urgency is most felt in the information technology industry where business slogans like "a year has only fifty days" or "speed is our friend – time is our enemy" are often heard.[47]

The second additional factor pushing M&As is the desire for instant acquisition of strategic assets, such as R&D or technical know-how, patents, brand names, the possession of local permits and licenses, and supplier or distribution networks, which otherwise would require time to develop. The acquisition of Tetley Ltd. of United Kingdom by Tata Tea of India offers a fitting example that represents need for speed and the quest for strategic assets. The main reason why Tata acquired Tetley was, as explained by the former's Vice-Chairman: "for us to develop a global market in the time frame we had in mind, the acquisition of Tetley, with its brand name and distribution system, was the only option."[48]

Moreover, where companies foresee that they cannot dominate the market, they make a strategic decision to exit the market by selling to firms that can dominate. Acting on the slogan that "bigger is better", buyers tend to position themselves for playing on the

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[44] *See* PETER O. STEINER, MERGERS: MOTIVES, EFFECTS, POLICIES, 30-31 (Ann Arbor: Uni. of Michigan Press, 1975).
[45] OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS, 104 (New York: The Free Press, 1975)(Vertical integration economizes on transactions by harmonizing interest and permitting a wider variety of sensitive incentive and control processes to be activated.).
[46] United Nations, *World Investment Report 2000: Cross-border Merger and Acquisitions and Development*, at 140 (New York: United Nations, 2000). [Hereinafter "United Nations, WIR 2000"].
[47] *Id.*

global market. And finally the advances in technology prompt firms in network industries to capture first-mover advantages or to buy out new entrants that may threaten their long-term dominance.[49]

Functionally, there are three types of M&As: horizontal, vertical and conglomerate. In a horizontal M&A, the merging firms and/or the acquiring and the acquired firms are in the same industry (for instance, two automobile manufacturers or two airlines). In a vertical M&A, the merging firms (the acquiring and the acquired firms) are typically in a client-supplier or buyer-seller relationship. M&As between parts and component makers and their clients (such as final electronics or automobile manufacturers) are examples of vertical M&A. A conglomerate M&A occurs between companies operating in different industries or conducting unrelated activities.

For the purposes of our inquiry, the classification of M&As, however, does not matter. Because once a proposed merger meets notification thresholds in a jurisdiction, it becomes subject to its merger review process.

E. Growing Trend of Transnational M&As

In the past two decades (1980-99), the M&As completed worldwide have grown at an average annual rate of 42 per cent to reach the value of $2.3 trillion in 1999[50] and $3.5 trillion in 2000.[51] These two decades have witnessed two M&A waves, the first during the late 1980s (1988-1990) and second (and current) one started in 1995. Both waves are marked by relatively high economic growth and widespread industrial restructuring.

According to the United Nations' *World Investment Report 2000: Cross-border Merger and Acquisitions and Development*, cross-border M&As maintained a steady 25 per cent of worldwide M&As in terms of both value and number of deals throughout the 1990s. However, the years 1990 and 1999 witnessed high activity in cross-border M&As

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[48] *Id.* at 143. Quoting R. K. Krishana Kumar, Vice-Chairman, Tata Tea Ltd., at the UNCTAD Expert Meeting on Mergers and Acquisitions: Policy Aimed at Maximizing the Positive and Minimizing the Negative Impact of International Investment, Geneva, June 19-21, 2000.

[49] John M. Nannes, Last Year and this Year: The View from the Antitrust Trenches, address before New York State Bar Association, Antitrust Law Section Annual Meeting, New York, New York (January 27, 2000) *available at* <http://www.usdoj.gov/atr/public/speeches/4086.htm>, (visited on April 25, 2001).

[50] United Nations, WIR 2000, *supra* note 46, at 106.

[51] *The Great Merger Wave Breaks*, EDGE (AUSTL.), Jan. 01, 2001; 2001 WL 2167212.

when they exceeded the 30 per cent of worldwide deals. In terms of value, cross-border M&As rose from $75 billion in 1987 to $720 billion in 1999.[52]

The Report defines cross-border M&As as the acquisition of more than 10 per cent of equity shares. Acquisition can be minority (foreign interest of 10 to 49 per cent of a firm's voting shares), majority (foreign interest of 50-99 per cent), or outright acquisitions (foreign interest of 100 per cent). Acquisitions involving less than 10 per cent constitute portfolio investment and, therefore, are not considered as acquisitions.[53]

The worldwide data on M&As show that less than 3 per cent of cross-border M&As by number are "mergers."[54] Even when a merger is supposedly between "equals," the deal in reality was acquisition of control by one company of another. Given the low percentage of "real" mergers, the acronym "M&As" for all practical purposes means "acquisitions." During 1999, full or outright (100 per cent) acquisitions accounted for more than half of all cross-border M&As. About one-third of acquisitions by foreign firms in developing countries were minority (10-49 per cent) acquisitions as compared to less than one-fifth in developed countries.[55]

In 1999, the value of cross-border M&As grew by 35 per cent and the number of deals exceeded 6,000. Almost one-fifth of these cross-border M&As involved acquiring and acquired firms located in the same country, but with different ultimate parent countries. Some 90 per cent of cross-border M&As (by value of sales and purchases) were in developed countries.

During the current merger wave a number of "mega deals" (M&As worth $1 billion or more) have taken place but they are by no means exceptionally large by historical standards. The creation of US Steel, in the US, at the beginning of the twentieth century would have been worth around $600 billion at today's prices. By contrast, the largest recent transaction was the acquisition of Mannesmann by Vodafone AirTouch for $200 billion in 2000. There were 109 cross-border "mega deals" in 1999, most of which were among firms from developed countries.

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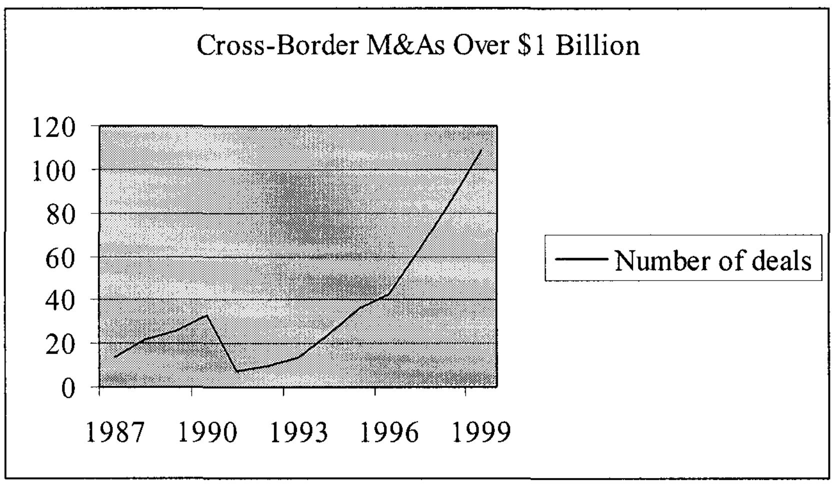
[52] United Nations, WIR 2000, *supra* note 46, at 106.
[53] *Id.* at 99.
[54] *Id.*
[55] *Id.*

Cross-border M&As with values of over US$1 billion, 1987-1999				
Year	Number of deals	Percentage of total	Value (billions of US$)	Percentage of total
1987	14	1.6	30.0	40.3
1988	22	1.5	49.6	42.9
1989	26	1.2	59.5	42.4
1990	33	1.3	60.9	40.4
1991	7	0.2	20.4	25.2
1992	10	0.4	21.3	26.8
1993	14	0.5	23.5	28.3
1994	24	0.7	50.9	40.1
1995	36	0.8	80.4	43.1
1996	43	0.9	94.0	41.4
1997	64	1.3	129.2	42.4
1998	86	1.5	329.7	62.0
1999	109	1.7	500.8	69.6

Source: WIR 2000, Table IV.2 at page 108, citing: UNCTAD, Cross-border M&A Database, based on data from Thomson Financial Security Co.



The number of cross-border mega deals grew even more in the year 2000. In the first half of 2000, 99 mega deals took place compared to 55 deals in the first half of 1999. The value of mega deals during this period rose 60 percent to reach an all time first-half high of $643 billion. Twenty-three countries participated in the merger wave compared to

18 countries in the first six months of 1999.[56] The trend in cross-border M&As is likely to continue in the future affecting a higher number of countries (See Table-1 below).[57] In 2000, 36,700 companies worldwide changed hands in $3.5 trillion worth of activity.[58]

Although the data presented concern cross-border mergers only, most mergers, even between firms in the same country, have international impact, and it is the mergers with international impact that will be the subject matter of a future IMCR. For the sake of convenience, we will refer to cross-border mergers and mergers with international impact as "transnational mergers."

1. Growing Concentration in the Global Market

As the number of cross-border mergers grows, so does the concentration of the global market. As noted above, the current global merger wave is driven by long-term strategic and economic motives, such as "acquiring the scale and resources to compete at home and abroad, protecting and enlarging market share, reducing competition and attaining greater pricing power, in what large corporations see increasingly, often primarily, as a global market."[59]

All major industries – financial, telecommunications, pharmaceuticals, oil and gas, mining, automobiles, airlines, steel, among others – are being restructured to meet the demands of globalization. The restructuring is, however, resulting in higher concentration of the global market and in the creation of "giga-corporations."[60] Below is a brief account of growing global consolidation in select industries.

a. *Financial Industry*

The financial industry became global before globalization became a buzzword.

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[56] Lynn Woods, *The World is Merging on Up: Mergers and Acquisitions Activity Increased Again in 2000*, 11 BUSINESS WITHOUT BORDERS, No. 110, at 14 (col. 1).
[57] Abdel M Agami, *Cross-Border Mergers among Multinational Businesses*, 9 MULTINATIONAL BUS. REV. Issue 1, at 7787; 2001 WL 18417211.
[58] Leon Rubis, *Overdue Diligence for M&As*, 46 HRMAGAZINE, Issue 6, June 1, 2001, at 12; 2001 WL 10647015.
[59] Richard B. Du Boff & Edward S. Herman, *Mergers, Concentration, and the Erosion of Democracy*, 53 MONTHLY REV., Issue 1, at 1429; 2001 WL 12550411.

The merger of Chemical with Chase Manhattan in 1995 was perhaps the first merger to give rise to a global bank. In 2000, Chase Manhattan acquired J.P. Morgan to form J.P. Morgan Chase. In 1998, the merger between Travelers Group and Citicorp marked the beginning of a process that "will leave just a few truly global firms."[61] In 2000, Royal Bank of Scotland Group PLC merged with National Westminster Bank PLC – two top UK banks – invoking the need to compete on the global scale. The same year, HSBC acquired Republic Bank, Safra Republic Holdings and Credit Commercial de France.[62] Notable transatlantic and trans-industry (financial and professional services) mergers include Credit Suisse First Boston of Switzerland's acquisition of Donaldson, Lufkin & Jenrette Inc., a US-based securities firm, UBS AG's purchase of securities firm PaineWebber and Chase Manhattan's acquisition of Robert Fleming Holdings Ltd.[63]

In the US, over the last twenty years about 8,000 bank mergers took place. According to Bernard Shull, co-author *of Bank Mergers in a Deregulated Environment*, the merger trend in the US banking industry is likely to continue at a relatively high rate through out this decade resulting in the creation of five to ten very large global banking companies and several thousand smaller local regional institutions.[64] Similarly in Western Europe, the merger trend in the financial sector has been prevalent during the last decade and is likely to continue in the future, predicts an International Labor Organization Report.[65]

The M&As in the financial industry clearly point to growing concentration resulting in a handful of global players in the industry.

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[60] Paul Sheehan, *Global Warning*, SYDNEY MORNING HERALD, March 31, 2001, at 32; 2001 WL 18179361. (Giga-corporations --huge global companies with more economic power than most countries); *See also* Hussein Shobokshi, *Challenges of Globalization Confront Arab Economies*, MIDDLE EAST NEWSFILE, March 29, 2001; 2001 WL 10778522.

[61] *Morgan Stanley Chief Sees More Fin Services Mergers*, DOW JONES INT'L NEWS SERV., 02:06:00, November 17, 1998. (Quoting Philip Purcell, chairman and chief executive officer of Morgan Stanley Dean Witter & Co. (MWD)).

[62] Lynn Woods, *supra* note 56.

[63] *Id.*

[64] Ricardo Roberts, *Banking M&A Expert Sounds Off: Former Federal Reserve Economist Discusses His New Book.*(Mergers and Acquisitions, Bank Mergers in a Deregulated Environment by Bernard Shull) (Interview), MERGERS & ACQUISITIONS REP., June 25, 2001, Item 01176003; 2001 WL 6855933.

[65] *ILO: 300,000 Finance Jobs to be Lost in Europe in 3 Years*, DOW JONES INT'L NEWS, 06:48:00, Feb. 3, 2001.

b. *Airline Industry*

The airline industry, like any other global network industry, is being restructured by the forces of globalization. Airlines are faced with the challenge of providing services to its customers to all the major destinations of the world. Unlike firms operating in other industries, airlines cannot expand their operation and market share by engaging in cross-border M&As, which are constrained by bilateral agreements and other government restrictions. However, the present regulatory environment does permit other forms of co-operation.[66] The result is the emergence and creation of the global airline alliances, as no airline is able to provide services with its own aircraft and crew to every destination its customers require.

Alliances take the form of code-sharing and other marketing arrangements, including earning and redemption of frequent flyer miles on member carriers. These alliances are changing industry structure by challenging the limits posed by restrictive bilateral agreements. To date there are four major global airline alliances and a number of smaller and local alliances, including Wings which has become a *de facto* name for the alliance between KLM and Northwest and affiliates.[67] What follows is a brief description of four major alliances: Star Alliance, Qualiflyer, Oneworld, and SkyTeam.

In 1997, five airlines – United Airlines, Lufthansa, Air Canada, Varig and Thai Airways – formed the first global airline alliance called **Star Alliance**. Since its inception the membership of the Star Alliance has grown to 15 members.[68] Star Alliance carries some 282 million customers every year to over 800 destinations in more than 130 countries around the globe.[69]

In April 1998, Swissair, Sabena and Austrian launched their own alliance under the name of **Qualiflyer**. Since its launching, Qualiflyer has brought in nine more members.[70] Qualiflyer, however, has a policy that SAirGroup (Swissair's holding

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[66] Jane Boyle, *BA's Merger by any Other Name*, AUSTL. FIN. REV., June 12, 2001, at 14; 2001 WL 21618523.

[67] Anthony Harrington, *Business Travel Decisions - Cosy Club Class*, FIN. DIRECTOR, June 6, 2001, at 6; 2001 WL 10783139.

[68] Air Canada, Air New Zealand, All Nippon Airways, Austrian Airlines Group, bmi British Midland, Lufthansa, Mexicana, SAS, Singapore Airlines, Thai Airways International, United Airlines, and Varig.

[69] *United, bmi British Midland Press for 'Open Skies' Agreement*, 11 WORLD AIRLINE NEWS, Issue: 25, June 22, 2001; 2001 WL 7664153.

[70] TAP Air Portugal and Turkish Airlines, AOM French Airlines, Crossair, Air Littoral, Air Europe, LOT Polish Airlines, Portugalia, Volare.

company) was to acquire a minimum 49% stake in member airlines, which prompted Austrian to leave Qualiflyer and join Star Alliance.[71]

By the end of 1999, Swissair had a 20% stake in South African Airways (not a member of Qualiflyer), a 37.6% stake in Polish airline LOT (which is a member), 49.5% stake in Sabena, and 10% stake in Austrian.[72] With a policy of acquiring 49% of member airlines of Qualiflyer, Swissair intended to create an empire on a pattern similar to the one that created trusts in the United States at the end of the nineteenth century. However, Swissair's policy resulted in over-extending its financial resources and lead to its insolvency.

In February 1999, American Airlines, British Airways, Canadian Airlines, Cathay Pacific Airways and Qantas Airways launched their own alliance under the name of **Oneworld**. In late 1999, Air Canada, member of the Star Alliance, took over Canadian Airlines, whereas Aer Lingus, Finnair, Iberia and LanChile joined the alliance. As of July 2001, Oneworld has eight full member and 23 affiliates, which it claims, makes it the world's most "international global airline alliance."[73] Oneworld carriers serve 559 destinations in 134 countries and carry some 209 million passengers a year worldwide, equivalent to one in 30 of the global population.

In June 2000, Delta formed another global alliance, SkyTeam, by teaming up with AeroMexico, Air France and Korean Air. In March 2001, CSA Czech Airlines joined the alliance and in November 2001 Alitalia became a formal member of the alliance. SkyTeam carriers serve 472 destinations in 112 countries.[74]

In addition to global airline alliances, the possibility of cross-border mergers between airlines is not out of the question. For instance, British Airways (BA) and American Airlines (AA) have engaged in talks about a potential "partnership merger" or "virtual merger", which if allowed, would enable the merged entity to control 60% of the

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[71] Catherine Chetwynd, *Travel Decisions - Airline Alliances - Promiscuous Times in the Mile-high Club*, FIN. DIRECTOR, Sept. 11, 2000, at 21; 2000 WL 14181865.
[72] *Id.*
[73] *Oneworld Extends its International Lead With Addition of New African Affiliate*, *available at* <http://www.oneworldalliance.com/pressroom/releases/details.cfm?dID=151>, (visited on July 14, 2001).
[74] *SkyTeam Celebrates First Anniversary With New Member and Cargo*, KOREA HERALD, June 29, 2001; 2001 WL 20830283; *Airlines' Alliance Takes Off*, EVENING NEWS - SCOT., July 11, 2001, at B5; 2001 WL 24049271.

airline traffic from the US to Britain.[75] Moreover, the airline industry is witnessing consolidation in domestic markets as well. For example, in the US, American Airlines bought Trans World Airlines to become the world's biggest carrier,[76] and in Canada, industry consolidation started with the acquisition of Canadian Airlines by Air Canada, followed by Canada 3000's acquisition of Montreal-based Royal Airlines and Halifax-based CanJet.[77] In Australia, Qantas, a major player in the Australasian airline sector, plans to increase in size.[78]

The emergence of global airline alliances and at the same time consolidation within national markets is reducing the number of airlines and therefore the choice previously available to the passengers.

c. *Telecommunications Industry*

Consolidation through M&As is also rampant within the telecommunications industry. Telecommunications analysts believe that there will be a small number of companies that will dominate the industry worldwide in the near future.[79] It seems that their predictions are coming true. For instance, in the case of wireless telephony, the U.K.-based Vodafone Group PLC is emerging as the global dominant player. In 2000, Vodafone completed a "a lightning series of acquisitions", which left it with a stake in 29 operators worldwide.[80] In early 2001, Vodafone expanded its operations in China by purchasing AT&T's 10% stake in Japan Telecom (JT) for $1.35 billion.[81] Later, it purchased BT's 20% stake in Japan Telecom and an equal holding in Japan Telecom's mobile unit, J-Phone Communications for $6.9 billion. The deal left Vodafone with 45% of Japan Telecom and 46% of J-Phone. Also Vodafone purchased BT's 17% stake in Spain's second-largest mobile operator, Airtel, increasing Vodafone's total stake in the

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[75] *Mammoth Air Merger Poised for Take-Off*, SUNDAY BUS. POST, June 24, 2001; 2001 WL 8743169.
[76] *Grounded Again: Airlines in Turbulence: Falling Traffic, Rising Losses, Striking Pilots, Failed Mergers. Some Everyday Problems for the World's Airlines*, ECONOMIST, July 7. 2001; 2001 WL 7319682.
[77] *Welcome Aboard: Canada 3000 Moving Quickly to Merge CanJet and Royal, available at* <http://www.canoe.ca/AirMergers/mar29_canada3000-cp.html>, (visited July 15, 2001). This ultimately lead to Canada 3000's bankruptcy.
[78] *Wings of Change*, ABIX - AUSTRALASIAN BUSINESS INTELLIGENCE: THE AUSTRALIAN, July 10, 2001; 2001 WL 24671438.
[79] Dana Fields, *CEO Says Sprint Not for Sale*, DAYTON DAILY NEWS, July 14, 2000; 2000 WL 20709511.
[80] H. Asher Bolande, *Asia's Tech Trends: A Region in Transformation*, ASIAN WALL ST. J., June 19, 2001, at N1; 2001 WL-WSJA 22051289.

company to 91.6%.[82] Vodafone Group PLC, with a subscriber base of 188 million in the world, and stake in over 29 operators worldwide, is the world's largest mobile telecommunications company.[83]

Like the airline industry, telecommunications operators also formed global alliances. The first such alliance was formed in the early 1990s in Europe by the newly deregulated PTTs, such as Telia Sweden, Swisscom, KPN (Netherlands), and Spain's Telefonica, with AT&T later joining to provide access to the US network. In 1994, France Telecom grouped with Deutsche Telekom and Sprint to form Global One. In 1998, British Telecom teamed up with AT&T to form Concert. These alliances, however, proved to be unsuccessful. Global One was dissolved in 2000 when France Telecom bought out the other partners, and more recently BT and AT&T are negotiating to end their joint-venture, Concert.[84]

One possible reason for the failure of alliances in the telecommunications industry is that companies are more free to merge and acquire, unlike their counterparts in the aviation industry. Foreign ownership restrictions in the telecommunications industry have been loosened over the last decade and the right of establishment for foreign firms have been enhanced (*e.g.*, in Canada we have Sprint and AT&T). By contrast, the airline industry remains subject to tight foreign ownership restrictions and to prohibitions against "cabotage" (*i.e.*, domestic operations by foreign carriers). Despite failure of global alliances in the telecommunications industry, mergers show that the big are getting bigger, and the prediction that there will be few global dominant players in the industry will become a reality sooner rather than later.

d. Petroleum Industry

Like Vodafone in the wireless telecommunications industry, ExxonMobile is emerging as the dominant global player in the oil industry, followed by Royal

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[81] Francis Till, *Vodafone Increases its Interest in Asia*, NAT'L. BUS. REV., March 2, 2001; 2001 WL 12146136.

[82] Brian Cattell, *BT Sets Terms for Stake Sale in Japan, Spain*, DAILY DEAL, May 3, 2001; 2001 WL 20232890.

[83] H. Asher Bolande, *supra* note 80.

[84] *See* Arielle Emmett, *The Gamers and the Gun-Shy*, AM. NETWORK, Dec. 1, 2000, at 2529; 2000 WL 10795218; *France Telecom to Offload Sprint Stake*, IR. INDEPENDENT, June 1, 2001; 2001 WL 4417444; Steve Gold, *AT&T, BT May Scrap Concert JV*, NEWSBYTES, July 2, 2001; 2001 WL 23415924.

Dutch/Shell, BP Amoco and ChevronTexaco.[85] In 1999, Exxon merged with Mobil – both US-based companies – to form the world's largest oil company. The same year British Petroleum (BP), a traditional power in Europe, spread its global business by merging with Midwest-centered American-based Amoco Corp., to form BP Amoco. Later BP Amoco bought Atlantic Richfield Co. (ARCO) to become the world's third largest oil company.[86] In 1999, France's TOTAL bought Belgium's PetroFina, which later acquired Elf Aquitaine of France to form TotalFinaElf. [87] In 2000, Chevron Corp. merged with Texaco Inc – both US-based companies – to form the world's fourth largest oil company.

The concentration in the global oil industry is certainly rising and the merger trend is likely to continue according to Jeremy Wilson, JP Morgan's global head of energy mergers and acquisitions. He predicts that "there are still 'two or three major mergers to be done' in the near future as global equity markets continue to reward oil companies that have scaled up their market capitalization through acquisition with higher share prices."[88] Another reason stated for such high global consolidation in the oil industry is the "rising costs and the increased difficulties in finding new oil reserves both on land and offshore."[89] Whatever the reasons may be, the oil industry is certainly witnessing growing concentration resulting in fewer global players.

e. *Automobile Industry*

The recent consolidation was not the first to hit the automobile industry. Between 1900 and 1925 there were around 5,000 automakers in the United States, which used spare barns to build early horseless buggies. At the turn of the twenty-first century consolidation has left only two major players in the US automobile industry: General Motors and Ford. The two giants have a tangled web of acquired brands and international alliances, which represent 30% of the worldwide automotive market. The consolidation

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[85] *See, e.g., BP Amoco Signs Deal With FTC, Acquires ARCO*, 98 OIL & GAS J., Issue 17, April 24, 2000, at 26; 2000 WL 14257159; Lynn Woods, *supra* note 56.
[86] *BP Amoco Signs Deal, id.; see also* Jerry Guidera and Campion Walsh, *FTC to Approve BP Amoco-Arco Merger With Phillips Deal*, DOW JONES NEWS SERV., April 11, 2000, at 11:32:00.
[87] Paul Sheehan, *supra* note 60.
[88] Darius Snieckus, *JP Morgan: More Oil Mergers Looming on Horizon*, 99 OIL & GAS J., Issue 10, Mar. 5, 2001, at 25; 2001 WL 9152111.
[89] Martin Sikora, *Cross-Border Deal of the Year*, MERGERS & ACQUISITIONS: DEALMAKERS J., Feb. 1, 2001; 2001 WL 9054535.

trend that started 75 years ago in the United States has now spread across the globe. Between January 1998 and May 2000 year, M&As in the automobile industry totaled $138.7 billion in more than 875 deals, according to Thomson Financial Securities Data.[90]

A major worldwide reorganization in the automobile industry was started by the acquisition of Chrysler by Germany's Daimler-Benz. Following the DaimlerChrysler merger, other industry players engaged in strategic moves to remain dominant outside home markets. Examples include GM's acquisition of the remaining 50% of Sweden's Saab, France's Renault purchasing 36.8% of Nissan Motor and 22.5% of Nissan Diesel in Japan,[91] and Ford's acquisition of Volvo Cars from Volvo AB for $6.45 billion.[92] In early 2000, DaimlerChrysler further consolidated its position by purchasing 34 percent of Japan's Mitsubishi Motors Corp., and General Motors bought 20% of Fiat.[93] In Japan, out of 11 automobile manufacturing companies, only three companies – including Toyota Motor Corp. group, and Honda Motor Co., are still "pure" Japanese companies without foreign capital.[94]

Today's world automobile industry pattern is summarized as "6+3", *i.e.*, six groups: General Motors (GM), Daimler-Chrysler, Ford, Toyota, Volkswagen and Renault; and three independent companies: Honda, BMW, and Peugeot.[95]

Since no auto manufacturer is safe from hostile takeovers, the message from automotive analysts is: "get bigger or be swallowed up."[96] With the process of globalization hitting the automobile industry, it has become difficult for companies to survive without entering into a business alliance. Companies realize that, in order to create economies of scale in marketing, manufacturing, and research & development – as

[90] Peter List, *The Few Become Fewer*, 14 GLOBAL FIN., Issue 6, June 01, 2000, at 3847; 2000 WL 12860905.
[91] Janine Brewis, *M&A in the Fast Lane*, CORP. FIN. IIII, April 1, 2000; 2000 WL 11921050.
[92] *Ford Might Buy Volvo Truck Division to Protect Brand*, DET. NEWS, Mar. 30, 2000, at 03; 2000 WL 3472521.
[93] Janine Brewis, *supra* note 91; *see also Foreign Firms to Drive Car Industry*, DAILY YOMIURI/YOMIURI SHIMBUN, April 3, 2000; 2000 WL 4645544.
[94] *Foreign Firms To Drive Car Industry, id.*
[95] *China's Auto Industry at the Crossroad*, ASIAPORT DAILY NEWS, May 18, 2001, at 01; 2001 WL 2581920.
[96] Janine Brewis, *supra* note 91.

well as to deter potential competitors – they have to be one of the biggest players in their industry. Hence, they perceive "mergers as a do-or-die proposition."[97]

f. Pharmaceuticals

Like other industries, the global pharmaceutical industry is also in the midst of rapid consolidation, driven, in part, by the need to spend large sums on costly research and development, and by the shareholders' demand for higher profits.[98] In 2000, at least four mega-mergers were consummated in the pharmaceutical industry.

Glaxo Wellcome merged with SmithKline Beecham – both U.K.-based companies that were themselves created by mergers – to form Glaxo-SmithKline (GSK), the world's largest pharmaceutical company. Pfizer acquired Warner-Lambert – both US companies – to become the world's second largest pharmaceutical company. Pharmacia & Upjohn merged with Monsanto (all US companies), and France's Rho[ACI]ne-Poulenc and Germany's Hoechst merged to create a new company, Aventis.[99] By the end of 2000, GSK tied the knot with Pfizer to claim the world's biggest drugmaker's position with a global market share of 7% each. GSK is to continue to gain market share, as it plans to introduce 15 new drugs by 2005. Earlier this year, GSK Chief Executive signaled that the company is looking for possible acquisitions and joint ventures.[100]

Although, at present the global market share of the biggest drugmakers is relatively small, the trend towards consolidation is likely to continue in the future. Industry analysts predict that "eventually about six to 10 companies will own the pharmaceutical market" and that the biggest will get even bigger.[101]

2. Effects of Growing Concentration

The reshaping of the global economy through M&As is arguably affecting consumers adversely. Business leaders these days are "obsessed with boosting short-term

[97] Fariborz Ghadar & Pankaj Ghemawat, *Hey, Deutsche Telekom: Bigger Isn't Necessarily Better*, WALL ST. J., July 27, 2000, at A22; 2000 WL-WSJ 3038134.
[98] *Glaxo, Smithkline Continue Drug Company Merger Trend*, HOUS. CHRON., Jan. 18, 2000, at 3; 2000 WL 4275775.
[99] *Id.*; *see also* Paul Sheehan, *Global Warning, supra* note 60.
[100] Kerry Capell, *First Aid for Queasy Investors*, BUS. WK., July 9, 2001, at 50; 2001 WL 2207993.
[101] *Glaxo, Smithkline Continue Drug Company Merger Trend, supra* note 98. (quoting Hemant Shah, an independent analyst); Kerry Capell, *id.* (quoting Jo Walton, pharmaceuticals analyst at Lehman Brothers Inc. in London).

share prices, reaching new markets at warp speed, and ramping up scale through mergers or alliances," noted Jeffrey E. Garten, Dean of the Yale School of Management, who interviewed 40 top business executives, including that of: General Electric, Intel, America Online, Dell Computer, Goldman Sachs, Federal Express, BP Amoco, Nokia, and Toyota.[102] It is no wonder that in their race to get bigger and bigger, businesses often neglect consumer welfare or customer satisfaction. Surveys conducted to gauge consumer satisfaction reveal that a growing number of customers feel poorly treated by banks, airlines, hotels, and retailers.[103]

For instance, under a global airline alliance code-sharing, which occupies the centerpiece of airline alliances, air carriers get together to operate a route jointly under a flight code. Code-sharing gives passengers the "impression they are flying straight through from starting point to end destination, in the same aeroplane, when they are doing nothing of the sort." A passenger would probably think that he is going to enjoy the services of a major carrier's Boeing 737, say from London Gatwick to Paris, only to end up on someone else's little Fokker. Moreover, under the alliance, partners reduce the frequency of flights on the routes where they were competing. And since they are no longer competing, the low fares that used to be available disappear. For example, under the banner of Star Alliance, Lufthansa and United, which used to compete with each other on transatlantic routes and offered discounts of between 15% and 30%, have consolidated the discount rate at 15% – to the disadvantage of passengers.[104]

In addition to offering lower quality of services, growing concentration in industries has other adverse affects for the domestic and global economies. For instance, consolidation in the automobile industry is likely to affect millions of people working as designers, engineers, assemblers, marketers, and administrators and an even greater number of people employed as parts suppliers and dealers.[105] Similarly, consolidation in the banking industry put some 130, 000 people out of work and further consolidation in

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[102] Jeffrey E. Garten, *The War for Better Quality is Far From Won*, BUS. WK., Dec. 18, 2000, at 32; 2000 WL 24487129; Jeffrey E. Garten, *The Mind of the C.E.O.*, BUS. WK., Feb. 5, 2001, at 106; 2001 WL 2205246.
[103] Diane Brady, *Why Service Stinks*, BUS. WK., Oct. 23, 2000, at 118; 2000 WL 24485866.
[104] Catherine Chetwynd, *supra* note 71.
[105] Peter List, *supra* note 90.

the industry would likely cut 300,000 jobs only in Western Europe, according to the International Labor Organization Report.[106]

Finally, the emergence of giga-corporations gives rise to concerns about the concentration of political powers. For instance, Citibank formed by the merger of Citicorp and Travelers, has a market capitalization of $155 billion -larger than the Mexican bourse- has 170,000 employees, and 100 million clients in 100 countries.[107] The growing power of corporations vis-à-vis countries is arguably skewing the balance between public and private needs. Big corporations exert disproportionate clout over national legislation. For example, in the United States, Jeffrey Garten believes that Boeing-McDonnell Douglas exert formidable control over US trade policy.[108] And companies like Exxon-Mobil Corp. "deal with oil-producing countries almost as equals, conducting the most powerful private diplomacy since the British East India Company wielded near-sovereign clout throughout Asia."[109]

Some of the concerns raised above may be addressed through social and/or economic policy other than competition policy. Competition policy does not operate in isolation and should not turn a blind eye to the larger impact of growing consolidation in the global markets. Thus, some countries may choose to build social and economic safeguards into the application of their competition laws. For example, they may wish to allow for structural adjustments that might involve temporary lessening of competition.

F. Merger Review: Objective

Merger review, which forms part of competition law, is conducted by competition authorities to prevent lessening of competition (as in the US) or emergence of a dominant player (as in the EU) in the relevant market. The analysis of mergers focuses on the effects of the consolidation of businesses and firms. A consolidation of firms is referred to as "concentration" within the EU,[110] and as "mergers" in the US.[111]

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[106] *ILO: 300,000 Finance Jobs to be Lost in Europe, supra* note 65.
[107] *See* Hussein Shobokshi, *supra* note 60.
[108] Jeffrey E. Garten, *Megamergers are a Clear and Present Danger*, BUS. WK., Jan. 25, 1999, at 28; 1999 WL 8225752.
[109] *Id.*
[110] *See* Commission Notice on the Concept of Concentration under Council Regulation 4067/89 on the Control of Concentrations Between Undertakings, 1998 O.J. (C 66) 5 (EEC).

Unlike most of competition law, which becomes operative after an act prohibited by it is committed (*ex post facto*), merger review is preventive in nature, that is, it seeks to prevent a structural restraint against competition prior to its occurrence and therefore requires *ex ante* assessment of the possible effects of consolidation on the medium or long-term performance of markets and firms.[112] In order to assess the effects of a merger, most merger control regimes require merging parties to notify competition authorities of proposed transactions that meet certain criteria and to await the competition authorities' review before consummating those transactions.

While conducting merger review, competition authorities consider a range of issues including some that form part of the country's industrial or social policy. Some of the issues the competition authorities take into account are:

1. lessening of competition in the market;
2. likely adverse effects on consumers;
3. likely adverse effects on domestic firms;
4. employment consequences;
5. preserving ancient industrial landmarks and national champions; and
6. international competitiveness (at least where a domestic enterprise is involved or threatened.[113]

Since competition agencies across nations use different criteria to assess potential outcomes of a merger, the chances of inconsistency and controversy are greater than, say, if more than one competition authority is prosecuting a global cartel.[114]

G. Proliferation of Merger Control Laws: Why?

Today, an estimated 90 countries have competition laws and another 20 or so are in the process of drafting such laws. Of these 90 countries, over 52 countries drafted and promulgated competition laws in the last decade and some 60 countries require premerger

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[111] *See* HERBERT HOVENKAMP FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE (St. Paul, Minn. : West Pub. Co., 1994).
[112] Donald I. Baker, *Antitrust Merger Review in an Era of Escalating Cross-Border Transactions and Effects, in* POLICY DIRECTIONS FOR GLOBAL MERGER REVIEW, a Special Report by the Global Forum for Competition and Trade Policy (1999), at 71, 72; *see also* Andre Fiebig, *A Role for the WTO in International Merger Control,* 20 NW. J. INT'L L. & BUS. 233, 237 (2000).
[113] *See* Donald I. Baker, *Id.*
[114] *Id.*

notification (see Table-2 below).[115] This proliferation of merger control laws can be attributed to a number of factors. Some of the important factors are described below.

1. Benefits of Merger Control Laws

While a merger normally leads to cost savings and other benefits for the merging parties, it also has the potential to harm consumer welfare where the merger leads to the creation of a dominant position. Merger control laws give competition authorities the ability to assess and remedy the potential anticompetitive effects of a merger, thereby preserving competitive market structure and benefiting consumers. According to the US Department of Justice (DoJ) its merger review efforts during 1998 saved consumers $4 billion.[116] And according to the US Federal Trade Commission (FTC), it has helped save consumers approximately $250 million annually since 1997 on the strength of a court injunction to prevent two office supply superstores from merging. In 1998, the FTC prevented two mergers in the drug wholesaling industry which saved consumers another $300 million annually.[117] Protection of consumers through merger control laws has been the major factor that prompted a number of jurisdictions to enact such laws in the last decade.[118]

2. Deregulation Paved the Way for Competition

The deregulatory wave that started in the mid-1980s has almost spread all around the world. Arguably, the majority of countries have now engaged a transition from

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[115] A. Douglas Melamed, Promoting Sound Antitrust Enforcement in the Global Economy, Speech before Fordham Corporate Law Institute, 27th Annual Conference on International Antitrust Law and Policy, New York, New York, (October 19, 2000) *available at* <http://www.usdoj.gov/atr/public/speeches/6785.htm>, (visited on April 25, 2001); *see also* Fox, *Antitrust and Regulatory Federalism, supra* note 41, at 1783; *Enforcement: IBA Conference Participants Focus on Practical Effects of Globalization*, BNA ANTITRUST & TRADE REGULATION DAILY, Nov. 17, 2000. (There were only around 10 antitrust authorities a decade ago; today, they are anywhere between 80 and 100 in existence); ICPAC, Final Report, *supra* note 13, at 89; Calvin S. Goldman, *Emerging Procedural and Substantive Issues for Mergers with Cross-Border Effects,* Remarks Before ABA Section of Antitrust Law, Advanced International Antitrust Workshop, (Washington, D.C. Jan. 1999), at 2. (unpublished manuscript, on file with the author); Mark R.A. Palim, *The Worldwide Growth of Competition Law: An Empirical Analysis*, 43 ANTITRUST BULL. 105, 109 (1998) (noting 70 countries with competition laws as of end of 1996, of which 42 were drafted after 1990 and 56 after 1980s).

[116] Department of Justice, Antitrust Division, FY2000 Congressional Budget Submission, at 64.

[117] FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997); FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34 (D.D.C. 1998)(enjoining the merger of Cardinal Health Inc. with Brunswig Corp. and McKesson Corp. with Amerisource Health Corp.).

[118] *See* ICPAC, Final Report, *supra* note 13, at 88.

command-and-control economies to free market economies. The deregulation of industries and opening up of markets to competition necessitated that competition laws be put in place that would preserve competitive structure in the market.

3. External Pressure for Reform

A number of sources, such as the International Monetary Fund, the World Bank, the European Union, and the United States, are encouraging countries without competition laws to adopt such laws.

Most Central European countries which are aspiring to become members of the European Union are already being required by the EU to approximate the laws of the European Community, particularly competition law, within their national legal systems.[119] Such a requirement is designed to ensure a "level playing field" or common conditions of competition within the Common Market.[120]

In 1999, Indonesia adopted a new competition law, which it was required to do by the International Monetary Fund as part of the economic reforms on which rescue funds were conditioned.[121] Moreover, the US and EU are playing an active advocacy role in convincing nations that competition law is good for them; because competition within domestic markets will make their businesses efficient and better able to compete globally, while attracting investment and jobs, thereby increasing economic activity and allowing their people to thrive as entrepreneurs, consumers, and workers.[122] Many countries in Latin America[123] and Eastern Europe[124] have adopted a competition law system on the

[119] *See infra,* Chap. III, footnotes 49 to 54, and accompanying text for information on EU's enlargement.
[120] Fox, *Antitrust and Regulatory Federalism, supra* note 41, 1792; *see also* JOHN FINGLETON, ET AL., COMPETITION POLICY AND THE TRANSFORMATION OF CENTRAL EUROPE 54-56 (1996).
[121] *See* Eleanor M. Fox, *Equality, Discrimination, and Competition Law: Lessons From and For South Africa and Indonesia*, 41 HARV. INT'L L.J. 579, 588 & n.49, 589 (2000).
[122] Fox, *Antitrust And Regulatory Federalism, supra* note 41, 1784.
[123] William E. Kovacic, *Institutional Innovations in Competition Policy in Peru: INDECOPI After Five Years*, 1 INT'L ANTITRUST BULL. 34 (Summer 1998); Gabriel Castaneda and Fernando Sanchez Ugarte, *Mexico Still Setting the Pace for Latin America*, 1 GLOBAL COMPETITION REV. 12 (Feb./March 1998).
[124] *See* MARJO OJALA, THE COMPETITION LAW OF CENTRAL AND EASTERN EUROPE (1999); Michael G. Cowie and Monica Novotna, *Premerger Notification in Central and Eastern Europe*, 12 ANTITRUST 19 (Summer 1998); Carolyn Brzezinski, *Competition and Antitrust Law in Central Europe: Poland, the Czech Republic, Slovakia and Hungary*, 15 MICH. J. INT'L L. 1129 (1994); Georghe Oprescu and Eric D. Rohlck, *Competition Policy in Transition Economies: the Case of Romania*, 1999/3 EC COMP. POL'Y NEWSL. 62.

encouragement of the US and European Commission.[125] Even the developing countries of Southeast Asia[126] and the People's Republic of China[127] are preparing laws for the protection of competition.

H. Costs of Proliferating Merger Control Laws

As merger control regimes proliferate they also increase the costs for parties to transnational mergers. When MCI merged with WorldCom in 1997, the parties had to notify over 30 competition authorities.[128] This overlap of merger review by multiple competition authorities is due to the fact that many of these agencies now deploy the "effects test"[129] to assume jurisdiction over transactions which are proposed even by two foreign companies. The proliferation and overlapping reach of merger control laws, in the absence of any mechanism for coordination, has inherent inefficiencies from the perspective of global consumer welfare. Furthermore, it unnecessarily burdens a majority of transactions that pose no anticompetitive threats and it presents a serious challenge to nations' sovereign control over firms conducting business within their borders. Each of these problems is addressed in the sections that follow.

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[125] *See* Karel Van Miert, *Competition Policy in Relation to the Central and Eastern European Countries - Achievements and Challenges*, 1998/2 EC COMP. POL'Y NEWSL. 1; Robert Rice, *Brittan Urges Basic Competition Rules*, FIN. TIMES, Nov. 8, 1993, at 3; Kathleen E. McDermott, *US Officials Provide Competition Counseling to Eastern Europe*, 5 ANTITRUST 4 (Fall/Winter 1991); Shanker Singham, *US and European Models Shaping Latin American Competition Law*, 1 GLOBAL COMP. REV. 15 (Feb./March 1998).

[126] William E. Kovacic, *Capitalism, Socialism, and Competition Policy in Vietnam*, 13 ANTITRUST 57 (Summer 1999); William E. Kovacic, *Merger Enforcement in Transition: Antitrust Controls on Acquisitions in Emerging Economies*, 66 U. CIN. L. REV. 1075 (1998); William E. Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 BROOK. J. INT'L L. 403 (1997); Normin Pakpahan, *Indonesia: Enactment of Competition Law*, 27 INT'L BUS. LAW 491 (1999); Whie-kap Cho, *Korea's Economic Crisis: The Role of Competition Policy*, 27 INT'L BUS. LAW 495 (1999); Sutee Supanit, *Thailand: Implementation of Competition Law*, 27 INT'L BUS. LAW 497 (1999).

[127] Tianlong Yu, *An Anti-Unfair Competition Law Without a Core: An Introductory Comparison Between US Antitrust Law and the New Law of the People's Republic of China*, 4 IND. INT'L & COMP. L. REV. 315 (1994).

[128] Adam Frederickson, A Strategic Approach to Multi-jurisdictional Filings, 4 EUR. COUNSEL 23 (Dec. 1999/Jan. 2000).

[129] According to the US version of effects test, "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends." US v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945); *see also* Hartford Fire Insurance v. California, 509 US 764 (1993); US Dept. of Justice and Federal Trade Commission, Antitrust Enforcement Guidelines *available at* <http://www.usdoj.gov/atr/public/guidelines/horiz_book/toc.html>, (visited on Feb. 7, 2001).

1. Cost to Merging Parties

The growing number of merger control regimes create increased costs for the merging parties. Some of the challenges are "heightened uncertainty regarding the ultimate legality of the proposed transaction; the necessity for interacting and negotiating with multiple reviewing authorities; the possibility of inconsistent and perhaps conflicting rulings; and the potential for overly burdensome remedies. These challenges increase transaction costs for merging parties and, in the worst-case scenario, may result in the abandonment of procompetitive transactions."[130]

Merging parties face an ever increasing array of merger regimes and are required to:

a. have knowledge of and compliance with complex filing rules;
b. have knowledge of and compliance with review schedules and waiting periods;
c. complete an array of forms in accordance with various national requirements; and
d. pay substantial fees to the reviewing authorities (often designed to subsidize the operation of government agencies).[131]

Just determining the jurisdictions where notification has to be filed poses a significant cost on the merging parties. The merging parties first have to ascertain whether merger control laws exist in all potentially affected jurisdictions, and then determine whether the disparate notification thresholds are met or not.

Once jurisdictions where notification is to be filed are identified, and their notification thresholds are determined, then come the costs of actually submitting the notifications. Most of the jurisdictions require an extensive amount of information concerning markets, competitors, customers and suppliers, and market entry conditions in each of the markets in which the merging parties operate. The foregoing information is required once the thresholds are met irrespective of whether the transaction poses any anticompetitive threats.

Regulatory compliance poses direct and indirect costs to the merging parties. Direct costs include attorneys' fees, filing fees, and document production costs. Indirect costs, which are difficult to quantify and may exceed the direct costs, include top

[130] ICPAC, Final Report, *supra* note 13, at 41.

management's time and loss of productivity. At hearings conducted by the US International Competition Policy Advisory Committee, one expert noted:

> Executives' time and productivity lost due to a protracted investigation (or series of investigations) takes a heavy toll on the parties to the transaction. In each jurisdiction where some form of compliance is required, senior officers of the companies involved will have to spend many hours conducting, coordinating, and supervising the search for financial and market information that will have to be produced to each of the regulating authorities involved. The senior officers will also likely have to make themselves available to counsel and to the authorities for interviews and other information gathering activities, which distract the senior officers from the business of the firm.[132]

The loss of executives' and other managers' time gets compounded each time a request for further information is made by competition authorities. Furthermore, the time devoted by the merging parties becomes a dead-weight loss if a merger is blocked by one competition authority and cleared by the others.[133]

Other indirect costs arise from the delays caused by merger review by a number of jurisdictions. Such delays arise from lack of strict deadlines for the completion of the review and asynchronous triggering events for notification. In case of a merger in a high-technology industry such as electronics, computers, or software, delays may prove fatal for the transaction as product life cycle are very short. Moreover, "delay breeds uncertainty in product, labor, and capital markets, enabling competitors to raid customers and staff."[134]

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[131] *Id.* at 90-94.

[132] *Id.* at 93 & n.17. Citing James B. Kobak, Jr., and Anthony M. D'Iorio, Hughes Hubbard & Reed LLP, *The High Cost of Cross-Border Merger Reviews, in* THE GLOBAL ECONOMY AT THE TURN OF THE CENTURY, Vol. III INTERNATIONAL TRADE, at 721-22 (Gulser Meric and Susan E.W. Nichols eds. 1998); In the Halliburton/Dresser transaction, parties estimated that they spent approximately $3.5 million to comply with notification and investigation requirements in the six jurisdictions where notification was required (Australia, Brazil, Canada, the EU, Mexico, and the United States). In addition, company officials spent a great amount of time compiling requested data and preparing for and undergoing formal depositions. The United States deposed 12 executives, and informal interviews were conducted with a few key executives by the authorities in Mexico and the EU. The EU also conducted a site visit.

[133] *See, e.g., Statement by General Electric Regarding European Commission Decision, available at* http://www.ge.com/news.htm (last visited on Oct. 18, 2001). (When GE-Honeywell case was blocked by the EC Commission, GE Chairman and CEO Jack Welch expressed profound regret at the loss of eight months of thousands of GE and Honeywell employees' time, who worked hard to make the deal happen).

[134] ICPAC, Final Report, *supra* note 13, at 93 & n.19. Citing *Submission* of Barry Hawk, *Reforming Merger Control to Reduce Transaction Costs*, ICPAC Hearings (Nov. 3, 1998), at 12-13.

Delays also cause lost opportunity costs. For example, "[d]uring the time that deals are delayed, the parties to a transaction lose the savings, efficiencies and synergies (assuming there are any) that induced their respective business decisions to do the deal in the first place, and the economy is denied whatever competitive benefits would result."[135] Delays also hamper the merging parties' ability to accept business that would have been attracted and accepted by the merged entity.[136]

2. Cost to Competition Agencies

The review of transnational mergers or mergers with international impact also impose significant costs to competition authorities. In such transactions, the merging parties assets and production facilities, more often than not, are located in more than one jurisdiction, and so are documents and witnesses. As a result, competition authorities may impose remedies with extraterritorial effects or remedies that may prevent other jurisdictions from obtaining the relief they seek. Where such divergent outcomes are reached by the competition authorities, they would either attempt to reconcile their differences or create international friction which may lead to trade wars – a dilemma which is not faced by the competition authorities in case of a purely domestic merger.

3. Diverse Approaches: Diverse Outcomes

Countries with merger control regimes use different substantive standards to review mergers. The basic thrust of these regimes in conducting merger analysis varies three approaches: i) prohibiting or controlling anticompetitive mergers; ii) prohibiting or controlling mergers that create or enhance dominant position; and iii) prohibiting or controlling "either anticompetitive mergers or those that create or enhance dominance unless the economic advantages of the merger to the country – including preservation of

[135] *Id.* at 93 & n.20: Joe Sims and Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 ANTITRUST L.J. 865, 885-86 (1997); *see also* Testimony of J. William Rowley, McMillan Binch, ICPAC Hearings (Nov. 3, 1998), at 145. A company representative estimated that clearing antitrust regulatory hurdles in eight jurisdictions cost British Telecommunications PLC an estimated $100 million in lost efficiencies during each month that the British Telecommunications/MCI Telecommunications Corp. transaction could not be closed. Statement of Tim Cowen, BT Group Legal Services, at the Fordham Corporate Law Institute (Oct. 22 & 23, 1998).

[136] *Id.* at 93-4.

jobs and promotion of exports – outweigh the disadvantages."[137] In addition to the basic difference in orientation of the regimes, these regimes also differ on definitions and meaning of, say, "anticompetitive" or "dominance."

The EU's recent decision blocking a merger between two US companies, General Electric Co. (GE) and Honeywell International Inc., is an example of divergent outcomes owing to different approaches used to analyze the merger. On July 3, 2001, the EU Commission announced its decision to block the proposed merger, which had already received clearance from the antitrust authorities of the US, Canada and a dozen of other countries.[138]

Given the truly global nature of the proposed transaction, the difference of opinion between the EU Commission and US antitrust agencies became all the more striking. In the past differences of opinion between the US and EU antitrust enforcers could be explained by different geographic and product markets that each authority had to investigate. In GE-Honeywell, however, the relevant market is a global aerospace industry that transcends national borders. Therefore, the divergent outcomes in the case bespeak a differences of approach that are much more significant than mere procedural divergences.[139]

4. Friction among Jurisdictions

The difference in approaches to merger review often results in friction among jurisdictions. There are at least three circumstances in which review of a transnational merger causes friction among jurisdictions. The first arises where a domestic competition authority considers only the competitive effects of a merger within its own borders and fails to take into consideration competitive benefits or harms in foreign markets. For instance, a competition authority may clear a merger that could result in an increase in prices in other jurisdictions. Conversely, a competition authority may block a merger that

[137] *Id.* at 48.

[138] *The Commission Prohibits GE's Acquisition of Honeywell,* Press Release by the E.U. Commission *available at*: http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/939|0|RAPID&lg=EN, (visited on July 21, 2001); *see also* Michael A. Taverna, *Failed Mega-Merger Causing Shock Waves*, 155 AVIATION WK. & SPACE TECH., No. 2, July 9, 2001, at 27; 2001 WL 7150775.

[139] Philip Shishkin, *Barred Merger Signals US-EU Divergence*, WALL ST. J. July 5, 2001, at A4; 2001 WL-WSJ 2868557. For more commentary on the case, *see infra*, Chap. VIII, Section C at pages 297 et seq.

would have produced benefits to consumers in other jurisdictions. Second, friction among jurisdictions could arise when remedies imposed by competition authorities have extraterritorial effects. Finally, frictions could also occur when a merger is reviewed by several competition authorities which reach conflicting decisions.[140]

Take the example of the GE and Honeywell merger. The conclusion reached by the European Commission evoked a strong reaction from US politicians and created significant friction between the two jurisdictions. US Senator John D. Rockefeller IV, chairman of the Senate aviation subcommittee, in a letter to EU Competition Commissioner Mario Monti, wrote that blocking the merger "could have a chilling effect on future trans-Atlantic aviation and aerospace cooperation." Senator. Ernest F. Hollings, accused the Commission of "using its merger-review process as a tool to protect and promote European industry at the expense of US competitors."[141] Senator Phil Gramm, said the United States had to ensure that "we don't have bad policies imposed on us as Europeans try to protect themselves from competition."[142]

5. Limit on Sovereign Control

The proliferation of merger control laws is also challenging the sovereign power of nations to regulate domestic firms that are conducting business internationally. The GE-Honeywell saga is but one example of how the powers of national competition authorities are curtailed by the application of a foreign country's merger control laws.[143] The case also highlights the fact that in a multijurisdictional merger review, and in the absence of a formal dispute resolution mechanism, the nation which imposes the most restrictive remedies prevails.[144]

[140] ICPAC, Final Report, *supra* note 13, at 54.

[141] John R. Wilke, *Drumbeat Persists Over Denial of Merger*, Asian Wall St. J., July 6, 2001, at 5; 2001 WL-WSJA 22052407.

[142] William Drozdiak, *EU Blocks Merger of GE, Honeywell; Trade Tension Rises*, HOUS. CHRON., July 4, 2001, at 1; 2001 WL 23612304.

[143] For example, in March 1996, Sandoz and Ciba-Geigy –both Swiss companies– announced their plans to merge and form a new company, Novartis. The EC Commission cleared the merger, however, the US FTC required the merged entity to sell off key units of their business and to license a patent to a competitor as a condition for approval of their merger. *See* Brian Peck, *Extraterritorial Application of Antitrust Laws and the US-EU Dispute Over the Boeing and McDonnell Douglas Merger: From Comity To Conflict? An Argument for a Binding International Agreement on Antitrust Enforcement and Dispute Resolution,* 35 SAN DIEGO L. REV. 1163 (1998).

I. Gaps in Global Governance and the Need for an IMCR

The rapid transition of domestic markets into a globally integrated market and the proliferation of merger control regimes have given rise to a gap in institutional arrangements for managing global markets. First, globalizing markets have weakened the power of nation states to regulate businesses effectively even within their own domestic markets. Second, nation-states are lagging behind – vis-à-vis the pace of globalization – in developing international rules to meet emerging challenges. The proliferation of national merger control regimes aimed at achieving different objectives distorts the level playing field for global businesses.

National policy makers rarely if ever address the notion of global consumer welfare. While globalization promotes global consumer welfare, disparate review of a transnational merger by competition authorities of several countries (inherently embedded with free-rider and prisoner's dilemma problems) cuts right across the idea of global consumer welfare – a global public good.[145]

Markets are good in producing private goods. However, when it comes to public goods they tend to produce them at a sub-optimal level, which justifies governmental intervention in rectifying the production level. Like national markets, the global market cannot ensure optimal provision of global public good, such as global consumer welfare, without additional mechanisms such as cooperation or coercion.[146] The theory of "local public goods" that forms the basis for the allocation of competence between the various levels of governments, defines the optimal size of the region for the supply of public goods. Thus, where the region that needs to be supplied with public goods is the globe, nations acting collectively or a supranational authority will be the competent authority to ensure the provision of the goods.[147] However, "nations dwell in perpetual anarchy, for

[144] *See* Fox, *Extraterritoriality and Merger Law, supra* note 24.

[145] *See* Aman, *The Globalizing State*, *supra* note 3, at 787. ("Despite the global nature of the forces that create and limit the choices a state can make, domestic politics often ignore the larger, global dimension in which 'local' issues are debated").

[146] Kaul, *Defining Global Public Goods*, *supra* note 21, at 7. *See also* Joseph E. Stiglitz, *Knowledge as a Public Good*, *in* GLOBAL PUBLIC GOODS, *supra* note 21, 308 at 320; J. Mohan Rao, *Equity in Global Public Goods Framework, in* GLOBAL PUBLIC GOODS, *supra* note 21, at 73.

[147] *See* Hilde Smets and Patrick Van Cayseele, *Competing Merger Policies in a Common Agency Framework,* 15 INT'L REV. L. & ECON. 425, 426 (1995).

no central authority imposes limits on the pursuit of sovereign interests."[148] Thus, any cooperative agreement among nation states, if it were to last, has to be enforced, and that may require coercion.[149] In such a scenario, an international organization may play a major role, but to conceive of such organization as an enforcer of the agreement would be a mistake. Instead such organization's role is to "assist cooperation by creating the conditions that make agreements self-enforcing."[150]

In any international agreement in which an international organization forms a constituent part, such an institution should not be seen as holding a supranational position and issuing edicts from above for the enforcement of agreements or as a form of world government. Rather, such institution's coercive power, if any, should be viewed only as the result of acts of delegation by nation-states parties to the agreement. Mostly, these delegated powers come under the rubric of information provision. Even international organizations, such as the WTO or European Court of Justice, which are increasingly engaging themselves in dispute resolution, should be conceptualized "as assisting states in resolving their cooperation dilemmas, rather than acting as an authoritative enforcer of rules and norms. By providing guidance on how to interpret international agreements and the specifics of state behaviour, dispute resolution is properly seen as one more type of information provision."[151]

To fill the gap in global governance, identified by globalization of markets and proliferation of merger control law, we need a multilateral cooperation agreement. To enforce such an agreement, an international organization, such as the WTO, may be required to create conditions conducive for cooperation and information provision. In the next two chapters we will study the development and features of existing antitrust laws of the United States and European Union, so as to help define the context and contours of such an agreement.

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[148] Lisa L. Martin, *The Political Economy of International Cooperation,, in* GLOBAL PUBLIC GOODS, *supra* note 21, 51 at 52.
[149] J. Mohan Rao, *supra* note 146, at 73.
[150] Lisa L. Martin, *supra* note 148, at 52.
[151] *Id.*

TABLE -1

M&As in Major Overseas Markets in 2000 By Number of Deals *		
Target County	**No. of Deals**	**Value ($ Billion)**
United Kingdom	2,245	$4420.9
Germany	1,186	276.0
France	1,014	145.1
Canada	889	127.9
Australia	641	42.1
Japan	475	149.8
Spain	438	40.8
Netherlands	384	61.5
Italy	364	87.5
Switzerland	295	16.8
Sweden	280	31.1
Brazil	265	38.3
Finland	224	12.9
Belgium	216	7.6
Hong Kong	153	45.0
Argentina	153	15.2
Austria	151	2.1
Denmark	148	13.7
Malaysia	142	4.7
Czech Republic	140	2.0
India	133	2.6
Norway	128	15.0
Poland	128	10.1
Hungary	125	1.2
South Africa	123	3.0
Portugal	120	16.8
New Zealand	120	4.0
Russia	114	1.8
Mexico	110	10.8
South Korea	105	15.8
Singapore	104	7.5
Ireland	104	5.5
Greece	99	2.9
China	84	38.6
Israel	61	2.9
Thailand	58	2.4
Chile	55	5.4
Philippines	44	4.3
Bulgaria	39	0.6
Romania	36	0.1

* Data include US acquisitions abroad and cross-border and intra-national deals done by foreign companies.

Source: Mergers & Acquisitions, The Dealmaker's Journal, Vol. 36, No. 2, p. 40 (February 2001).

TABLE-2

Worldwide Antitrust Merger Notification Systems			
Mandatory Preclosing Notification System		**Mandatory Postclosing Notification System**	**Voluntary Notification System**
Albania	Latvia	Argentina	Australia
Argentina	Lithuania	Denmark	Chile
Austria	Macedonia	Greece	Ivory Coast
Azerbaijan	Mexico	Indonesia	France
Belarus	Moldova	Japan	New Zealand
Belgium	Netherlands	Macedonia	Norway
Brazil	Poland	Russia	Panama
Bulgaria	Portugal	South Africa	United Kingdom
Canada	Romania	South Korea	Venezuela
Colombia	Russia	Spain	
Croatia	Slovak Republic	Tunisia	
Cyprus	Slovenia		
Czech Republic	South Africa		
EC	South Korea		
Estonia	Sweden		
Finland	Switzerland		
Germany	Taiwan		
Greece	Thailand		
Hungary	Tunisia		
Ireland	Turkey		
Israel	Ukraine		
Italy	USA		
Japan	Uzbekistan		
Kazakhstan	Yugoslavia		
Kenya			

Source: Annex 2-C, Final Report, International Competition Policy Advisory Committee, US DoJ.

II
US Antitrust and Merger Control Laws

Just as today nations find their merger control regimes incapable of effectively controlling transnational mergers, so too the states of the United States found their antitrust laws incapable of effectively controlling the conduct of trusts that were traversing state boundaries in the late nineteenth century. To cure such a governance gap, the US Congress, pursuant to its authority emanating from the Commerce and Supremacy clauses of the US Constitution,[1] enacted the Sherman Act, which created administrative and institutional capacities to address the limits of state jurisdiction. However, in our globalized world, there is neither a "Congress" of the world's states nor any other institution with power to regulate transnational commerce or to enact supreme law for all nations. Although the problem presently faced globally is analogous to that faced by the states of the United States, the tools available to address it are not. It is the very want of those tools that provides the *raison d'être* for this thesis.

In this Chapter we will map the historical and legal developments that shaped current US antitrust and merger control laws. The US has the most mature and developed antitrust regime in the world. The US antitrust regime offers a unique and useful model for developing an IMCR by virtue of co-existence of state and federal antitrust agencies competence over a single merger transaction. In particular, the relationship between the

[1] Commerce clause provides: "Congress shall have power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." US CONST. art I, § 8, cl. 3.
Supremacy clause provides: This Constitution, and the Law of the United States which shall be made in pursuance thereof; and all treaties made, or shall be made, under the Authority of the United States, shall be the supreme Law of the Land." US CONST. art VI, cl. 2.

state and federal antitrust agencies and the manner in which they coordinate with each other in reviewing a merger transaction is the most instructive.

Furthermore, an overview of the legislative history of US antitrust laws is necessary to understand what accommodations must be made within an IMCR in order to take account of the US regime. However, it may be mentioned here that the lessons drawn from the US experience cannot simply be reproduced in a global scenario. The US enjoys cultural, economic and linguistic homogeneity, whereas nation-states of the world harbor different cultures, languages, and levels of economic development. Cognizant of these differences, it is nonetheless pertinent to study the US antitrust regime comprehensively.

At another level of analysis, the study of the US antitrust regime is important not only to formulate an IMCR that is acceptable to the US, but also to shed light on the origin of the phenomenon of mergers and acquisitions. There is, however, a fine line between a comprehensive overview and excessive detail. Although, I have tried to be comprehensive, readers who are familiar with US antitrust laws may be well advised to go directly to the last section of this chapter, in which lessons drawn from the US experience are enumerated. For others, it is hoped that the discussion of historical development in the US will help them put the current global developments in proper perspective. The discussion is presented in chronological order. Lessons drawn are clustered at the end of the chapter.

A. Raison d'être of Antitrust and Merger Control Laws

1. Origin of the US Antitrust Laws

Before the emergence of trusts in the late 1870s, the competition policy of the US was based principally on two sources of law, 1) the law of corporate charters, and 2) the law of contracts in restraint of trade.[2] The former dealt with the questions of when implied and explicit monopoly rights would be recognized, whilst the latter dealt with any voluntary contractual restraint assumed upon an individual's right to carry on a trade or calling. Such contracts were considered illegal because they were deemed injurious both to the individual who entered into the contract as well as to the public.[3] However, during "most of the nineteenth century the law of cartels and mergers was not part of the law of the contracts in restraint of trade. Few American decisions before 1870 dealt with price-fixing and even fewer dealt with the competitive consequences of mergers."[4]

a. *The First Merger Wave: 1880s-1890s*

The industrial revolution that followed the Civil War[5] resulted in unparalleled economic growth in the United States. Such growth is attributed to three factors: (i) the emergence of a single national market for manufactured products, facilitated by revolution in transportation and spread of railroads, (ii) advances in technology that enabled large scale production; and (iii) the availability of large amounts of capital through the emergence of a generally accessible capital market.

The emergence of a single market prompted firms that were local in operation to merge with other firms in order to avail themselves of opportunities provided by the expanded market. The merged firms adopted a new decentralized organizational structure, similar to the modern corporation, that allowed them to conduct business with greater efficiency.[6] This first time US merger wave lasted from 1889 to 1902.[7] To understand the dynamics of this merger wave, one must consider the formation of trusts.

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[2] Herbert Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, *in* THE POLITICAL ECONOMY OF THE SHERMAN ACT 144 (E. Thomas Sullivan, ed. Oxford: Oxford University Press, 1991).

[3] *See* Standard Oil Co. v. United States, 221 US 1, at 51; 31 S.Ct. 502 at 512 (1911) (tracing the history of Sherman Act in the English common law rules).

[4] Hovenkamp, *The Sherman Act and the Classical Theory of Competition, supra* note 2, at 144 (although mergers were frequently challenged in court during the period 1850-1890, most challenges attacked them as ultra vires, not as anticompetitive). (footnotes omitted).

[5] The war in the United States between the Union and Confederacy from 1861 to 1865.

[6] KENNETH M. DAVIDSON, MEGAMERGERS, CORPORATE AMERICA'S BILLION DOLLAR TAKEOVERS 130 (Cambridge, Mass.: Ballinger, 1985). [Hereinafter "DAVIDSON, MEGAMERGERS"]; Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust-Retrospective and Prospective: Where are We Coming From? Where are We Going?,* 62 N.Y.U. L. REV. 936, 939 (1987) [Hereinafter "Fox & Sullivan, *Antitrust-Retrospective*"]. (see pages 937-42 for an account of the historical development that led to the enactment of the antitrust laws in the United States).

b. Formation of Trusts

As markets expanded, competition escalated. During the mid-1870s and 1880s, businessmen were inventing strategies to seek "relief from unrelenting competition."[8] They found refuge from cut-throat competition in agreements that coordinated outputs and reduced price competition. However, John D. Rockefeller found a solution to such unrelenting competition in the formation of trusts. A trust was established through a legally enforceable agreement among member corporations to unify control. It was formed when a number of corporations "turned their stock over to a board of trustees receiving in return trust certificates of equivalent value."[9] A trust by virtue of holding common stocks in different corporations gain legal control over the member corporations, and controlled only price and output decisions and never interfered with the actual operation of the corporations.[10]

Trusts were formed in almost all industries, such as oil, tobacco, steel, whiskey and sugar.[11] They had monopoly powers, and the hostile takeover was the *modus operandi* used to build the trust's empire. The targets were given the choice of either joining the trust or being driven out of business.[12] Matthew Josephson in his book, *The Robber Barons,* described how John D. Rockefeller built his Standard Oil.

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[7] DAVIDSON, MEGAMERGERS, *id.*, at 129. (The first wave of mergers was remembered for mergers that created monopoly); *see also* Dennis C. Mueller, *Do We Want a New, Tough Antimerger Law, in* MERGERS AND ACQUISITIONS, CURRENT PROBLEMS IN PERSPECTIVE 169 (Michael Keenan & Lawrence J. White, eds., Lexington, Mass.: Lexington Books (D.C. Heath & Company), 1982); Debra L. Golbe & Lawrence J. White, *Catch a Wave: The Time Series Behavior of Mergers, in* THE REVIEW OF ECONOMICS AND STATISTICS 493 (1993). (The first merger occurred during the 1890s, another in the 1920s, a third in the 1960s, a fourth during the early and mid-1980s and currently the United States in the midst of fifth merger wave); Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 228-9 (1960) ("The first great wave of mergers in [the United States] is usually thought to have begun with the formation of the Standard Oil trust in 1879. Slowed temporarily by a depression in 1893, the tempo of acquisitions revived by 1897 and quickly gathered momentum. Over a thousand firms disappeared into mergers during the single year of 1899, and in 1901 the wave reached its peak with the joining together of several smaller trusts into the world's first billion-dollar corporation, United States Steel.").

[8] Fox & Sullivan, *Antitrust-Retrospective, supra* note 6, at 939.

[9] *See* Eleanor M. Fox & Lawrence A. Sullivan, *The Good and Bad Trust Dichotomy: A Short History of a Legal Idea, in* 1 THE ANTITRUST IMPULSE, AN ECONOMIC, HISTORICAL AND LEGAL ANALYSIS, 77, 81 (Theodore P. Kovaleff, ed., New York: M.E. Sharpe, 1994).

[10] Fox & Sullivan, *Antitrust-Retrospective, supra* note 6, at 939.

[11] DAVIDSON, MEGAMERGERS, *supra* note 6, at 104; *see also* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 96-98 (1982).

[12] DAVIDSON, MEGAMERGERS, *supra* note 6, at 105.

> [Rockefeller] would say:
>
> "You see, this scheme is bound to work. There is no chance for anyone outside of Standard Oil. But we are going to give everyone a chance to come in. You are to turn over your refinery to my appraisers, and I will give you Standard Oil stock or cash, as you prefer, for the value we put upon it. . . ."
>
> Now a sort of terror swept silently over the oil trade. In a vague panic, competitors saw the Standard Oil officers come to them and say (as Rockefeller's own brother and rival, Frank, testified in 1876): "If you don't sell your property to us it will be valueless because we have got the advantage with the railroads."
>
> The railroad rates were indeed suddenly doubled to outsiders, and those refiners who resisted [Standard Oil] came and expostulated; then they become frightened and disposed of their property.[13]

The economic and political power of the trusts was formidable. When Henry Frick of the steel trust provoked strikes by lowering wages at Carnegie's Homestead steelworks, he sent in hundreds of armed Pinkerton agents to break the strike. Pinkerton agents, however, failed to break the strike, and Frick was then able to persuade the government to bring in soldiers to put an end to a five-month siege of the factories and to break the workers' union.[14] This incident and others like it provoked widespread resentment against the trusts.

2. The Birth of Federal Antitrust Laws: The Sherman Act (1890)

The unprecedented size of the trusts and their apparently unchecked power that generated fear among citizens, who began to seek a political response to the trusts.[15] By the late 1880s, farmers, abused by the railroads and trusts alike, joined by laborers and small businessmen, shaped political opinion adverse to the trusts. In the 1888 election campaigns, both the Republicans and the Democrats included antitrust reform in their manifestoes.[16] Although some states had passed antitrust laws before 1890,[17] those state

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[13] *Id.* at 105-6 (citing MATTHEW JOSEPHSON, THE ROBBER BARONS 118-19 (New York: Harcourt, Brace & World, Inc., 1962)).
[14] *Id.* at 105.
[15] *Id.*
[16] Fox & Sullivan, *Antitrust-Retrospective, supra* note 6, at 940.
[17] State Antitrust Laws by Date of Passage*

laws were deemed incapable of preventing anticompetitive conduct of the trans-state trusts.[18] There was thus a perceived need for federal antitrust laws.[19]

Senator John Sherman, who proposed antitrust legislation, warned Congress in a debate over the enactment of antitrust laws that "[i]f we will not endure a king as a

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State	Date of passage	State	Date of passage
Before 1890:		1890-1900	
Maryland	1867	Kentucky	1890
Tennessee	1870	Louisiana	1890
Arkansas	1874	Mississippi	1890
Texas	1876	Alabama	1891
Georgia	1877	Illinois	1891
Indiana	1889	Minnesota	1891
Iowa	1889	California	1893
Kansas	1889	New York	1897
Maine	1889	1900 – 1929	
Michigan	1889	Connecticut	
Missouri	1889	Florida	
Montana	1889	Massachusetts	
Nebraska	1889	New Hampshire	
North Carolina	1889	Ohio	
North Dakota	1889	South Carolina	
South Dakota	1889	Vermont	
Washington	1889	Virginia	
		Wisconsin	

* For forty-two states obtaining statehood prior to 1890; states also in this group but with no antitrust legislation as of 1929 were: Colorado, Delaware, Nevada, New Jersey, Oregon, Pennsylvania, Rhode Island, and West Virginia. *See* George J. Stigler, *The Origin of the Sherman Act*, in THE POLITICAL ECONOMY OF THE SHERMAN ACT *supra* note 2, at 36. (Well before 1890 some states had passed antitrust law, and in some cases also had constitutional prohibitions on monopolies. Five states, all southern, passed laws before 1880. Twelve Northern states passed laws in 1889, and three more in both 1890 and 1891).

[18] *See* William J. Baer and David A. Balto, *The Politics of Federal Antitrust Enforcement*, 23 HARV. J.L. & PUB. POL'Y 113, 115 & n.10 (1999)("The effectiveness of state statutes was hampered, however, by jurisdictional limitations. The federal courts consistently struck down state statutes that attempted to regulate commerce between the states."); For example, Wabash, St. Louis & Pac. Ry. Co. v. Illinois, 118 US 557 (1886) (prohibiting state regulation of interstate rail shipments); HANS THORELLI, THE FEDERAL ANTITRUST POLICY, *id.* at 107. ("By 1890 it was plain that the federal courts, through the interpretation of the due process and interstate commerce clauses, intended to review and control the legislative enactments of the states, especially as they related to the ownership, operation, regulation, control and disposition of private property."); James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. PA. L. REV. 495 (1987) at 509 & n.85. The constitutional limitations on states' antitrust law was most directly addressed in the congressional debates preceding the passage of the Sherman Act in 1890. For example, Senator Sherman, embraced a comparatively quite expansive view of federal power. He believed existing state power to be more limited than various other members of Congress believed it to be. (*See* McCurdy, *The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869-1903*, 53 BUS. HIST. REV. 304, (1979) at 323-28); Hovenkamp, *State Antitrust in the Federal Scheme*, 58 IND. L. J. 375, 379 (1983). 379. In frequently quoted language, Sherman declared, 'If the combination is confined to a State, the State should apply the remedy; if it is interstate and controls any production in many States, Congress must apply the remedy.' 21 CONG REC. 2457 (1890).

[19] *See* Deborah A. Ballam, *The Evolution of the Government-Business Relationship in the United States: Colonial Times to Present*, 31 AM. BUS. L. J. 553, 613 (1994) (although extensive state common law on restraint of trade existed, there was no federal common law on the topic. This led to cries for federal legislation.)

political power we should not endure a king over production, transportation and sale of any of the necessaries of life."[20] He went on further to apprise Congress:

> The popular mind is agitated with problems that may disturb social order, and among them none is more threatening than the inequality of condition of wealth and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition. . . . You must heed [the] appeal or be ready for the socialist, the communist or the nihilist.[21]

On July 2, 1890, President Benjamin Harrison signed into law the Sherman Act,[22] christened after the name of Senator Sherman. Although a variety of accounts have been given, it is fair to say that a primary objective of the Sherman Act was to promote consumer welfare through ensuring free competition.[23] Robert Bork, sifting through the legislative history of the Act, concludes that "[n]ot only was consumer welfare the predominant goal expressed in the Congress but the evidence strongly indicates that, in case of conflict, other values were to give way before it."[24] In *Cargill, Inc. v. Monfort of Colorado*,[25] Justice Brennan noted that "the antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only

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[20] 21 CONG. REC. 2, 457 (1890).

[21] *Id.* at. 2, 460.

Others that contributed to the Congressional debate raised concerns that went beyond the power over prices. For instance:

Representative Mason stated: "Some say the trusts have made products cheaper, have reduced prices; but if the price of oil, for instance, were reduced to 1 cent per barrel it would not write the wrong done to the people of this country by the "trusts" which have destroyed legitimate competition and driven honest men from legitimate enterprises." 21 CONG. REC. 4, 100 (1890).

Senator Hoar expressed: "The complaints have come from all parts and all classes of this country of these great monopolies, which are becoming not only in some cases an actual injury to the comfort of ordinary life, but are menace to republican institutions themselves." *Id.* p.3, 146.

[22] Sherman Anti-Trust Act, Ch. 647, 26 Stat. 209, (1890) codified as amended at 15 USC.A. §§ 1-7, (2000). [Hereinafter "Sherman Act"].

[23] *See* Reiter v. Sonotone Corp., 442 US 330 at 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'" (quoting R. Bork, THE ANTITRUST PARADOX 66 (1978)); *see also* 1 AREEDA & TURNER, ANTITRUST LAW, 103 (Boston: Little Brown, 1978). (analyzing policy choices underlying the competition principle).

[24] Robert H. Bork, *Legislative Intent and the Policy of Sherman Act*, in THE POLITICAL ECONOMY OF THE SHERMAN ACT, *supra* note 2, at 42. *See also* Jerrold G. Van Cise, *Antitrust past–present–future*, *in* THE ANTITRUST IMPULSE, *supra* note 9, at 22. (The Sherman Bill prohibited combinations that tend to 'advance the cost of the customers.' The objective of this provision was to adopt as federal law another common law principle that outlawed combinations that 'increases the profits of the producers at the cost of the consumers.' Senator Sherman denied that increased efficiency through better methods of production could justify such combinations, because 'all experience shows that this saving of cost goes to the pockets of the producer.' (footnotes omitted)).

[25] 479 US 104 (1986); 107 S. Ct. 484 (1986).

against the loss of profits from practices forbidden by the antitrust laws."[26] In *Northern Pacific Railway Co. v. United States,*[27] the United States Supreme Court held that the "Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress . . .."[28]

Section 1 of the Act renders illegal every contract, or conspiracy in restraint of interstate or foreign trade.[29] Section 2 prohibits monopolization of or attempts to monopolize any part of interstate trade or trade with foreign nations.[30]

a. *Enforcement of the Sherman Act*

Unlike the Interstate Commerce Commission Act of 1887,[31] which was almost contemporaneous and responded to a parallel concern about the monopoly power of railways, the Sherman Act did not set up any administrative body to enforce its provisions. Congress envisaged in the Sherman Act a broad, open-ended mechanism for controlling corporate power rather than the establishment of a regulatory agency.[32] The provisions of the Sherman Act set general standards for competitive behaviour instead of

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[26] *Id.* at 116.
[27] 356 US 1 (1958).
[28] *Id.* at 4-5.
[29] Sec. 1. Trusts, etc., in restraint of trade illegal; penalty
Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court
Sherman Act, *supra* note 22 , § 1.
[30] Sec. 2. Monopolizing trade a felony; penalty
Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
Id. § 2.
[31] Act of Feb. 4, 1887, ch. 104, 24 Stat. 379.
[32] Spencer Weber Waller, *Prosecution By Regulation: The Changing Nature Of Antitrust Enforcement*, 77 OR. L. REV. 1383, 1387 (1998). ("The failure of the Interstate Commerce Commission to restrain anticompetitive excesses in the economy led, in part, to the creation of a federal antitrust law.")

defining specific acts that were prohibited.[33] Commenting on the nature of the Act, Senator Sherman stated the following during a Congressional debate:

> [I]t is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law, as the courts of England and the United States have done for centuries.[34]

Congress thus vested the federal courts with the responsibility to interpret the Sherman Act, and the Department of Justice with the responsibility to enforce it.[35]

The Act introduced some innovative provisions. It provided for criminal prosecutions, gave public and private parties the right to seek injunctive relief. Moreover, it gave private parties the right to institute treble damage actions.[36] However, it was expected that the federal courts would "federalize the existing state common law of restraints of trade and monopolies," and would create "a new federal common law of competition."[37]

As expected, in the early years of the enactment of the Sherman Act, most lower federal courts interpreted the Act as if it was a codification of the common law, and thus prohibited only unreasonable restraint of trade.[38] However, in 1897, the Supreme Court for the first time got an opportunity to construe the Sherman Act in *United States v. Trans-Missouri Freight Association*.[39] In *Trans-Missouri*, the Court declared that the Sherman Act was not intended simply to codify the common law, and that the Act drew no distinction between reasonable and unreasonable restraint of trade.[40] The Court, thus, declared both reasonable and unreasonable restraint of trade as illegal.

The decision was praised by small businesses and local merchants, who saw the

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[33] *See* 1 EARL KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 365 (New York: Chelsea House Publishers, 1978-85).
[34] 21 CONG. REC. 2,460 (1890).
[35] PHILLIP AREEDA, ANTITRUST ANALYSIS, PROBLEMS, TEXT, CASE, 24 (Boston: Little Brown, 1967).
[36] Spencer Weber Waller, *supra* note 32, at 1388.
[37] *Id.*; *see also* 1 PHILLIP AREEDA & DONALD W. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATIONS ¶ 106, at 15 (Boston: Little Brown & Co, 1978).
[38] Deborah A. Ballam, *supra* note 19, 614.
[39] United States v. Trans-Missouri Freight Ass'n, 166 US 290 (1897). For a discussion of this case see Martin J. Sklar, *Sherman Antitrust Act Jurisprudence and Federal Policy-Making in the Formative Period, 1890-1914*, 5 N.Y.L. SCH. L. REV. 791 (1990).
[40] Martin J. Sklar, *id.* at 792.

Sherman Act as a white knight in their war against the new national corporations.[41] However, during the 1890s, the Sherman Act was not effectively enforced.[42] Describing the reasons for such lack of enforcement of the Sherman Act, Richard Hofstadter writes:

> [T]he problem of big business and the threat of monopoly were still so new that it was hard to get one's bearings. Bigness had come with such a rush that its momentum seemed irresistible. No one knew when or how it could be stopped. . . .
> Since it had widely been assumed that competition, being "natural," would be largely self-perpetuating the [American [people]] had not reckoned with the possible necessity of underwriting competition by statute.[43]

Against this backdrop, the courts struggled to strike a balance between eliminating the egregious power of trusts without losing the advantages of mass production.[44]

The *Trans-Missouri* decision, however, perturbed all those who saw positive aspects in the growth of trusts, as the decision rendered all trusts illegal – even those that were beneficial to consumers. Among those perturbed by the decision was Theodore Roosevelt, who later became president of the United States in 1901. He viewed large trusts as essential for building the global economic position of the United States. He held that any attempt to break down the trusts in order to return to the world of small business would be disastrous. However, he also acknowledged that the power of trusts, in the absence of governmental control, would be detrimental to the public welfare. Shackled by the *Trans-Missouri* decision, the challenge for Roosevelt was to devise a strategy "to negate the chilling effect of the Court's ruling on business development while at the same

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[41] Deborah A. Ballam, *supra* note 19, at 614.
[42] DAVIDSON, MEGAMERGERS, *supra* note 6, at 106.
[43] *Id.* at 107. (citing Richard Hofstadter, *What happened to the Antitrust Movement, in* THE PARANOID STYLE OF AMERICAN POLITICS 197 (Alfred A. Knopf, ed., New York, 1965). *But see* James R. Withrow, Jr, *Did Sherman Want to Break the "Trusts"?, in* THE ANTITRUST IMPULSE, *supra* note 9, at 19, 20. James Withrow documenting the experience of one of his clients- who happened to be a special messenger/office boy of John D. Rockefeller during the 1880s and 1890s, wrote that his client told him that: "on one occasion he[the client] was given an envelope [by J. D. Rockefeller] to deliver to Senator Sherman. John D. told him [the client] that it contained $10,000 and that the Senator has assured him [John D.] that the antitrust law to be passed would be quite mild and without real tooth" The fact that Standard Oil trust (221 US 1 (1991)) was fully attacked two decades after the Sherman Act was passed testifies that the Act "was in fact quite toothless." *Id.*
[44] DAVIDSON, MEGAMERGERS, *supra* note 6, at 107.

time guard against the dangers inherent in unchecked power of big business."[45] Roosevelt found the solution in enhancing the power of the executive branch.[46]

In 1903, Congress created the Bureau of Corporations. The Bureau was vested with the power to gather information on trusts. It reported to the President, which helped Roosevelt to take action against "bad" trusts and support the continuation of the "good" trusts. The Bureau made recommendations for incorporation of businesses at the federal level, as well as inspection and licensing thereof by the federal government.[47] In 1914, the Bureau of Corporation was superseded by the Federal Trade Commission.

b. Sherman Act and the Merger Wave

From 1890 to 1914, corporate mergers, which fell short of creating an outright monopoly, continued to take place uncontested because they were interpreted to fall beyond the purview of the Sherman Act.[48] Although section 1 of the Act clearly prohibited the formation of trusts, it was not clear whether it prohibited "the union of two or more firms under common control" through common corporate ownership.[49] While, section 2[50] of the Act was successful in arresting mergers that resulted in the creation of monopolies, however, it "could not prevent mergers bringing together companies of less than monopolistic dimensions."[51]

After the *Trans-Missouri* decision in 1897 up until the *Standard Oil*[52] decision in 1911, the Supreme Court remained divided on the question of whether to interpret the Act in light of the common law and therefore permit reasonable restraints of trade or whether the Act had superseded the common law and thereby prohibited all restraints, reasonable or unreasonable.[53] Prior to the Standard Oil decision, the Supreme Court

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[45] Deborah A. Ballam, *supra* note 19, at 615.
[46] *Id.* at 615-618.
[47] *Id.*; *see also* Spencer Weber Waller, *supra* note 32, at 1388.
[48] DAVID D. MARTIN, MERGERS AND THE CLAYTON ACT, 33 (Berkeley, CA: Uni. of California Press, 1959).
[49] *Id.* at 13; *see also* Laura L. Stephens, Note, *Nonprofit Hospital Mergers and Section 7 of the Clayton Act: Closing an Antitrust Loophole*, 75 B.U. L. REV. 477 (1995).
[50] "[C]ombine . . . with any other person or persons to monopolize." Sherman Act, *supra* note 22, § 2.
[51] Dennis C. Mueller, *supra* note 7, at 169; *see also* Brian Golden, *The Evolution of Horizontal Mergers and the 1992 Merger Guidelines*, 28 NEW ENG. L. REV. 159, 171 (1993) (before 1914, challenges to horizontal mergers only occurred if a merger would create monopolistic effects under section 2 of the Sherman Act).
[52] 221 US 1 (1911).
[53] Martin J. Sklar, *supra* note 39, 792 (1990).

issued "literalist" opinions[54] that revealed "some early confusion about the relationship of section 1's prohibition to common law notions of 'restraint of trade.'"[55]

In *Standard Oil*, and shortly thereafter, in *American Tobacco,*[56] the Supreme Court adopted the rule of reason approach, under which it considered the totality of circumstances in order to determine the legality of the challenged act.[57] Although the Court explicitly condemned the trusts, it eschewed declaring any of their specific acts, such as hostile takeovers and predatory pricing, to be illegal in and of themselves.[58]

The *Standard Oil* and *American Tobacco* decisions posed very vague and loose restrictions on the business, and failed to provide any means to curtail the power of large corporations. These decisions raised the public concern over the trusts' immunity from the Sherman and made supporters of antitrust law angry. [59] Indeed, public response was so strong that "in 1912, all three major parties [Republican, Progressive, and Democratic] advocated legislation to strengthen the antitrust laws, and to supplement the broad but flexible prohibitions of the Sherman Act, in their platforms."[60] The agitation over the decisions "ultimately resulted in two major pieces of antitrust legislation – the Clayton and Federal Trade Commission Acts of 1914."[61]

3. The Clayton Act, 1914

In 1914, Congress passed the Clayton Act[62] to curb the creation of holding companies, envisaged as the second generation of the "trusts", and which could not be

[54] *See* Northern Sec. Co. v. United States, 193 US 197 (1904); United States v. Addyston Pipe & Steel Co., 175 US 211 (1899); United States v. Joint Traffic Ass'n, 171 US 505 (1898); United States v. Trans-Missouri Freight Ass'n, 166 US 290 (1897).
[55] PHILLIP AREEDA, ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES 314 (Boston: Little Brown, 3d ed. 1981).
[56] United States v. American Tobacco Co., 221 US 106 (1911).
[57] Rudolph J. Peritz, *The 'Rule of Reason' in Antitrust Law: Property Logic in Restraint of Competition*, 40 HASTINGS L.J. 285, 285-86 (1989).(Modern scholars, policy makers and judges agree that the Supreme Court's adoption of the 'rule of reason' in 1911 represents the emergency of modern antitrust law. That is, the 'rule of reason' affords the analytical tool for making judgments about the competitive effects of market conduct and in turn for identifying 'unreasonable restraints of trade.')
[58] DAVIDSON, MEGAMERGERS, *supra* note 6, at 107.
[59] *Id.*
[60] Merger Standards Under Antitrust Laws, A.B.A. SEC. ANTITRUST, MONOGRAPH NO. 7 at 5 (1981) [Hereinafter "A.B.A. MONOGRAPH 7"]; *see also* Laura L. Stephens, *supra* note 49, at 483.
[61] Rudolph J. Peritz, *supra* note 57 at 314; Clayton Act, ch. 323, 38 Stat. 730 (1914) (current version at 15 USC. §§ 12-44 (1982)) [Hereinafter "Clayton Act"]; Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (current version at 15 USC. §§ 41-77 (1982)) [Hereinafter "FTC Act"].
[62] Clayton Act, *supra* note 61.

stopped under the Sherman Act.[63] The Clayton Act was designed to "arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation."[64] Section 7 of the Act "prohibited the acquisition by one corporation of the stock of another corporation when such acquisition would result in a substantial lessening of competition between the acquiring and the acquired companies, or tend to create a monopoly in any line of commerce."[65] Section 7 as originally worded covered only "stock acquisitions,"[66] and "was silent as to assets acquisitions and as to mergers and consolidations."[67] The omission of asset acquisition from the scope of section 7 was advertent, as Congress intended to strike a balance between economic freedom and prevention of bad trusts that had been established by "the development of the holding companies and [by] the secret acquisition of competitors through the purchase of . . . stock."[68] In *Arrow-Hart and Hegeman Elec. Co. v. FTC.*,[69] the Supreme Court clarified that a merger was not a "stock acquisition" but a statutory consolidation not subject to section 7 of the Clayton Act. The Court, however, noted section 7's ineffectiveness to regulate "asset acquisition" even if transfer of assets arises out of stock acquisition.

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[63] LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 590 (St. Paul: West Pub. Co., 1977). The original Clayton Act was "an Act then conceived to be directed primarily at the development of holding companies and at the secret acquisition of competitors through the purchase of all or parts of such competitors' stock." Brown Shoe Co. v. United States, 370 US 294, 314 (1962) [Hereinafter "*Brown Shoe*"].

[64] S. Rep. No. 698, 63d Cong., 2d Sess. 1 (1914); *see also* Laura L. Stephens, *supra* note 49, at 484; Dennis C. Mueller, *supra* note 7, at 169. (The Clayton Act differs from its predecessor by trying to halt and constrain monopoly power "in its incipiency" rather than dealing with it in its fully developed state as Sherman Act does.)

[65] *Brown Shoe*, *supra* note 63, at 312-13. *See also* Clayton Act, *supra* note 61, § 7, read in relevant part:

[N]o corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

[66] Brian Golden, *supra* note 51, at 172 & n.96. A "stock acquisition" refers to a firm acquiring the stock of another firm. Any reference to "asset acquisition" was omitted from § 7 of the original Clayton Act. An "asset acquisition" involves the transfer of the property of one entity to another. Oftentimes, the first step in a merger would involve one firm first acquiring a controlling share of the stock of another. Once the acquiring firm held enough stock to establish voting control of the company, that firm would transfer the assets of the acquired firm into its possession. Lawrence A. Sullivan, *supra* note 63, at 587-90. For an example of "stock acquisition" followed by "asset acquisition," see Thatcher Mfg. Co. v. FTC, 272 US 554 (1926); FTC v. Western Meat Co., 272 US 554 (1926); Swift & Co. v. FTC, 272 US 554 (1926).

[67] United States v. Philadelphia Nat'l Bank, 374 US 321, 337-38 (1963) (Section 7 omitted any reference to assets acquisitions because "Congress's principal concern was with the activities of holding companies, and specifically with the practice whereby corporations secretly acquired control of their competition by purchasing the stock of those companies").

[68] *Brown Shoe*, *supra* note 63, at 314; *see also* DAVIDSON, MEGAMERGERS, *supra* note 6, at 108.

[69] 291 US 587 (1934).

Section 4 of the Clayton Act granted any person who suffers injury to his business or property through anything forbidden by the antitrust laws the right to institute a treble-damages suit for such injury sustained.[70] In 1990, the Supreme Court in *California v. American Stores Co.*,[71] expanded the right of private parties when it held that State Attorneys General and private parties are not precluded from enforcing section 7 of the Clayton Act, and may seek divestiture even when a US agency has cleared the transaction.[72]

B. Dual Federal Antitrust Enforcement Agencies

The authority to enforce federal antitrust laws rest with two agencies: the FTC and the DoJ. The creation of dual federal antitrust agencies was more a matter of happenstance than a well-developed policy of Congress at the time of enacting the antitrust laws.

1. The Federal Trade Commission Act, 1914

Concomitant with the enactment of the Clayton Act, Congress also passed the Federal Trade Commission Act[73] ("FTC Act"). Whilst the Clayton Act embodied specific rules condemning certain corporate behaviour, the FTC Act established an expert agency, the Federal Trade Commission (FTC). The FTC was vested with information gathering responsibility and the power to prevent anticompetitive practices which fell short of Sherman Act violations but could grow into full-blown antitrust violations if left unchecked at "incipiency."[74]

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[70] Clayton Act, *supra* note 61, § 4.
[71] 495 US 271 (1990); 110 S. Ct. 1853 (1990).
[72] *Id.*; *see also* 2 J. W. ROWLEY & D. I. BAKER, THE INTERNATIONAL MERGERS, THE ANTITRUST PROCESS 1622 (London: Sweet &Maxwell, 2nd ed. 1996). [Hereinafter "ROWLEY & BAKER"]. (more recently some states have become active in trying to block mergers having a perceived local impact. Thus, it is not uncommon for a merger, which neither the FTC or the DoJ has decided to challenge, to be challenged in a private suit by a private plaintiff or a state attorney general).
[73] FTC Act, *supra* note 61.
[74] Laura L. Stephens, *supra* note 49, at 484; *see also* PETER C. WARD, FEDERAL TRADE COMMISSION: LAW, PRACTICE, AND PROCEDURE 4-16 (1994) (noting that these trade practices have been referred to as "incipient" violations that "could evolve" into antitrust violations); JULIAN O. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATIONS 119.05 [1] (1993). (the FTC Act is not considered to be an antitrust act.). *Id.* s 119.04[5].

The objectives of the FTC were best summarized by Representative Raymond B. Stevens, while debating on the Trade Commission Bill:

> [T]his trade commission bill [later renamed as Federal Trade Commission] will do three things of importance and benefit to the American people. First, it will gather for the use of future Congresses more accurate and complete information about the big business interests of the country. Secondly, it will give to the Department of Justice in the enforcement of the antitrust law the benefit of its investigations and its more expert knowledge of business conditions. Last, and to my mind the most important one, it will give to this commission the power of preventing in their conception and in their beginning some of these unfair processes in competition which have been the chief sources of monopoly.[75]

Section 5 of the FTC Act thus empowered the Commission to "prohibit *unfair methods of competition* in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."[76](emphasis supplied). "Unfair methods of competition" are construed by the courts to include actual violations of acts covered by the Sherman and Clayton Acts, as well as all those acts which are not covered by the Sherman and Clayton Acts but conflict with their basic policies.[77]

a. *Institutional Framework of the FTC*

The FTC is headed by five commissioners, serving for staggered terms of seven years. Commissioners are nominated by the President and must be confirmed by the Senate.[78] No more than three Commissioners can be from the same political party. Of the five Commissioners, one is designated by the President to serve as the Chairman. The FTC consists of an office of General Counsel and three bureaus, (i) the Bureau of

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[75] 51 CONG. REC. 14,941 (1914); *see also* F. M. Scherer, *Sunlight and Sunset at the Federal Trade Commission*, 42 ADMIN. L. REV. 461, 467 (1990).

[76] 15 USC. § 45(a)(1) (1994).

[77] Laura L. Stephens, *supra* note 49, at 484 & n.44 citing FTC v. Brown Shoe, Inc., 384 US 316 (1966). In recent years, the courts and the FTC have declined to find a violation of § 5 in the absence of an antitrust violation; PETER C. WARD, *supra* note 74, at 4-17 (1994); E.I. DuPont de Nemours & Co. v. FTC, 729 F.2d 128, 140 (2d Cir. 1984) (holding that in the absence of proof of an antitrust violation or evidence of collusive, coercive, predatory, or exclusionary conduct, § 5 is not violated unless practices have an anticompetitive purpose or cannot be supported by independent legitimate reason); *see also* Boise Cascade Corp. v. FTC, 637 F.2d 573, 582 (9th Cir. 1980) (ruling that courts must find either collusion or actual effect on competition). *But see* General Foods Corp., 103 F.T.C. 204, 366 (1984) (reasoning that if monopolizing conduct does not meet the Sherman Act standard, such conduct is also insufficient to establish a § 5 violation).

[78] FTC Act, *supra* note 61, at § 1. (a commissioner may be removed only for "inefficiency, neglect of duty, or malfeasance in office.)

Competition, (ii) the Bureau of Consumer Protection, and (iii) the Bureau of Economics.[79]

b. Authority of the FTC

FTC has both prosecutorial and decision-making functions.[80] The Bureau of Competition is responsible for enforcing section 5 of the FTC Act, Clayton Act, as well as for those parts of the Sherman Act that are judicially interpreted to fall within the scope of section 5 of the FTC Act.[81] The Bureau undertakes investigations of alleged violations of antitrust laws, and where appropriate recommends that the Commission take formal enforcement action against the alleged violator.[82] If the Commission agrees to take an action, the Bureau will prepare the case for litigation before an administrative law judge (ALJ). The ALJ is an official to whom the Commission "delegates the initial performance of statutory fact-finding functions and initial rulings on conclusions of law."[83] The administrative law judge follows a procedure similar to the one observed by US district courts and issues a so-called initial decision.[84] Decisions by the ALJ may be appealed to the full Commission on both findings of fact and conclusions of law by either the FTC staff or the merging parties.[85] The final decision of the Commission may, in turn, be appealed before the US Court of Appeals and, ultimately, to the US Supreme Court.

The Bureau's Premerger Notification Office is responsible for collecting and overseeing premerger notification filings.[86]

2. The Establishment of the Antitrust Division of the DoJ: 1933

The Antitrust Division of the DoJ finds its origin in the establishment of the post of the Assistant Attorney General for Antitrust in 1903.[87] In 1933, the Department of

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[79] *See generally* FTC's website http://www.ftc.gov (visited on Jan. 30, 2001); Justin Dingfelder & Sandra Brickels, *To Protect Consumers, The FTC Means Business*, 45-JAN FED. LAW. 24 (1998).
[80] *See* 15 USC. § 45 (1994).
[81] 16 CFR 0.16(2000); *see Antitrust Division Relationships With Other Agencies and With the Public*, DIVISION MANUAL, Chapter VII-1 (3rd ed., 1998) *available at* <http://www.usdoj.gov/atr/foia/divisionmanual/ch7.pdf>, (visited on April 14, 2001).
[82] 16 C.F.R. § 0.16 (2000).
[83] *Id.* § 0(14).
[84] *Id.* § 3(51).
[85] *Id.* § 3(52).
[86] *Id.*
[87] *See* Ernest Gellhorn, et al., *Has Antitrust Outgrown Dual Enforcement? A Proposal for Rationalization*, *in* THE ANTITRUST IMPULSE, *supra* note 9, at 407.

Justice established the Division as the exclusive branch responsible for enforcing the Sherman Act, the Clayton Act and other relevant laws. The Division is headed by the Assistant Attorney General, who is nominated by the President and must be confirmed by the Senate. The Assistant Attorney General serves at the pleasure of the President.

The Antitrust Division is responsible for both criminal and civil matters under the antitrust laws, and currently employs over eight hundred lawyers, economists, paralegals, and a large number of support staff. Its head-office is located in Washington, D.C.[88]

3. Interrelation Between the Antitrust Division and the FTC

The Antitrust Division and the FTC have concurrent jurisdiction to enforce the Clayton Act. In addition, section 5 of the FTC Act, as judicially interpreted, confers authority on the FTC to challenge conduct that violates the Sherman Act, and thus, there is an overlap with the Division in this area as well. This overlapping jurisdiction of the Division and FTC necessitated "coordination between the two agencies to ensure both efficient use of limited resources and fairness to subjects of antitrust investigations."[89]

In 1938, the agencies entered into an interagency agreement, which was later modified by formal correspondence between the two agencies, to establish a "clearance procedure" for coordination. On December 2, 1993, the agencies jointly issued "Clearance Procedures for Investigations." These procedures stipulated, *inter alia*, the criteria for resolving "contested matters" – matters in which both agencies are interested in investigating. On March 23, 1995, the agencies jointly announced "Hart-Scott-Rodino Premerger Program Improvements," whereunder each agency committed to resolve clearance on matters involving premerger notification under HSR Act within nine business days of filing.[90]

Despite the overlap of jurisdictions, there is a certain statutory division of activities between the two agencies. While the DoJ has exclusive jurisdiction over criminal matters, such as market division or price fixing, and matters related to regulated

[88] *See generally* A. Douglas Melamed, Antitrust Enforcement in a Global Economy, Speech Before Fordham Corporate Law Institute 25th Annual Conference on International Antitrust Law and Policy, Oct. 22, 1998; 1998 WL 1769818 (D.O.J.); *Symposium, In Commemoration of the 60th Anniversary of the Establishment of the Antitrust Division of the Department of Justice*, 39 ANTITRUST BULL. 813-940 (1994).
[89] *See* DIVISION MANUAL, *supra* note 81, at VII-1.
[90] *Id.* at VII-2

industries such as banking, telecommunications, rail, and air transportation, the FTC is primarily responsible for consumer protection activities. Furthermore, matters relating to specific industries is allocated to one Agency or the other based on historical experience. For instance, the FTC has historically dealt with petroleum, refining, natural gas pipelines, cement, department stores, and grocery retailing, whilst the DoJ has investigated matters dealing with steel, brewing, aluminum, and newspaper industries. Where both agencies wish to investigate a matter, the conflict is resolved under the Clearance Procedure for Investigations, mentioned above, based on an assessment of which Agency has more expertise.[91]

C. The Development of Merger Analysis Jurisprudence

This section will review how the socio-political conditions, legislative activity and legal commentary influenced the courts in their analysis of merger transactions. From 1914 – when the Clayton Act was enacted – until the 1980s, merger analysis jurisprudence completed a full cycle: from minimal intervention to activist intervention blocking all mergers and then back to minimal intervention.

1. Clayton Act During the War Era: 1914-1950

In 1914, the same year in which the Clayton and FTC Acts were enacted, the United States entered into World War I. Antitrust laws were suspended during wartime. President Wilson created several wartime agencies to relieve the tremendous pressure mounted on the economy by the War. The wartime agencies encouraged industries to form trade associations and "fix prices and set production goals in order to maximize the efficient use of the nation's resources."[92] During the war and in the 1920s, there was voluntary cooperation between the government and business. The trade associations, which arguably continued to facilitate anticompetitive practices, flourished under the

[91] Sergio Baches Opi, *Merger Control in the United States and European Union: How Should the United States' Experience Influence the Enforcement of the Council Merger Regulation?,* 6 J. TRANSNAT'L L. & POL'Y 223, 285 & n.386 (1997).
[92] Deborah A. Ballam, *supra* note 19, at 622.

blessing of the Supreme Court, which ruled in *Maple Flooring Assn. v. United States*[93] that the trade associations were not violating any antitrust prohibitions.

a. *The Second Merger Wave: 1925-30*

The lenient enforcement of the antitrust law and the ineffectiveness of the Clayton Act gave rise to a second merger wave that gained momentum in the mid-1920s and lasted until the Great Depression of the 1930s.[94] In its 1926 *FTC v. Western Meat Co.*[95] decision, the Supreme Court had its first opportunity to interpret section 7 of the Clayton Act. The Court confirmed that acquisitions effected through the purchase of assets rather than of stock fell outside the ambit of section 7. Taking advantage of this lacuna in merger law, corporate acquisitions grew at an unprecedented annual rate. From 1926 to 1930, more than 4,800 corporations were bought out. However, despite such heavy merger activity, the impact of the second merger wave was not as 'pronounced' or 'widely dispersed' as that of the first merger wave.[96]

Concerned about the "asset loophole," the FTC in 1928 recommended amendments to the Clayton Act. Not only did it suggest extension of the Act to cover asset purchases, but it also recommended that parties proposing a merger be required to give premerger notification to the Commission.[97] However, it was only in 1950 that Congress heeded to the FTC's first recommendation and plugged the assets loophole with an amendment to the Clayton Act.

b. *The Third Merger Wave: 1940-47*

The third merger wave began in 1940.[98] In 1941, the Temporary National Economic Committee undertook an empirical study of the concentration of economic power.[99] In its final report, the Committee highlighted the problems associated with big

[93] Maple Flooring Assn. v. United States, 268 US 563 (1925).
[94] Arthur Austin, *Antitrust Reaction to the Merger Wave: The Revolution v. the Counterrevolution,* 66 N.C. L. REV. 931, 934 (1988).
[95] 272 US 554 (1926).
[96] Derek C. Bok, *supra* note 7, at 230.
[97] *Brown Shoe*, *supra* note 63, at 315.
[98] *Id.* at 316; John Litner & John Butters, *Effect of Mergers on Industrial Concentration, 1940-47*, 32 REV. ECON & STAT. 30 (1950).
[99] Temporary National Economic Committee, Investigation of Concentration of Economic Power, A Study of the Construction and Enforcement of the Federal Antitrust Laws, 76th Cong., 3d Sess. (Senate Comm. Print, Monograph No. 38, 1941).

businesses and recommended legislation for stopping mergers.[100] However, at that time the country was engaged in World War II, and therefore very few efforts were made to curb the wave of acquisitions.[101]

After World War II ended in 1945, the fear of big business gained heightened attention in the United States. There was a "widely-shared perception of danger to the political well-being of the country and its citizens stemming from the merger movement."[102] Americans were of the view that the leaders of big business in Nazi Germany, and Imperial Japan supported the belligerent policies of their governments.[103] They thought that had these nations been more democratic and pluralistic, their citizens would have prevented their governments from waging the War.[104]

In 1948, FTC undertook a study "to describe in some detail the character of the merger movement which has been under way since World War II."[105] In its report, the FTC noted that from 1940 to 1947 almost 2,500 companies with a total asset value of $5 billion representing 5.5 percent of the total assets of all manufacturing corporations had been swallowed by corporate acquisitions. The report warned that "if nothing is done to check the growth in concentration, either the giant corporations will ultimately take over the country, or the Government will be impelled to step in and impose some form of direct regulation in the public interest."[106]

The Supreme Court's decision in the *United States v. Columbia Steel Co.,*[107] also in 1948, further provided Congress with impetus to tighten the then existing merger

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[100] Temporary National Economic Committee, Final Report and Recommendations, S. DOC. NO. 35, 77th Cong., 1st Sess., at 38-39 (1941); Derek C. Bok, *supra* note 7, at 231.
SULLIVAN, *supra* note 63, at 590.
[102] Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1064 (1979).
[103] Representative Emanuel Celler echoed these concerns during the debates that took place before the amendment to section 7 of the Clayton Act.
I want to point out the danger of this trend toward more and better combines. I read from a report filed with [the Secretary of War] as to the history of cartelization and concentration of industry in Germany: "Germany under the Nazi set-up built up a series of industrial monopolies in steel, rubber, coal and other materials. The monopolies soon got control of Germany, brought Hitler to power and forces virtually the whole world into war."
95 CONG. REC. 11, 486 (1949).
[104] DAVIDSON, MEGAMERGERS, *supra* note 6, at 109.
[105] FTC, *Report on the Merger Movement: A Summary Report* V (1948) [Hereinafter "FTC Report"].
[106] *Id.* at 68; *But see* Arthur Austin, *supra* note 94, at 935(arguing that "in reality, there was no threat: 'The supposed 'sharp rise in economic concentration' through mergers which concerned the Congress was long ago shown to be a piece of fiction.") (footnotes omitted).
[107] 334 US 495 (1948).

law.[108] In *Columbia Steel,* the DoJ sought to enjoin, under sections 1 and 2 of the Sherman Act, US Steel from acquiring the physical assets of Consolidated Steel. Whilst the Court approved the acquisition of Consolidated by the US Steel, it noted that there was a need for more stringent merger laws. The Court stated:

> it is not for courts to determine the course of the Nation's economic development . . .. The basic industries, with few exceptions, do not approach in America a cartelized form. If businesses are to be forbidden from entering into different stages of production that order must come from Congress, not the courts.[109]

The decision in *Columbia Steel* made clear that the Sherman Act was not an effective check on pure asset acquisitions that were not covered by the Clayton Act in the first place.

From 1914 to 1950, the DoJ challenged only 16 mergers under section 7 of the Clayton Act. Eight of these challenges were settled by consent decrees.[110] The Supreme Court ruled on only five merger cases,[111] all of which had been blocked by the FTC. Of these five cases, the FTC succeeded in only one.[112] The lax enforcement of the Clayton Act, public fear of big business, and the Supreme Court's decision in *Columbia Steel* set the stage for amendment to the Clayton Act.

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[108] The Columbia Steel case was often cited by congressmen as a primary impetus to amendment of Section 7. H.R.Rep. No. 1191, 81st Cong., 1st Sess. 10-11 (1950); Hearings before the Subcommittee of the Senate Committee on the Judiciary on Corporate Mergers and Acquisitions, 81st Cong., 1st and 2d Sess. 24; 96 Cong. Rec. 16453 (1950) (Senator Kefauver, Senate sponsor of the bill to amend Section 7, stated that "[t]he Columbia Steel Co. case is a vivid illustration of the necessity for the proposed amendment of the Clayton Act.").

[109] *Columbia Steel*, 334 US at 526.

[110] A.B.A. MONOGRAPH 7, *supra* note 60, at 25.

[111] Brian Golden, *supra* note 51, 172-3 & n.100:

Three significant companion cases were brought in 1926: Thatcher Mfg. Co. v. FTC, 272 US 554, 560-61 (1926) (FTC could not restrict the transfer of assets following a stock acquisition where the transfer occurred prior to the FTC filing a complaint); FTC v. Western Meat Co., 272 US 554, 557-60 (1926) (upholding a divestiture order which barred the acquiring company from transferring stock or assets of the acquired company to any of its subsidiaries when the complaint was filed prior to the transfer); Swift & Co. v. FTC, 272 US 554, 561-63 (1926) (FTC could not restrict the transfer of assets following a stock acquisition where the transfer occurred prior to the FTC filing a complaint). In the 1930s, the Supreme Court decided International Shoe Co. v. FTC, 280 US 291 (1930) (acquiring a company on the verge of liquidation did not violate § 7 of Clayton Act); and Arrow- Hart & Hegeman Elec. Co. v. FTC, 291 US 587 (1934)

[112] *Id.*; FTC v. Western Meat Co., 272 US 554 (1926).

2. The Celler-Kefauver Antimerger Act, 1950: Amendment to the Clayton Act

In 1950, Congress passed the Celler-Kefauver Antimerger Act, 1950[113] ("CKA Act"), which put to rest Congress' concern about the third merger wave. Congress believed that the third merger wave stemmed from its failure in 1914 to envisage the acquisition of assets as an alternative means of effectuating mergers.[114] The CKA Act amended section 7 of the Clayton Act so as to prohibit the acquisition of the whole or any part of the assets of another corporation when the effect of the acquisition was to substantially lessen competition or tend to create a monopoly.[115]

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[113] The Celler-Kefauver Antimerger Act, ch. 1184, 64 Stat. 1125 (1950) (current version at 15 USC. §§ 18, 21 (1988), amended by Pub. L. No. 46-349, § 6(a), 94 Stat. 1154 (1980)).

[114] In *Brown Shoe*, *supra* note 63, the Supreme Court summarized the following policy concerns behind the enactment of the CKA Act:

First, there is no doubt that Congress did wish to 'plug the loophole' and to include within the coverage of the Act the acquisition of assets no less than the acquisition of stock.

Second, by the deletion of the "acquiring-acquired" language in the original text, it hoped to make plain that s 7 applied not only to mergers between actual competitors, but also vertical and conglomerate mergers . . .

Third, . . . Congress saw the process of concentration in American business as a dynamic force; it sought to assure the FTC and the courts the power to brake this force at its outset and before it gathered momentum.

Fourth, . . . [CKA Act was intended "to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding." Thus, the Congress thought inappropriate to apply the "standards for judging the legality of business combinations adopted by the courts in dealing with cases arising under the Sherman Act" to section 7 of the amended Clayton Act.]

Fifth, at the same time that it sought to create an effective tool for preventing all mergers having demonstrable anticompetitive effects, Congress recognized the stimulation to competition that might flow from particular mergers. . . .

Sixth, Congress neither adopted nor rejected specifically any particular tests for measuring the relevant markets, either as defined in terms of product or in terms of geographic locus of competition, within which the anti-competitive effects of a merger were to be judged.

Seventh, ... Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular industry . . . .

Eighth, Congress used the words '*may* be substantially to lessen competition' (emphasis supplied), to indicate that its concern was with probabilities, not certainties.[ ] Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities. Mergers with a probable anticompetitive effect were to be proscribed by this Act.

Id. at 316-323.

[115] 15 USC. 18 ('No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.'); *see also* United States v. General Dynamics Corp., 415 US 486, 490 (1974); In 1980, Section 7 was amended to replace "corporation" with "person." The use of term "corporation" severely limited the Act's applicability. See Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Sys., Inc., 491 F. Supp. 1199 (D. Haw. 1980).

However in enacting the CKA Act, Congress did not pay any attention to the FTC's recommendation requiring merging parties to give premerger notification to the Commission.

a. *Merger Analysis Under § 7 Clayton Act: Sole Reliance on Market Share*

The enactment of the CKA Act marked a U-turn in the merger enforcement policy of the government. The DoJ started to use 'structural presumptions' in merger litigation. Courts started condemning "mergers upon a simple showing that the market shares of the merging parties exceeded a minimum level."[116] Commenting on the post-CKA Act decisions of the Supreme Court, Professor Areeda stated:

> [O]ne may wonder whether the anti-merger stringency of a later Court might result from leaning over backward to avoid the "sins" of earlier Courts whose "undue" toleration of mergers permitted the economy to become as concentrated as it is.[117]

i. Brown Shoe Co. v. United States

In its 1962 *Brown Shoe Co.* v. *United States* decision, the Supreme Court got its first opportunity to interpret the CKA Act.[118] The DoJ contended that the effect of the merger of Brown, the third largest seller of shoes by dollar volume in the United States, and Kinney, the eighth largest company, by dollar volume, 'may be substantially to lessen competition or to tend to create a monopoly.' Even though the acquisition of Kinney by Brown would have increased the market share of the latter by only 5%, the Court, ruling in favour of the Government, noted:

> If a merger achieving 5% control were now approved, we might be required to approve future merger efforts by Brown's competitors seeking similar market shares. The oligopoly Congress sought to avoid would then be furthered and it would be difficult to dissolve the combinations previously approved. Furthermore, in this fragmented industry, even if the combination controls but a small share of a particular market, the fact that this share is held by a large national chain can adversely affect competition.[119]

[116] *See* Ernest Gellhorn, et al., *supra* note 87, at 395.
[117] PHILLIP AREEDA, *supra* note 35, at 545.
[118] *Brown Shoe*, *supra* note 63.
[119] *Id.* at 344.

The Court's reasoning placed reliance upon the legislative history of the CKA Act:

> [W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.[120]

The Court, thus, preferred a decentralized market in order to allow smaller businesses the opportunity to compete over market efficiencies that could have been realized by the merger of Kinney with Brown.

ii. United States v. Philadelphia National Bank

A year after the *Brown Shoe*, the Supreme Court was faced with the merger of two banks in *United States* v. *Philadelphia National Bank.*[121] Philadelphia National Bank and Girard Trust Corn Exchange Bank were, respectively, the second and third largest banks in the Philadelphia metropolitan area which was home to the headquarters of forty-two commercial banks. The Court first noted that merger did not fit squarely in either the "stock acquisition"[122] or "asset accession"[123] provisions of section 7 of the Clayton Act.

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[120] *Id.*

[121] United States v. Philadelphia National Bank, 374 US 321 (1963).

[122] The Court noted the following difference between a merger and a stock acquisition:

1. A merger transaction can be consummated upon the affirmative vote of the holders of only two-thirds of the outstanding stock of each corporation, but in a stock acquisition, the acquiring company negotiates the purchase of stock held by each individual shareholder who could decide for himself whether to transfer his shares.
2. A merger requires public notice, whereas stock can be acquired privately.
3. A shareholder dissenting from a merger has the right to receive the appraised value of his shares; in contrast, no shareholder has a comparable right in a stock acquisition.
4. The corporate existence of a merged company is terminated by the merger, but remains unaffected by an acquisition of stock. *Id.* at 337 & n.14.

[123] The Court noted the following difference between the sale of assets and mergers:

1. A merger involves the complete disappearance of one of the merging corporations. A sale of assets, on the other hand, may involve no more than a substitution of cash for some part of the selling company's sold assets.
2. Shareholders of merging corporations surrender their interests in those corporations in exchange for different rights in the surviving corporation. In an asset acquisition, however, the shareholders of the selling corporation obtain no interest in the purchasing corporation and retain no interest in the assets transferred.
3. In a merger, unlike an asset acquisition, the resulting firm automatically acquires all the rights and obligations of the merging firms.
4. In a merger, but not in an asset acquisition, there is the likelihood of a continuity of management and other personnel.

Although there was a strong argument that mergers between banks were exempt from the purview of the CKA Act,[124] the Court nonetheless assumed jurisdiction over the merger. It noted that reading an exemption for the banks "would create a large loophole in a statute designed to close a loophole,"[125] and "immunity from the antitrust laws is not lightly implied."[126] The Court once again enjoined the merger based on the market share of the merging banks. The Court, reasoning its decision on "presumptive illegality," held:

> [A]ny merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.[127]

iii. United States v. Von's Grocery Co.

The sole reliance on market share criterion reached its extreme in *United States v. Von's Grocery Co.*,[128] when the Supreme Court condemned the merger between two competing grocery chains, whose combined market share after the merger would have been 7.5%.

In *Von's Grocery*, Justice Potter Stewart issued a strong dissenting opinion condemning the Court's reliance on market concentration as the "beginning and end of merger analysis."[129] Justice Stewart observed:

> [T]he court pronounces its work consistent with the line of our decisions under [Section 7 of the Clayton Act] since the passage of the 1950 amendment. The sole consistency I can find is that under section 7, the

The Court observed that "stock acquisition" is more akin to mergers than "asset acquisition." Because the former, like mergers, give the acquirer a say in the management of the corporation, whereas the latter grants no such say. *Id.* 336-37& n.13.

[124] PHILLIP AREEDA, *supra* note 35, at 595. (The CKA Act brought within section 7 asset acquisitions by a 'corporation subject to the jurisdiction of the Federal Trade Commission.' The CKA Act, thus, seems to exclude banks which are not subject to the FTC jurisdiction. It was this premise on which Congress enacted the 1960 Bank Merger Act which tightened administrative regulation over bank mergers.)

[125] *Philadelphia Nat'l Bank*, *supra* note.121, at 343. (Any other construction would be illogical and disrespectful of the plain congressional purpose in amending s 7, because it would create a large loophole in a statute designed to close a loophole. It is unquestioned that the stock-acquisition provision of s 7 embraces every corporation engaged in commerce, including banks.)

[126] *Id.* at 348.

[127] *Id.* at 363.

[128] *United States* v. *Von's Grocery Co.*, 384 US 270 (1966).

[129] James E. McCarty, *The FTC 1984, Merger Enforcement at the Federal Trade Commission*, 467 PLI/CORP 213, 217 (Dec. 13, 1984).

> Government always win. . . . The merger between Von's and Shopping Bag produced a firm with 1.4 percent of the stores and 7.5 percent of the grocery sales and resulted in 1.1 percent increase in the market share enjoyed by the two largest firms in the market. . . . [Those] figures are hardly [an] "undue percentage" of the market, nor are [they a] "significant increase in concentration."[130]

It can be argued that the post-CKA cases reflected a focus on a decentralized market protecting competitors from rivals rather than promoting an efficient, competitive marketplace.[131]

b. *The Fourth Merger Wave: Mid-1960s*

The CKA Act, as interpreted by the Courts, altered the pattern of corporate acquisitions. It proved successful in arresting horizontal and vertical mergers. However, it had little effect on conglomerate mergers, which in any event were deemed to have marginal anticompetitive effect. During the mid-1960s, the United States experienced another merger wave, composed primarily of acquisitions of unrelated firms.[132] Thus, it has been said that the CKA Act like the original Clayton Act "proved effective in stopping the mergers of the past, but not the mergers of the future."[133]

3. **The DoJ's Merger Enforcement Guidelines 1968**

Prompted by the line of decisions from the Supreme Court flowing from the CKA Act,[134] the DOJ released its first Merger Guidelines in 1968.[135] Recognizing that the objective of section 7 of the Clayton Act was "to preserve and promote market structures conducive to competition," the Guidelines attempted to identify mergers that were likely to alter the market structures that were inimical to competitive conduct.[136] The Guidelines focused on market structure based on the premise that the "conduct of the individual

[130] *Von's Grocery*, *supra* note 128.
[131] Brian Golden, *supra* note 51, at 182.
[132] Arthur Austin, *supra* note 94, at 937. (F.T.C. statistics indicate that during the years 1960-1966, 71% of all mergers involving large manufacturing and mining firms were conglomerate.) F.T.C., *Economic Report on Corporate Mergers*, pt 8A, at 30 (1969).
[133] DAVIDSON, MEGAMERGERS, *supra* note 6, at 112.
[134] *See* Brian Golden, *supra* note 51, at 180; Ernest Gellhorn, et al., *supra* note 87, at 395.
[135] US DOJ, *Merger Guidelines 1968, reprinted in* 2 TRADE REG. REP. (CCH) p 4510 (1982) [Hereinafter "*1968 Guidelines*"].
[136] *Id.* at 6882

firms in a market tends to be controlled by the structure of the market."[137]

The Guidelines initially adopted a four-firm concentration ratio criterion to ascertain market concentration.[138] Under the four-firm criterion the DOJ was able to challenge mergers involving firms with combined market shares as small as 8 percent, irrespective of other economic evidence.[139]

4. Antitrust Revolution

a. *Demise of the 1968 Guidelines: Evolution in Merger Analysis*

Despite the fact that 1968 Guidelines were in line with the case law, the courts followed them irregularly.[140] The first major departure from the 1968 Merger Guidelines was the Supreme Court's 1974 decision in *United States v. General Dynamics Corp.*[141] In *General Dynamics*, the Supreme Court refused to order the divestiture of Strip-Mining

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[137] *Id.*; *see also* E. Thomas Sullivan, *The Antitrust Division as a Regulatory Agency: An Enforcement Policy in Transition*, 64 WASH. U. L.Q. 997, 1025 (1986). (market structure involve: market conditions which are fairly permanent or subject only to slow change (such as principally, the number of substantial firms selling in the market, the relative sizes of their respective market shares, and the substantiality of barriers to entry of new firms into the market)). *Id.*

[138] The 1968 Guidelines specified the following thresholds:

1. Horizontal mergers: if the four-firm concentration ratio is less than 75 per cent a merger up to 30 percent of the acquirer and 1 per cent of the acquiree might not be challenged; if the four-firm concentration ratio exceeds 75 percent the percentages fall to 15 per cent and 1 per cent respectively.
2. Vertical mergers: where a supplying firm has at least 10 per cent of the sales in its market and the purchasing firm at least 6 per cent of the total purchase in that market, the merger will be cancelled.

Conglomerate mergers: where reciprocal buying or market dominance occurs, the merger will be challenged.

The DOJ will challenge the merger, if any of the above thresholds are exceeded. Note that for horizontal mergers, if the four firm concentration ratio exceeds 75 per cent, the department would not challenge if any acquiring firm had a 4 per cent share and the acquiree had a 5 per cent share. This means that if the acquirer had a 5 per cent share and the acquiree had a four per cent share, the DOJ would challenge the merger.

1968 Guidelines, *id.* at 6683-84; *see also* Terence E. Cooke, MERGERS AND ACQUISITIONS 96 (New York: Basil Blackwell Inc, 1986).

[139] Ernest Gellhorn, et al., *supra* note 87, at 395.

[140] *See* Brian Golden, *supra* note 51, at 181 & n.156. Example of cases that referred to 1968 Merger Guidelines: Pargas, Inc. v. Empire Gas Corp., 423 F. Supp. 199 (D. Md. 1976); FTC v. PepsiCo, 477 F.2d 24 (2d Cir. 1973); Stanley Works v. FTC, 469 F.2d 498 (2d Cir. 1972); American Smelting & Refining Co. v. Pennzoil United, Inc., 295 F. Supp. 149 (D. Del. 1969). For examples of cases making reference to the Merger Guidelines approach to measuring market share, see United States v. Amax, Inc., 402 F. Supp. 956 (D. Conn. 1975); Bowl America, Inc. v. Fair Lanes, Inc., 299 F. Supp. 1080 (D. Md. 1969).

For example of cases that did not refer to the 1968 Merger Guidelines, see E. Thomas Sullivan, *supra* note 137, at 1026 & n.125: Fruehauf Corp. v. FTC, 603 F.2d 345, 353-54 (2d Cir. 1979); United States Steel Corp. v. FTC, 426 F.2d 592, 606 (6th Cir. 1970) with Stanley Works v. FTC, 469 F.2d 498, 504 n.13 (2d Cir. 1972), cert. denied, 412 US 928 (1973); Marathon Oil Co. v. Mobil Corp., 530 F. Supp. 315, 325 (N.D. Ohio), aff'd, 669 F.2d 378 (6th Cir. 1981), *cert. denied*, 455 US 982 (1982). See also F & M Schaefer Corp. v. C. Schmidt & Sons, 597 F.2d 814, 817 & n.5 (2d Cir. 1979); Allis-Chalmers Mfg. Co. v. WhiteConsol. Indus., Inc., 414 F.2d 506, 524-25 (3d Cir. 1969), *cert. denied,* 396 US 1009 (1970).

Coal Corporation, which had been acquired by Deep Shaft Coal-Mining Corporation, the predecessor of appellee, General Dynamics, on the basis of market share only. The Supreme Court, held "that the finder of the fact could and should look beyond the market concentration numbers to 'other pertinent factors affecting the . . . industry and the business of the appellees. . .'".[142] Following *General Dynamics*, the legal and economic thinking about mergers evolved and the 1968 Merger Guidelines had to be revised and reworked.[143]

b. *The Chicago School*

The Warren Court's commitment to protect inefficient small firms provoked an "Antitrust Revolution" by the Chicago School of Law and Economics.[144] An ideological alliance of lawyers and economists, the Chicago School intended to calibrate antitrust law in line with "efficiency economics."[145]

According to the Chicago School, the first priority in enforcing the antitrust laws is efficiency, "not legal rules designed to move the economy closer to a model of atomistic competition."[146] The Chicago School rejected the use of socio-economic factors (such as equality of opportunity for small but less efficient firms) in conducting antitrust analysis. Similarly, it rejected political factors (such as "big is bad" because bigness exerts negative influences on government). It advocated the analysis of business transactions using the lens of "efficiency," as any business conduct that is efficient would translate into consumer welfare through lower prices, effective service, and better product quality.[147]

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[141] United States v. General Dynamics Corp., 415 US 486 (1974).
[142] *Id.* at 498; s*ee also* 2 ROWLEY & BAKER, *supra* note 72, at 1631.
[143] US *Department of Justice and Federal Trade Commission Statement Accompanying Release of Revised Merger Guidelines* (April 2, 1992) *available at* <http://www.ftc.gov/bc/docs/horizmer.htm>, (visited on July, 2001).
[144] *See* Kauper, *The 'Warren Court' and the Antitrust Laws: of Economics, Populism, and Cynicism*, 67 MICH. L. REV. 325, 330-34 (1968); Arthur Austin, *supra* note 94, at 947; Austin, *The Emergence of Societal Antitrust*, 47 N.Y.U. L. REV. 903 (1972).
[145] *See* Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979). For a critique of the 'market approach' to law and life see Minda, *The Lawyer-Economist at Chicago: Richard A. Posner and the Economic Analysis of Law*, 39 OHIO ST. L. REV. 439 (1978).
[146] Arthur Austin, *supra* note 94, at 947, citing Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1698 (1986).
[147] *Id.* at 946.

c. *Reaganomics*

A commitment to *laissez faire* economics by the Chicago School put them in a natural choice for the conservative Republicans. With the election of Ronald Reagan in 1980,[148] the Chicago School found a platform to transform their philosophy into the law and policy of the United States. William Baxter, a professor from Stanford Law School and a strong advocate of efficiency economics, was appointed as the head of the DoJ's Antitrust Division by President Reagan. Professor Baxter practiced his convictions with utmost boldness as the Division's Chief. He believed that "the marketplace will Schumpeterize and become competitive from its own creative convolutions."[149] Thus, under Baxter's efficiency economics, mergers were either neutral or procompetitive; section 7 of the Clayton Act was in effect "mothballed."[150]

D. Merger Enforcement Guidelines

In this section we will review the various merger and antitrust enforcement guidelines issued by the Department of Justice and the Federal Trade Commission.

1. The DoJ's Merger Enforcement Guidelines 1982: Efficiencies Recognized

On June 14, 1982, the Department of Justice revised its 1968 Merger Guidelines so as to reflect the legal and economic development in merger analysis that took place in

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[148] *Id.* at 947 & n.114: ('The political development that has helped turn antitrust enforcement of the 1970's upside down and made it, in a sense, more leisurely was the arrival of the Reagan administration and is view that business is essentially good.' Elias, *Scales Tip Against Antitrust Statutes, Insight,* WASH. TIMES, June 15, 1987, at 8, 11).

[149] *Id.*, n.116: Schumpeter believed that monopoly often occurs but eventually dissipates under the pressure of 'creative destruction,' a process of 'industrial mutation' that 'incessantly revolutionizes the economic structure from within, incessantly destroying the old one, incessantly creating a new one. This process of Creative Destruction is the essential fact about capitalism.' J. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 83 (1962).

[150] *Id.*, n.117: 'Merger enforcement by the Division and the F.T.C. from 1982-1986, as a percentage of reported transactions has been running at 28% of the level of 1979-1980.' *Rodino Finds Division's Enforcement is Lax, Takeovers as Threats to Economy,* 52 ANTITRUST & TRADE REG. REP. (BNA) at 422 (March 5, 1987). Noting that merger enforcement had dropped during the 1980s, Robert Pitofsky observed: 'It was anticipated that this lenient drift would continue under the Reagan Administration, but few predicted just how lenient the policy would become. Mergers among giant competitors regularly have been cleared . . . At times, people could not help wondering if the Administration would ever meet a merger it did not like.' Pitofsky, *Coke and Pepsi Were Going Too Far*, N.Y. TIMES, July 27, 1986, at F2, col. 1; In his paper, Austin concluded that "Chicago is very close to accomplishing a de facto repeal of Clayton 7, if not antitrust." *Id.* at 961.

14 years since their issuance.[151] The 1982 Guidelines[152] outlined "the general principles and specific standards the Department's Antitrust Division use[d] in screening the hundreds of mergers it examines every year."[153] The major premise of the Guidelines was that merger analysis involve more than calculation of market shares, and that other qualitative factors, such as market entry, product homogeneity and buy characteristics are equally pertinent.[154] On the same date the Federal Trade Commission released its Statement Concerning Horizontal Mergers, wherein it expressed its agreement with the merger analysis enunciated in the DoJ's 1982 Guidelines and noted that "considerable weight" would be accorded to the Guidelines by the Commission.[155]

The Guidelines were aimed at providing a clear set of objective criteria that would enable merging parties to ascertain in advance whether the transaction would be challenged by the DoJ. The Guidelines reflected the DoJ's understanding that "most mergers do not threaten competition and that many are in fact procompetitive and benefit consumers." Thus, the Guidelines focused only on the horizontal effects of a merger and placed little importance on vertical and conglomerate mergers.[156]

The Guidelines used a so-called five percent test to ascertain the relevant product and geographic markets.

a. *Product Market*

Product market was determined by asking how many buyers would switch to other products and how many sellers would enter the market if the merging parties would raise the price by 5 per cent. A final product market would be the one in which a small increase in price would not prompt a significant number of buyers to leave or sellers to enter the market. The rationale for such an exercise was to gauge whether a merger would

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[151] DOJ, *Merger Guidelines 1984*, 4 TRADE REG. REP. (CCH), June 29, 1984, ¶¶ 13,103, Statement Preceding the Guidelines. [Hereinafter "*1984 Guidelines*"]. (Over time, the Department's merger policy changed so much that there was little similarity between that policy and the policy described in [the] 1968 Guidelines. The 1982 revisions eliminated the resulting confusion by accurately describing the Department's actual merger enforcement policy).

[152] DOJ, *Merger Guidelines 1982*, 4 TRADE REG. REP. (CCH), June 14, 1982, ¶¶ 13,102, § III(A). [Hereinafter "*1982 Guidelines*"].

[153] *Id.*

[154] *See* David A. Clanton, *Recent Merger Developments: Coming of Age Under the Guidelines*, 53 ANTITRUST L.J. 345, 348 (1984).

[155] FTC, *Statement Concerning Horizontal Mergers*, (June 14, 1982). [Hereinafter "*FTC 1982 Statement*"].

[156] *1982 Guidelines*, *supra* note 152, at 4504.

lead to an oligopoly with the possibility of increased collusion.

b. Geographic Market

A geographic market was determined when firms located elsewhere would not be able to sell sufficient quantities of the product within the market to make a small increase in price unprofitable within a period of one year. Sellers would therefore be able to increase profits by increasing prices. In ascertaining the geographic market, the Guidelines considered the possibility of extending the markets beyond US boundaries. They recognized the role that foreign competition plays in the Department's merger analysis. However, the Guidelines noted that foreign companies are usually not able to provide effective competition because they are subject to additional restraints of trade such as tariffs, exchange rates and political constraints.

c. Determination of Market Concentration

The 1982 Guidelines superseded the four-firm concentration ratio criterion with the Herfindahl-Hirschman Index (HHI) for ascertaining market concentration. In contrast to the four-firm concentration ratio (CR4), which took into consideration the market share of only the top four firms, the HHI gives importance to the market share of each of the firms in the relevant market. The HHI is calculated by squaring the market shares of all the firms in the market and then summing the squares. The Guidelines then call for an examination of the post-merger HHI number and the change or increase in the HHI caused by the merger.[157] The Guidelines distinguish the markets in three categories:

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[157] The Herfindahl-Hirchman Index (HHI) is preferred to the four-firm concentration ratio as the appropriate measure of concentration within a market. The four-firm concentration ratio (CR4) measures the extent to which the top four firms monopolize a market. In contrast, the HHI gives weight to the importance of each of the firms engaged in a market. It does this by summing the squares of each individual market share. For example, if there are six firms in a market X with market share as follows:

A	50%	D	10%
B	18%	E	5%
C	13%	F	4%

CR4= 50+18+13+10 = 91%
HHI= $50^2 + 18^2 + 13^2 + 10^2 + 5^2 + 4^2 = 3134$

If firm D and E were to merge, the new four-firm concentration ratio and HHI would be:

CR4= 50+18+13+15 = 96%

i. Unconcentrated markets where the HHI is less than 1000;

ii. Moderately concentrated markets where the HHI is between 1000 and 1800; and

iii. Highly concentrated markets where HHI exceeds 1800.

If the post-merger HHI is below 1,000, it is likely that the Department would not challenge the merger. If markets are moderately concentrated, that is, the post-merger HHI is between 1,000 and 1,800, the Department would likely challenge the merger if the post-merger HHI would increase by more than 100 points. In case of highly concentrated markets, a merger is likely to be challenged if the post-merger increase in HHI is less than 50 points.

Thus, under the above-stated criteria, the Government would not have challenged the merger of Von's Grocery chain with Shopping Bag, a competing grocery chain, in

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HHI= $50^2 + 18^2 + 13^2 + 15^2 + 4^2 = 3234$

It is noticeable that the HHI has increased by 100 points. Mathematicians will quickly realize that the increase in HHI may be calculated by doubling the product of the market share of the merging firms, i.e., 2 x 10 x 5 = 100

The HHI may range from a maximum of 10 000, when the market is controlled by one firm, towards zero, where there are many equally sized firms.

The advantage of the HHI is that relative weights are attached to each company, with greater emphasis being given to larger firms. It is the larger firms which often have the power and inclination to make collusive agreements. For example, if there are six firms in market Y with market shares as follows:

A	22%	D	18%
B	20%	E	17%
C	19%	F	4%

CR4= 79
HHI= 1874

If firm D and E were to merge, the new ratios would be:

CR4= 96%
HHI= 2486

It is important to realize that the pre-and post-merger CR4 in markets X and Y are identical. Market X is dominated by firm A, which undoubtedly would be price leader. The HHI also reveals a high level of concentration in market X with the post-merger HHI increasing by 100 points. In contrast, the premerger HHI in market Y reveals that there are a number of fairly equally sized firms where competition may be intense. If firms D and E merge, the HHI increases by a dramatic 612 points, highlighting the situation for a new dominant firm in the market. Terence E. Cooke, *supra* note 138, at 98-99.

United States v. Von's Grocery Co.[158] In *Von's Grocery*, the premerger HHI was 300 and the post-merger HHI was about 40 points higher.[159]

2. The DoJ's Merger Enforcement Guidelines 1984

In 1984, the Department of Justice, recognizing that 1982 Merger Guidelines were "either ambiguous or [had] been interpreted by observers in ways . . . not fully consistent with the Department's actual policy,"[160] revised the 1982 Guidelines. The 1984 Guidelines made revisions in five key areas: (1) market definition and measurement; (2) factors affecting the significance of concentration and market share data; (3) treatment of foreign competition; (4) treatment of efficiencies; and (5) treatment of failing divisions of healthy firms.[161] The key revisions are summarized below:

a. *Market Definition and Measurement*

The 1984 Guidelines rescinded the five percent price elasticity test for the determination of product market, and replaced it with a more open-ended test assessing the impact of "small but significant and non-transitory" price increase over a period of one year.

b. *Treatment of Foreign competition*

The 1984 Merger Guidelines dealt with foreign competition more explicitly than the 1982 Guidelines. It treated foreign producers selling into the US market in the same way as domestic producers.

c. *Efficiencies*

The 1982 Guidelines gave the impression that efficiencies would only be considered in 'extraordinary cases.' The 1984 Guidelines made clear that all types of efficiencies, and not just those related to the economies of scale, would be considered in all cases. However, the merging parties had the burden to show by "clear and convincing" evidence that efficiencies would result from the transaction.

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[158] 384 US 270 (1966).

[159] *See* Eleanor M. Fox, *The New Merger Guidelines: Blueprint for Microeconomic Analysis*, 27 ANTITRUST BULL. 519 (1982).

[160] *1984 Guidelines*, *supra* note 151, ¶¶ 13,103.

d. Failing Divisions of Healthy Firms

The Guidelines noted that the Antitrust Division, while evaluating the competitive significance of the market share of the firms, will take into account the financial condition of the firms as well. In addition, the acquisition of a failing firm will be considered against the efficiencies that will result from such acquisition.

3. DoJ/FTC's Horizontal Merger Enforcement Guidelines, 1992/1997

On April 2, 1992, the Department of Justice and the Federal Trade Commission (hereinafter the "Agencies") for the first time issued a unified set of Horizontal Merger Guidelines[162] (hereinafter the "1992 Guidelines). The 1992 Guidelines superseded both the 1984 DoJ's Merger Guidelines and the 1982 FTC Statement Concerning Horizontal Mergers. The 1992 Guidelines, however, do not represent any radical departure from the 1984 Guidelines. They represent the enforcement policy of the Agencies concerning mergers subject to section 7 of the Clayton Act,[163] section 1 of the Sherman Act,[164] or section 5 of the FTC Act.[165] They describe the analytical process that the Agencies will employ in determining whether to challenge a horizontal merger.

On April 18, 1997, the Agencies revised their 1992 Horizontal Merger Guidelines to provide the agencies, merging firms, and the public with a clearer guidance for identifying "whether efficiencies will lead merging firms to lower prices, create new products, or otherwise enhance competition. They also make clear what merging firms must do to demonstrate claimed efficiencies."[166] The 1997 Guidelines made clear that only "cognizable efficiencies," that is, "merger specific efficiencies that have been verified and do not arise from anticompetitive reduction in output or service,"[167] will be

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[161] *Id.*

[162] US DoJ & FTC, *Merger Guidelines 1992*, are *available at* the DoJ's website at <http://www.usdoj.gov/atr/public/guidelines/horiz_book/toc.html> & FTC's website at <http://www.ftc.gov/bc/docs/horizmer.htm>, (visited on Feb. 7, 2001). [Hereinafter "*1992 Guidelines*"].

[163] Clayton Act, *supra* note 61, § 7. Mergers subject to section 7 are prohibited if their effect "may be substantially to lessen competition, or to tend to create a monopoly."

[164] Sherman Act, *supra* note 22, § 1. Mergers subject to section 1 are prohibited if they constitute a "contract, combination . . ., or conspiracy in restraint of trade.

[165] FTC Act, *supra* note 61, § 45. Mergers subject to section 5 are prohibited it they constitute an "unfair method of competition."

[166] *FTC/DOJ Announce Revised Guidelines on Efficiencies in Mergers*, April 8, 1997, *available at* <http://www.ftc.gov/opa/1997/9704/effpress.htm>, (visited on Feb. 15, 2001).

[167] *1992 Guidelines*, *supra* note 162.

considered in merger analysis. According to William Baer, the revisions were made to express the belief of the Agencies that "efficiencies needed to be analyzed with some rigor and should be based on an adequate factual foundation."[168]

4. Antitrust Enforcement Guidelines for International Operations, 1995

On April 5, 1995, the US Department of Justice and the Federal Trade Commission issued Antitrust Enforcement Guidelines for International Operations[169] ("1995 Guidelines"). This was the first time that the Agencies released jointly guidelines for international operations. Prior to the 1995 Guidelines, only the DoJ had issued guidelines in 1977,[170] which were later revised in 1988.[171] The 1995 Guidelines are intended to provide businesses engaged in international operations with a roadmap for the international antitrust enforcement policy of the Agencies.

The 1995 Guidelines reflect the Agencies commitment to enforce "the US antitrust laws to the fullest extent of the jurisdiction that the Congress has conferred on"[172] them. Unlike the 1988 Guidelines, the 1995 Guidelines stress the need and importance of cooperation with other antitrust agencies in order to enforce the antitrust laws effectively. The 1995 Guidelines instruct international businesses that:

(a) Foreign commerce cases can involve almost any provision of US antitrust law;

(b) The Agencies do not discriminate in the enforcement of those laws on the basis of the nationality of the parties;

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[168] William J. Baer, New Myths and Old Realities: Perspectives on Recent Developments in Antitrust Enforcement, Remarks before the Bar Association of the City of New York (Nov. 17, 1997); 1997 WL 728608, at * 10, (1997).

[169] DOJ/ FTC, *Antitrust Enforcement Guidelines for Int'l Operations*, 68 ANTITRUST AND TRADE REG. REP. S-1 (BNA) No. 1707 (April 06, 1995) (Special Supp.); also *available at* the DoJ's website <http://www.usdoj.gov/atr/public/guidelines/internat.htm>, (visited on Feb. 8, 2001) [Hereinafter "*1995 International Guidelines*"].

[170] DOJ, *Antitrust Guide for International Operations*, (Jan. 26, 1977), *reprinted in* ANTITRUST AND TRADE REG. REP. (BNA), No. 799, at E-1 (Feb. 1, 1977); For commentary on 1977 International Antitrust Guidelines see Wilbur L. Fugate, *The Department of Justice's Antitrust Guide for International Operations*, 17 VA. J. INT'L LAW 645 (1977).

[171] DOJ, *Antitrust Enforcement Guidelines for Int'l Operations*, 55 ANTITRUST AND TRADE REG. REP. (BNA) No. 1391 (Nov. 17, 1988) (Special Supp.); For commentary on 1988 International Antitrust Guidelines see Wilbur L. Fugate, *The New Justice Department Antitrust Enforcement Guidelines for International Operations-A Reflection of Reagan and, Perhaps, Bush Administration Antitrust Policy*, 29 VA. J. INT'L L. 295 (1989).

[172] *ABA Panel Probes International Guides Immediately After Release by Government*, 68 ANTITRUST AND TRADE REG. REP. 491 (BNA) No. 1708 (April 13, 1995).

(c) The Agencies do not employ their statutory authority to further non-antitrust goals; and
(d) Once jurisdictional requirements, comity, and doctrines of foreign governmental involvement have been considered and satisfied, the same substantive rules apply to all cases.[173]

Noting the extraterritorial reach of the US antitrust laws,[174] the 1995 Guidelines state that the Sherman Act "applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."[175] With respect to foreign commerce other than imports, the Guidelines note that "the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA") applies to foreign conduct that has a direct, substantial, and reasonably foreseeable effect on US commerce."[176] The Guidelines further note that the principles governing the foreign commerce jurisdiction of the Agencies would apply to Clayton Section 7 cases just as they apply to the cases under the Sherman Act.[177] Thus, when there is a merger between two non-US firms, and the merger transaction would have substantial effects in the United States, the Clayton Act will apply. The "effects test" is usually met when either or both of the merging parties have

[173] 1995 International Guidelines, *supra* note 169, ¶ 2.
[174] *See* Joseph P. Griffin, *Extraterritoriality in US and EU Antitrust Enforcement*, 67 ANTITRUST L.J. 159, 160-62 (1999); The extraterritorial application of the US antitrust law was first recognized by the US Court of Appeals for the Second Circuit in United States v. Aluminum Co. of Am., 148 F. 2d 416 (2d Cir. 1945) (*Alcoa*). Pronouncing the "effects" test of jurisdiction, the Court held that the United States had jurisdiction over wholly foreign conduct if that conduct had an intended effect within the United States. *Id.* at 443-44. In 1976, the US Court of Appeals for the Ninth Circuit enunciated "jurisdictional rule of reason" test in Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir. 1976). The Court held that the "effects" test of jurisdiction laid down in Alcoa is "by itself [...] incomplete because it fails to consider other nations' interests. Nor does it expressly take into account the full nature of the relationship between the actors and this country." *Id.* at 611-12.
Under the *Timberlane's* "jurisdictional rule of reason" test the Court evaluated and balanced a number of factors, namely: "t]he degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad."*Id.* at 614.
Timberlane's "jurisdictional rule of reason" test was adopted by courts in: Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3d Cir. 1979); Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876, 884-85 (5th Cir. 1982); Montreal Trading Ltd. v. Amax, Inc., 661 F.2d 864, 869-70 (10th Cir. 1981). Other courts have questioned the validity of "jurisdictional rule of reason" test, see Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 948-49 (D.C. Cir. 1984) (Timberlane factors "are not useful in resolving the controversy"); In re Uranium Antitrust Litig., 617 F.2d 1248, 1255 (7th Cir. 1980) (failure to consider *Timberlane* test did not constitute an abuse of discretion).
[175] Hartford Fire Insurance Co. v. California, 113 S. Ct. 2891, 2909 (1993).
[176] *1995 International Guidelines*, *supra* note 169, ¶ 3.1; Sherman Act, *supra* note 22, § 6a; FTC Act, *supra* note 61, § 45(a)(3).
[177] *1995 International Guidelines, id.* ¶ 3.14.

production or distributional facilities in the United States or when the parties export products to the United States.[178]

In applying the US antitrust laws to mergers involving non-US companies, the Agencies recognize that the merging parties are also subject to the concurrent jurisdiction of other countries involved. The Agencies therefore try to coordinate, where possible, with the antitrust agencies of those other countries, and attempt to fashion structural relief in a manner that would take account of the anticompetitive concerns in the US only, thus allowing other countries to fashion remedies to prevent anticompetitive effects within their jurisdictions.[179]

E. Premerger Notification Regime and Review Process

In this section we will consider the origins of premerger notification regime, and the various steps in the merger analysis conducted by antitrust enforcement agencies.

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[178] *Id.* illustrative example H; *see* Joseph P. Griffin, *supra* note 174, 169 & n.157; United States v. CIBA Corp., 1970 Trade Cas. (CCH) ¶ 73,269 (S.D.N.Y. 1970) (consent decree) (merger of two foreign firms permitted on the condition that certain US assets be divested to eliminate anticompetitive effects in the United States).

[179] *1995 International Guidelines, id.*, illustrative example J; Joseph Griffin, *id.* 169 & n.158: *see, e.g.*, Roche Holding Ltd., 5 Trade Reg. Rep. (CCH) ¶ 24,393 (FTC May 22, 1998); In re Degussa, 5 Trade Reg. Rep. (CCH) ¶ 24,406 (FTC June 10, 1998) (settlement requires FTC notification of acquisitions by Degussa, a German company, in Canada not reportable under Hart-Scott because of "North American" market); Ciba-Geigy Ltd., 5 Trade Reg. Rep. (CCH) ¶ 24,182 (FTC Mar. 24, 1997) (merger of two Swiss firms); Glaxo plc., 5 Trade Reg. Rep. (CCH) ¶ 23,784 (FTC June 14, 1995) (jurisdiction existed over acquisition of one British firm by another because both had substantial sales in the United States); Oerlikon-Buhrle Holding A.G., 5 Trade Reg. Rep. (CCH) ¶ 23,697 (FTC Feb. 1, 1995) (consent order) (challenge to Swiss firm's acquisition of German firm settled by divestiture of product line); Hanson plc, [Transfer Binder, FTC Complaints and Orders 1987-1993] Trade Reg. Rep. (CCH) ¶ 23,107 (FTC Mar. 9, 1992) (consent agreement) (challenge of tender offer by an English company for the shares of another English firm settled by divestment of some of their California assets); Institut Merieux, S.A., [Transfer Binder, FTC Complaints and Orders 1987-1993] TRADE REG. REP. (CCH) ¶ 22,779 (FTC Aug. 6, 1990) (consent agreement) (acquisition of Canadian firm by French competitor permitted after Canadian firm agreed to lease business in Toronto for at least 25 years to an FTC-approved acquiror); United States v. American Brands, Inc., 1983-1 Trade Cas. (CCH) ¶ 65,275 (S.D.N.Y. 1983) (consent decree) (acquisition by US stapler company of British stapler company with a US subsidiary permitted, but US company ordered to divest one of its two lines); United States v. Merck & Co., 1980-81 Trade Cas. (CCH) ¶ 63,682 (S.D. Cal. 1980) (consent decree) (acquisition permitted on condition that US acquired company divest a Canadian subsidiary); United States v. Gillette Co., 1976-1 Trade Cas. (CCH) ¶ 60,691 (D. Mass. 1975) (consent decree) (acquisition permitted on condition that new company be created with the German company to sell in the United States).

1. Hart-Scott-Rodino Antitrust Improvement Act, 1976

Congress enacted the Hart-Scott-Rodino Antitrust Improvements Act of 1976[180] ("HSR Act") to complement the enforcement of amended section 7 of the Clayton Act, which was intended to arrest anticompetitive mergers in their incipiency.[181]

The enactment of HRS Act emerged from the protracted litigation in *United States v. El Paso Natural Gas Co.*[182] In *El Paso*, the Department of Justice filed a suit, in July 1956, under section 7 of the Clayton Act challenging the acquisition of the stock and assets of Pacific Northwest Pipeline Corp. (Pacific Northwest) by El Paso Natural Gas Co.[183] After seven years of litigation, the Supreme Court ruled in favour of the Government and "ordered divestiture without delay." It took ten years before the divestiture was completed: so much "divestiture without delay!" Prior to the divestiture, El Paso had held Pacific Northwest for seventeen years, and earned $10 million in profits per annum from the illegally acquired company.[184]

El Paso was an example of a "midnight merger" that got consummated before the antitrust agencies found out about it. It showed that post-merger litigation can be protracted for years, and that the completion of a divestiture can take even longer. In addition, it showed that once a merger takes place and assets get "scrambled," it becomes very difficult to unscramble them and to reconstruct a viable separate assets.[185]

The FTC tried to remedy the problems highlighted by the El Paso case by implementing its own premerger notification program in 1969. However, the FTC's

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[180] Pub.L. No. 94-435, 90 Stat. 1383 (1976). The premerger notification provisions are located in § 7A of the Clayton Act, 15 USC. § 18a. [Hereinafter "HSR Act"].
[181] William J. Baer, *Reflections on Twenty Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, 65 ANTITRUST L.J. 825, 827 (1997). [Hereinafter "William Baer, *Reflections on Twenty Years*"]; H.R.REP. NO. 1373, 94th Cong., 2d Sess. 7 (1976).
[182] 376 US 651 (1964).
[183] *Id.* at 655.
[184] William Baer, *Reflections on Twenty Years, supra* note 181, at 827.
[185] *Id.* at 830;
In a House Report that documented the debates over the enactment of the HSR Act, it was noted:
During the course of the post-merger litigation, the acquired firm's assets, technology, marketing systems, and trademarks are replaced, transferred, sold off, or combined with those of the acquiring firm. Similarly, its personnel and management are shifted, retrained, or simply discharged.
In these ways the acquiring and acquired firms are, in effect, irreversibly "scrambled" together. The independent identity of the acquired firm disappears. "Unscrambling" the merger and restoring the acquired firm to its former status as an independent competitor is difficult at best, and frequently impossible.
H.R.REP. NO. 1373, 94th Cong., 2d Sess. 8 (1976).

premerger notification program proved ineffective as it lacked authority to enjoin consummation of the merger before a requisite waiting period.[186]

It was principally against this background that Congress enacted the three-title HSR Act.

a. *Title I of the HSR Act*

Title I amended the Antitrust Civil Process Act to expand the Civil Investigative Demand ("CID") authority it conferred on the Department of Justice. In addition, it granted to the Department tools necessary for modern antitrust enforcement.[187]

b. *Title II: The Premerger Notification Act*

Title II of the HSR Act added section 7A to the Clayton Act and required premerger notification for acquisitions of assets and voting securities that meet the specified thresholds.[188] The object of premerger notification was to provide enforcement agencies with notice and investigatory tools necessary to arrest anticompetitive mergers and acquisitions prior to their consummation.

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[186] *Id.* at 828.
[187] *Id.* at 825.
[188] 15 USC. § 18A (1992) (provides that "[n]o person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification").

i. Notification Thresholds[189]

The HSR Act provides a two-prong test that must be met before a transaction becomes notifiable: (1) the "size-of-person" and, (2) the "size-of-transaction" tests. In December, 2000 the HSR was amended for the first time since it was enacted in 1976 by the HSR Reform Legislation.[190] Among other changes, Reform Legislation adjusted the size-of-person and the size-of-transaction thresholds to index them to current dollar values.

(a) **The Size-of-Person Test**

The size-of-person test requires that:

(i) one person to the transaction to have annual net sales or total assets of at least $10 million; and

(ii) the other person to have annual net sales or total assets of at least $100 million.

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[189] 16 CFR § 801.1(h):
Notification threshold. The term "notification threshold" means:
(1) An aggregate total amount of voting securities and assets of the acquired person valued at greater than $50 million but less than $100 million;
(2) An aggregate total amount of voting securities and assets of the acquired person valued at $100 million or greater but less than $500 million;
(3) An aggregate total amount of voting securities and assets of the acquired person valued at $500 million or greater;
(4) Twenty-five percent of the outstanding voting securities of an issuer if valued at greater than $1 billion; or
(5) Fifty percent of the outstanding voting securities of an issuer if valued at greater than $50 million.
Examples:
1. Person "A" will acquire 10 percent of the voting securities of corporation "B" for $60 million. "A" would indicate the $50 million notification threshold. "A" later will acquire all of the outstanding voting securities of "B" and will hold as a result voting securities of "B" valued at $600 million. "A" would indicate the 50 percent notification threshold for the later filing, even though the $100 million and $500 million notification thresholds would also be crossed as a result of the acquisition.
2. Person "A" will acquire 26 percent of the voting securities of corporation "B" for $550 million. "A" files for the $500 million notification threshold. Later "A" will acquire an additional 20 percent of the voting securities of "B" and as a result will hold 46 percent of the voting securities of "B" valued at $1.1 billion. "A" is now required to file for the 25 percent notification threshold despite the fact that it already holds in excess of 25 percent of the voting securities of "B" prior to the current acquisition. The 25 percent threshold is crossed when as the result of an acquisition, 25 percent or more, but less than 50 percent, of an issuer's voting securities are held and those securities are valued in excess of $1 billion.
[190] HSR Reform Legislation, Pub.L. No. 106-553, 114 Stat. 2762 (2000).

Annual net sales are calculated on the basis of the most recent regularly prepared annual statements of income and expense, and total assets are calculated on the basis of the most recent regularly prepared balance sheet.[191]

(b) **The Size-of-Transaction Test**

Under the revised HSR Act any transaction resulting in an acquiring person holding $50 million or more of assets or voting securities of an acquired person will have to be reported. To determine whether the size-of-transaction test is satisfied, an acquiring person would have to aggregate the voting securities of the acquired person it currently holds with the voting securities or assets it is acquiring in the present transaction.

Any transaction which is valued at $200 million or less, but over $50 million, and meets the size-of-person test would have to be notified. However, any transaction which is valued at more than $200 million would have to be reported irrespective of the size-of-person test.

The HRS Reform Legislation require adjustment in dollar thresholds each fiscal year beginning with the fiscal year 2005 to reflect changes in the Gross Domestic Product during the previous year.

ii. Filing Fees

The HSR Reform Legislation has introduced a tiered fee structure. For transactions valued at less than $100 million, the prescribed filing fee is $45,000; for transactions valued at $ 100 million but less than $500 million, the fee is $125,000; and for transactions valued at $ 500 million and more, the fee is $280,000.[192]

iii. Transactions Subject to Foreign Antitrust Reporting Requirements

The HSR Reform Legislation has amended the Notification Form to add a space for reporting persons to indicate whether the filing is subject to foreign antitrust reporting requirements. The Form requests voluntary submission of the name(s) of any foreign

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[191] 16 C.F.R. § 801.11 (2000).
[192] 16 C.F.R. § 803.9 (2000).

antitrust or competition authority that has been or may be notified of the proposed transaction and the date or anticipated date of such notification.[193]

iv. Exemptions From Premerger Notification Requirements

There are a number of exemptions to the filing requirements of the HSR Act.[194] Since the HSR Act only requires notification of activities affecting US commerce, "transactions having only a limited nexus with United States commerce"[195] are exempted. For instance, the acquisition of foreign assets by a foreign person is exempt from the premerger notification requirement irrespective of the quantity of sales in or into the US attributable to those assets.[196] The acquisition by a foreign person of assets valued at less than $50 million (excluding investment assets) located in the US is also exempt.[197] Furthermore, any acquisition by a foreign person of another foreign person is also exempt if the acquired and acquiring persons' aggregate annual sales and aggregate total assets are each less than $110 million in the US.[198]

v. Application of HSR on Foreign Persons

The FTC and DoJ have successfully sued foreign persons for failing to notify acquisitions falling under the HSR Act and not qualifying for the above-mentioned exemptions.[199] In 1993, the US enforcement agencies sued, for the first time, a foreign person for failing to report its acquisition of other foreign persons having significant sales

[193] 16 C.F.R. § 803, App. (2000).
[194] 15 USC. § 18a(c) (2000); 16 C.F.R. §. 802 (2000) (Exemption rules).
[195] Statement of Basis and Purpose, 43 Fed. Reg. 33451, 33495 (1978).
[196] 16 C.F.R. §802.51(a) (2000).
[197] 16 C.F.R. §802.51(c) (2000).
[198] 16 C.F.R. §802.51(d) (2000).
[199] *See* Joseph P. Griffin, *supra* note 174, at 170-71, citing United States v. Bell Resources, Ltd., 1986-2 Trade Cas. (CCH) ¶ 67,321 (S.D.N.Y. 1986) (consent decree) ($450,000 penalty for failure to notify); United States v. Lonrho, PLC, [Transfer Binder, US Antitrust Cases 1988-1996] Trade Reg. Rep. (CCH) ¶ 45,088 (Case 3535) (D.D.C. July 8, 1988); 1988-2 Trade Cas. (CCH) ¶ 68,232 (D.D.C. 1988) (consent decree) ($122,000 civil penalty for failure to notify); United States v. Tengelmann, WHG, [Transfer Binder, US Antitrust Cases 1988-1996] Trade Reg. Rep. (CCH) ¶ 45,089 (Case 3624) (D.D.C. June 7, 1989); 1989-1 Trade Cas. (CCH) ¶ 68,623 (D.D.C. 1989) (consent decree) ($3 million civil penalty for failure to notify); United States v. Baker Hughes, Inc., 1990-1 Trade Cas. (CCH) ¶ 68, 976 (D.D.C. 1990) (consent decree) ($275,000 civil penalty for failure to file important document with premerger notification form); United States v. Beazer, PLC, 1992-2 Trade Cas. (CCH) ¶ 69,923 (D.D.C. 1992) (consent decree) ($760,000 civil penalty for failure to notify).

in the United States.[200] In February 1997, the FTC sued German and Brazilian manufacturers of diesel engine parts for deliberately ignoring HSR notification requirements and obtained the highest ever civil fine of $5.6 million.[201]

c. *Title III: The Parens Patriae Act*

Title III of the HRS Act is also known as the Parens Patriae Act.[202] Title III empowers state attorneys general to sue as *parens patriae* on behalf of their state citizens to seek monetary relief under section 4 of the Clayton Act for Sherman Act violations.[203] Congress recognized that "the economic burden of many antitrust violations is borne in large measure by the consumer." It thus designed Title III to provide "an effective mechanism to permit consumers to recover damages for conduct which is prohibited by the Sherman Act, by giving State Attorneys General a cause of action against antitrust violators."[204]

Title III requires that whenever the US Attorney General brings an action under antitrust laws, she should notify any State Attorney General who, in the opinion of the former, would be entitled to bring an action arising out of the same alleged violations. The US Attorney General is also to share with the latter certain investigative information.[205] Arrangements controlling coordination and cooperation procedure among the State Attorneys General, the DoJ and the FTC are dealt with comprehensively in Section F below.

2. Merger Review Process

The HSR Act requires that certain transactions that affect interstate or foreign

[200] Joseph P. Griffin, *id.*; United States v. Anova Holding AG, 1993-2 Trade Cas. (CCH) ¶ 70,383 (D.D.C. Sept. 13, 1993) (consent decree) ($414,650 civil penalty for failure to notify).
[201] Mahle GmbH & Metal Leve SA, 5 Trade Reg. Rep. (CCH) ¶ 24,291 (D.D.C. 1997); *see also* Joseph P. Griffin, *id.*; William Baer, *Reflections on Twenty Years, supra* note 181, at 859.
[202] Pub. L. No. 94-435 (codified at 15 USC.A. §§ 15c-15h (2000)); *See generally* Susan Harriman, Note, *Parens Patriae Actions on Behalf of Indirect Purchasers: Do They Survive Illinois Brick?*, 34 HASTINGS L.J. 179 (1982); Irving Scher, *Emerging Issues Under the Antitrust Improvements Act of 1976*, 77 COLUM. L. REV. 679, 701 et seq. (1977).
[203] 15 USC.A. § 15c (2000); *see also* Jonathan Rose, *State Antitrust Enforcement, Mergers, and Politics*, 41 WAYNE L. REV. 71, 76 (1994). Another purpose of HSR Title III was to overrule court decisions that precluded such recovery. *See, e.g.*, California v. Frito-Lay, 474 F.2d 774 (9th Cir. 1973). *Cf.* Georgia v. Pennsylvania R.R., 324 US 439 (1945) (common law authorized state to obtain injunction as parens patriae). As a result, the states now had both statutory and common law parens patriae authority.
[204] S. REP. NO. 94-803, 94th Cong., 2d Sess. 39 (1976).
[205] 15 USC. § 15f (2000).

commerce and meet the notification thresholds stipulated in the Act, be notified to both the DoJ and FTC. Notifications should be filed by both parties to an acquisition of assets and voting security transaction, or in the case of a tender offer by the acquiring party, on a prescribed Premerger Notification Form.[206] The Premerger Notification Form may be filed as early as upon entering into an agreement in principle, a (nonbinding) letter of intent or contract.[207] Once the parties have given premerger notification to the DoJ and FTC, they must wait for 30 days, or in the case of cash tender offer for 15 days, before consummating the transaction. During this waiting period, the DoJ and FTC coordinate with each other to decide which agency shall review the transaction. This is called the "clearance procedure," and normally takes about 9 calendar days.[208] Once it is decided which agency will review the case, the reviewing agency may either terminate the initial waiting period and allow the transaction to proceed, or where the reviewing agency suspects that the transaction may violate antitrust laws, it may require, within the initial waiting period, that the parties submit additional information or documentary material relevant to the proposed acquisition – the so-called Second Request information – and extend the initial waiting period for a further 30 days, or in the case of a cash tender offer, 15 days.[209] Where the parties fail to comply with the Second Request, the agency must apply to the United States District Court to further extend the waiting period.[210]

Where the agency concludes that the proposed transaction violates section 7 of the Clayton Act, section 5 of the FTC Act, or sections 1 or 2 of the Sherman Act, it shall file a motion for a preliminary injunction seeking to prevent the consummation of the transaction *pendente lite*, in the United States District Court for the judicial district within which the respondent resides or carries on business, and certifies to the court that it

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[206] 15 USC. § 18A(d) (2000); The Premerger Notification Form requires information concerning: (1) a description of the transaction, the parties and the parties' businesses; (2) information to determine the horizontal overlap of competitive products and prior acquisitions with regard to the areas of overlap; (3) vertical relationships between the parties; and (4) financial reports, the merger agreement or letter of intent, and notification of other contracts between the parties.
The Form is *available at* <http://www.ftc.gov/bc/hsr/newhsrform.pdf>, (visited on Aug. 03, 2001).

[207] US DOJ, International Competition Policy Advisory Committee, *Final Report*, at 110 (2000), *available at* <http://www.usdoj.gov:80/atr/icpac/finalreport.htm>, (visited on Jan. 04, 2001) [Hereinafter "ICPAC, Final Report"]; *see also* Leigh Walton, *Letter of Intent, Representing the Growing Business*, SE77 ALI-ABA 609 (June 1, 2000).

[208] DIVISION MANUAL, *supra* note 81, ch. VII. (describes the "clearance procedures" used by the FTC and the DOJ to determine which agency should review a merger); *see also*, William Baer, *Reflections on Twenty Years, supra* note 181, at 845.

[209] 15 USC. § 18A(e)(1) (2000).

believes that the public interest requires relief *pendente lite*.[211]

Pursuant to the 1992 Guidelines, the Agencies have adopted an eight-step process to ascertain whether a merger would result in substantial lessening of competition or in the creation of a monopoly. The eight steps are:

a. analysis of the relevant product and geographic markets;
b. identification of competitor firms;
c. calculation of market shares;
d. calculation of market concentration;
e. assessment of potential adverse effects of the mergers, based on market concentration and other characteristics of the market;
f. assessment of market entry, that is, would it be, timely, likely, and sufficient enough either to deter or counteract the anticompetitive effects of the merger;
g. assessment of efficiency gain, which the merger parties cannot otherwise gain but for merger; and
h. assessment of likelihood, in the absence of merger, of either party to the merger to fail causing its assets to exit the market.

a. *Relevant Markets*

A market is defined in the Guidelines "as a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a 'small but significant and nontransitory'[212] increase in price, assuming the terms of sale of all other products are held constant." A relevant market is defined as "a group of products and a geographic area that is no bigger than necessary to satisfy this test."[213]

i. Relevant Product Market

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[210] 15 USC. § 18A(e)(2) (2000).
[211] 15 USC. § 18A(f) (2000).
[212] The "small but significant and non-transitory" increase in price is employed solely as a methodological tool for the analysis of mergers: it is not a tolerance level for price increases.
[213] *1992 Guidelines, supra* note 162, § 1.0.

In determining the relevant product market, the Guidelines instruct the Agency to:

> start with each product produced or sold by the merging parties and ask 'what would happen if a hypothetical monopolist of that product imposed at least a 'small but significant and nontransitory' increase in price, but the terms of sale of all other products remained constant. If, in response to the price increase, the reduction in sales of the product would be large enough that a hypothetical monopolist would not find it profitable to impose such an increase in price, then the Agency will add to the product group the product that is the next-best substitute for the merging firm's product.'
>
> The price increase question is then asked for a hypothetical monopolist controlling the expanded product group. In performing successive iterations of the price increase test, the hypothetical monopolist will be assumed to pursue maximum profits in deciding whether to raise the prices of any or all of the additional products under its control. This process will continue until a group of products is identified such that a hypothetical monopolist over that group of products would profitably impose at least a "small but significant and nontransitory" increase, including the price of a product of one of the merging firms. The Agency generally will consider the relevant product market to be the smallest group of products that satisfies this test.[214]

ii. Relevant Geographic Market

In defining the geographic market or markets affected by a merger, the Agency will begin with the location of each merging firm (or each plant of a multiplant firm) and ask what would happen if a hypothetical monopolist of the relevant product at that point imposed at least a "small but significant and nontransitory" increase in price, but the terms of sale at all other locations remained constant. If, in response to the price increase, the reduction in sales of the product at that location would be large enough that a hypothetical monopolist producing or selling the relevant product at the merging firm's location would not find it profitable to impose such an increase in price, then the Agency will add the location from which production is the next-best substitute for production at the merging firm's location.

The Agency will then ask price increase question:

> for a hypothetical monopolist controlling the expanded group of locations. In performing successive iterations of the price increase test, the

[214] *Id.* § 1.11.

> hypothetical monopolist will be assumed to pursue maximum profits in deciding whether to raise the price at any or all of the additional locations under its control. This process will continue until a group of locations is identified such that a hypothetical monopolist over that group of locations would profitably impose at least a "small but significant and nontransitory" increase, including the price charged at a location of one of the merging firms.[215]

b. Identification of Competitors

Once the relevant product and geographic markets are ascertained, the Agency moves on to identify "participants", which "include firms currently producing or selling the market's products in the market's geographic area." In addition to the firms that are currently producing or selling the relevant product, other firms which may start supplying the relevant product within the relevant geographic area, without incurring significant sunk costs of entry and exit, in response to a "small but significant and nontransitory" price are also considered to be participants.[216]

c. Market Shares

Once the relevant markets and the participants therein are determined, the Agency will consider both the post-merger market concentration and the increase in concentration resulting from the merger. The 1992 Guidelines, like the 1982/84 Guidelines, employ the Herfindahl-Hirschman Index ("HHI") to measure market concentration. The HHI divides the market into three categories, unconcentrated, moderately concentrated and highly concentrated. Where the threshold for each category of market is exceeded, it is presumed that the merger would "raise significant competitive concerns." The merging parties can rebut that presumption by bringing evidence of factors tending to show that the merger would be unlikely to create or enhance market power. The Guidelines state clearly that the determination of HHI is only a first step in the merger analysis.[217]

d. Assessment of the Likely Adverse Effects

The next step is an assessment of likely adverse effects. The inquiry under this

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[215] *Id.* § 1.21.
[216] *Id.*
[217] *Id.* § 1.5.

step is geared to detect the likelihood of collusion, termed "coordinated interaction." The relevant questions posed are whether coordinated interaction would be profitable, and whether any deviation from the terms of the coordination interaction could be detected, and punished. The 1992 Guidelines introduced a new feature into the adverse effects analysis – the consideration of "unilateral effects." While the 1984 Guidelines recognized the heightened danger of post-merger coordinated activity, they did not recognize the danger of unilateral effects.[218]

e. *Market Entry Conditions*

Once the competitive effects are assessed, the analysis moves on to assess the market entry conditions by posing questions such as whether new entry would be timely, likely and sufficient to deter or counteract anticompetitive effects. Unlike the 1984 Guidelines, the 1992 Guidelines assess the likelihood of entry in pre-merger rather than post-merger market conditions. In addition, the 1992 Guidelines have categorized the potential entrants into "uncommitted entrants" and "committed entrants." Uncommitted entrants are those who could enter the relevant market without committing to major new investment. Committed entrants are those who could not enter without incurring major sunk costs that are specific to a particular market. Uncommitted entrants may not only be treated as potential entrants but also as actual market participants in calculating market shares, whereas committed entrants are considered only as potential market entrants after the market share analysis has been completed.[219]

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[218] *Id.* § 2.1-2.2.; *see* Joshua F. Greenberg, et al., *Addressing the Antitrust Aspects of Mergers*, 841 PLI/CORP 77, at 100; PLI Order No. B4-7058; (March 9-11, 1994). The Guidelines instruct that in markets where products are "differentiated," (that is the products are not close substitutes of each other) a merger between two companies whose products are close substitutes for each other, and whose products are the first and second choices of many buyers, may create a potential to increase prices in the market more than a merger between two competitors whose products are more distant from one another in terms of buyer preferences. Where the merging companies' products are the first and second choices of many buyers, and other competitors cannot easily make equivalent products, there may be an especially great impact on market prices even in the absence of any collusion. However, the Guidelines note that this effect should be considered in cases where the combined market share of the merging firms is at least 35 percent. (The Guidelines also point out the greater likelihood of adverse unilateral effects where the merging firms have a combined market share of at least 35 percent and other firms in the industry have limited excess capacity with which to respond to a price increase imposed by the merged firms.)

[219] *1992 Guidelines, id.* §§ 3.0-3.4.

f. Efficiencies Defense

Finally, the 1992 Guidelines provide for the efficiency and the failing firm/division defenses. However, the Agency will consider only "cognizable efficiencies;" that is, "merger-specific efficiencies that have been verified and do not arise from anticompetitive reduction in output or service."[220]

g. Failing Firm Defense

With respect to the failing firm or division defense, the parties must prove that in the absence of merger, the assets of the firm or division in issue would exit the relevant market.[221]

F. Co-ordination Among State and Federal Antitrust Agencies

Since the enactment of Title III of the HSR Act, the State Attorneys General, acting as *parens patriae*, have played an important role in complementing federal antitrust enforcement.[222] In 1990, the Supreme Court in *California v. American Stores Co.*,[223] expanded the authority of State Attorneys General when it held that both they and private parties are not precluded from enforcing section 7 of the Clayton Act, and may seek divestiture even when a US agency has cleared the transaction.[224]

A number of States have enacted antitrust laws similar to the provisions of the Clayton Act and the Sherman Act to review intra-state mergers. However, most State Attorneys General prefer to challenge mergers in federal courts under section 7 of the Clayton Act.[225] In this section we will review the relationship among the state and federal antitrust agencies.

[220] *Id.* § 4.
[221] *Id.* § 5.
[222] *See* William Baer, *Reflections on Twenty Years, supra* note 181, at 825; *see also* section E(c) above.
[223] 495 US 271 (1990); 110 S. Ct. 1853 (1990).
[224] *Id.*; *see also* 2 ROWLEY & BAKER, *supra* note 72, at 1622. (more recently some states have become active in trying to block mergers having a perceived local impact. Thus, it is not uncommon for a merger, which neither the FTC or the DoJ has decided to challenge, to be challenged in a private suit by a private plaintiff or a state attorney general.)
[225] *Id.*; *see also* California v. ARC America Corp., 490 US 93, 100-01 (1989) (while Congress has the authority to pass statutes that pre-empt state laws, state antitrust laws are not considered to be pre-empted by the federal antitrust laws.).

1. Association of State Attorneys General: NAAG

In 1907, the State Attorneys General established National Association of Attorneys General (NAAG),[226] to create a collegial network among the chief legal officers of the states. NAAG endeavors to promote cooperation and coordination on interstate legal matters in order to foster a responsive and efficient legal system for state citizens.[227]

In 1983, NAAG created its Multistate Antitrust Task Force (Task Force) to coordinate multistate antitrust investigations and litigation. In 1985, the Task Force issued antitrust enforcement guidelines for vertical restraints,[228] and in 1987 it released guidelines for horizontal mergers,[229] which were revised in 1993[230] in an effort to harmonize them with that of the 1992 FTC/DoJ Merger Enforcement Guidelines.[231] The Task Force has been particularly active since 1987, and has engaged itself in a number of antitrust activities affecting the mutual interest of the states. Under the coordination of the Task Force, the states have successfully prosecuted several high-profile cases.[232]

2. NAAG Voluntary Premerger Disclosure Compact

The Attorneys General recognize that the interest of the business community and the general welfare of the states economy and citizens demand an orderly administration of state and federal merger control laws. However, this can be achieved only if both federal and state agencies review *the same factual information* when conducting merger

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[226] *See generally* NAAG's website at http://www.naag.org (visited on Feb. 12, 2001); Membership is open to the Attorneys General and chief legal officers the states, territories, District of Columbia and the Commonwealths of Puerto Rico. The US Attorney General is an honorary member.
[227] *Id.*
[228] NAAG, *Guidelines for Vertical Restraints*, 4 TRADE REG. REP. (CCH) ¶ 13,400 (1985).
[229] NAAG, *Horizontal Merger Guidelines*, 4 TRADE REG. REP. (CCH) ¶ 13,405 (March 10, 1987).
[230] NAAG, *Horizontal Merger Guidelines*, 4 TRADE REG. REP. (CCH) ¶ 13,406 (March 30, 1993); 64 ANTITRUST & TRADE REG. REP. (BNA) Special Supp. at 357 (April 1, 1993).
[231] *60 Minutes With Laurel A. Price, Chair, National Association of Attorneys General Multistate Antitrust Task Force*, 62 ANTITRUST L.J. 247, 254 (1993). The 1993 revision to the NAAG Guidelines were intended to achieve two goals. Those two goals were (1) to harmonize, to the extent possible, [NAAG] Guidelines with those of the federal authorities; and (2) to reduce the rhetorical level of the Guidelines in order to make them a more neutral statement of merger policy rather than a political statement critical of another law enforcement agency.
[232] Jonathan Rose, *supra* note 203, 80. *See, e.g.*, New York v. Nintendo of Am., 775 F. Supp. 676 (S.D.N.Y. 1991). Fifty states were involved. Maryland v. Mitsubishi Elec. Am., Inc., 1992-1 Trade Cas. (CCH) ¶ 69,743 (D. Md. 1992); Ohio v. Mitsubishi Elec. Am., Inc., 1992-1 Trade Cas. (CCH) ¶ 69,744 (D. Md. 1992). Fifty states were again involved. NAAG also coordinated major settlements with Panasonic, involving 49 states, and one with Minolta involving 37 states.

analysis. Thus, in 1987, NAAG adopted a Voluntary Premerger Disclosure Compact[233] (the "Compact") that offers merging parties an incentive to provide voluntarily to the states a copy of the premerger notification filed with the DoJ and FTC under the HSR Act in return for the states' promise not to serve upon them investigative subpoenas, civil investigative demands, or other compulsory pre-complaint demands for disclosure (compulsory process) as a means of obtaining additional information concerning the transaction during the premerger review period. The merging parties could satisfy their obligations under the Compact by filing with a designated "liaison state"[234] a copy of their initial HSR filing, copies of subsequent requests for information from federal agencies, and, at the request of a state, copies of the additional information provided in response to the subsequent requests. The Liaison State would then make the materials available to all other interested member states of the Compact.

In March, 1994, NAAG amended the Compact in order to reflect the enhanced authority conferred on the State Attorneys General by the Supreme Court's decision in *California* v. *American Stores*.[235] The revised Compact[236] gives the member states[237] more bargaining power with prospective merging parties. Under the revised Compact, the states have qualified their promise not to resort to compulsory process during the premerger review period by retaining the right to serve compulsory process whenever the merging parties decline to provide additional requested materials to the states within a

[233] NAAG, *Voluntary Premerger Disclosure Compact*, 1345 ANTITRUST & TRADE REG. REP., (Dec. 17, 1987); 53 ATRR 943.

[234] Proviso 3 of the Compact stipulates the following order of preference for determining the liaison state.
First, the Attorney General of the state which is the principal place of business of the acquiring party to the merger;
Second, the Attorney General of the state which is the principal place of business of the acquired party;
Third, the Attorney General of the state of incorporation of the acquiring party; and
Fourth, the Attorney General of the state of incorporation of the acquired party.
If no member of The Compact falls within the foregoing four preferences, the parties may make the voluntary filing upon the Chair of the Multistate Antitrust Task Force or any other member of The Compact who is willing to act as the liaison state for such transaction.

[235] *See supra* note 223.

[236] NAAG, *Voluntary Premerger Disclosure Compact*, 1656 ANTITRUST & TRADE REG. REP., (March 24, 1994).

reasonable time period. Further, the revised Compact made clear that parties opting for the Compact make themselves obligated to provide a copy of everything that they provide to the federal agencies. This includes materials that were turned over voluntarily and were not part of a formal filing.

The revised Compact can be invoked by "any party" to the merger transaction, rather than all "the parties" to the transaction, as was required by the original Compact. The revision is intended to cover hostile takeover situations.[238]

The revised Compact added a new proviso (numbered 7) which stipulates that by opting for the Compact, the parties waive the confidentiality provisions of the federal law with respect to merger filings. In particular, Proviso 7 allows the members states of the Compact to have access to HRS filing with the federal antitrust enforcement agencies, and it obliges a merging party that has opted into the Compact to notify in writing the federal antitrust agencies of its waiver of confidentiality, if so requested by any member state of the Compact.

3. Information Sharing Protocol

In order to complement the NAAG's 1987 Voluntary Premerger Disclosure Compact, the federal antitrust agencies entered into an Information Sharing Protocol[239] (the "Information Protocol") with the NAAG member states in 1992. Under the Information Protocol, the states, upon furnishing the FTC with a waiver of confidentiality certificate from the merging parties, were allowed to have access to certain confidential information and limited analysis of the merger.[240]

In 1995, the FTC announced a new policy to increase the sharing of information regarding mergers with the NAAG Member States. The policy allows the states to receive

[237] As of June, 1996, the Compact has 36 member States and territories: Alabama, Alaska, American Samoa, Arizona, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maine, Massachusetts, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Northern Mariana Islands, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Virgin Islands, Virginia, Washington, West Virginia, and Wisconsin. *Revisions to the National Association of Attorneys General Premerger Disclosure Compact, in* ANTITRUST AND UNFAIR COMPETITION, ILLINOIS INSTITUTE FOR CONTINUING LEGAL EDUCATION, June, 1996; AUCIL-CLE5-1(1996).

[238] *Id.*, Background Statement.

[239] Program for Federal-State Cooperation in Merger Enforcement, 57 Fed. Reg. 8127 (1992), *reprinted in* 4 TRADE REG. REP. (CCH) P 13,212.

[240] *Id.*

information obtained by the FTC from third parties (without disclosure of the identity of those third parties) as well as the merger analysis memoranda prepared by the FTC staff, once the FTC has decided whether it will challenge the merger.[241]

When used in conjunction with the Information Protocol, the Compact permits the coordination and exchange of information among state and federal antitrust agencies in the early stages of the transaction, and is thus expected to diminish the risk of inconsistent outcomes.[242]

4. NAAG, DoJ/FTC Protocol for Joint State/Federal Merger Investigations

In 1998, the NAAG, DoJ and FTC entered into a *Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General*[243] (the "Coordination Protocol"). The Coordination Protocol is based on the premise that multiple reviews of the same merger should be conducted in such a way as to minimize the burden on merging parties and the reviewing agencies alike.[244] Multiple demands for documents and examination of witnesses are a waste of resources from the point of view of both the agencies and the merging parties.

Commenting on the importance of the Coordination Protocol, Tom Miller, Chair of the Antitrust Committee of the NAAG, said, "Cooperation between state and federal antitrust agencies, while always desirable, is essential as mergers increase in quantity and complexity. The Protocol insures that we will make the best use of scarce government resources, reduce the burden on businesses and provide the best possible enforcement for consumers."[245] The Coordination Protocol consists of five sections: a) Confidentiality; b) procedure involving the merging parties; c) conduct of joint investigation; d) settlement discussions; and e) statements to the press.

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241 FTC News, Press Release, *21.6.95; National Ass'n of Attorneys General*, 22 ANTITRUST REPORT, May/June 1995, at 2-3.
242 Barry E. Hawk & Laraine L. Laudati, *Antitrust Federalism in the United States and Decentralization of Competition Law Enforcement in the European Union: A Comparison*, 20 FORDHAM INT'L L.J. 18, 40 (1996).
243 *Protocol For Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General*, 1851 ANTITRUST & TRADE REG. REP. (March 12, 1998); 66 ATTR 325; 25 No. 2 NAAG ANTITRUST REP. 1 (March/April, 1998) [Hereinafter "*Coordination Protocol*"].
244 Statement Preceding the *Coordination Protocol, id.*
245 Quoted in Kevin O'Connor & Stephen D. Houck, *Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General*, 1050 PLI/CORP. 631, 633-34 (April-July, 1998).

a. *Confidentiality*

The first section stipulates specific rules for maintaining the confidentiality of information shared among the agencies.

b. *Procedure Involving the Merging Parties*

The second section stipulates the rules under which the FTC and DOJ will provide the State Attorneys General with confidential information. It states that if both parties to a merger submit a letter to either the FTC or DoJ waiving confidentiality laws, the FTC or DoJ will release confidential information to the state investigating the merger, or if there is multistate work group, to the Coordinating State.

Where two or more states wish to investigate a merger, a Coordinating or "Chair" State must be identified "to coordinate the investigative and enforcement activities of the working group states, to coordinate with any federal agency collaborating with the states, and to facilitate settlement discussions."[246] A Coordinating State is determined by the states actively involved in the investigation after consultation with the Chair of the Multistate Antitrust Task Force. The Coordinating State is identified by assessing whether the prospective Coordinating State:

i. is likely to be adversely affected by a proposed transaction;
ii. is in a position to commit resources to the investigation; and
iii. can coordinate effectively with the other states and the federal agencies that may be involved in reviewing the same transaction.

The state assuming the role of the Coordinating State need not be the same state identified by the NAAG Premerger Disclosure Compact as the "liaison state."

c. *Conduct of Joint Investigation*

The third section sets forth the rules for conducting a joint investigation. The first step recommended is a conference call among the reviewing authorities at the outset of the investigation. During the conference call, the following topics should be discussed: (a) identification of the lawyers and other members of the team assigned to the case; (b) identification of potential legal and economic theories of the case to be developed; (c)

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[246] *Coordination Protocol*, *supra* note 243, Section II; EXHIBIT 2: Correspondence/Memorandum Department of Justice (September 6, 1996).

identification of documents, witnesses, and experts needs; and (d) selection of the Coordinating State, if need be.[247]

With respect to document production, the rules recommend that "three steps should be taken in connection with issuing a second request or subpoenas, civil investigative demands, or voluntary requests for information from the merging parties or third parties:

i. Consideration of ideas from other investigating agencies on the content and scope of the request.
ii. Providing correspondence to other investigating agencies memorializing agreements with parties to narrow or eliminate request specifications.
iii. Division of responsibility among investigating agencies for document review and exchange of summaries and indices."[248]

d. Settlement Discussions

Section four makes clear that in order to reap the benefits of cooperation, federal and state agencies should collaborate closely with respect to the settlement process. While the Coordination Protocol recognizes the sovereignty and independence of federal and state agencies, section four stresses the need for a unified and coordinated front. However, where a state or federal agency determines that circumstances warrant pursuit of a negotiation or settlement strategy different from that of the other agencies, it should inform the other agencies of that fact immediately.[249]

e. Statements to the Press

The final section of the Coordination Protocol requires coordination among the agencies before any information is released to the news media.[250]

G. Commentary: Lessons to be Learned

In the late nineteenth century, the US experienced internally a phenomenon analogous to contemporary globalization. Spurred by the industrial revolution, local markets were transformed into a single national market, trans-state mergers were

[247] Coordination Protocol, *id.* at sec. III.
[248] *Id.*
[249] *Id.* sec. IV
[250] *Id.* sec. V.

rampant, and business structure was adjusted to reflect the expanded scope of the corporation. Today a global market has emerged, spurred by technological advances and trade liberalization. Transnational mergers are reported daily in newspapers, and firms have adopted a new form of corporate structure – the transnational enterprise – to reflect the scope of operations in the global market.

This parallel suggests that as a new global competition regime is created, there is much to be learned from the US experience of creating its antitrust regime. Below is a brief account of some of the most relevant features of the US antitrust laws that are directly instructive in formulating an IMCR.

1. Raison d'être of Antitrust Laws

The expansion of commerce from local markets to interstate commerce highlights the inadequacy of the then existing laws to address the dangers of market concentration. Such inadequacy prompted Congress to enact the Sherman Act. Describing the objectives of the Sherman Act, the US Supreme Court held that "[t]he Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."[251] According to the Supreme Court free and unfettered competition is *the* rule of trade.

Nation-states find themselves engaged in ever-increasing international trade, without "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition." The history of the US antitrust law instructs us that just as the Sherman Act was necessary to maintain free competition as the rule of trade among the states of the United States, so too an over-arching instrument is necessary to preserve and maintain free competition in the global market.

2. Development in the Merger Analysis Jurisprudence

The merger analysis case law in the US has shifted position over time. In the early years of the Clayton Act, the courts took a lenient attitude toward mergers. In the 1960s, the antitrust law was more interventionist in its approach. The courts showed utmost abhorrence for consolidations and blocked mergers to protect small businesses without

[251] Northern Pacific Railway Co. v. United States, 356 US 1, 4-5 (1958).

paying particular attention to the interests of consumers. They based their decisions solely on market share, and refused to take efficiencies into account, which may translate into lower prices and better quality products that enhance consumer welfare.

Once President Reagan adopted the Chicago School doctrine, "the common wisdom [became]: competition is an economic modality for the purpose of producing efficient markets, and antitrust law is a tool to aid the process in the event of market failure."[252] Reversing the tendency to block mergers solely on the basis of increases in market share, antitrust agencies have now "began to look at efficiencies as a reason to let a merger go through."[253]

The gradual development in the merger analysis technique in the US instructs us that merger analysis is an evolutionary process. Merger analysis rules cannot be cast in stone. Rather, in proposing any global merger analysis rules, we should leave enough room to accommodate changing pattern of response to the merger phenomenon. We should also provide a mechanism periodically to review such rules and to update them.

3. Enforcement Guidelines

Publication of merger enforcement guidelines serves the merging parties and antitrust agencies alike. It informs the parties about the enforcement policy of the agencies. The parties then prepare and present their case as suggested by the guidelines which makes the review process rather simple for the agencies. Since 1968, US antitrust agencies have engaged a complex and elaborate process of issuing and updating merger enforcement guidelines.

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[252] Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U. L. Rev. 1781, 1798 (2000); *see also* Fox & Sullivan, *supra* note 6, 957-59.

[253] Robert Pitofsky, *Conference Board: Current and Former Enforcement Officials Plot New Directions in Competition Policy*, BNA ANTITRUST & TRADE REGULATION DAILY NEWS, March 8, 1999, at d2; *see* California Dental Ass'n v. FTC, 526 US 756, 775 & n.12, 776-78 (1999) (stating that antitrust should not intervene in absence of empirical evidence of output-limiting effects); Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 US 209, 224 (1993) (stating that antitrust is not about fairness, and that fact "[t]hat below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured"); Fox, *Antitrust and Regulatory Federalism*, *supra* note 252, 1790 & n.35: (while contemporary US antitrust law is guided by efficiency defined in terms of consumer welfare, United States antitrust law was not enacted as "efficiency law," and legacies of the antipower, prodiversity era remain); Fox & Sullivan, *supra* note 6, 936 (noting historical "preference for pluralism, freedom of trade, access to markets, and freedom of choice").

There is merit in this practice and would be reasonable to pursue it at the international level through the publication of enforcement guidelines for member states governed by a future IMCR.

4. Dual Federal Antitrust Enforcement Agencies

Just as the US Congress felt the need to establish the FTC to aid and assist the DoJ in enforcing the antitrust laws, there is a similar need to establish an international agency – such as a Competition Office within the WTO framework – to aid and assist national antitrust agencies in enforcing competition law beyond their national boundaries. There is, of course, a separate question, to be discussed below, concerning the scope of authority of any such agency.

The effective enforcement of merger control laws by more than one federal antitrust agency demonstrates that co-existence of jurisdiction over a single merger transaction can be coordinated successfully. Although the relation between the DoJ and FTC is different in kind from the relation among the antitrust agencies of separate countries, yet the manner in which the DoJ and FTC resolve jurisdictional issues between themselves is instructive for a future IMCR. In any given matter, both the DoJ and the FTC resolve jurisdictional issues through an established "clearance procedure." Where a matter is contested, that is, where both agencies want to investigate the matter, the clearance procedure gives jurisdiction to the agency with most expertise in the product in question gained through a 'substantial investigation' of the product within the last five, or exceptionally last ten, years. Neither agency is allowed to begin an investigation until clearance is granted. The expertise criterion can be adapted to resolve jurisdictional issues in a future IMCR.

5. Coordination Among the State and Federal Antitrust Agencies

The relationship among the state antitrust agencies and the federal agencies – based on the NAAG Voluntary Premerger Disclosure Compact, the Information Sharing Protocol, and the NAAG DoJ/FTC Protocol on Joint Federal/State Merger investigations – is most instructive for a future IMCR.

The NAAG Premerger Disclosure Compact facilitates coordination among the state agencies by appointing a Liaison State that will make the material received from the merging parties available to all other *interested* member states of the Compact. Nation-states can borrow the idea of appointing a Liaison State to facilitate coordination among their antitrust agencies. The Liaison State would provide information and coordinate only with members with proven interest in a transaction and not with all members of the IMCR.

Complementing the Compact is the Information Protocol, which aims at reducing the duplication of work to be done by state antitrust agencies. Under the Information Protocol, the FTC provides the NAAG member states with the information it receives from third parties and with merger analysis conducted by its staff. Information sharing is essential for coordination or cooperation in conducting a merger review among antitrust agencies. Subject to national confidentiality laws, clauses similar to that of the Information Protocol could be adopted within a future IMCR.

To further bolster their relation, the NAAG and DoJ/FTC entered into the Coordination Protocol, under which states and federal agencies coordinate merger investigations. Where more that one state is interested in investigating a merger, a *Coordinating State* is identified to coordinate merger investigation, on the one hand, between and among the states, and on the other hand, between the states and federal agencies.

The Coordination Protocol has achieved a level of cooperation that has not been achieved hitherto through any multilateral effort.[254] Such enhanced cooperation among the state and federal agencies was facilitated by harmonization of the NAAG Horizontal Merger Enforcement Guidelines with those of the Federal Merger Enforcement Guidelines.

The Coordination Protocol provides a working draft for an IMCR proposal. The concept of appointing a Coordinating State where more than one state wishes to investigate a merger forms the core of our proposal. Under the proposal, the Coordinating State (or the Lead Jurisdiction, as we will name it) would not only coordinate with other

[254] *See* Douglas H. Ginsburg & Scott H. Angstreich, *Multinational Merger Review: Lessons From Our Federalism*, 68 ANTITRUST L.J. 219, 233 (2000).

national agencies and an International Agency (Liaison State) but would also be responsible for conducting the merger review.

6. Premerger Notification Regime

Despite the considerable age of the US antitrust laws, the premerger notification regime is relatively young. As we have observed, the FTC first recommended a premerger notification regime in 1928. However, it took Congress almost 50 years to act on that recommendation. It instructs us that even in the absence of sovereignty concerns promulgation of new laws takes a long time.

Below are some features of the US Premerger notification regime that may be adopted by a future IMCR.

a. *Notification Thresholds*

The HSR Act requires notification of activities that affect US commerce. To ensure that only activities that affect US commerce come within the premerger notification net, thresholds are based on annual sales and total assets of the acquired and acquiring parties within the United States.

Notification thresholds are the foundation for any merger control regime, since they provide basis for assuming jurisdiction over a merger. To formulate an efficient and effective merger control regime, it is imperative that thresholds be defined to reflect the objectives of the regime. The use of annual sales and total assets within the territory of a country provides a sensible criteria for defining thresholds.

b. *A Two-Tier Merger Review Process*

The HSR Act envisages a two-tier merger review process. The two-tier review process is beneficial for merging parties as well as for the antitrust agencies. For instance, in the fiscal year 1999, 4,679 transactions were notified under the HSR Act. Of these 4,679 transactions, federal agencies requested additional information in 113 cases –only 2.4% – of the notified transactions.[255] As more than 95% of the transactions notified under the HSR Act raise no anticompetitive concerns, the scheme allows for an efficient

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[255] ICPAC, Final Report, *supra* note 207, at 96.

"triage." For the merging parties, it is beneficial as it does not impose an unnecessary burden to provide detailed information at the initial filing stage. For the antitrust agencies, it is beneficial as they need not sift through a plethora of information to detect any *prima facie* anticompetitive effects flowing from the notified transaction.

c. *Triggering Events*

Under the HSR Act, a premerger notification can be filed as soon as the merging parties come to an agreement in principle or enter into a non-binding letter of intent. The triggering events prescribed under the HSR Act are beneficial for the merging parties by allowing them to get an assessment from a federal antitrust agency as to the anticompetitive effects of the transaction in its early stages. The fact that notifications must be accompanied by the deposit of filing fees eliminates the risk of frivolous "trial balloon" filings.

d. *Tiered Fee Structure*

The HSR reform legislation introduced a tiered fee structure. On the one hand, the tiered fee structure has some merit because it can reflect the resources that the reviewing agency must allocate to larger transactions. On the other hand, in the case of conglomerate mergers, where the merging parties meet the higher thresholds but the transaction is benign, the imposition of higher fee is a tax on the parties simply for being "big."

e. *Voluntary Disclosure of Other Antitrust Agencies Involved*

The HRS reform legislation also introduced voluntary reporting by the merging parties of other national agencies which are notified or may be notified of the proposed merger. This is an essential step towards facilitation of cooperation and coordination with antitrust agencies in conducting multijurisdictional merger review. It is simply not possible to implement a regime based on coordination and cooperation when competition authorities do not know what other agencies are reviewing a transaction.

7. Summary of the Lessons Learned

i. Negotiations over an IMCR may take years before nations can come to any agreement as to its contents and scope.

ii. There should be a clearance procedure under the IMCR similar in principle to that used by the DoJ and FTC in resolving jurisdictional issues between themselves.

iii. A Liaison State whose role is to receive information from the merging parties and to assist member states in identifying a Coordinating State (Lead Jurisdiction) could be designated under an IMCR. Such a role would conceivably be played by an international organization, such as the WTO.

iv. A Coordinating State that would coordinate the actual merger review with all other competition agencies of member states that have an interest in it should be appointed for each case under the IMCR. Under the IMCR such Coordinating State may be termed as a "Lead Jurisdiction."

v. The criteria provided in the Coordination Protocol to identify the Coordinating State should be part of the IMCR.

vi. Following the experience of the NAAG and DoJ/FTC there should be some harmonization of the substantive elements of merger control regime through the establishment of transnational merger enforcement guidelines.

vii. The substantive evaluative criteria to be developed under the IMCR should focus on preserving competition in the markets, rather than protecting competitors. It should also make provision for an assessment of the efficiency gains in a merger.

viii. Other provisions of the Coordination Protocol, such as the voluntary waiver of confidentiality, initial conference calls among interested agencies, coordination among agencies while formalizing a second request, subpoenas for further information, or requests for voluntary information from the merging parties or third parties, and coordinated settlement negotiations between the agencies and the merging parties, could also be adopted by the IMCR.

ix. Notification thresholds should be tied to annual sales and net assets.

x. As more than 95% of transactions notified do not raise any anticompetitive concerns, the merger review process under the IMCR could be two-tiered: 1) minimum information: initial filing and initial review; and 2) close scrutiny: second filing and second-phase review.

xi. Merging parties should be allowed to file premerger notification as soon as they agree in principle to a merger or sign a non-binding letter of intent.

xii. Under the IMCR, domestic filing fees should be scaled to an internationally agreed standard. The filing fees may be graduated and may provide exceptions for conglomerate mergers.

xiii. Under the IMCR, domestic merger notification forms may be amended so as to require disclosure of the identity of other antitrust agencies with whom notification is filed.

III
EC Competition and Merger Control Laws

The European Union (EU) offers a unique model for competition enforcement. Sovereign nations have ceded their authority over merger control to a supranational institution, the study of which is essential to any inquiry whose objective is to propose an international merger control regime. Moreover, EU's merger control regime is second only to that of the US as regards sophistication and maturity. With its current membership of the Fifteen, which is expected to grow to thirty-one in the near future, the EU, as a block, exercises a considerable weight in any negotiation concerning international trade, particularly if it is conducted under the umbrella of the World Trade Organization. Thus, it is natural to devote a chapter of this thesis to the study of EC's[1] merger control regime, so as to be in a position to propose the outlines of an acceptable international merger control regime.

The chapter briefly traces the origins of the European Union, reviews its institutional framework, and then focuses on its development of merger control laws. The objective of the review is to: 1) ascertain the conditions necessary for the creation of a supranational competition authority, 2) assess the political realities of formulating an

[1] "EC law" refers to the law governing the European Community (EC). The EC is a subpart of the EU. However, EC law is binding on all the Member States of the EU and is enforced by the Court of First Instance and European Court of Justice. Because only the rules governing the EC are legally binding, the only law within the EU is EC law. *see* JOHN PINDER, EUROPEAN COMMUNITY: THE BUILDING OF A UNION 40 (2d ed. 1995). According to Pinder, "although it is becoming more common for all elements of the EU to be referred to as the EU, it is inappropriate to use the term EU in relation to the EU's legal system, which only applies to the European Communities." *Id.* at 19. We will, therefore, use the term "EC Law" for the laws governing the European Union.

international treaty on transnational merger review, and 3) glean elements from the EC merger review process which may be adopted with an IMCR.

A. Foundation of the European Union and Its Supranational Institutions

The aftermath of World War II led various European statesmen to recognize the need for cooperation among the European nations so as to put an end to competitive nationalism – especially between France and Germany. In May 1950, Robert Schuman, the French Minister of Foreign Affairs, and Jean Monnet proposed a plan ("the Schuman Plan") to bring the nation-states of Europe (initially France and Germany) together to form an integrated economy in order to avoid future war among the member states.[2] While the original plan envisaged a strong pan-European economic union, the failure to create a customs union between France and Italy led the parties to settle for a less ambitious plan. The modified plan sought cooperation in the control and production of coal and steel. Coal and steel industries were selected because they were thought to be the most vital industries for waging a war. If war was to be controlled, it was believed that a common market for coal and steel was necessary.[3]

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[2] *See* James J. Friedberg, *The Convergence of Law in an Era of Political Integration: The Wood Pulp Case and the Alcoa Effects Doctrine*, 52 U. PITT. L. REV. 289, 293 (1991); Eric F. Hinton, *European Community Competition Law, Subsidiarity, and the National Courts*, 11 BYU J. PUB. L. 301, 302 (1997); NEILL NUGENT, THE GOVERNMENT AND POLITICS OF THE EUROPEAN UNION 38 (Durham, NC: Duke University Press, 3rd ed. 1994); DAVID W. P. LEWIS, THE ROAD TO EUROPE (New York: P. Lang, 1993); D. LASOK & J. BRIDGE, INTRODUCTION TO THE LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES (London: Butterworths; St. Paul, Minn.: Mason Pub., 3rd 1982).

[3] James J. Friedberg, *id.* at 293.

Compelling reasons caused [coal and steel] industries to be the narrow focus of the first modern efforts of European integration. The geopolitical conflict between France and Germany during the preceding three-quarters of a century had been focused sectorially in the coal and steel industr[ies], and geographically in the border regions joining the two powers –regions where coal and iron resources were plentiful and where the steel industry flourished. The three wars fought between 1870 and 1945 partly reflected attempts by one nation or the other to control those resources for itself and deny them to the other. The success of each nation's vital steel industry was seen to hang in the balance. Turning Franco-German conflict over coal, iron, and steel into Franco- German interdependence was a goal which promised to the early molders of European unity a much more stable continent. *Id.* at 293-294; *see also* LASOK & BRIDGE, *supra* note 2.

1. The European Coal and Steel Community (Treaty of Paris, 1951)

In 1951, France, Germany, Italy, and the Benelux countries[4] (Belgium, the Netherlands, and Luxembourg) concluded a treaty in Paris that established the European Coal and Steel Community (the "ECSC Treaty").[5] The major objective of the ECSC Treaty was to the regulate the production of and to promote free trade in the coal, iron, and steel industries, in order to foster economic expansion, growth of employment and to raise the standard of living in each of the member states.[6] The ECSC Treaty established a nine-member High Authority as a regulatory body for the coal and steel industries. The High Authority, composed of independent persons nominated by the member states, was responsible for the oversight of prices, wages, investment and competition in the industry. The other institutions established by the Treaty were: (1) a Special Council of Ministers who advised the High Authority; (2) a Common Assembly – composed of delegates from each of the national parliaments; and (3) a Court of Justice.[7] The creation of the ECSC was the first major step towards the increased economic cooperation among European states.[8] The ECSC Treaty will expire on July 23, 2002.[9]

2. The European Economic Community (Treaty of Rome, 1958)

In early 1955, the Benelux countries proposed the creation of a Common Market, a common transportation infrastructure, and coordination of energy resources among the ECSC member states. The proposal – after being approved by France, Italy and Germany – led to the conclusion of the Treaty Establishing the European Economic Community

[4] In 1947, Belgium, Luxembourg and the Netherlands concluded the Benelux Customs Convention with the objective to establish a common trading area. Pursuant to the Convention, the member states abolished internal customs duties and established a common external tariff on all imports. In 1958, the member states formed the Benelux Union. *See* Treaty Instituting the Benelux Economic Union, Feb. 3, 1958, 381 U.N.T.S. 165. *See also* John P. Flaherty, & Maureen E. Lally-Green, *The European Union: Where Is It Now?*, 34 DUQ. L. REV. 923, 928 (1996).[Hereinafter "Flaherty & Lally-Green"].

[5] Treaty Establishing the European Coal and Steel Community, April 18, 1951, 261 U.N.T.S. 140 [Hereinafter "ECSC Treaty"]. *See also* Joseph H. H. Weiler, *The Transformation of Europe*, 100 YALE L. J. 2403, 2405 (1991).

[6] ECSC Treaty, *id.* art 2.

[7] *Id.* art 7; *see also* Flaherty & Lally-Green, *supra* note 4, at 932.

[8] James J. Friedberg, *supra* note 2, at 293.

[9] 1997 O.J.(C 340) 183.

(the "EEC Treaty", or the "Treaty of Rome").[10] The EEC Treaty, signed in Rome on March 25, 1957, became effective on January 1, 1958, for an indefinite period of time. Its stated objectives were: "coordination of economic and monetary policies, creation of free and fair competition and harmonization of the fiscal and social policies and the laws of all the Member States."[11] The EEC Treaty provided for the establishment of four institutions: a Council of Ministers, a Commission, a single Assembly (later the Parliament), and a Court of Justice. The EEC Treaty as amended by the Treaty on European Union is now called the Treaty Establishing the European Community (the "TEC").[12]

a. *The Council of Ministers*

The Council of Ministers is entrusted with the power of legislation and with a responsibility to "ensure the coordination of the general economic policies of the Member States."[13] The Council consists of representatives of each member state with authority to commit on behalf of their respective governments.[14] It makes decisions by "qualified majority" with votes weighted according to a formula reflecting population.[15]

With respect to competition law, the Council derives its legislative power from article 83 (ex 87) of the TEC. Article 83(1) provides that the Council may by qualified majority adopt "appropriate regulations or directives to give effect to the principles set out in articles 81 (ex 85) and 82 (ex 86)."[16] In addition, the Council may also enact competition related directives pursuant to article 308 (ex 235) of the TEC. Article 308

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[10] *See* Flaherty and Lally-Green, *supra* note 4, at 933-34; Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11. ("EEC Treaty"). The EEC Treaty as amended by the Treaty on European Union (31 I.L.M. 247) is called the Treaty Establishing the European Community (the "TEC"). Consolidated version of the TEC is *available at* http://europa.eu.int/eur-lex/en/treaties/dat/ec_cons_treaty_en.pdf (visited on August 04, 2001). [Hereinafter "TEC"]. Article 12 of the Treaty of Amsterdam (1997 O.J. (C340) 1) renumbered the articles of TEC; *see* <http://europa.eu.int/comm/competition/legislation/treaties/ec/new_numbering.html> (visited on March 8, 2001) (the Treaty of Amsterdam became effective on May 1, 1999. Any reference to articles previously numbered 85 and 86 of the EEC Treaty will be treated herein as articles 81 and 82, respectively.)

[11] Flaherty and Lally-Green, *id*.

[12] Hereinafter in the text, amended EEC Treaty will be referred to as TEC, and pre-amended EEC Treaty will be referred to as EEC Treaty.

[13] TEC, *supra* note 10, art. 202.

[14] *Id.* art. 203.

[15] *Id.* art. 205(2).

[16] *Id.* art. 81.

provides that where a certain action is necessary to achieve Community objectives, and the Treaty has not otherwise provided the necessary powers, the Council may adopt "appropriate measures" by a unanimous vote, acting on a proposal from the Commission.[17] The Council invoked article 308 for the first time in relation to competition law when it adopted the Merger Control Regulation in December 1989.[18]

b. The Commission

The EEC Treaty provided for the establishment of a nine member Commission with two representatives each from France, Italy and West Germany and one representative each from the Benelux countries. The Commission now consists of twenty members,[19] who serve for a renewable term of five years.[20] The members of the Commission, also known as "Commissioners," are assigned one or more portfolios, such as competition, external relations or transportation. Each Commissioner is in charge of a Directorate-General responsible for the activities pertaining to his or her portfolio.

Although the members of the Commission are appointed by their respective national governments, they are completely independent of their governments and are to work for the general interest of the Community. The Commission is responsible for ensuring that the provisions of the TEC are implemented, and adhered to by the other EC institutions and the Member States. It exercises powers – granted to it by the Council of Ministers – to enforce the rules made under the Treaty, to formulate recommendations, and to deliver opinions on matters dealt with by the TEC.[21]

Article 85 of the TEC entrusts the Commission with the power to oversee the application of competition law principles laid down in articles 81 and 82 of the Treaty.[22] The Commission enforces competition law through the Directorate-General for

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[17] *Id.* art. 235.
[18] *See* FRANK L. FINE, MERGERS AND JOINT VENTURES IN EUROPE: THE LAW AND POLICY OF THE EEC 6 (London: Graham & Trotman, 2nd ed., 1994).
[19] TEC, *supra* note 10, art. 213.
[20] *Id.* art. 214.
[21] *Id.* art. 211.
[22] Article 85, in pertinent part, reads as follows:
Without prejudice to Article 84, the Commission shall ensure the application of the principles laid down in Articles 81 and 82. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, who shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.

Competition ("DG-Comp."). DG-Comp., in addition to enforcing the EC competition rules, also partakes in the development of both legislation[23] and policy in this area. In 1990, when the EC Merger Control Regulation ("MCR")[24] was promulgated, the DG-Comp. established a Merger Task Force ("MTF"), consisting of DG-Comp. officials and experts seconded from the Member States, for the implementation and enforcement of the MCR.[25]

c. *The European Parliament*

The third institution established by the EEC Treaty was the European Parliament. Originally known as the Assembly, the European Parliament consists of representatives of the people of the Member States.[26] Prior to 1979, the members of the European Parliament were delegates from their respective national parliaments.[27] However, since 1979 the members of Parliament are elected by direct universal suffrage representing cross-border political parties. The members represent more their party interests than their states. Currently, the European Parliament consists of 626 representatives.[28] The European Parliament, which was originally a purely consultative assembly, now acts in some measure as a legislative parliament, in some cases exercising powers similar to those of national parliaments, *i.e.*, (i) the power to legislate, (ii) the power of the purse; and (iii) the power to supervise the executive.[29]

d. *The Court of Justice*

The fourth institution established by the EEC treaty was the Court of Justice, which was entrusted with the power "to ensure that in the interpretation and application

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Id. art. 85.

[23] The Commission may either submit proposals to the Council or obtain the Council's authorization to adopt implementing legislation. *See e.g.*, Concil Regulation No. 19/65, 1965 J.O. (36) 533, and Concil Regulation No. 2821/71, 1971 J.O. (L 285) 46, by which the Council empowered the Commission to adopt block exemptions under Article 85(3) with respect to various categories of agreements.

[24] Council Regulation No. 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings, 1989 O.J. (L 395) 1, *reprinted as corrected in*, 1990 O.J. (L 257) 14, and amended by Council Regulation (EC) No. 1310/97, 1997 O.J. (L 180) 1. [Hereinafter "Merger Regulation"].

[25] FRANK L. FINE, *supra* note 18, at 4.

[26] TEC, *supra* note 10, art. 189.

[27] Flaherty and Lally-Green, *supra* note 4, at 935.

[28] TEC, *supra* note 10, art. 190.

of [the TEC] the law is observed."[30] The Court consists of 15 judges and nine advocates general, who are each selected by the Member State governments for a renewable staggered term of six years.[31] Each Member State is allowed one seat on the Court of Justice.

In competition matters, the Court of Justice has jurisdiction under article 230 to review the appeals of Member States against Commission decisions on grounds of "lack of competence, infringement of an essential procedural requirement, infringement of [the TEC] or any rule of law relating to its application or misuse of powers."[32] The Court also has jurisdiction under article 232 to hear cases brought by the Member States against the Council or the Commission, for their "failure to act" in violation of the Treaty. Under article 234, the Court of Justice has jurisdiction to issue preliminary rulings on references from national courts.

B. Enhanced Economic Integration

In this section we will briefly review the efforts made to enhance economic integration among the EEC member states after the Treaty of Rome.

1. European Free Trade Association (1960)

On January 4, 1960, Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom, entered into a Convention (the "Stockholm Convention")[33] establishing a free trade area in the form of the European Free Trade Association (the "EFTA"). The EFTA abolished customs duties and import quotas among the member states.

[29] Welcome to the European Parliament, <http://www.europarl.eu.int/presentation/default_en.htm>, (visited on April 30, 2002).
[30] TEC, *supra* note 10, art. 220.
[31] *Id.* arts. 221-223.
[32] *Id.* art. 230.
[33] *See* Convention Establishing the European Free Trade Association, Jan. 4, 1960, 370 U.N.T.S. 5.

2. New Membership of the EEC

The EEC Treaty was to "lay the foundations of an ever closer union among the peoples of Europe."[34] Anticipating that other states of the Europe would join the Community, the EEC Treaty in article 237[35] provided the procedure for accession. In 1973, the EEC membership grew for the first time when Denmark, Ireland and the United Kingdom joined the Community. Later, in 1981, Greece became member of the EEC followed by Portugal and Spain in 1986. By 1986, the membership of the EEC grew to twelve.

3. The Single European Act (1987)

In 1987, the twelve members of EEC amended the EEC Treaty with the Single European Act[36] (the "SEA"). The main objective of the SEA was to transform the European Communities into a European Union through the creation of an economic and monetary union. By securing economic and social cohesion, the SEA aimed to create a single internal market by the end of 1992. [37]

Moreover, the SEA made some changes in the powers of the Community institutions. For example, it gave the Parliament a larger voice in the legislative process by providing a "parliamentary cooperation procedure." The Council was given powers to legislate in certain areas by a qualified majority vote instead of a unanimous vote. And the Commission was delegated more authority from the Council.[38]

The SEA also provided for the establishment of the Court of First Instance (CFI). The CFI, which came into existence in September 1989, has original jurisdiction in competition matters to review decisions of the Commission imposing fines or penalties obliging periodic payments. The CFI reviews appeals brought by natural or legal persons against Commission decisions. Each of these types of case was previously within the exclusive jurisdiction of the Court of Justice.[39]

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[34] TEC, *supra* note 10, Preamble.

[35] Art. 237 of EEC Treaty was repealed by TEU, *supra* note 10, art. G(84).

[36] The Single European Act (the "SEA"), July 1, 1987, 2 C.M.L.R. 741 (1987); 1987 O.J. (L 169) 1; 25 I.L.M. 503.

[37] Flagherty and Lally-Green, *supra* note 4, at 943.

[38] *Id.* at 944.

[39] FRANK L. FINE, *supra* note18, at 7-8.

4. The Treaty on European Union (Treaty of Maastricht ,1992)

In 1992, the members of the EEC desiring to establish among themselves a deeper European Union concluded the Treaty on European Union[40] (the "TEU" or the "Treaty of Maastricht") amending the TEC. The TEU marked "a new stage in the process of creating an ever closer union among the peoples of Europe."[41] Through TEU, the Member States implemented the concept of a European Union, based on the foundation provided by a European Community (the "EC"), thus replacing the former European Economic Community.

The European Union is understood to rest on three pillars. The first pillar is the European Community (formed by the treaties of EEC, the Euratom and the ECSC), which represents the EU's institutional framework and scope of operations including the new Economic and Monetary Union (the "EMU"). The second pillar is the Common Foreign and Security Policy (CFSP) and the third pillar is Cooperation in Justice and Home Affairs.[42]

5. European Economic Area (1994)

On January 1, 1994, Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and the Swiss Confederation ("EFTA States") and the members of the European Union created the European Economic Area (the "EEA").[43] The Agreement establishing the EEA aimed at promoting "a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition."[44] In order to achieve that objective, the Agreement provided for free movement among the Contracting Parties of goods, persons, services and capital — the four cornerstones of the Common Market.

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[40] *See* 31 I.L.M. 247. consolidated version *available at* <http://europa.eu.int/eur-lex/en/treaties/dat/ec_cons_treaty_en.pdf>, (visited on March 8, 2001) [Hereinafter "TEU"].

[41] *Id.* art. 1.

[42] *Id.* articles 11 and 29.

[43] Agreement on the European Economic Area; Decision of the Council and the Commission of 13 December 1993 on the conclusion of the Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation, 94/1/ECSC, EC (1).

[44] *Id.* art. 1.

The EEA Agreement provided for common rules on competition.[45] It thus mirrored the competition law provisions of the EC Treaty.[46] Article 108 of the Agreement provided for the establishment of an EFTA Surveillance Authority (ESA) as well as procedures similar to those existing in the Community for the EFTA States.[47] Under the EEA Agreement, both the EU Commission and ESA are responsible for enforcing competition law within the EEA. Pursuant to the EEA Agreement, the Commission and ESA established procedures (Protocols 23 & 24) for cooperation and coordination on competition matters.[48] Protocol 24 on cooperation in the field of control of concentrations is discussed in detail below.

On January 1, 1995, Austria, Finland and Sweden became members of the EU. Today, the EEA comprises the fifteen Member States of the EU and three EFTA States: Iceland, Liechtenstein, and Norway.

6. The Treaty of Nice (2001): The EU's Enlargement

In preparing for the 21st century, the EU sees its additional enlargement as one of the most important opportunities to "further the integration of the continent by peaceful means, extending a zone of stability and prosperity to new members."[49] In March 1998, the EU initiated a process that will enlarge the Union by embracing thirteen Eastern European applicant countries.[50] However, before an applicant country can become a member of the Union, it must have achieved:

1) stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;
2) the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union; and

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[45] *Id.* art. 2.

[46] *Id.* articles 53 and 54 (restrictive practices and dominant positions, mirroring article 85 and 86 of the EC Treaty, respectively). Article 57(mergers) and article 59 (public undertakings).

[47] *Id.* art. 108.

[48] *Id.* art. 58; Protocol 23 Concerning the Cooperation Between the Surveillance Authorities (Article 58), 1994 OJ (L1) 186; Protocol 24 on Cooperation in the Field of Control of Concentrations, 1994 OJ (L1) 188.

[49] *See EU Enlargement - A Historic Opportunity, available at* <http://europa.eu.int/comm/enlargement/intro/index.htm>, (visited on March 3, 2001).

[50] Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, the Slovak Republic, Slovenia and Turkey. *Id.* It should be noted that the EFTA members of the EEA Agreement (Iceland, Liechtenstein, and Norway) have not applied for accession to the European Union.

3) the ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.[51]

In addition to the above, the applicant country must have created "the conditions for its integration through the adjustment of its administrative structures, so that European Community legislation transposed into national legislation is implemented effectively through appropriate administrative and judicial structures."[52]

On February 26, 2001, the 15 Member States of the EU concluded the Treaty of Nice,[53] which will introduce institutional reform by amending the Treaty on European Union, the Treaties establishing the European Communities and the Protocol on Enlargement of the European Union. The amendments will come into force when the Treaty of Nice has been ratified by all the Member States in accordance with their respective constitutional rules.[54] It is expected that by the end of 2002 the EU will be in a position to take in new member states which are ready and meet the prescribed conditions.

C. EC Competition and Merger Control Laws

In this section we will review the legislative instruments, court cases, and other efforts that have shaped the current merger regime of the EC.

1. Origins of the EC Competition and Merger Control Laws: The ECSC Treaty

The ECSC Treaty, which laid the foundation of the European Union, also laid the foundation of EC competition and merger control laws. Article 4 of the ECSC Treaty proscribed measures or practices which i) discriminate between producers, purchasers or consumers in terms of prices or delivery terms; ii) interfere with the purchaser's free choice of supplier; and iii) tend towards the sharing or exploiting of markets.[55] Article 60 prohibited anti-competitive pricing practices, more specifically, "unfair competitive

[51] *Id.*
[52] *Id.*
[53] 2001 OJ (C 80).
[54] *See Treaty of Nice,* 2001 O.J. (C80) 70, also *available at* <http://europa.eu.int/comm/nice_treaty/index_en.htm.>, (visited on March 03, 2001).
[55] ECSC Treaty, *supra* note 5, art. 4.

practices, especially purely temporary or purely local price reductions tending towards the acquisition of a monopoly position within the Common Market."[56]

Article 65 embodied the main competition law provisions. It read in relevant part as follows:

> 1. All agreements between undertakings, decisions by associations of undertakings and concerted practices tending directly or indirectly to prevent, restrict or distort normal competition within the Common Market shall be prohibited, and in particular those tending:
>   a. to fix or determine prices;
>   b. to restrict or control production, technical development or investment;
>   c. to share markets, products, customers or sources of supply.[57]

Article 66 dealt with concentrations (European parlance for "mergers and acquisitions") and required premerger notification before the transaction could be consummated. Article 66 in relevant part read as follows:

> Any transaction shall require the *prior authorization* of the Commission, [. . .], if it has in itself the direct or indirect effect of bringing about within the [Common Market], as a result of action by any person or undertaking or group of persons or undertakings, a concentration between undertakings [. . .], whether the transaction concerns a single product or a number of different products, and whether it is effected by merger, acquisition of shares or parts of the undertaking or assets, loan, contract or any other means of control.[58] [emphasis supplied].

Given the limited scope of the ECSC Treaty, it dealt most comprehensively with the competition matters. Article 66 was the first piece of international legislation in the world that addressed premerger notification.

2. The Treaty of Rome

Like the ECSC Treaty, the Treaty of Rome also embodied provisions to protect competition within the Common Market. Article 81(1) prohibits agreements that have the effect of preventing, restricting or distorting competition within the Common Market. In particular, it prohibits agreements relating to price-fixing, tied-selling, and market

[56] *Id.* art. 60.
[57] *Id.* art. 65.
[58] *Id.* art. 66.

sharing.[59] Any agreement found in violation of article 81 is automatically rendered void.[60] However, the prohibition contained in article 81(1) is not absolute. Article 81(3) lists exceptions to the application of article 81(1), which enable the Commission to declare the prohibition inapplicable if the benefits of the agreement, decision or concerted practices concerned outweigh the harms to competition caused by it.[61]

Article 82 protects against the abuse of a dominant position by one or more undertakings within the Common Market, or in a substantial part thereof, insofar as the abuse may affect trade between Member States.[62] Unlike the ECSC Treaty, the Treaty of Rome did not explicitly deal with the merger control, as it was not considered a problem by the Treaty's signatory states at the time its adoption. Instead, mergers were encouraged as they were deemed instrumental in integrating the different markets into a

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[59] TEC, *supra* note 10, art. 81 reads as follows:

1. The following shall be prohibited as incompatible with the Common Market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market, and in particular those which:

    (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
    (b) limit or control production, markets, technical development, or investment;
    (c) share markets or sources of supply;
    (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
    (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
3. The provision of paragraph 1 may, however, be declared inapplicable in the case of:

    any agreement or category of agreement between undertakings;
    any decision or category of decisions by associations of undertakings;
    any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

[60] *Id.* art. 81(2).

[61] *Id.* art. 81(3).

[62] Article 82 reads as follows:

Any abuse by one or more undertakings of a dominant position within the Common Market or in a substantial part of it shall be prohibited as incompatible with the Common Market in so far as it may affect trade between member-States. Such abuse may, in particular, consist in:

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

Common Market.[63] However, some commentators express the view that the Treaty framers did consider the option of placing merger review under the Community's ambit, but abandoned the idea when they failed to secure an agreement on common criteria and procedures.[64]

3. The 1966 Memorandum

In 1966, the European Commission issued a Memorandum[65] which embodied the Commission's policy with respect to the applicability of articles 81 and 82 to concentrations. In the Memorandum, the Commission noted that article 81(1), which prohibits restrictive agreements and concerted practices, fails to draw a distinction between cartels and concentrations.[66] Further, the Commission stated that "it is not possible to apply article [81] to agreements whose purpose is the acquisition of total or partial ownership of enterprises or the reorganization of the ownership of enterprises (merger, acquisition of holdings, purchase of part of the assets)."[67] The Commission reasoned that article 81 is both over-inclusive and under-inclusive with respect to its application to concentrations. The strict criteria of article 81(1) would block even permissible mergers, thereby making it over-inclusive. On the other hand, the exemptions

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> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. *Id.* art 82

[63] *See* Sergio Baches Opi, *Merger Control in the United States and European Union: How Should the United States' Experience Influence the Enforcement of the Council Merger Regulation*?, 6 J. TRANSNAT'L L. & POL'Y 223, 233 (1997); Ethan Schwartz, *Politics As Usual: The History Of European Community Merger Control,* 18 Yale J. Int'l L. 607, 613 (1993). (describes in detail the legislative history of Merger Regulation).

[64] Ethan Schwartz, *id.*, citing D.G. GOYDER, EEC COMPETITION LAW 29 (1988); Advocate-General Roemer's opinion in Continental Can, Case 6/72, Europemballage Corp. & Continental Can Co. v. Commission, 1973 E.C.R. 215, 253-56; MERGER CONTROL IN THE EEC 222 (Boston: Kluwer, 1988).

[65] Comm'n, Competition Series, No. 3, The Problem of Industrial Concentrations in the Common Market (1966) [Hereinafter "the 1966 Memorandum"], cited in FRANK L. FINE, *supra* note 18, at 42.

[66] The 1996 Memorandum distinguished between cartel and concentration as follows:

Whereas a cartel can be defined as an agreement, relative certain market practices, between firms that remain independent, the term "concentration of firms" is used where several firms are brought together under a single economic management at the expense of their economic independence as a permanent arrangement. A cartel creates an obligation with regard to practices whereas a concentration brings about a modification of the internal structure of the firms. . . [T]he most important types of concentrations are: a company's acquisition of holdings or participation in other companies, the total or partial acquisition of the capital assets of other companies, and the merger of two or more legally independent companies into a new company."

The 1966 Memorandum, *id.*, pt. III, ¶ 1.

[67] *Id.* ¶ 58.

laid down in article 81(3) allowed clearance for mergers on industrial policy considerations, thereby making it under-inclusive.[68]

Although the Commission rejected the use of article 81 to review mergers, it suggested that "a concentration of enterprises which has the effect of monopolizing a market should be treated as improper exploitation of a dominant position within the meaning of article [82], except where special circumstances are present."[69] Thus, the Commission proposed the use of article 82 for the control of mergers which may create monopoly. The proposal offered a window for expanding Community competency over mergers, of which the Commission later availed itself in *Continental Can.*[70]

4. Continental Can (1973): Application of Article 82 to Concentrations

The Commission for the first time applied article 82 to a concentration in *Continental Can.*[71] The facts of the case briefly are as follows:

In 1969, Continental Can, a US-based company engaged in the business of producing metal, paper and plastic packaging, and of producing machines for the manufacture of such packaging, acquired 86% of the shares in Schmalbach-Lubeca-Werke AG ("SLW"), a West German producer of light metal containers for meat and fish and of metal closures for glass jars. In February, 1970 Continental entered into an agreement with Thomassen & Drijver-Verblifa ("TDV"), a Dutch Company engaged in the same business as SLW with a strong position in Benelux market, for the acquisition of TDV by Continental. Pursuant to this Agreement, Continental was to establish a holding company, Europemballage, to which Continental would transfer its shares in SLW. Europemballage, financed by Continental, would then acquire 91% of the shares of TDV.

The Commission learned of the transaction, and under article 82 started an investigation of the acquisition of TDV shares by Continental. The Commission held that Continental enjoyed a dominant position, through SLW, in the West German market for

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[68] *See* Ethan Schwartz, *supra* note 63, at 614.

[69] Barry E. Hawk, *The EEC Merger Regulation: The First Step Toward One-Stop Merger Control*, 59 ANTITRUST L.J. 195, 196 (1990).

[70] 1972 J. O. (L7) 25 , [1972] CMLR D11, *on appeal* Europemballage Corp. & Continental Can Co. v. EC Commission, Case 6/72 [1973] E.C.R. 215, [1973] CMLR 199. [Hereinafter "*Continental Can*"]; *see also* Ethan Schwartz, *supra* note 63, at 615.

[71] *Continental Can, id.*

light metal containers for meat and fish and in the market of metal closures for glass jars. Continental through Europemballage abused its dominant position when it acquired the controlling interest in TDV, thereby practically eliminated competition in the Benelux and West Germany, which together constituted a substantial part of the Common Market.[72]

Continental appealed to the Court of Justice. The Court upheld the Commission's application of article 82 to concentrations.[73] The Court stated that article 81 when read in conjunction with article 3(f) would prevent the distortion of competition in the Common Market. The Court held that this objective would be defeated if the restraint of competition, which is prohibited if it is a result of acts proscribed in article 81, would be allowed under article 82. The Court then noted that acts listed in article 82 are merely examples and are "not an exhaustive list of the kinds of abusive exploitation of a dominant position prohibited by the [TEC]."[74] It held that abuse may occur "if an undertaking in a dominant position strengthens that dominant position so that the degree of control achieved substantially obstructs competition, *i.e.*, so that the only undertakings left in the market are those which are dependent on the dominant undertaking with regard to their market behaviour."[75]

Continental Can represented the first step in the evolution of merger control law under the TEC. It brought mergers under the ambit of article 82 and placed emphasis on the assessment of probable abuse of dominant position resulting from an increase in the market share of an undertaking that already has a dominant position. However, this development in merger law was limited in its scope. It only covered mergers where one of the merging parties already held a dominant position in the market. Thus, a merger between two or more non-dominant undertakings creating an undertaking with a dominant position in the relevant market remained beyond the purview of EC competition law.[76]

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[72] *Id.* ¶ 28 at 225.
[73] *Id.* ¶ 27 at 225. (however, the Commission lost the case on the merits because it failed to correctly analyze the supply side substitutability of the products concerned and, therefore, the dominant position of Continental Can had not been proven at all.)
[74] *Id.* ¶ 26 at 224-5.
[75] *Id.*
[76] *See* Thomas P. O'Toole, *"The Long Arm of The Law"--European Merger Regulation And Its Application To The Merger of Boeing & McDonnell Douglas*, 11 TRANSNAT'L LAW 203, 214-215 (1998).

5. Commission's Proposals for Coherent Merger Control: Political Gridlock

In 1973, the Commission proposed to the Council the adoption of a coherent merger control regulation. The draft merger regulation proposed by the Commission granted authority to the Commission to review any merger involving at least one EC firm, in which the merging parties had a world-wide turnover of over 200 million ECUs and more than twenty-five percent market share of the relevant product in at least one EC member state.[77] Premerger notification was required for mergers where the merging parties' aggregate turnover exceeds 1 billion ECUs.[78]

The draft merger regulation was endorsed by the European Parliament, but was blocked in the Council owing to the differences among the competition policies of the member states. France, Italy, and the United Kingdom wanted the Council to retain its authority over mergers, whereas Germany, Denmark, and the Benelux countries wanted the Commission to be entrusted with final authority.[79]

In 1981, the Commission proposed a modified version of the 1973 draft merger regulation to the Council for approval.[80] The 1981 draft increased the thresholds from 200 million ECUs to 500 million ECUs,[81] and established a presumption in favour of approving mergers where the merging parties' combined market share was less than twenty percent based on turnover in the Community.[82] However, the 1981 draft did not make any changes as to the final authority over mergers, which rested with the Commission.[83] Like its predecessor, the 1981 draft suffered the similar fate, and was rejected by the Council owing to difference among the Member States.[84]

In February 1984, the Commission submitted a third proposal. Again it raised the turnover thresholds, this time from 500 million ECUs to 750 million ECUs. Any merger below that threshold would be subject to regulation only if the merged entity would have

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[77] Draft Regulation of the E.C. Council Concerning Control of Concentrations Between Undertakings, COM (73) 1210 final, *reprinted in* 12 C.M.L.R. D205, D207 (1973); *see also* Ethan Schwartz, *supra* note 63, at 623.
[78] *Id.* at D209.
[79] Ethan Schwartz, *supra* note 63, at 624.
[80] Modification de 1a proposition de règlement du Conseil sur 1e contrôle de 1a concentration, COM(81) 773 (final).
[81] *Id.* annex, at 2.
[82] *Id.* at 1.
[83] *Id.* at 3.
[84] Ethan Schwartz, *supra* note 63, at 624.

fifty percent market share in a relevant product in a substantial part of the Community. The Commission again retained the final authority, however, it pledged to consult frequently with the Council.[85] The Council meted out the same treatment to the 1984 draft as it did to its two predecessors.

6. Philip Morris (1987): Application of Article 81 to Concentrations

The Philip Morris[86] case was the first case in which the Commission applied article 81 – dormant since the Commission's 1966 Memorandum – to concentrations, and was upheld by the Court of Justice.[87]

The facts of the Philip Morris case briefly are as follows. The Rembrandt Group Ltd. (Rembrandt), a South African company, owned all of Rothmans Tobacco (Holding) Ltd. (RTH), a U.K.-based company. RTH in turn held a controlling interest in Rothmans International (RI), a U.K. cigarette manufacturer. In April 1981, Philip Morris (PM), an American cigarette manufacturer, entered into an agreement with Rembrandt, whereby PM acquired fifty percent of Rembrandt's equity in RTH. Pursuant to the agreement, PM and Rembrandt would jointly manage RI.

RJ Reynolds, a US-based company and a competitor of PM, along with the British American Tobacco Company (BAT), filed a complaint with the Commission alleging that the agreement between PM and Rembrandt infringed articles 81(1) and 82 of the EC Treaty, as the agreement established a link between PM and RI, previously independent competitors. The Commission endorsed RJ Reynolds' complaint and required PM and Rembrandt to restructure their agreement. Under the restructured agreement, PM returned to Rembrandt all of its shares in RTH in exchange for 38.8% of capital stock, which represented 24.9% of voting rights, of RI. In addition, the restructured agreement dropped provisions for cooperation in the management of RI. The Commission found the restructured agreement in compliance with articles 81 and 82, and dismissed RJ Reynolds and BAT's complaint.

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85 Commission des Communautés Européennes, Proposition Modifee de Règlement du Conseil sur le contrôle de la concentration, Doc. No. COM(84) 59 (final); *see also* Concurrence: Avis de la Commission CEE sur les Fusions et les Joint Ventures, EUROPOLITIQUE, Sept. 20, 1986, at 4-5.

86 Joined Cases 142 & 156/84, British Am. Tobacco Co., Reynolds Indus. v. Commission, 1987 E.C.R. 4487.[Hereinafter "*Philip Morris*"].

87 *See* FRANK L. FINE, *supra* note 18, at 52.

RJ Reynolds and BAT appealed the Commission's decision before the Court of Justice. The primary issue presented before the Court was "whether and in what circumstances the acquisition of a minority shareholding in a competing company may constitute an infringement"[88] of articles 81 and 82 of the Treaty. The Court upheld the Commission's decision that the share acquisition by PM of RI did not infringe article 81(1).[89]

The importance of the decision lies in the Court's finding that the acquisition of shares by one company of another (a form of merger) was properly analyzed by the Commission under article 81 of the Treaty.[90] The judgment enhanced the Commission's power over concentrations, and was viewed by the then Commissioner, Peter Sutherland, "as a weapon for securing the adoption of [a merger control regulation]."[91]

7. Merger Wave: 1987-

In addition to the *Philip Morris* case, the year 1987 witnessed the signing of the Single European Act, which indirectly gave impetus to the Member States for the adoption of the Merger Regulation. The objective of Single European Act,[92] was to create a single internal market through economic and monetary union by the end of 1992. The Member States started to dismantle trade barriers in order to promote economic integration. With the integration process under way, EC and non-EC businesses started restructuring their business activities in the Community at an unprecedented level.[93] Non-EC European countries firms, for example from Sweden, were among the most

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[88] *Philip Morris*, *supra* note 86, ¶ 31.

[89] The Court, however, noted four situations in which a share acquisition in a competitor may infringe article 81(1):

(i) Where the agreement expressly provides for 'commercial co-operation' between the parties or, in the absence of such an express provision, where the agreement 'creates a structure likely to used for such co-operation:'

(ii) Where the agreement provides the investing company with 'the possibility of reinforcing its position' at a later date in order to obtain effective control of the other company;

(iii) Where, as a result of the agreement, the investing company 'obtains legal or *de facto* control' of the commercial conduct of the competitor; and

(iv) '[A]ny attempted takeover' involving companies in a market which is oligopolistic, stagnant in terms of competition, and in which the advertising and cooperate acquisitions are the primary means of increasing market share.

FRANK L. FINE, *supra* note 18, at 57-58.

[90] *Philip Morris*, *supra* note 86, at 4582-84; *see also*, Sergio Baches Opi, *supra* note 63, at 236.

[91] Commission Press Release IP (87) 282, July 9, 1987.

[92] SEA, *supra* note 36.

[93] *See generally* Patrick Thieffry, *The New EC Merger Control Regulation*, 24 INT'L LAW 543 (1990).

aggressive acquirers as they did not wish to let the developments taking place in the Community to pass them by.[94] In 1990, the number of trans-Community mergers and acquisitions involving at least one of the Community's one thousand largest firms rose to 315 compared to 65 in 1985. In 1989, the number of cross-border M&As for the first time exceeded the number of national transactions.[95]

8. The Need for a Community-Wide Merger Control Regulation

Trans-European mergers were the natural consequence of diminishing trade barriers and were deemed essential for the coherent integration of member states' markets into a single market. However, the need to notify multiple competition authorities, in addition to the Commission, in order to effectuate a merger had a chilling effect on the merging parties. Merging parties were subjected to excessive costs in obtaining multiple clearances, and were running the risk of "multiple jeopardy" – a situation in which a merger, despite having been cleared by the competition authorities of some states, can still be blocked by others.[96]

There was a need to provide for a bright line test distinguishing between mergers that could be reviewed by the competition authorities of the individual Member States, and those that would be reviewed by the Commission alone. In short, there was a need for a "one-stop-shop." The "one-stop-shop" approach was deemed efficient in a "situation in which separate inquiries are conducted by different Member State authorities, each judging the merger on the basis of partial information, and against slightly different criteria."[97] The one-stop-shop approach would send a clear signal to firms, and therefore would encourage trans-European mergers, which would help integrate the economy into a single market and make the objective of the SEA a reality. Thus, i) the need for a one-stop-shop, ii) the fear that Non-EC companies would dominate the Common Market, and

[94] *See* Derek Ridyard, *An Economic Perspective on the EC Merger Regulation*, EUR. COMPETITION L. REV. 1990, 11(6), 247-254 at 248.
[95] Wayne D. Collins, *The Coming of Age of EC Competition Policy*, 17 YALE J. INT'L L. 249, 278 (1992). (reviewing LEON BRITTAN, COMPETITION POLICY AND MERGER CONTROL IN THE SINGLE EUROPEAN MARKET. (Cambridge: Grotius Publications Ltd., 1991)).
[96] C. J. COOK & C. S. KERSE, E.C. MERGER CONTROL 61 (London: Sweet & Maxwell, 2nd ed. 1996). [Hereinafter "COOK & KERSE"].
[97] Ridyard, *supra* note 94, at 248.

iii) the failure of articles 81 and 82 to effectively control large scale mergers, re-activated efforts to promulgate merger control laws at the Community level.

9. The Rebirth of Proposals for Merger Regulation

Commissioner Sutherland, in spring of 1988 submitted a new draft merger control regulation for consideration to the Council.[98] The 1988 draft regulation sought to prohibit any concentration that created or reinforced a dominant position.[99] However, in July 1988 the Commissioner amended the draft regulation to reflect the notion that dominance alone would not constitute a *per se* violation of the merger regulation and that the Commission would have to prove that the proposed merger would have anti-competitive effects in the market.[100]

In January 1989, Sutherland was replaced by Sir Leon Brittan of Great Britain. In March, 1989, Brittan presented yet another draft regulation to the Council. In order to appease divergent national interests and to streamline and clarify the merger regulation, Brittan pledged that the Commission would not invoke articles 81 and 82 after a merger was consummated and would analyze the merger only in accordance with the new regulation.[101] On December 21, 1989, the Council at last adopted Merger Regulation 4064/89[102] ("Merger Regulation"). Brittan praised the text of the Regulation and declared that the "Community as a whole will have, for the first time, a single framework within which takeovers and mergers of a community dimension can be dealt with, recognizing the importance of maintaining fair competition throughout the single market."[103]

Given the long history of failed negotiations over the merger regulation, the relative ease with which the Merger Regulation passed through the Council reflected the a changed attitude towards a centralized merger control owing to the changed market structure within the Community.

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[98] Amended Proposal for a Council Regulation on the Control of Concentrations Between Undertakings, COMMON MARKET LAW REPORTS ANTITRUST SUPPLEMENT (1988), [1988] 4 C.M.L.R. 472 [Hereinafter "1988 Proposal"]. For a comprehensive review of the drafting history of E.C. Merger Regulation, see Ethan Schwartz, *supra* note 63, at 643-53.

[99] 1988 Proposal, *id.*, arts. 2(2), 8(2); Ethan Schwartz, *supra* note 63, at 643.

[100] Ethan Schwartz, *id.* at 644, quoting Concurrence: La Commission Tente D'Amadouer Les Britanniques Avec Le Nouveau Projet Sur Les Fusions, EUROPOLITIQUE, Sept. 10, 1988.

[101] *Id.* at 650; Spokesman's Service, European Commission, Press Release No. IP (89) 200, Mar. 31, 1989.

[102] Merger Regulation, *supra* note 24.

D. Merger Regulation: Instrument for Transnational Merger Review

The Merger Regulation became effective on September 21, 1990. Recognizing that the "dismantling of internal frontiers" gave rise to "major corporate re-organizations in the Community, particularly in the form of concentrations,"[104] the preamble to Merger Regulation acknowledged a regulatory gap in the TEC that allowed competition distorting concentrations not covered by articles 81 and 82 of the Treaty to escape scrutiny.[105] The regulatory gap was to be filled by a merger control regime guaranteeing that the achievement of a single market by the end of 1992 would not result in lasting damage to competition within the Community.[106] Thus, the Merger Regulation was meant to be the sole instrument through which the Commission would monitor concentrations leading to "significant structural changes" having an impact on the market going beyond the national borders of any one Member state.[107]

1. One-Stop-Shop

The Regulation aims to avoid regulatory duplication by providing for a "one-stop-shop" approach.[108] Accordingly, it grants the Commission the exclusive jurisdiction over concentrations with a "Community dimension."[109] For the purposes of the Merger Regulation, a concentration is deemed to arise where:

(a) two or more previously independent undertakings merge, or
(b) one or more persons already controlling at least one undertaking, or one or more undertakings acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings.[110]

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[103] Lucy Kellaway, *EC Ministers Hand Brussels the Power to Vet Large Mergers*, FIN. TIMES, Dec. 22, 1989, at 2.
[104] Merger Regulation, *supra* note 24, Recital 3.
[105] *Id.* Recital 6.
[106] *Id.* Recital 5.
[107] *Id.* Recitals 7 & 9.
[108] *See* Council Regulation (EC) No 1310/97, 1997 O.J. (L 180) 1. (Recital 1 reads: "*whereas multiple notification of the same transaction increases legal uncertainty, effort and cost for companies and may lead to conflicting assessments*").
[109] Merger Regulation, *supra* note 24, art. 21.
[110] *Id.* art. 3.

2. **Community Dimension: Notification Thresholds**

A merger has a Community dimension where:

i. the aggregate worldwide turnover of all the undertakings concerned is more than ECU 5,000 million; and

ii. the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 250 million;

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover in one and the same Member State.[111]

In June 1997, the Commission added the following supplementary criteria for concentrations that fail to meet the aforementioned Community dimension criteria.[112] Under the supplementary criteria a concentration has a Community dimension if:

i. the combined aggregate worldwide turnover of all the undertakings concerned is more than ECU 2.5 billion;

ii. in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than ECU 100 million;

iii. in each of these three Member States, the aggregate turnover of each of at least two of the undertakings concerned is more than ECU 25 million; and

iv. the aggregate Community-wide turnover of at least two of the undertakings concerned is more than ECU 100 million;

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. [113]

Once a merger satisfies either the primary or the secondary thresholds and does not fall under the terms of the final proviso, the merger is said to have a Community dimension. In such a case the Commission would have jurisdiction over the concentration, irrespective of the place of business of the parties.[114] However, even if a

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[111] *Id.* art. 1(2).

[112] *See* Council Regulation (EC) No. 1310/97, *supra* note 108.

[113] *Id.* art. 1(3).

[114] The Commission has exercised its jurisdiction on:

(1) the acquisition of joint control over a non-EU undertaking by an EU undertaking and a non-EU undertaking, See, e.g., Commission Decision 97/26/EC, 1997 O.J. (L 11) 30, Case IV/M.619 (LEXIS, Eurcom Library, Legis. File) (Gencor/Lonrho); Commission Decisions of July 8, 1992, 1992 O.J. (C 201) 26, Case IV/M.236 (LEXIS) (Ericsson/Ascom); Nov. 27, 1995, 1995 O.J. (C 330) 9, Case IV/M.648 (LEXIS) (McDermott/ETPM);

merger satisfies the thresholds, it will not have a Community dimension if each of the merging parties carrying on business in the Community achieves *more than two-thirds* of its aggregate Community-wide turnover[115] in one and the same Member State. The two-thirds rule is designed to ensure that where significant Community turnover is involved but is earned in one and the same Member State the merger remains within the jurisdiction of the competition authority of that Member State.[116] The two-thirds rule thus maintain primary control over mergers by national authorities where the merger has its most significant effect on local markets.

3. Exceptions to Community-Dimension

There are three instances in which a merger with a Community dimension may be reviewed by a national competition authority or a merger without a Community dimension may be reviewed by the Commission.

a. Referral to National Competition Authority: The "German Clause"

Article 9 of the Merger Regulation provides that any Member State may claim jurisdiction over a merger with a Community dimension if the merger would affect competition in a "distinct market" within that Member State's territory. Once the

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(2) the acquisition of sole control of a non-EU undertaking by a non-EU undertaking, *see, e.g.*, Commission Decision 97/816/EC, (Case No IV/M.877 - Boeing/McDonnell Douglas) 1997 O.J. (L 336) 16; Commission Decisions of: March 23, 1998, 1998 O.J. (C 128) 21, Case IV/M.1120 (LEXIS, Eurcom Library, Legis. File) (Compaq/Digital); July 6, 1998, 1998 O.J. (C 267) 18, Case IV/M.1207 (LEXIS) (Dana/Echlin); Mar. 7, 1991, 1991 O.J. (C 66) 13, Case IV/M.069 (LEXIS) (Kyowa/Saitama Banks); Aug. 11, 1997, 1997 O.J. (C 283) 13, Case IV/M.963 (LEXIS) (Compaq/Tandem); Sept. 8, 1997, 1997 O.J. (C 305) 6, Case IV/M.977 (LEXIS) (Fujitsu/Amdahl); Oct. 24, 1997, 1997 O.J. (C 378) 3, Case IV/M.1011 (LEXIS) (Ingersoll-Rand/Thermo King); Feb. 20, 1997, 1997 O.J. (C 120) 6, Case IV/M.882 (LEXIS) (Archer-Daniels-Midland/Grace Cocoa);

(3) the acquisition of joint control over a non-EU undertaking by non-EU undertakings, *see, e.g.*, Commission Decisions of Oct. 24, 1997, 1998 O.J. (C 6) 2, Case IV/M.994(LEXIS, Eurcom Library, Legis. File) (DuPont/Hitachi); June 30, 1993, 1993 O.J. (C 219) 0, Case No IV/M.346 (JCSAT / SAJAC); June 1, 1995, 1995 O.J. (C 201) 3, Case IV/M.583 (LEXIS) (Inchcape/Gestetner); and

(4) the merger of two non-EU undertaking,. *see, e.g.*, Commission Decisions of April 2, 1998, 1998 O.J. (C 144) 4, Case IV/M.1138 (LEXIS, Eurcom Library, Legis.) (Royal Bank of Canada/Bank of Montreal); Oct. 15, 1997, 1997 O.J. (C 341) 8, Case IV/M.985 (LEXIS) (Credit Suisse/Winterthur); Oct. 26, 1995, 1996 O.J. (C 33) 7, Case IV/M.642 (LEXIS) (Chase Manhattan/Chemical Banking).

[115] Merger Regulation, *supra* note 24, art 5(1). Article 5(1) defines turnover as "the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings' ordinary activities after deduction of sales rebates and of value added tax and other taxes directly related to turnover."

[116] COOK & KERSE, *supra* note 96, at 64.

Commission receives such a claim, it determines whether such "distinct market" exists or not, and if it does, whether the merger would create or strengthen a dominant position within that market. Irrespective of the answers to the preceding two questions, the Commission has discretion as to whether to refer the case to the competent authority of the Member State claiming jurisdiction.

b. Jurisdiction Over Mergers Without Community Dimension: The "Dutch Clause"

Article 22(3)-(6) allows a Member State to request that the Commission assume jurisdiction over a merger without a Community dimension. This exception is meant for smaller Member States that either do not have a national competition authority or are unwilling to challenge bigger mergers on their own. The Commission may take action under the Merger Regulation if it finds that "concentration affects trade between Member States."[117]

c. Legitimate National Interest: The "British Clause"

Article 21(3) allows Member States to "take appropriate measures to protect [their] legitimate interests," which are considered to be violated if the merger is cleared by the Commission. The Regulation provides examples of legitimate interests, such as public security, plurality of the media and prudential rules for the financial institutions. If a Member States wishes to invoke the legitimate interest exception on grounds other than the ones aforementioned, it must communicate its reasons to the Commission. The Commission then assesses the compatibility of the interest with the provisions of Community law and informs the Member State of its decision within one month of the communication from the Member State.

4. **Premerger Notification**

If a merger meets the Community dimension thresholds it must be notified to the Commission not more than one week after (i) the conclusion of the agreement, (ii) the announcement of the public bid, or (iii) the acquisition of a controlling interest. Where a

[117] Merger Regulation, *supra* note 24, art. 22(3).

transaction involves more than one of these elements, the period for notification begins to run from when the first of those events occurs.[118] It may be mentioned here that while the Regulation fixes a time by which notification must be given, it does not prevent filing of the notification before the occurrence of the specified events, provided, however, that the merging parties can fulfill all the requirements of a prescribed notification form, Form CO.[119] In fact, all of the information requested in Form CO can be furnished without the parties having to enter into a final agreement.[120]

Notification must be filed by the merging parties or the acquiror of the control.[121] The notifying party must submit 24 copies of Form CO and of all the supporting documents to the Commission through the office of Merger Task Force.[122] The Commission must then transmit the copies of notification within three working days to the competent authorities of all the Member States.[123] Once the notification is filed, the parties must wait for three weeks before consummating the transaction.[124]

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[118] *Id.* art. 4(1).

[119] COOK & KERSE, *supra* note 96, at 98; Form Co Relating to the Notification of a Concentration Pursuant to Regulation (EEC) No 4064/89, Annex 1 to Commission Regulation (EC) No 447/98 of March 1, 1998, 1998 O.J.(L 61) 1. [Hereinafter "Form CO"]. For additional discussion on the requirements of Form CO, *see infra,* Chap. IV, footnotes 19 to 21, and accompanying text.

[120] Form Co, *id* sec. 2. (section 2 requires details of the "proposed" transaction, for example, "proposed concentration," "proposed or expected date of any major events," and "proposed structure of ownership.")

[121] Merger Regulation, *supra* note 24,art. 4(2).

[122] Commission Regulation (EC) No 447/98 of 1 March 1998 on the Notifications, Time Limits and Hearings Provided for in Council Regulation (EEC) No 4064/89 on the Control of Concentrations Between Undertakings, 1998 O.J. (L61) 1, art. 2(2). [Hereinafter "Implementing Regulations"].

[123] Merger Regulation, *supra* note 24, art. 19(1).

[124] *Id.* art. 7(1).

For apparent inconsistency between Article 7 and Article 4, consider the following:

Article 7(1) expressly provides that a concentration shall not be put into effect before its notification. On the other hand Article 4(1) provides that concentrations must be notified to the Commission not more than one week after conclusion of the agreement, or the announcement of the public bid, *or the acquisition of a controlling interest* (emphasis supplied). It is the acquisitions of a controlling interest which may result, in accordance with Article 3(1)(b), in a concentration arising for the purposes of the Regulation. Article 4 therefore contemplates the situation where it is quite lawful for a party to complete the transaction in advance of notification. The apparent inconsistency between Article 4 and Article 7 is understandable when one appreciates the different types of case with which Article 4(1) is intended to deal. The acquisition of a controlling interest is a residuary category. There may well be cases where there is no agreement and no public bid. A party may, for example, take up a rights issue in a situation where other parties do not and the consequence is that its shareholding increases to such an extent that it has control within the meaning of Article 3. Such a situation is clearly not a public bid and it would be artificial to treat it as "an agreement" for the purposed of Article 4(1).

COOK & KERSE, *supra* note 96, at 113.

5. Merger Analysis

a. *Substantive Evaluation*

The Commission appraises a concentration with a view to ascertaining whether it "creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the Common Market or in a substantial part of it."[125] Article 2(1) of the Regulation provides the Commission with a set of guidelines to assess the compatibility of a concentration with the Common Market. In making this determination, the Commission must take into consideration, i) the need to preserve and develop effective competition within the Common Market; ii) actual or potential competition from the EC or from around the world; iii) market position of the undertakings and their economic and financial power; iv) access of suppliers and users to supplies and markets; v) legal or other barriers to entry; vi) supply and demand trends for the relevant goods; vii) the interests of the intermediate and ultimate consumers; and viii) the development of technical and economic progress, provided that it is to the consumers' advantage and does not form an obstacle to competition.[126]

i. *Pure Competition Standards vs. Industrial Policy*

All of the factors which the Commission must take into account in appraising a concentration are based on pure competition law except the last one: the development of technical and economic progress. This criterion poses a question as to whether the Commission is obliged, while assessing the compatibility of a concentration with the Common Market, to take into account industrial policy grounds, such as preventing a foreign company from acquiring a controlling interest in a key EC company, preventing a merger that would lead to considerable unemployment in the Community, or creating a Euro-champion to revive a declining EC industry or to compete effectively with a foreign competitor.[127]

[125] Merger Regulation, *supra* note 24, art. 2(2)-(3).
[126] *Id.* art. 2(1).
[127] I. VAN BAEL & J. BELLIS, COMPETITION LAW OF THE EUROPEAN COMMUNITY ¶ 639(6), at 468 (Oxfordshire: CCH, 3rd ed., 1994) [Hereinafter "VAN BAEL & BELLIS"].

The concept of technical and economic progress, as stated by the Commission, has been borrowed from exceptions to the article 81(1) prohibition listed in article 81(3).[128] This may lead to an interpretation that where a concentration is impugned on pure competition grounds it could nevertheless be granted clearance on technical or economic progress grounds. However, such interpretation has been excluded by the Commission.[129]

A concentration is impugned if it creates or strengthens a dominant position that significantly impedes effective competition within the Common Market. There is nothing in the Merger Regulation that exempts a concentration which is judged to have such an effect on competition. Applying the *ejusdem generis* rule of statutory interpretation, the development of technical and economic progress should be viewed as a factor to be applied in assessing the effect of the concentration on competition. Such an interpretation finds support in the Commission's decision in *MSG Media Services,*[130] when it blocked a joint venture established to operate in the field of digital pay-TV. The Commission held that "even though MSG would contribute to the development of digital television, the successful spread of that medium would be hindered rather than promoted by the deterrent effect on new entry which would result from the dominant position the joint venture would quickly gain."[131] The Commission noted:

> The reference to this criterion [development of technical and economic progress] in Article 2(1)(b) of the Merger Regulation is subject to the reservation that no obstacle is formed to competition. As outlined above, however, the foreseeable effects of the proposed concentration suggest that it will lead to a sealing-off of and early creation of a dominant position on the future markets of technical and administrative services and to a substantial hindering of effective competition on the future of market of Pay-TV.[132]

The Commission went so far as to question the likelihood of achieving technical and economic progress when a concentration creates or strengthens a dominant position. In the Commission's opinion, there is an apparent inconsistency between technical and

[128] *Id., see also* accompanying statements entered in the minutes of the EC Council concerning Council Regulation 4064/89, interpretative statement by the Commission concerning the application of art. 2(1)(b), *Nineteenth Report on Competition Policy,* p. 266.
[129] *Id.*; *see also* COOK & KERSE, *supra* note 96, at 165.
[130] 1994 O.J. (L364) 1. *See also Nordic Satellite Distribution*, 1996 O.J. (L53) 20.
[131] COOK & KERSE, *supra* note 96, at 165-66.

economic progress and a dominant position, notwithstanding the reference in article 2(1)(b).[133]

In addition to the apparent inconsistency among the substantive criteria listed in article 2(1)(b), the thirteenth recital to the preamble to the Merger Regulation instructs the Commission to:

> place its appraisal within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty, including that of strengthening the Community's economic and social cohesion, referred to in Article 130a [of the EC Treaty].[134]

Recital thirteen's reference to articles 2 and 130a of the TEC suggests that when assessing a concentration, the Commission should take into consideration the special interests of less developed regions of the EU and the need to reduce economic imbalances among the regions and/or Member States of the Community. Thus, an otherwise suspect merger between firms of the less developed regions of the EU may be allowed if it will make the resultant firm more competitive vis-à-vis firms in the economically stronger regions.[135]

However, recital thirteen does not impose any specific positive obligation on the Commission to analyze, for example, the employment consequences of a notified concentration. In *Comité Central d'Enterprise de la Societé Anonyme Vittel v. European Commission*,[136] the Commission argued that in order for the Perrier trade union's (Union) application to be admissible, the Union had to demonstrate that it had an interest

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[132] *Id.*
[133] *Id.*
[134] Merger Regulation, *supra* note 24, Preamble.
TEC, *supra* note 10, art. 2 reads:
The Community shall have as its task, by establishing a Common Market and an economic and monetary union and by implementing the common policies or . . ., to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.
Art. 130a of the TEC, *supra* note 10, reads:
Economic and social cohesion
In order to promote its overall harmonious development, the Community shall develop and pursue its actions leading to the strengthening of its economic and social cohesion.
In particular, the Community shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions, including rural areas.
[135] VAN BAEL & BELLIS, *supra* note 127, at ¶ 639(6) pp. 469-70.

consistent with the essential purpose of the Merger Regulation, which is to maintain and develop effective competition in the Common Market. Thus, it was for the applicant to establish a *prima facie* case that clearance or prohibition of a concentration by the Commission would prejudice the objectives stated in article 2 of the TEC. While the Court dismissed the Union's application, its decision did seem to suggest a positive obligation on the Commission to review the concentration within the general framework of article 2 of the TEC.[137]

Recital thirteen along with the technical and economic progress criterion provides evidence that article 2(1)(b) of the Merger Regulation introduces elements inconsistent with the pure competition analysis. That it is difficult to reconcile these criteria is borne out by the practice of the Commission, which has adhered to pure competition criteria and downplayed economic development and progress notions.

ii. Dominant Position

The Commission uses the above criteria to ascertain whether a concentration would "create or strengthen a dominant position" that would significantly impede competition in the Common Market or in a substantial part of it. The Merger Regulation does not provide any definition of dominant position. However, in *Hoffmann La Roche,*[138] the Court of Justice defined dominant position as an ability of a firm or group of firms to behave to an appreciable extent independently of competitors, customers and ultimately of consumers. The Commission continues to adhere to the definition provided by the Court in *Hoffmann La Roche* case.[139]

iii. Relevant Product and Geographic Markets

In order to assess whether the parties to a concentration enjoy or would enjoy a dominant position, the Commission needs to define relevant market. Again, the Merger Regulation fails to provide any guidance as to how to define relevant product and

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[136] Case T-12/93. [1995] II E.C.R. 1247. The case involved a challenge by trade unions in the Perrier group to the Commission's conditional clearance of the *Nestlé/Perrier* deal.

[137] COOK & KERSE, *supra* note 96, at 168-69.

[138] Hoffmann La Roche & Co AG v. Commission, Case 87/76, [1979] E.C.R. 461.

[139] See Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law. 1997 O.J. (C 372). [Hereinafter, "Commission's Definition of the Relevant Market"].

geographic markets. Section 6 of Notification Form CO,[140] provides the following definitions of the relevant product and geographic markets.

A relevant product market is defined as: a "market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use."[141] Factors, such as substitutability, conditions of competition, prices, cross-price elasticity of demand, should be considered in including or excluding the products/services within the relevant product market. In 1997, the Commission issued a notice on the definition of relevant market, wherein it applied a "small but significant non-transitory increase in price" (SSNIP) test. "Under the SSNIP test, two products are deemed to be in the same market if a hypothetical non-transient 5-10 percent price increase for product A would cause sufficient number of customers to switch to product B to make the price increase unprofitable for the supplier of product A."[142]

A relevant geographic market is defined as "the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas."[143] In assessing the relevant geographical market, factors such as the nature and characteristics of the products or services concerned, the existence of entry barriers or consumer preferences, appreciable differences in the undertakings' market shares as between neighbouring areas, or substantial price differences, should be taken into consideration.

iv. Market Shares

Once the relevant product and geographic markets are defined, the Commission assesses the undertaking's dominant position in the relevant market by calculating its

[140] Form CO, *supra* note 119, sec.6; *see also* Commission's Definition of the Relevant Market, *id.*
[141] Form CO, *id.*
[142] Commission's Definition of the Relevant Market, *supra* note 139; *see also* James S. Venit & William J. Kolasky, *Substantive Convergence and Procedural Dissonance in Merger Review, in* ANTITRUST GOES GLOBAL, WHAT FUTURE FOR TRANSATLANTIC COOPERATION? 79, 84 (Evenett et al., eds., Washington, D.C.: Brookings Institution Press, 2000). [Hereinafter "Venit & Kolasky"].
[143] Commission's Definition of the Relevant Market, *supra* note 139.

market share. Yet again, the Merger Regulation does not provide any guidance as to the test for quantification of market shares. However, the preamble to the Merger Regulation instructs the Commission to presume that any concentration resulting in a market share below 25 percent is compatible with the Common Market.[144]

The Commission, however, uses market shares only as a starting point for an analysis of actual and potential competition with the relevant market. In *Mannesmann/Hoesch*, the Commission noted:

> Market shares characterize the current market position of an undertaking. High market shares represent an important factor as evidence of a dominant position provided they not only reflect current conditions but are also a reliable indicator of future conditions. If no other structural factors are identifiable which are liable in due course to change the existing conditions of competition, market share have to viewed as a reliable indicator of future conditions.[145]

The relatively low importance given by the Commission to market shares in its analysis of the concentration resulted in situations in which the Commission has approved concentrations with a combined market share of as high as 83 per cent.[146]

v. Significant Impediment to Effective Competition

Assuming that the Commission determines that the notified concentration creates or strengthens a dominant position, it then analyzes the significant consequences flowing from the undertaking's dominant position that may distort effective competition in the Common Market.

vi. Efficiencies Defense

The Merger Regulation does not provide that the efficiencies defense must be considered in merger analysis. The Commission, however, recognizes the efficiencies defense and considers it "in the overall assessment to determine whether dominance has

[144] Merger Regulation, *supra* note 24, recital 15.
[145] *Mannesmann/Hoesch*, 1993 O.J. (L114) 34, ¶ 91 at 45.

been created or strengthened and not to justify or mitigate that dominance in order to clear a concentration which would otherwise be prohibited."[147] The efficiencies recognized by the Commission are: "a long-term and structural reduction in the marginal cost of production and distribution, which comes as a direct and immediate result of the merger, which cannot be achieved by less restrictive means and which reasonably will be passed on to the consumer on a permanent basis, in terms of lower prices or increased quality."[148]

vii. Failing Firm Defense

Although the Merger Regulation does not provide a "failing firm defense," the Commission has recently started to take the defense into consideration. In *Kali und Salz,*[149] the European Court of Justice approved the use of the defense by the Commission to allow consolidation in Germany, even though the merger would clearly have created a dominant firm there. The defense can be invoked only if the following three conditions are met:

a. the acquired company would in the near future be forced out of market if not taken over by another company;
b. the acquiring company would gain the market share of the acquired company if it were forced out of the market; and
c. there is no less anticompetitive alternative purchase.[150]

b. Initial Review

Once the Commission is notified of the concentration, it then conducts an initial review, using the substantive criteria described above, to determine the compatibility of the concentration with the Common Market. At the completion of the initial review, the

[146] VAN BAEL & BELLIS, *supra* note 127, at ¶ 637, p. 448. citing: *Alcatel/Telettra*, 1991 O.J. (L122) 48, ¶37 at 53.(market share in Spain of 81 per cent in the line transmission equipment market and 83 per cent in microwave equipment market). Other footnotes omitted.
[147] Contribution from the Commission of the European Union, *Efficiency Claims in Mergers and Other Horizontal Agreements*, OCDE/GD(96)65, Competition Policy Roundtables, Les tables rondes sur la politique de concurrence, No. 4 *available at* <http://www.oecd.org/daf/clp/Roundtables/EFFC09.HTM>, (visited on April 15, 2001).
[148] Götz Drauz, Unbundling GE/Honeywell: The Assessment of Conglomerate Merger Under the EC Competition Law, Speech Before Fordham Corporate Law Institute's 28th Annual Conference on International Antitrust Law and Policy 26 (October 25-26, 2001) (on file with the author).
[149] Kali und Salz, cases 68-94 and 30-95, ECR 1998 p. I 1375; 1998 O.J. (C 209) 2.
[150] *Id.*

Commission must conclude that the notified concentration: i) does not fall within the scope of the Merger Regulation; or ii) falls within the scope of the Merger Regulation, but fails to raise any serious doubts as to its compatibility with the Common Market; or iii) falls within the scope of the Merger Regulation and raises serious doubts as to its compatibility with the Common Market and, therefore merits an in-depth investigation.[151]

The Commission must conclude the initial review within one month from the date of the receipt of complete notification.[152] In case the Commission fails to decide within the stipulated time, the transaction will be deemed declared as compatible with the Common Market.[153]

c. Second-Phase Investigation

If the Commission decides to initiate a second-phase investigation, it must make its final decision within four months of the date the proceedings are initiated.[154] The Commission's second-phase investigation consists of four stages. First, the Commission conducts a careful analysis of the concentration, and issues a statement of objections, if necessary. Second, the parties to the transaction are asked to submit their response to the statement of objections.[155] Third, the Commission will draft a decision and circulate it for comments to an Advisory Committee made up of representatives of the Member States.[156] The Advisory Committee will review the draft decision, and deliver its opinion on it, if necessary by taking a vote.[157] Finally, the Commission, after giving due consideration to the opinion of the Advisory Committee, will render its final decision. The final decision must state that the notified transaction i) does not create or strengthen a dominant position which impedes effective competition in the Common Market and, as a result, remains compatible with the Common Market; or ii) does not create or strengthen a dominant position pursuant to the modifications made to the transaction and is, therefore, compatible with the Common Market;[158] or iii) creates a dominant position

[151] Merger Regulation, *supra* note 24, art. 6(1).
[152] *Id.* art. 10(1).
[153] *Id.* art. 10(6).
[154] *Id.* art. 10(3).
[155] *Id.* art. 18(1). (the parties should be granted opportunity, at every stage of the procedure up to the consultation of the Advisory Committee, of making known their views on the objections against them).
[156] *Id.* art. 19(3).
[157] *Id.* art. 19(6).
[158] *Id.* art. 8(2).

and distorts competition in the Common Market and, thus, is incompatible with the Common Market.[159] The final decision of the Commission is published in the Official Journal of the European Communities.[160]

The Merger Regulation provides a very strict time schedule to which the Commission must adhere.[161] The whole process – from the notification of a concentration to the final decision – is to take no more than five months.

6. **Extraterritorial Application of the Merger Regulation**

Like US antitrust law, EC competition law goes beyond its territorial borders to protect competition within its markets. The Commission and the Court have espoused three grounds – i) Single Economic Entity[162] ii) the place of implementation[163] iii) the

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[159] *Id.* art. 8(3).
[160] *Id.* art. 19(7).
[161] *Id.* art. 10.
[162] *See* Imperial Chemical Industries Ltd. v. Commission, Case 48/49, [1972] ECR 619 [Hereinafter *Dyestuffs*].
Dyestuffs was the first case in which jurisdiction over a non-EEC company was affirmed by the Court on the basis of the single economic entity theory. In 1967, the Commission began proceedings under Article 85(1) against 17 producers of dyestuffs based both within and outside the EEC for price-fixing in the Community. The Commission found that 10 of those producers, including Imperial Chemical Industries ("ICI") of the United Kingdom, had infringed Article 85(1), ICI was headquartered outside the EEC at that time, since the United Kingdom had not yet joined the Common Market. ICI appealed the decision to the Court, claiming *inter alia*, that the Commission could not assert jurisdiction over ICI on the sole basis of the effects of the producers' concerted practices within the Community. *Id.* at ¶ 125.
In the Court's affirmation of the Commission's jurisdiction over ICI, the Court agreed with the Commission that the price increases implemented by ICI had effects within the Common Market and that it was "necessary" to make this determination since a concerted practice was involved. *Id.* at ¶¶ 126-7. However, the Court believed that such effects did not in themselves permit the exercise of jurisdiction. Rather the important question was how ICI's contact in the Common Market could serve as a basis for asserting jurisdiction. The Court thus formulated its Single Economic Entity Theory:
"By making use of its power to control its subsidiaries established in the Community, the applicant was able to ensure that its decision was implemented on that market. . . The fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company. Such may be the case in particular where the subsidiary, although having separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company." *Id.* at ¶¶ 130-33.
Thus, the single economic entity approach, as shown in *Dyestuffs,* involved the attribution of the anti-competitive conduct of the EEC subsidiary to its non-EEC parent where: (i) the subsidiary had no real autonomy from its parent company, and (ii) the parent exercised its power of control by causing its subsidiary to engage in the conduct in question.
FRANK L. FINE, *supra* note 18, at 25-26.
[163] *See Wood Pulp*, O.J. L85/1, [1985] 3 CMLR 474, *on appeal* A. Ahlström Osakeyhtiö v. Commission, Cases 89/85 etc. [1988] ECR 5193, [1988] CMLR 901. [Hereinafter "*Wood Pulp*"].

effects doctrine[164] – to assert jurisdiction over companies that have their principal place of business outside the EU[165] The Merger Regulation does not contain any provision that explicitly deals with extraterritorial application of the Regulation.[166] However, Recital 11[167] to the Merger Regulation makes clear that irrespective of the place of business of the firms, if a merger meets the Community dimension thresholds it will fall within the purview of the Regulation, and therefore under the oversight of the Commission.[168]

E. Cooperation between the Commission and ESA: The Lead Jurisdiction Model

The Merger Regulation applies, *mutatis mutandis*, to the EEA.[169] Article 57(1) of the EEA Agreement defines concentration, in the same terms as defined by article 2(3) of

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The decisive factor is therefore the place where it is implemented. The producers in this case implemented their pricing agreement within the Common Market. It is immaterial in that respect whether or not they had recourse to subsidiaries, agents, sub-agents, or branches within the Community in order to make their contacts with purchasers within the Community. Accordingly the Community's jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognized in public international law. (emphasis supplied). *Id.* at ¶ 18.

[164] The Commission has always asserted its jurisdiction on the "effects doctrine." *See, e.g., Continental Can* 1972 J. O. (L7) 25, *on appeal* Europemballage Corp. & Continental Can Co. v. EC Commission, Case 6/72 [1973] E.C.R. 215, [1973] CMLR 199; *Cast Iron and Steel Rolls,* 1984 O.J. (L317) 1, [1984] 1 CMLR 694; *Franco-Japanese Ballbearings*, 1974 O. J. (L343) 19, [1975] 1 CMLR D8; *Preserved Mushrooms*, 1975 O. J. (L29) 26, [1975] 1 CMLR D83; *see also* James J. Friedberg, *supra* note 2, at 318-323 & n.134 (arguing that in *Wood Pulp* case, the Court of Justice adopted the "effects doctrine").

[165] FRANK L. FINE, *supra* note 18, at 25.

[166] COOK & KERSE, *supra* note 96, at 9-10.

An examination of the history of negotiation of the Regulation shows that, at the same time as the Council Working Group was heavily engaged in the detail discussion of the individual articles of the Regulation, the Court was seized of the jurisdiction questions raised by the *Woodpulp* case. For this and other reasons the Working Group was reluctant to enter into the issue. So although the issues of jurisdiction, both substantive and enforcement, were raised in the discussions, no Article addresses them expressly. *Id.*

[167] Merger Regulation, *supra* note 24, Recital 11 reads:

Whereas a concentration with a Community dimension exists where the aggregate turnover of the undertakings concerned exceeds given levels worldwide and throughout the Community and where at least two of the undertakings concerned have their sole or main fields of activities in different Member States or where, although the undertakings in question act mainly in one and the same Member State, at least one of them has substantial operations in at least one other Member State *whereas that is also the case where the concentrations are effected by undertakings which do not have their principal fields of activities in the Community but which have substantial operations there.* (emphasis supplied).

[168] There are numerous cases in which the Commission has asserted jurisdiction over merger involving only foreign but meeting the Community dimensions thresholds. *See, e.g., Boeing/McDonnell Douglas Case*, Case No. IV/M. 877 (1997); 1997 O.J. (L336) 16; *see also* Robert J. Guttman, *What they said: Competition Commissioner Mario Monti,* EUR. (DOW JONES), July 1, 2000, at S1S3; 2000 WL 20682281. (Commissioner Mario Monti was quoted as saying, "we assess mergers between companies based in the European Union or mergers between one company based in the EU and one based elsewhere or even mergers between two companies based outside the European Union").

[169] Agreement on the European Economic Area, 1994 O.J. (L1) 446, art. 60 and Annex XIV. For more information EFTA States and EEA Agreement, *see supra* footnotes 43 – 48, and accompanying text.

the Merger Regulation, and provides that where a concentration creates or strengthens a dominant position as a result of which effective competition would be significantly impeded within the EEA or a substantial part of it shall be declared incompatible. Article 57(2) provides that the EU Commission while reviewing a merger should take account of its effect within the EFTA States. It further provides that the ESA will review a merger that meets notification thresholds of EFTA States (*i.e.*, EFTA dimension).

Article 58 imposes a specific duty on both the Commission and ESA (hereinafter referred to as the "Authorities"), to co-operate in order to develop and maintain uniform surveillance throughout the European Economic Area in the field of competition and to promote the homogeneous implementation, application and interpretation of the provisions of the EEA Agreement. Protocol 24[170] sets out the framework for cooperation in the review of concentrations.

The Commission and the ESA are obliged to cooperate where:

(a) the combined turnover of the undertakings concerned in the territory of the EFTA States equals 25 per cent or more of their total turnover within the territory covered by the EEA Agreement; or

(b) each of at least two of the undertakings concerned has a turnover exceeding ECU 250 million in the territory of the EFTA States; or

(c) the concentration is liable to create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the territories of the EFTA States or a substantial part thereof.[171]

In addition to the above, the Authorities are also obliged to cooperate (i) where the concentration threatens to create or strengthen a dominant position which would significantly impede effective competition in a distinct market within an EFTA State, irrespective of whether that distinct market constitutes a substantial part of the EEA, and (ii) where an EFTA State wishes to adopt measures to protect legitimate interests, such as public security, plurality of media and prudential rules.[172] Article 6(2) grants the EFTA

[170] Protocol 24 on Cooperation in the Field of Control of Concentrations, 1994 O.J. (L1) 188.[Hereinafter "Protocol 24"].
[171] *Id.* art. 2(1).
[172] *Id.* art. 2(2).

States the right to appeal to the European Court of Justice, invoking the same grounds as an EC Member State may invoke under article 173 EC Treaty.[173]

Protocol 24 provides rules for assistance and cooperation between the Authorities at all stages of the proceedings. Within three working days, the Commission must provide the ESA copies of the notification of cases that fall within the purview of the Protocol, and, copies of the most important documents lodged with or issued by the EU Commission as soon as possible.[174] The EFTA States and ESA may be represented at the hearings of the undertakings concerned.[175] They are also entitled to be present in the EC Advisory Committee on Concentrations and to express their views therein. However, they do not have a right to vote.[176]

The Commission is granted the power to obtain all necessary information from the ESA and EFTA States. The Commission is obliged to provide the ESA copies of requests and decisions seeking information from an undertaking in the EFTA State. The Commission can also request the ESA to undertake an investigation within its territory, and to transmit the results of such an investigation to the Commission immediately after its completion. Where the Commission conducts investigations within the Common Market, it shall inform the ESA of the fact that such an investigation has taken place and, if requested by the ESA, the Commission shall transmit in an appropriate way the relevant results of the investigation to the ESA.[177]

F. Recent Developments in the EC Competition Policy: Establishing a Network for Cooperation

On September 27, 2000 the Commission adopted a formal proposal for a new Council Regulation to reform the almost forty year-old Regulation, which implements rules for the application of articles 81 and 82.[178]

Regulation No. 17 was originally designed for a Community of six Member States. It gave the Commission, national competition authorities (NCAs) and national

[173] *Id.* art. 6(2).
[174] *Id.* art. 3(1).
[175] *Id.* art. 4.
[176] *Id.* art. 5(3).
[177] *Id.* art. 8.

courts (NCs) the right to apply articles 81(1) and 82 directly. However, it reserved the right to grant exemptions from article 81(1) prohibitions under article 81(3) exclusively to the Commission. Regulation No. 17 thus established a highly centralized authorization system for all restrictive agreements requiring exemption.

With the imminent enlargement of the EU and a new global economic environment, Regulation No. 17 would most likely prove to be an ineffective mechanism for ensuring competition within the Common Market.[179] Anticipating failure of the Regulation, the Commission proposed a new regulation whose principal aims "are to provide more efficient protection of competition by refocusing Commission action on enforcement, to create a more level playing field and more consistent application of Community competition law while ensuring an adequate level of certainty for companies and reducing the bureaucracy currently imposed on business."[180]

The new regulation proposes to replace prior notification (and comfort letters) by a directly applicable system of exemptions under which agreements are to be regarded as lawful where they meet the prescribed conditions. It will therefore divest the Commission of its exclusive power to declare an agreement lawful, and vest that power in the NCAs and NCs, in addition to the Commission. The NCAs and NCs would now be able to apply Community law directly. One of the fundamental aims of the proposed regulation is to ensure that the Commission and the NCAs form a network of competition authorities that cooperate closely in the application of articles 81 and 82. The network will incorporate mechanisms that seek to preserve the consistency of Community competition law. The main features of the new regulation are:

1. Replacement of prior notification (and comfort letters) by a directly applicable system of exemptions under which agreements are to be regarded as lawful where they meet the prescribed conditions.

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[178] Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, COM(2000) 582; 2000 O.J. (C 365E) 284.

[179] *See* Alexander Schaub, *Continued Focus on Reform: Recent Developments in EC Competition Policy*, Speech Before Fordham Corporate Law Institute, 28th Annual Conference on International Antitrust Law and Policy, New York, New York, (October 25-26, 2001) (on file with the author).

[180] European Parliament Report on the proposal for a Council regulation on the implementation of the rules on competition laid down in Articles 81 and 82, EP document no. A5-0229/2001, at 21.

2. Decentralization of authority of the Commission with respect to providing exemptions under article 81(3) to national competition authorities (NCAs) and national courts (NCs).
3. Creation of a more level playing field in the Common Market, by making Community competition law applicable, to the exclusion of national competition laws, to restrictive practices (prohibited under articles 81 and 82) that may affect trade between Member States.
4. Creation of a common network linking NCAs and the Commission, to ensure, *inter alia*, cooperation on fact-finding and information; case allocation; and the consistent application of EC law.

Chapter V of the new regulation sets forth the framework for collaboration. Since both the Commission and the NCAs would have concurrent competence over the application of Community competition law, the cooperation mechanism ensures an efficient allocation of cases, generally to a single authority which is considered the "best placed" to act. The objective of creating a one-stop shop could fail if the NCAs were bound by their national competition laws to continue dealing with a case charged to the Commission. Thus, the regulation recommended that parallel proceedings should be avoided. Where more than one NCA wishes to assume jurisdiction over a single case, the Commission is empowered to withdraw that case from the NCAs and to deal with it itself. The Commission would also be "best placed" to deal with cases that raise policy issues requiring a community solution.[181]

Article 11 of the regulation requires NCAs to inform the Commission at an early stage of cases being assessed under articles 81 and 82. The communications between the Commission and the NCAs will be conducted through electronic means, and information concerning cases will be made available to all NCAs via the network. Article 11 requires compulsory consultation in cases where the NCAs aim to terminate or penalize an infringement of articles 81 and 82. The objective is to allow for coordination of prohibition decisions and equivalent decisions in order to ensure consistent application. Article 12 of the new regulation provides for the exchange of any information, including confidential information between the Commission and the NCAs, and among the NCAs,

[181] Alexander Schaub, *Continued Focus on Reform, supra* note 179, at 10.

as well as its use as evidence in proceedings applying Community competition law. The exchange of information would allow the transfer of a case from one authority to another in the interest of effective case allocation.

On September 6, 2001, after examining the Commission's proposal, the European Parliament adopted a resolution supporting the proposal. The European Parliament noted that in light of the forthcoming enlargement of membership, a fundamental reform of the Community competition policy is required. The proposal is now being considered by a working group within the Council of Ministers, and it is expected that the working group will continue to work on the proposal into 2002. Once the proposal is adopted, it will be effective after one year from the date of adoption. This window of time will allow the Member States to adapt their laws to the new system, and will allow the Commission to adopt a new implementing regulation.[182]

G. Commentary: Lessons to be Learned

1. Creating a Global Supranational Institution for Merger Control

The level of transnational merger activity across the globe today is more or less the same as the level of trans-Community merger activity in the European Community in the late 1980s when the Merger Regulation was adopted. Does that mean the world should follow the lead of the European Union and create a global supranational institution for reviewing mergers? One might ask whether the countries of the world, through rapid trade liberalization in the last few years, have achieved a level of economic integration comparable to what the member states of the EU had achieved in 1989? And is there any agreement among the countries of the world, equivalent to the Single European Act, to achieve a single Common Market by a certain date? The answer to each of these question is no.

There is certainly no agreement among the countries of the world to achieve a single market by any given date. It is true that under the WTO's trade liberalization agreements, nations are dismantling barriers to trade and the world is becoming a more

[182] *Id.* at 7.

seamless global marketplace. Nonetheless, the state of global integration is nowhere close even to creating a customs union, let alone the EU's current integration level achieved through the establishment of a free trade area and a common currency. Moreover, there is no impetus for the developed countries, whose firms are most active in the current merger and acquisition frenzy, to cede their authority to any supranational institution. This is particularly so given that there is no supranational institution, comparable to the Commission, that has experience in enforcing competition law internationally. The closest parallel to the European Commission at the international level is the WTO. Can the WTO, for example, assume the role of an international antitrust enforcer? The WTO neither has the experience of administering international antitrust law nor the bureaucratic strength and political support that was enjoyed by the Commission at the time of the adoption of the Merger Regulation. Further, the Commission's authority to make a decision is qualified by 1) its obligation to maintain close links with the competition authorities of the Member States, 2) its obligation to give due consideration to the opinion of the Advisory Committee, and 3) a right to appeal to the Court of First Instance and the European Court of Justice. Such an institutional and administrative framework would represent a dramatic re-working of the Dispute Settlement Understanding of the WTO. The EU experience would suggest that the time is not yet ripe to propose the creation of a supranational institution for reviewing transnational mergers.

2. Delegation of Merger Review to a Supranational Institution

Even if the nations of the world were to agree to the creation of a supranational competition institution, that does not mean that they would also allow it to have final authority to review transnational mergers. We have noticed above that it took a family of nations, which vowed to create a single market among themselves through economic integration and monetary union, twenty-three years to come to any consensus on control of mergers by a supranational body, the Commission. Although the Merger Regulation "embodied an apparent Community-level consensus on goals, merger control is in fact deeply entangled with national politics."[183] Indeed, control over mergers is an essential tool of government policy for keeping markets and the economy stable within borders. Member States were extremely reluctant to cede authority to the Commission, which is a political institution rather than an independent regulatory body. Yet, Member States agreed to cede their authority only so as to facilitate their national undertakings' quest for a Community-wide presence through mergers and acquisitions. As a compromise, through the so-called German Clause, the Member States were granted a right to request that the Commission refer to the requesting state's competition authority a concentration that meets the Community dimension thresholds, but raises significant anti-competitive effects within the requesting state's borders.[184] This exception highlights the importance to national governments of competence over mergers.

3. **Recent Reform to the Competition Policy: Adoption of a Lead Jurisdiction Approach**

The recent proposal for new regulation to implement articles 81 and 82 recast doubts on centralized governance to adapt to growing membership of the EU. These latest efforts would set a pattern for a global competition law initiative. The crux of the proposed regulation lies in establishing a network of competition authorities that cooperate closely among themselves. To facilitate such cooperation, the proposed regulation recommends establishing a electronic network for information exchange. To avoid inconsistent outcomes, it provides for compulsory coordination among NCAs in case any one of them wishes to terminate or penalize an infringement of articles 81 or 82. To avoid duplication of efforts by NCAs, the proposed regulation provides that the "best placed" authority should review the infringement. And to avoid parallel proceedings, the proposed regulation recommends that national laws be amended so as to allow suspension or termination of proceedings. Each of these elements could find its way into an IMCR.

[183] *See* Ethan Schwartz, *supra* note 63, at 627.
[184] Merger Regulation, *supra* note 24, art. 9.

4. **Protocol 24: The Lead Jurisdiction Model**

Protocol 24 pursuant to the EEA Agreement provides an even more relevant pattern for a possible future IMCR, and corroborates our view that creating a global supranational institution for merger control is not a feasible solution at least in the short term. The experience of Protocol 24 warns us that even where nations have agreed to form a common economic market among themselves, it remains difficult to cede authority over merger control to a supranational institution. Protocol 24 instructs us that the most plausible merger review arrangement between and among competition agencies would be a cooperation and coordination agreement rather than creation of a supranational authority or cessation of authority in one institute.

At the same time, Protocol 24 offers us a Lead Jurisdiction model to implement the coordination agreement among the competition authorities. Acknowledging the broader scope of the Common Market vis-à-vis the EFTA territory, Protocol 24 grants *de facto* "Lead Jurisdiction" status to the EU Commission for mergers that meet the Community dimension as well as the EFTA dimension. In acting as the Lead Jurisdiction, the Commission must take account of the effects of concentration within the markets of the EFTA States, and must coordinate with the EFTA Surveillance Authority at all stages of the merger review. A parallel to this approach could be adopted within an IMCR.

5. **Notification Procedure Under the Merger Regulation**

The Merger Regulation requires complete notification in a single stage of disclosure. From September 12, 1999 to December 31, 2000, the Commission received 1573 notifications. Of 1573 concentrations notified, the Commission choose to conduct second-phase investigation in 95 cases, which amounts to 6 % of the cases notified.[185] Given the low proportion of concentrations that actually pose anticompetitive concerns, the requirement to provide complete information at the initial stage of inquiry puts an unnecessary burden on the merging parties. Form CO requires information that should be required only if after an initial inquiry the concentration appears to have potential to harm effective competition within the relevant market. The Commission subsequently recognized this problem during consultations with the Member States. To rectify it, the Commission was granted power to waive certain information requirements in Form CO.[186]

The notification procedure puts an additional burden on the parties by requiring them to provide an excessive number of copies of the notification Form and all supporting documents to the Commission.[187] Section 2.3 of Form CO requires the following information for each of the undertakings involved in the concentration:

i. World-wide turnover
ii. Community-wide turnover
iii. EFTA-wide turnover
iv. Turnover in each Member State
v. Turnover in each EFTA State
vi. The Member State, if any, in which more than two-thirds of Community-wide turnover is achieved
vii. The EFTA State, if any, in which more than two-thirds of EFTA-wide turnover is achieved.

The above information provides a sufficient basis to determine which Member State has what level of interest in the concentration. Yet, the Merger Regulation provides that copies of the notification and all supporting documents be provided to all the Member States. Even the Member States whose national markets would not be affected by the concentration are provided copies of the documents. Given the imminent enlargement of the EU, the right of the Member States to receive copies would inordinately burden the merging parties by requiring them to provide up to 37 copies of notification and all supporting documents.

Moreover, section 9.3 of Form CO requires information about the concentration in the world-wide context. In particular, the parties need to provide information about their size and competitive strength outside the EEA territory. Article 2(1)(a) of the Merger Regulation does require the Commission to take account of foreign competition while assessing the competition impact of a concentration. However, Form CO does not require the parties to inform the Commission of notification to any other competition authority. Thus, Form CO does not take account of the Commission cooperating and/or

[185] European Merger Control - Council Regulation 4064/89 – Statistics <http://europa.eu.int/comm/competition/mergers/cases/stats.html>, (visited on March 23, 2001).
[186] *See* Ridyard, *supra* note 94, 251 & n.13.

coordinating with foreign competition authorities in its review of a concentration. Although the heading of this section of the thesis is *"Lessons to be Learned"* and not *"Lessons to be Taught,"* I would nonetheless recommend here that Form CO should be amended, given the ever increasing number of merger control regimes, so as to incorporate a section that requires information about the foreign competition authorities involved in the review of the concentration. Such an approach would be useful within an IMCR, as would the acknowledgment that two-stage disclosure, on the US model, is the most appropriate format.

6. Decision-Making Procedure Under the Merger Regulation

The Merger Regulation directs the Commission to keep in close and constant liaison with the competent authorities of the Member States during all the stages of review of a concentration.[188] The Member States are allowed to express their opinion at any or all stages of such review.[189] In addition, after its second-phase investigation, the Commission is obliged to seek comments on its draft decision from an Advisory Committee composed of all the Member States. The Advisory Committee can take its decision by vote. The Commission after taking into account the opinion of the Advisory Committee makes its final decision, which can be appealed to the Court of First Instance.

The Merger Regulation stresses the need for consultation with all the Member States during all the stages of a merger review. This right to the Member States is given perhaps by virtue of their membership of the Community alone, and not because of the effect the merger may have on their domestic markets. The Merger Regulation itself recognizes the concept of "a distinct market."[190] A market is distinct if the brunt of anti-competitive effects flowing from a merger would be felt in it. A logical inference from the concept of distinct market is that there are markets which bear little or no effect if a merger is cleared or blocked. Thus, from our perspective of inquiry, that is formulating a global merger control regime, a question then arises is: should all the parties member to an international merger control regime be given a right to be consulted during the merger

[187] *See* note 122, and accompanying text.
[188] Merger Regulation, *supra* note 24, art. 19(2).
[189] *Id.*
[190] *Id.* art. 9.

review process? Moreover, should all the member parties be given a right to sit and vote on an advisory committee?

The answer to the preceding two questions, in my opinion, should be "No." Members party to an international merger control regime should not be allowed a right to be consulted simply by virtue of its membership to the regime. Instead, that right should be given only if a member state can show that its domestic markets would be affected adversely if a merger is allowed to proceed. Such short-listing of the member would reduce the burden on the coordinating agency and expedite the consultation procedure.

Similarly, only members with proven interest in a merger should be allowed to sit and vote on an advisory committee. To allow members with no interest in the merger to sit and vote on the committee would distort the outcome of the review process. Since it may be relatively easy to influence the vote of an uninterested member state, allowing uninterested members to vote on the opinion of the advisory committee could also allow subjective concerns unrelated to competition to creep into the decision-making process.

7. Summary of the Lessons Learned

i. Nation states will not simply cede to a supranational institution their authority to review transnational mergers that have effect within their borders.

ii. In addition to the above, and given that trade liberalization has a long way to go before achieving the highest levels of economic integration among the nation-states of the world, the conditions are not conducive for the creation of a global supranational institution for transnational merger review.

iii. Even if nation-states achieve high levels of economic integration, the recent proposed EU regulation for implementing articles 81 and 82 instructs us that as the number of members to a multilateral regime grows, a centralized mode of ensuring competition within the common market becomes ineffective. It also instructs us that in a global market, the "best placed" (or the Lead Jurisdiction) approach would be efficacious in dealing with cases having transnational effect.

iv. Moreover, Protocol 24 also instructs us that, irrespective of the level of economic integration among member states, the most practical solution for multijurisdictional transnational merger review would be cooperation and coordination among competition authorities led by a jurisdiction most affected by the transaction.

v. The recent proposed regulation instructs us that in order to facilitate cooperation and coordination among NCAs, an electronic network for information exchange be established.

vi. Requiring premerger notification in one stage poses unnecessary burdens on the merging parties; therefore, the notification procedure should be two-tiered.

vii. The parties should not face the burden of providing copies of the notification and supporting documents for all the member states party to a merger control regime.

viii. The notification form should have a section that requires identification of all the competition authorities that have been notified or will be notified of the concentration.

ix. Only member states likely to be affected by the proposed merger should participate in the merger analysis conducted through the Lead Jurisdiction.

x. The merging parties should have a right to appeal the decision of the Lead Jurisdiction before an arbitration panel, or before another appropriate forum.

IV
Comparison Between the US and EC Merger Control Laws

The last two chapters were devoted to the study of the merger control laws of the US and EU. This Chapter will highlight the differences and similarities between the two merger control regimes in order to help define the contours of an IMCR.

A. Objective of Competition Laws in the US and the EU

The two jurisdictions have deployed competition law to achieve different objectives. The primary objective of the EU's competition law was to promote the integration of the separate economies of the member states into a unified "Common Market," while the other major, albeit secondary, goal was to promote effective competition in the Community.[1] By contrast, the US antitrust laws were enacted to maintain competition within a market that had been established almost a century previously and guaranteed by the Commerce Clause of the US Constitution.[2] The difference in the basic purpose of the competition law in the US and the EU has, however, assigned the antitrust authorities different roles to play. While US antitrust

[1] 2 BARRY HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 5 (Prentice Hall Law & Business, Supp 1990).

[2] One of the chief goals of the [US] Constitution was to create an area of free trade, a truly "Common Market," among the United States. The Constitution accomplished that goal through the Commerce Clause, which provides that "Congress shall have power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."
In Gibbons v. Ogden, 22 US (9 Wheat) 1, 190 (1824), the Supreme Court clearly asserted the primacy of Congress' commerce powers over inconsistent state legislation and struck down a state-created monopoly. In the years since *Gibbons*, courts have often invoked the Commerce Clause to safeguard the US Common Market at the expense of anticompetitive state laws. (footnotes omitted). *See* James F. Rill, *Creating and Maintaining Competition in a Common Market: The Future of Antitrust in an Integrated World Economy,* 1992 U. CHI. LEGAL F. 263 (1992) (publication page references are not available in WESTLAW).

authorities are responsible only for maintaining conditions of fair competition within the US market, the EU competition authority is responsible for both creating and maintaining a Common Market. Such a difference in the role to be played by antitrust authorities has led them to the adoption of different enforcement policies.[3] However, with the achievement of economic integration among the EU Member States, the EU competition authority is now focusing on purely competition-based concerns, and thus narrowing the traditional difference between US and EU competition polices.

In addition to the general competition law, the merger control laws of the two jurisdictions were also enacted to achieve somewhat dissimilar objectives. Whilst the US Congress, in enacting and amending section 7 of the Clayton Act, intended to halt "the rising tide of economic concentration in the American economy," the EU Council, in passing the Merger Regulation, intended to facilitate trans-Community mergers by establishing a single and coherent test for reviewing mergers with a Community dimension and preventing non-EC firms from gaining a dominant position within the Common Market.[4] The difference in objectives in enacting the merger control laws has bearing on the merger review process used by the two jurisdictions.[5]

B. General Procedural Dissimilarities

What follows is a brief description of some of the general procedural dissimilarities between the U.S and the EU merger control laws.

1. Powers of the Relevant Agencies

The EU Commission acts both as a prosecutor and judge, and does not need the blessing of a court to enjoin a merger.[6] The decision by the Commission can be judicially

[3] *Id.*

[4] *See* Chap. III, section C(8) on page 137. *See also* Margarida Afonso, *A Catalogue of Merger Defenses Under European and United States Antitrust Law*, 33 HARV. INT'L L.J. 1, 65 (1992).

[5] *See* Robert Pitofsky, Prepared Remarks, Staples and Boeing: What They Say About Merger Enforcement at the FTC (Washington, D.C. Sept. 23, 1997) *available at* <http://www.ftc.gov/speeches/pitofsky/STAPLESspc.htm> (visited on April 13, 2001). (the antitrust authorities in Brussels and in Washington are enforcing two different statutes with modestly different emphases.)

[6] *See* Council Regulation No. 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings, 1989 O.J. (L 395) 1, *reprinted as corrected in* 1990 O.J. (L 257) 14, and *amended by* Council Regulation (EC) No. 1310/97, 1997 O.J. (L 180) 1, art 7. [Hereinafter "Merger Regulation"].

reviewed by the CFI and ECJ. However, the review available is based on limited grounds of annulment[7] and therefore does not amount to full appeal. Moreover, Courts show great deference to the economic analysis of the facts and circumstances performed by the Commission. Additionally, initiation of action before the Courts does not automatically suspend the Commission's decision from taking effect.[8]

On the other hand, if the US DoJ comes to a conclusion that a merger will create or enhance market power, it can either fashion a remedy that will eliminate the competitive problem, or if it wishes to enjoin the merger it needs to seek an injunction in federal court to that effect.[9] If the request for an injunction is refused by the federal court, the DoJ may bring a regular action against the parties in a federal court. However, the FTC has both prosecutorial and decision-making powers. The prosecutorial powers of the FTC are exercised by the Bureau of Competition, while decision-making power, at first instance, is exercised by an Administrative Law Judge – an official of the FTC. Appellate decision-making power is exercised by the full Commission, that is, by all five Commissioners of the FTC. However, if FTC wants a preliminary injunction, it also must obtain such relief from the district court. The FTC has no authority, acting under its administrative powers, to impose preliminary relief.

Another difference in powers of the EU Commission and the US antitrust authorities is that the EU Commission can challenge only those transactions which are notifiable under the Merger Regulation, whereas the DoJ and FTC can challenge a transaction even if it need not to be notified under the HSR Act.

Moreover, US antitrust authorities can take the merged entity to court even after clearing the merger if it engages in abuse of the market power it gained because of the merger. The EU Commission does not have such power.[10]

Arguably, articles 81 and 82 of the EC Treaty empower the EU Commission to initiate proceedings against any entity engaged in abuse of market power, but it seems

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[7] TEC, *supra* Chap. III, note 10, art. 230(4).
[8] *Id.* art. 242.
[9] 15 USC. § 18A(f); *see also* Robert Pitofsky, Chairman, Prepared Statement of the Federal Trade Commission, Before the Committee on the Judiciary, Subcommittee on Antitrust, Business Rights, and Competition, United States Senate (July 24, 1997); 1997 WL 414858 (F.T.C.).

that the Commission honors its pledge that the Commission will not invoke articles 81 and 82 against the merged entity after the merger is effectuated – a pledge that was given by Sir Leon Brittan to the EU Council when it approved the Merger Regulation.[11] Because of its unwillingness to check abuse of market power resulting from the merger once a merger is cleared, the EU Commission often scrutinizes mergers more closely, and thereby assumes the role of regulating markets prospectively instead of simply ensuring free competition within them.

2. Private Parties Right to Challenge

Another substantial procedural difference between the US and the EU merger control regimes is the right of private parties to challenge merger transactions. If a merger falls within the purview of the Merger Regulation, third parties have no right to challenge the merger. However, article 18 of the Merger Regulation allows parties, who may be adversely affected by a merger to make representations before the Commission.[12] Moreover, private parties may still challenge such a merger under articles 81 and 82 of the EC Treaty in a national court, or may lobby a Member State that has a market affected by the merger to request the Commission to refer the case to the national competition authority by invoking the so-called German clause.

In the US, private parties have fairly broad rights to challenge a merger, and may seek divestiture even when an antitrust agency has cleared the transaction.[13] In order to invoke that right the parties must show that they would sustain "antitrust injury" if the transaction is cleared.[14]

The private parties' right to challenge a merger in the US could pose a significant obstacle to any effort at streamlining the transnational merger review process. This

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[10] Michael A Taverna, *Failed Mega-Merger Causing Shock Waves*, 155 AVIATION WK. & SPACE TECH., No. 2, July 9, 2001, at 27; 2001 WL 7150775. (Monti acknowledged that Europe was often pushed to scrutinize mergers more closely than other areas because "it lacks the ability to take companies to court for abuse of market power after a merger has been concluded.")

[11] *See* Chap. III, note 101 and accompanying text.

[12] The Merger Regulation gives administrative and management staff, and recognized workers' representatives of the merging parties the opportunity to be heard. This right consists of the right to intervene, and presumably the right to appeal an objectionable Commission decision to the Court of Justice., Merger Regulation, *supra* note 6, art. 18.

[13] California v. American Stores Co., 495 US 271 (1990); 110 S. Ct. 1853 (1990).

[14] Atlantic Richfield Co. v. USA Petroleum, Co., 495 US 1097 (1990).

problem was highlighted in *Consolidated Gold Fields* v. *Anglo American Corp.,*[15] where a tender offer was investigated at the national level by the antitrust authorities of Australia, the EC, the United Kingdom and the United States. Each authority approved the transaction, but a private suit in the US federal court blocked the offer "on the basis of a product market definition and a concentration threshold that had been rejected by both the British and American authorities."[16] The Special Committee on International Antitrust of the American Bar Association has recognized this problem and noted that "it is unlikely that the private right of action under section 7 of the Clayton Act will be legislatively cut off."[17] The Committee recommended a legislative limit on private rights of suit under section 7 of the Clayton Act and similar merger laws where more than one jurisdiction is affected. Providing reasons for such a recommendation, the Committee noted:

> Multinational mergers directly affect the economic structure of nations, giving rise to considerations of national policy and potential conflicts with the policies of other nations. Sovereign governments are in the best position to evaluate and weigh these policy considerations, and the motivation underlying national merger enforcement reflects the consideration of these issues. Private suits do not.[18]

In addition to the private parties' right to challenge a merger, state attorneys general in the US can also challenge a merger in a state or federal court exercising *parens patriae* jurisdiction. However, with the execution of information sharing and coordination protocols between the NAAG and federal antitrust agencies, the risk of separate challenge by State Attorneys General has been considerably reduced.

C. Premerger Notification Procedural Dissimilarities

1. Information Requirements: One-Step Filing vs. Two-Step Filing

The EU's Form CO, and the HSR Notification and Report Form require similar information concerning the parties, transaction, financial and sales data, in addition to other basic information. Form CO, however, requires much more detailed information

[15] 698 F. Supp. 487 (S.D.N.Y.), *aff'd*, 871 F. 2d 2525 (2nd Cir.) *on remand*, 713 F. Supp. 1457 (S.D.N.Y), *cert. denied*, 492 US 939 (1989).
[16] ABA Report, Special Committee on International Antitrust, 196 (Chicago, 1991).
[17] *Id.*

with respect to "affected markets," that is, markets in which the merging parties directly compete and/or have vertical relations. For each affected market, section 7 of Form CO requires information, for the previous three financial years, specifically with respect to i) EEA territory, ii) the Community as a whole, iii) the territory of the EFTA States, and iv) individual Member State of the Community and EFTA. The information required includes:

> estimates of market sizes by volume and value, sales and market share by value and volume of the parties, market share by value for competitors, import data and information on tariffs, transport costs, and other costs affecting imports, transportation costs and other barriers to intra-EEA trade, a description of how the parties produce and sell their products, comparison of price levels between parties in each Member State and EFTA State, comparison of price levels between the Community, the EFTA States and other relevant production areas and a description of the nature of vertical integration of the parties compared with competitors.[19]

The HSR Notification and Report Form, on the other hand, does not require detailed information concerning market shares, etc. Instead, it requires information on sales by reference to Standard Industrial Classification Codes (SIC Codes) through which competitive overlaps are determined. If the initial review of the notified transaction warrants further investigation, only then will a "second request" for information be issued. However, the second request usually is very demanding and requires detailed information about the proposed transaction, industry, and other key facts.[20]

Although both systems require extensive information, the US put this burden only on the parties whose proposed transaction has *prima facie* raised anticompetitive concerns. Given that 95 percent of mergers do not raise any anticompetitive concerns, requiring a substantial amount of information from the merging parties at the time of filing notification poses an undue burden on them. Indeed, there is a consensus among

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[18] *Id.*

[19] Michael Reynolds, *EU and US Merger Control Procedural Harmonisation*, *in* POLICY DIRECTIONS FOR GLOBAL MERGER REVIEW 117 (Special Report, Global Forum for Competition and Trade Policy, 1999).

[20] US DOJ, International Competition Policy Advisory Committee, *Final Report*, at 122 (2000), *available at* <http://www.usdoj.gov:80/atr/icpac/finalreport.htm> (visited on Jan. 04, 2001) [Hereinafter "ICPAC, Final Report"].

commentators that the information required at the initial stage by EU Form CO is too detailed, and burdensome for the parties.[21]

2. **Notification Thresholds**

The notification thresholds under the HSR Act are based on annual sales and total assets of the acquired and acquiring parties in the United States. The combination of assets and sales ensures that only transactions that have the potential to affect US commerce fall within the premerger notification regime. Moreover, the HSR Act provides a set of useful exemptions.

In contrast to the HSR Act, the notification thresholds under the Merger Regulation are based on the world-wide and Community-wide turnover of the merging parties. Such thresholds, based solely on turnover, are likely to catch more transactions having no effect on the Common Market than would thresholds based on annual sales and total assets.[22] In addition, the Merger Regulation does not list any exemptions, *e.g.*, relating to the acquisition of "foreign assets" by another foreign person.

3. **Triggering Events**

The two merger control regimes also differ with respect to the events that trigger notification. While the Merger Regulation requires notification "not more than one week after the conclusion of the agreement or the announcement of the public bid, or the acquisition of a controlling interest,"[23] notification in the US can be filed as early as the date of the execution of a non-binding letter of intent. This difference is significant for transnational mergers if the EU Commission accepts notification "only after" the execution of a definitive agreement. The Merger Regulation is silent on the submission of a notification prior to the events mentioned, and arguably parties can file notification

[21] *See* Michael Reynolds, *supra* note 19; James S. Venit & William J. Kolasky, *Substantive Convergence and Procedural Dissonance in Merger Review, in* ANTITRUST GOES GLOBAL, WHAT FUTURE FOR TRANSATLANTIC COOPERATION? 79, 96 (Simon J. Evenett et al. eds., Washington, D.C.: Brookings Institution Press, 2000). [Hereinafter "Venit & Kolasky"].
[22] *See, e.g.,* Royal Bank of Canada/Bank of Montreal, Case IV/M.1138, 1998 O.J. (C 144) 4; JCSAT/SAJAC, Case No. IV.M.346, 1993 O.J. (C 219) 1. *See also* Rachel Brandenburger & Thomas Jassens, European Merger Control: Do the Checks and Balances Need to be Re-set", Speech Before Fordham Corporate Law Institute's 28th Annual Conference on International Antitrust Law and Policy 22 (October 25-26, 2001) (on file with the author).
[23] Merger Regulation, *supra* note 6, art. 4(1).

prior to the stated events so long as they can furnish all the information requested in Form CO. However, according to one commentator, the Commission would be "reluctant to accept notification (thus starting the initial one-month period) prior to the execution of a binding agreement or launching of a public bid."[24] He further argues that since "the Merger Regulation permits the Commission to examine and approve with a notified concentration certain 'ancillary restraints' and certain cooperative aspects of full-function joint ventures; in the absence of a definitive agreement, the Merger Task Force would not be in a position to evaluate such restrictions."[25]

The HSR Act, on the other hand, gives merging parties the flexibility to file notification early in the transaction planning process (that is, during negotiations), at an intermediate stage (after signing the definitive agreement) or nearer to the end of the transaction process (generally no later than 30 days before the expected closing or completion, or 15 days in the case of cash tender offers). The flexible approach adopted by the HSR Act is beneficial both for the antitrust agencies and the notifying parties.

The difference in triggering events between the two jurisdictions is not a major one and could easily be resolved by an IMCR. The EU might be reluctant to accept notification of a transaction which has not yet been finalized, as that would possibly waste the scarce resources of the Commission. However, if the EU agrees to change its one-step filing to a two-step filing, and requires filing fees from the notifying parties, the foregoing cause of reluctance may be overcome.

4. Review Period

Under both the US and EU merger control regimes, the time period for initial review is similar (one month/30 days). During the initial review almost 95 percent of all notified transactions get cleared both in the US and the EU.[26]

However, the timetable of the two regimes differs for the second-stage review. The Merger Regulation provides a much stricter time frame for all stages of a merger review. It gives the Commission a four month period to conclude its second phase

[24] Michael Reynolds, *supra* note 19, at 113.
[25] *Id.*

investigation. On the other hand, the HSR Act gives the DoJ and FTC an additional 30 days (or 15 days, in case of cash tender offer) to decide during the second-stage investigation whether to challenge the transaction.

For most transactions that are notified, the time periods for merger review of the two regimes are in harmony. It is for the minority of transactions, and indeed for those that require coordination, that the timetable of the two regimes differ. Owing to the basic structural difference in the authority of the EU Commission and of the US DoJ, adhering to a definitive time limit for a second-stage review may be a problem for the US The US International Competition Policy Advisory Committee ("ICPAC"), in its final report noted that "merger review periods should not be open ended and that companies derive value from certainty with respect to transaction planning."[27] In the U.S context, ICPAC recommended adherence to "nonbinding but notional time frames for second-stage review that vary in relation to the relative complexity of the transaction."[28] Because of the involvement of the federal courts in the merger review process in the US, a definitive time frame would be hard to prescribe. However, the courts may be instructed to give fast track priority to hearing merger cases filed by the DoJ or the FTC.

D. Substantive Evaluation

Owing to the difference between the objectives of competition policy of the US and EU, the two jurisdictions take somewhat different approaches to analyzing a merger. US merger law is consumer oriented. It focuses on the impact of a merger on consumers, *i.e.*, whether the consumers will be worse off or better off after the merger. Put another way, merger analysis is geared to ascertaining the effects of a merger on future prices.[29] US merger law is tolerant of single firm growth and even dominance on the theory that competition law should not punish those who have gained dominance through efficient use of resources, hard work, and innovation, and did not resort to exclusionary and

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[26] *See* ICPAC, Final Report, *supra* note 20, at 112, and European Merger Control - Council Regulation 4064/89 – Statistics http://europa.eu.int/comm/competition/mergers/cases/stats.html (visited on April 10, 2001).

[27] ICPAC, Final Report, *id.* at 114.

[28] *Id.*

[29] Pitofsky, Staples and Boeing, *supra* note 5.

anticompetitive tactics.[30] EC merger law, on the other hand, focuses more on the possible increase in the "leverage that can be exercised by a dominant firm and the possible impact of the merger on competitors,"[31] in addition to taking into account the impact of the merger on consumers.[32] Professor Kovacic, summarizing the difference in approach taken by US antitrust authorities and the EU Commission, noted that the EU Commission while analyzing a merger is more likely to:

(1) define relevant markets more narrowly;
(2) find substantial market power at lower market-share thresholds;
(3) reflect solicitude for the well-being of individual competitors, rather than focusing more single-mindedly on a transaction's effect on the choices available to users generally; and
(4) adopt a more expansive definition of dominant firm behavior that will be considered unlawfully exclusionary.[33]

While I tend to agree with this assessment, it is not always obvious that the US position is preferable to the EU position.

1. **Points of Convergence**

Lately, the Commission and the European Court of Justice have taken steps and rendered decisions that have narrowed the differences between US and EU substantive approaches to evaluating mergers.

a. *Substantive Test: Dominant Position vs. Substantial Lessening of Competition*

The "dominant position" test employed by the EU Merger Regulation has changed since the Regulation first came into force. Commenting on the evolution of the test, the Commission has said, this is inevitable "since markets are evolving and [the

[30] United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416, 430 (2d Cir. 1945).("The successful competitor, having been urged to compete, must not be turned upon when he wins.")
[31] Pitofsky, Staples and Boeing, *supra* note 5.
[32] Eleanor M. Fox, *Antitrust Regulation Across National Borders: the United States of Boeing Versus the European Union of Airbus*, 16 BROOKINGS REVIEW, No. 1, at 30; 1998 WL 10684773.
[33] William E. Kovacic, *Merger Enforcement in Transition: Antitrust Controls on Acquisitions in Emerging Economies*, 66 U. CIN. L. REV. 1075, 1086 (1998) (Footnotes omitted).

Commission's] approach must be adapted to constant changes in the competitive environment."[34]

Starting with Nestlé/Perrier,[35] the Commission has interpreted the Merger Regulation as applying not only to situations of single dominance but also to the creation or strengthening of a collectively held dominant position. The European Court of Justice in *Kali und Salz*,[36] and the Court of First Instance in *Gencor*[37] confirmed that collective dominant position does not fall outside the scope of the Regulation.[38] Since then the Commission has expanded the notion of collective dominance to cover a wide array of factual situations.

The ECJ's decision in *Kali* has converged the merger standards of the US and EU in a most fundamental way. The decision not only clarified that the Merger Regulation also applies to oligopolistic dominance – which has traditionally been the major focus of the US merger review – but also "required that the Commission apply a nuanced, multifaceted microeconomic analysis to determine the potential for coordinated behaviour in the market under review, thereby rejecting reliance on a laundry list of factors that could, in theory and under certain circumstances, lead to coordinated effects."[39] The Court's insistence on exacting economic analysis is consistent with the approach of US agencies, which they adopted pursuant to the Supreme Court's decision in *General Dynamics*.[40]

According to one commentator, the way the dominant position test has evolved in the EU, a more appropriate standard would be a substantial lessening of competition – the

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[34] Brandenburger & Jassens, *supra* note 22, at 35 (October 25-26, 2001) (on file with the author). Quoting: Gotz Drauz, *Recent Development in the Assessment of Dominance*, Address before the EC Merger Control 10th Anniversary Conference (September 2000) , *in* EC Merger Control: Ten Years on, 109 at 119 (International Bar Association: 2000).
[35] Nestlé/Perrier, 1992 O. J. (L 356) 1.
[36] France v. Comm'n and SCPA and EMC v. Comm'n, joined cases C-68/94 and C-30/95, ECR 1998 p.I, 1375 (CJ), 1998 O.J. (C 209) 2, [Hereinafter "*Kali*"].
[37] Genor v. Comm'n, Case T-102/96, 1999 ECR II 7153 (CFI).
[38] *Kali*, *supra* note 36, at ¶ 178.
[39] Venit & Kolasky, *supra* note 21, at 81-82.
[40] United States v. General Dynamics Corp., 415 US 486 (1974).

test applied in jurisdictions such as Canada and Australia, in addition to the US.[41] The UK is also considering adopting such a test.[42]

b. Definition of Relevant Markets

The US Merger Enforcement Guidelines place strong emphasis in defining the relevant markets accurately, and provide an elaborate set of rules for inclusion of products and suppliers in the relevant market.[43] The EU Merger Regulation, on the other hand, fails to provide any specific guidance on how to define product and geographic markets. However, in 1997 the EU Commission issued a notice on market definition, which adopted the "Small but Significant Non-transitory Increase in Price" (SSNIP) test to define relevant markets – a test long used by US antitrust agencies. The adoption of the SSNIP test by the EU Commission is a step toward bringing the US and EU merger control regimes closer.

2. **Differences**

Despite the growing convergence in the substantive merger standards of the US and the EU, there are however still some differences left.

a. Defining Market Concentration

In order to identify market participants and their market shares, the US Merger Enforcement Guidelines employ the Herfindahl-Hirschman Index (HHI) test to determine market concentration – a test grounded in sound economic principles.[44] The EU Merger Regulation is silent as to how to quantify market concentration.

This difference in techniques for identifying market concentration may lead to different results in merger analysis. For example, in the US, if a large firm acquires a small firm in a market with a number of small firms, the acquisition would probably be

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[41] Brandenburger & Jassens, *supra* note 22, at 41. *See also* Richard Wish, Substantive Analysis under the EC Merger Regulation: Should the Dominance Test be Replaced by Substantial Lessening of Competition?, Lord Fletcher Memorial Lecture, Kings College London (May, 2001).

[42] *See* Dept. of Trade & Industry, *Productivity and Enterprise: A World Class Competition Regime*, available at <http://www.dti.gov.uk/cp/whitepaper/5233.htm>, (last visited on Nov. 30, 2001).

[43] *See* US DoJ & FTC, *Merger Guidelines 1992*, § 2, *available at* <http://www.usdoj.gov/atr/public/guidelines/horiz_book/toc.html> (visited on Feb. 7, 2001); *see also* Margarida Afonso, *supra* note 4, at 57-58.

[44] *See* Chap. II, footnote 157, and accompanying text.

cleared by the DoJ/FTC, while the same acquisition would raise serious "dominance" concerns under EC Merger Regulation. On the other hand, the EU Commission may not find the creation of a "dominant position" in the merger of the number four and five firms in a market composed of a few large firms (oligopolistic market), whereas such a merger would probably raise the ire of the DoJ and/or FTC.[45]

b. Efficiencies Defense

The merger analysis in the US does not end with the determination that the merger would have anticompetitive effects. In accordance with the US merger policy, "the primary benefit of mergers to the economy is their potential to create economic efficiencies that can increase competition and lead to lower costs, lower prices and increased quality to customers."[46] Thus, even if a merger raises anticompetitive concerns, the DoJ/FTC would consider efficiencies that may benefit consumers. Recognized efficiencies include economies of scale, integration of production facilities, enhanced research and development capability, plant specialization, and lower transportation costs.[47] The parties claiming efficiencies must show that the efficiencies are likely to offset any likely anticompetitive effects of the merger. Although the efficiencies defense is easy to assert, it is difficult to make out.

Unlike in the US, the efficiencies defense in the EU is not considered after a determination has been made that the merger would have anticompetitive effects. Instead, efficiencies issues are "considered in the overall assessment to determine whether dominance has been created or strengthened and not to justify or mitigate that dominance in order to clear a concentration which would otherwise be prohibited."[48] The efficiencies recognized by the Commission are: "a long-term and structural reduction in the marginal cost of production and distribution, which comes as a direct and immediate result of the merger, which cannot be achieved by less restrictive means and which reasonably will be

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[45] Earl Ray Beeman, *The EEC Merger Regulation: Preparing for a Common European Market*, 19 PEPP. L. REV. 589, 627 (1992); *See also* Chap. II, footnote 157, and accompanying text.

[46] *See* Robert Pitofsky, Prepared Statement of the Federal Trade Commission, *supra* note 9, at 5; 1992 Merger Guidelines, *supra* note 43, § 4.0.

[47] *Id.*

[48] Contribution from the Commission of the European Union, *Efficiency Claims in Mergers and Other Horizontal Agreements*, OCDE/GD(96)65, Competition Policy Roundtables, Les tables rondes sur la politique de concurrence, No. 4 *available at* <http://www.oecd.org/daf/clp/Roundtables/EFFC09.HTM>, (visited on April 15, 2001).

passed on to the consumer on a permanent basis, in terms of lower prices or increased quality."[49] The test under the Merger Regulation for prohibiting a merger is "creation or strengthening of a dominant position." According to the Commission, this test requires a very high burden of proof and therefore, there is "no real legal possibility of justifying an efficiency defence."[50] One might add that the efficiencies recognized by the Commission are in any event very difficult to prove.

According to Venit and Kolasky, the Commission's skeptical approach to efficiencies may be traceable to a number of uniquely European cultural factors vis-à-vis the United States:

a. A greater distrust of bigness, which has its origins in concerns about the potentially negative influence that large concentrations of economic power can have on democratic institutions
b. Less thorough internalization of the consumer welfare model, under which the sole focus is on whether merger is likely to restrict output or increase price
c. A distrust of synergies due to concerns about unemployment
d. A greater willingness to manipulate the industrial structure, which may have its roots in greater state economic involvement in Europe
e. A tendency to equate preserving effective competition with preserving competitors.[51]

However, it is worth remembering that US antitrust authorities were also skeptical of bigness in the late 1890s and early 1900s. And the argument to allow combinations (mergers) on the basis of increased efficiency was specifically rejected by Senator Sherman, who retorted that "experience shows that this saving of costs [through increased efficiency] goes to the pockets of producer" instead of consumers.[52]

c. *Failing Firm Defense*

In the US, once an antitrust agency concludes that the merger transaction would substantially lessen competition or create a monopoly, it then considers efficiencies and the failing firm defense. Under the EU Merger Regulation, the failing firm defense is not

[49] Götz Drauz, Unbundling GE/Honeywell: The Assessment of Conglomerate Merger Under the EC Competition Law, Speech Before Fordham Corporate Law Institute's 28th Annual Conference on International Antitrust Law and Policy 26 (October 25-26, 2001) (on file with the author).
[50] *Id.*
[51] Venit & Kolasky, *supra* note 21, at 85-86.

available. Although, the EU Commission has now started to take into consideration the possibility that a merging firm might fail, an approach that was endorsed by the European Court of Justice in *Kali und Salz*,[53] the criteria used by the Commission is much stricter compared with the one used by the US antitrust agencies in allowing the acquiring firm to invoke the defense. In particular, the EU requires that the acquiring firm would have obtained the market share of the acquired company in any event. This requirement barely gives any force to the defense. Whether the EU Commission will apply that requirement in all cases remains to be seen.[54]

E. Concluding Remarks

We have studied in detail the US and EU merger control laws in the last two chapters, and have identified the differences and similarities between the two regimes in this chapter. Whereas substantive merger standards of the two regimes are converging, procedural aspects are still dissonant. In the next chapter we will review sample bilateral and multilateral efforts made by countries to harmonize their competition law and policy, in order to look for a suitable model for developing a future IMCR.

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[52] See Chap. II, note 24, and accompanying text.
[53] Cases 68-94 and 30-95, ECR 1998 p. I, 1375, 1998 O.J. (C 209) 2.
[54] Venit & Kolasky, *supra* note 21, at 84.

V
Recognition of Limits: Need for Cooperation and Convergence

With the dismantling of public barriers to trade, national markets are being transformed into a global market. This global restructuring is undermining the reach of national antitrust agencies to effectively monitor transnational activities. Recognizing the limits of their reach and seeking to fulfill this gap in global governance, antitrust agencies feel the need for cooperation and coordination, and seek convergence of laws.[1] Nations have tried to address the need for cooperation and convergence of laws at bilateral, and multilateral levels.

A. Convergence Through Cooperation at a Bilateral Level

The recognition of limits to domestic antitrust laws has lately given birth to a new generation of bilateral cooperation agreements. Some of the countries that have concluded these agreements are the European Union and the United States,[2] the European

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[1] *See* Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U. L. REV. 1781, 1785 (2000).

[2] Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1991, US-E.U., *reprinted in* 4 Trade Reg. Rep. (CCH) P 13,504; O.J. 1995 (L95) 47 (27 Apr. 1995), *corrected at* O.J. (L131) 38 (June 15, 1995). [Hereinafter "US-EU Agreement"].
The Agreement is based on a recommendation by the Organization for Economic Cooperation and Development ("OECD"), which encouraged its member states to resort to notification and consultation of other states before taking any antitrust enforcement actions likely to affect the others' interests. The recommendation, like the Agreement itself, was motivated by negative international reaction to the extraterritorial application of US antitrust laws. Council Recommendation Concerning Restrictive Business Practices Affecting International Trade, OECD Doc. C(86)44 (Final) (June 5, 1986).

Union and Canada,[3] and between the United States and, respectively, Australia,[4] Brazil,[5] Canada,[6] Israel,[7] Japan,[8] and Mexico.[9]

Just after the EC passed the Merger Regulation, Sir Leon Brittan suggested to the then US Assistant Attorney General for the Antitrust Division to enter into a cooperation agreement regarding the application of their competition laws. The two sides envisaged that the growth of the EC antitrust enforcement concomitant with the growth in transnational mergers would necessitate such cooperation.[10] In September 1991, the EU Commission and the US government (the "Parties") signed a formal cooperation agreement "to promote cooperation and coordination and lessen the possibility or impact of differences between the Parties and their application of competition laws." [11]

The 1991 US-EU Cooperation Agreement later became a model for subsequent agreements entered into by the United States.[12] Below is a brief review of the salient features of the US-EU Agreement.

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[3] Framework Agreement for Commercial and Economic Cooperation Between the European Communities and Canada, July 6, 1976, E.U.-Can., 1976 O.J. (L 260) 2.

[4] Agreement Between the Government of the United States and the Government of Australia Relating to Cooperation on Antitrust Matters, Apr. 27, 1999, US-Aust'l., *reprinted in* 4 TRADE REG. REP. (CCH) ¶ 13,502.

[5] Agreement Between the Government of the United States of America and the Government of the Federative Republic of Brazil Regarding Cooperation Between Their Competition Authorities in the Enforcement of Their Competition Laws, Oct. 26, 1999, US-Braz., *reprinted in* 4 TRADE REG. REP. (CCH) ¶ 13,508.

[6] Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws, Aug. 3, 1995, US-Can., *reprinted in* 4 TRADE REG. REP. (CCH) ¶ 13,503.

[7] Agreement Between the Government of the United States of America and the Government of the State of Israel Regarding the Application of Their Competition Laws, Mar. 15, 1999, US-Isr., *reprinted in* 4 TRADE REG. REP. (CCH) ¶ 13,506.

[8] Agreement Between the Government of the United States and the Government of Japan Concerning Cooperation on Anticompetitive Activities, Oct. 7, 1999, US-Japan, *reprinted in* 4 TRADE REG. REP. (CCH) ¶ 13,507.

[9] Agreement Between the Government of the United States of America and the Government of the United Mexican States Regarding the Application of Their Competition Laws, July 11, 2000, US-Mex., *reprinted in* 4 TRADE REG. REP. (CCH) ¶ 13,509.

[10] *Id*; *see also* Joel I. Klein, *Time for a Global Competition Initiative*?, Speech before the EC Merger Control, 10th Anniversary Conference, Brussels, Belgium (September 14, 2000) *available at* <http://www.usdoj.gov/atr/public/speeches/6486.htm> (visited on April 25, 2001).

[11] US-EU Agreement, *supra* note 2.

[12] Charles S. Stark, *Improving Bilateral Antitrust Cooperation,* 7, Speech at a Conference on Competition Policy in the Global Trading System: Perspectives from Japan, the United States, and the European Union, Washington, DC, (June 23, 2000) *available at* <http://www.usdoj.gov/atr/public/speeches/5075.htm>, (visited on April 25, 2001).

1. US-EU Cooperation Agreement

The provisions of the Cooperation Agreement, which must be read in a manner consistent with the existing laws of the Parties, are:

a. Notification

Each Party's competition authority is required to notify the other's when the former becomes aware that its enforcement activities may affect the latter's important interests.[13]

b. Exchange of Information

Article III stipulates that the competition authorities of the Parties should exchange information on:

i) their current enforcement activities and priorities;

ii) economic sectors of common interest; and

discuss policy changes which they are considering, and other matters of mutual interest relating to the application of competition laws.

c. Cooperation and Coordination in Enforcement Activities

Article IV requires each Party's competition authority to assist the other and to coordinate enforcement activities, provided that such coordination can be conducted within the reasonably available resources of the assisting Party, and without harming the assisting Party's own "important interest", or violating its laws. Commenting on this clause of the Agreement, Sir Leon Brittan stated that:

> This provision is sufficiently flexible to allow parties to coordinate their actions by *one party assuming the lead responsibility* for a specific enforcement activity of common interest to both parties. Through this procedure, the parties would coordinate their investigative efforts so as to

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[13] *Id.* § 2(1).

> gain the maximum benefits of their respective enforcement powers, and avoid duplication of effort.[14] (emphasis supplied).

The comment suggests that the framers of the Agreement envisaged the "Lead Jurisdiction" model for the conduct of joint investigation.

d. Positive Comity

Article V allows the Parties to request that the other Party initiate enforcement activities against any conduct taking place within the borders of the other Party that the requesting Party believes is adversely affecting its important interests and violating its competition laws. However, the Party notified is not obliged to initiate enforcement activities upon receiving a request against the complained conduct, and the requesting Party is not prevented from taking action against the conduct complained of under its own laws.

e. Avoidance of Conflicts over Enforcement Activities: Traditional Comity

Article VI provides that a Party should take into account the other Party's important interests at all stages of its enforcement activities.

f. Confidentiality of Information

Article VIII preserves the confidentiality of information laws of each Party and stipulates that neither Party is required to provide information to the other Party if that information is protected by confidentiality laws or if the disclosure of such information would be incompatible with important interests of the Party possessing the information.

2. Advantages of the US-EU Cooperation Agreement

From the perspective of review of transnational mergers, a bilateral coordination and cooperation agreement indeed has its advantages over no agreement at all. For example, the merging parties would be unable to offer inconsistent facts or legal theories to the competition authorities to justify their merger. The Agreement deters the parties

[14] Quoted in Joseph P. Griffin, *EC/US Antitrust Cooperation Agreement: Impact on Transnational Business*, (Summer, 1993) LAW AND POLICY IN INTERNATIONAL BUSINESS, 1051, 1059 (citing: European Community Press Release, *The EC Commission and US Government Sign Antitrust Agreement*, (Sept. 23, 1991)).

from providing asymmetric information to the competition authorities, even though the information provided under the HSR and Merger Regulation is confidential and cannot be exchanged by the competition authorities without the consent of the merging parties. Second, where one competition authority seeks to impose structural relief to address anticompetitive concerns arising from a merger, consultation with the other competition authority would ensure that the proposed relief would not adversely affect the interests of the other authority. Finally, coordination and cooperation indirectly lead to substantive convergence. With frequent coordination, competition authorities are most likely to adopt consistent approaches in, for example, defining relevant markets, identifying market participants and circumscribing the list of actual and potential foreign competitors.[15]

3. Limits of the US-EU Cooperation Agreement

The US-EU Agreement is a positive step in the right direction. However, at times it proves ineffective, given its present contours.

The Agreement is an executive agreement (or a "soft" agreement), which is subordinate to existing laws of each party – particularly laws pertaining to the confidentiality of information.[16] The Agreement contains no provision for its enforcement, and therefore the Parties cannot be compelled to coordinate.[17] The lack of enforcement provision allows the Agreement's mechanism to break down where, for instance, the Parties differ in opinion or approach with respect to the anticompetitive consequences of a proposed merger. This is exactly what happened in the Boeing-McDonnell Douglas and GE-Honeywell mergers.[18]

The Boeing-McDonnell Douglas and GE-Honeywell cases illustrated the limits of the US-EU cooperation agreement. What follows is a brief chronological overview of the

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[15] *Id.* at 1064-5.
[16] Charles S. Stark, *supra* note 12.
[17] *See* US-EU Agreement, *supra* note 2, § VI(4)(stating that subject to appropriate notice, either party may limit or terminate its participation in coordinated investigations); *id.* §§ V(4) & IX (emphasizing that nothing in agreement limits or contradicts either party's discretion to implement enforcement actions under its own laws or policies).
[18] *See* Alexander Schaub, *International Cooperation in Antitrust Matters: Making the Point in the Wake of the Boeing/MDD Proceedings*, EC COMPETITION POLICY NEWSLETTER, Feb. 1998, at 4. (diverging approaches of the competition authorities in Brussels and Washington made it impossible to reach commonly accepted solutions); *see also* Joseph P. Griffin, *Extraterritoriality in US and EU Antitrust Enforcement*, 67 ANTITRUST L.J. 159, 186 (1999).

cases, the purpose of which is to explore the effectiveness of the cooperation and/or coordination that took place under the Agreement.[19]

a. *The Boeing-McDonnell Douglas Case (1997)*

On December 14, 1996, Boeing and McDonnell Douglas Corporation (MDC) entered into an agreement by virtue of which MDC would become a wholly owned subsidiary of Boeing.[20] On February 18, 1997, pursuant to article 4 of the Merger Regulation, the merging parties notified the EU Commission of the proposed merger. The Commission conducted the first-phase inquiry and on March 19, 1997, decided that the merger raised serious doubts as to its compatibility with the Common Market, and therefore initiated the second-phase inquiry required under article 6 (1) (c) of the Merger Regulation.[21]

On June 26, 1997, the European Commission notified the FTC – in accordance with article VI of the US-EU Agreement – of its preliminary conclusions and concerns and requested that the FTC give due consideration to the important interests of the European Union in protecting competition in the market for large civil aircraft.[22] The same day the FTC's Chairman responded to the notification with a letter stating that the FTC would take account of the EU's concerns and interests in reaching its decision.

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[19] For an extensive commentary on Boeing-McDonnell Douglas merger, *see* Eleanor M. Fox, *Antitrust Regulation Across National Borders: the United States Boeing Versus the European Union of Airbus*, 16 BROOKINGS REVIEW, No. 1, at 30;1998 WL 10684773 [Hereinafter "Fox, *Antitrust Regulation Across National Borders"*]; Crystal Jones-Starr, *Community-Wide V. Worldwide Competition: Why European Enforcement Agencies are Able to Force American Companies to Modify Their Merger Proposals and Limit Their Innovations*, 17 WIS. INT'L L.J. 145 (1999); Kathleen Luz, *The Boeing-McDonnell Douglas Merger: Competition Law, Parochialism, and the Need for a Globalized Antitrust System,* 32 GEO. WASH. J. INT'L L. & ECON. 155 (1999); Amy Ann Karpel, *The European Commission's Decision on the Boeing-McDonnell Douglas Merger and the Need for Greater US-EU Cooperation in the Merger Field*, 47 AM. U. L. REV. 1029 (1998); Jeffrey A. Miller, *The Boeing/McDonnell Douglas Merger: The European Commission's Costly Failure to Properly Enforce the Merger Regulation*, 22 MD. J. INT'L L. & TRADE 359 (1999); Brian Peck, *Extraterritorial Application of Antitrust Laws and the US-EU Dispute Over the Boeing and McDonnell Douglas Merger: From Comity To Conflict? An Argument for a Binding International Agreement on Antitrust Enforcement and Dispute Resolution,* 35 SAN DIEGO L. REV. 1163 (1998); Thomas P. O'Toole, *"The Long Arm of the Law"–European Merger Regulation and Its Application to the Merger of Boeing & McDonnell Douglas*, 11 TRANSNAT'L LAW 203 (1998).

[20] The facts of Boeing's acquisition of McDonnell Douglas are well known: Both Boeing and McDonnell Douglas had business in a global market. Both had their productive assets in the United States. They had no productive assets in Europe. Airbus, the European rival to Boeing, is a European consortium and has received subsidies from three European governments.

[21] Commission Decision of 30 July 1997,(Case No IV/M.877 - Boeing/McDonnell Douglas), 1997O.J. (L336) 16, ¶¶ 2&3 [Hereinafter "Commission's Boeing Decision"].

[22] *Id.* ¶ 11.

On July 1, 1997, the FTC approved the merger unconditionally by a four-to-one vote, ruling that the merger would not substantially lessen competition in any relevant market.[23] Three days later, on July 4, the Advisory Committee to the EU Commission, completely ignoring the decision of the FTC, recommended that the Boeing and McDonnell Douglas merger be blocked on the grounds that it would harm fair trade.[24] On July 10, a spokesperson for the EC Competition Commissioner reiterated that the merger would not be approved unless Boeing came up with satisfactory concessions to address the European Commission's concerns.[25] On July 13, 1997, – some two weeks before the EU Commission's deadline for making a final decision – the US Government informed the European Commission of its concerns pursuant to articles VI and VII of the Agreement.[26]

The approaching deadline for the Commission to render its decisions increased the tension between the two jurisdictions. It was suggested that the Commission's review of the merger was tainted by political motives.[27] This may very well be so because long before Boeing gave premerger notification or provided factual information to the EU Commission, the Commissioner for Competition made it clear that the merger would not be approved without substantial concessions. The Commissioner gave speeches condemning the transaction before its review had been completed.[28] American politicians "waged a war to save Boeing/McDonnell Douglas from the Europeans."[29] In addition, US officials – including the Secretary of State, Madeleine Albright, the Undersecretary of Commerce, Stuart Eizenstat, and the Assistant Attorney General, Joel Klein – reportedly

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[23], Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger et al, In the Matter of the Boeing Company/McDonnell Douglas Corporation, File No. 971-0051; 1997 WL 359761 (F.T.C.).

[24] John-Thor Dahlburg, *Europe Panel Rejects Boeing Merger Plan*, L.A. TIMES, July 5, 1997, at A1 [Hereinafter "Dahlburg, *Europe Panel Rejects*"]. *See also* Karen West, *EU Panel Rejects Boeing Merger*, SEATTLE POST-INTELLIGENCER, July 17, 1997, at C1 [Hereinafter "West, *EU Panel*"].

[25] *See Merger Control: Boeing Working Towards Accommodation with European Commission*, EUR. REP., July 12, 1997; Karen West, *Boeing Intensifies Merger Negotiations With EU*, SEATTLE POST-INTELLIGENCER, July 11, 1997, at B1.

[26] Commission's Boeing Decision, *supra* note 21, ¶ 12.

[27] Michael L. Weiner, *Conflict and Cooperation: Meeting the Challenge of Increasing Globalization,* 12-Fall ANTITRUST 4 (1997); Boeing accused the European Commission (which is made up of representatives of the governments that are also the owners of Airbus) of acting to support Airbus, regardless of the merits of the transaction. *Id.*

[28] US DOJ, International Competition Policy Advisory Committee, *Final Report*, at 56 (2000), *available at* <http://www.usdoj.gov:80/atr/icpac/finalreport.htm> (visited on Jan. 04, 2001) [Hereinafter "ICPAC, Final Report"].

[29] *Id.* quoting Eleanor M. Fox, Lessons from Boeing.

lobbied various high-ranking European officials on behalf of Boeing.[30] Indeed, even the President of the United State intervened. On July 17, President Clinton stated that "the United States will use the World Trade Organization as its first line of protest against European efforts to stymie the merger of The Boeing Co. and McDonnell Douglas Corp." [31] "I think that there's an orderly process for handling this and I think we better let the orderly process play itself out before we talk ourselves in a trade war," Clinton told reporters.[32] However, the President further stated that "we have some options ourselves when actions are taken in this regard."[33] He was indeed referring to "retaliatory trade sanctions against Europe, such as putting US tariffs on European planes."[34]

After intense lobbying and political maneuvering, the EU Commission ultimately cleared the merger after getting the following concessions from Boeing:

1) that Boeing would not enforce the exclusive supplier contracts entered into with American, Delta and Continental Airlines, and would refrain from entering into any similar agreements until 2007;
2) that it would keep DAC – the civil aircraft manufacturing division of McDonnell Douglas – as a separate legal entity for ten years;
3) that it would license out patents obtained from McDonnell Douglas' government-funded military contracts and cross-license blocking patents to other aircraft manufacturers; and
4) that it would not leverage customer service and support arrangements with existing McDonnell Douglas customers in a way that would unfairly promote Boeing aircraft, or abuse relationships with parts suppliers that would force them away from their relationships with other airline makers.

It should be mentioned here that despite the common perception that EU Commission reviewed the Boeing-McDonnell Douglas merger to protect its "national champion" – Airbus Industrie – the merger analysis conducted by the Commission was in

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[30] Michael L. Weiner, *supra* note 27.
[31] *Clinton Warns European Commission Over Boeing, McDonnell Douglas Merger*, BNA ANTITRUST & TRADE REGULATION DAILY, July 18, 1997.
[32] *Id.*
[33] Fox, *Antitrust Regulation Across National Borders*, *supra* note 19.
[34] *Id.*

accordance with EC law.[35] However, as admitted by the Commission, the conflict was bound to occur because of the differences between the US merger analysis of the case and EC's analysis. As we have seen, whereas the EC competition law is oriented toward determining whether a merger strengthens a dominant position in the market, the US law focuses on whether a merger lessens competition.[36]

It is interesting to note that while the final decision of the EU Commission did make reference to the US-EU Agreement, and that the decision did take into consideration the "important interests" of the US government,[37] the FTC's opinion made no reference to the Agreement, or to any coordination that took place pursuant to it. The chronology of events mapped above shows that little, if any, coordination or cooperation took place during each party's investigation and analysis of the merger.[38] According to a spokesperson for EU Competition Commissioner, Karel Van Miert, "[i]f [the FTC"] had taken [EU Commission's] objections on board, the tense showdown and all the political posturing from American politicians could have been avoided."[39] Referring to the Boeing-McDonnell Douglas merger, Sir Leon Brittan said:

> We have avoided a crisis this time. But this is a problem which will not go away until there is an effective international agreement on the application of competition laws. We must explore all the implications of competition policy for the world trading system, so that WTO members can take a fully considered decision on how best to deal with these implications in the next major round of WTO talks.[40]

The case brought to light the limits of a cooperation Agreement that failed to provide a "mechanism for resolving conflicts in case of substantial divergence of analysis."[41] It illustrates the role played by political forces in the absence of a dispute resolution mechanism, and "the potential for involvement of the WTO in future merger

[35] *Id*; *see also* Amy Ann Karpel, *supra* note 19.
[36] *EC Tells US to Heed Future European Antitrust Concerns; Start Up WTO Division*, BNA ANTITRUST & TRADE REGULATION DAILY, July 25, 1997, at D6.
[37] *See* Commission's Boeing Decision, *supra* note 21, ¶¶ 11 & 12.
[38] *See also* Amy Ann Karpel, *supra* note 19, at 1063.
[39] *EC Tells US to Heed, supra* note 36.
[40] *Id.*
[41] Karel Van Miert, EC Competition Commissioner, The Transatlantic and Global Implications of European Competition Policy, Speech before North Atlantic Assembly Meeting - Palais Egmont, Brussels, (Feb. 16, 1998) *available at* <http://europa.eu.int/comm/competition/speeches/text/sp1998_054_en.html> (visited on April 30, 2001).

disputes."[42] In short, the case highlights the challenges posed by the ever-increasing globalization of antitrust laws.[43]

b. GE-Honeywell Case (2001)

Four years later, the bilateral relations between the US and EU suffered another serious blow. On July 3, 2001, the EU Commission blocked the merger between two US-based companies – General Electric Co. (GE) and Honeywell International Inc. This was the first time that a merger received regulatory approval in Washington was blocked in Brussels.[44]

Again, limited coordination and cooperation took place under the Agreement. Mario Monti, EU's Competition Commissioner, while prohibiting the merger, noted "that the different interpretation reached by the Justice Department, which expressed none of the qualms voiced by European regulators, was a troubling development."[45] He emphasized the need "to strengthen [US-EU] bilateral cooperation to reduce the risk that regulators on opposite sides of the Atlantic would disagree in the future."[46] Charles James, the US Assistant Attorney General for the Antitrust Division, echoed the concerns of Commissioner Monti and stressed "the continuing need for consultation to move toward greater policy convergence."[47]

The failure of the Cooperation Agreement is due in part to the absence of enforcement provisions, where the Parties choose not to adhere to the terms of the Agreement. Moreover, consent of the merging parties is required by the authorities to share information. However, merging parties more often than not allow the authorities to share information,[48] and in the vast majority of instances the two authorities conduct

[42] Harry First, *The Intersection of Trade and Antitrust Remedies*, 12-FALL ANTITRUST 16, 19 (1997).
[43] Michael L. Weiner, *supra* note 27.
[44] Brian M. Carney, *Loggerheads: Mario Monti, Central Planner*, ASIAN WALL ST. J., July 9, 2001, at 6; 2001 WL-WSJA 22052519.
[45] William Drozdiak, *EU Blocks Merger of GE, Honeywell; Trade Tension Rises*, HOUS. CHRON., July 4, 2001, at 1; 2001 WL 23612304.
[46] Brian M. Carney, *Loggerheads*, *supra* note 44.
[47] John R. Wilke, *Drumbeat Persists Over Denial of Merger*, ASIAN WALL ST. J., July 6, 2001, at 5; 2001 WL-WSJA 22052407.
[48] *See* Klein, *Time for a Global Competition Initiative?*, *supra* note 10.

merger reviews with a high level of cooperation and coordination under the Cooperation Agreement.[49]

4. Limits of Bilateralism

Bilateral agreements, while important, are insufficient to cope with the challenges posed by globalization.[50] In its 2000 Report, the *WTO Working Group on the Interaction Between Trade and Competition Policy* noted that there are important practical and substantive reasons pressing for a multilateral agreement. For instance,

> international cartels and other anti-competitive practices were unlikely to respect the neatly defined territories covered by bilateral agreements. Rather, they would naturally tend to act strategically and to seek out the cracks that existed between relevant regional and bilateral agreements. Only by having a proper network that covered all potential areas, that is, a multilateral framework, could Members prevent such behaviour. In the area of mergers, it was possible that key pieces of information that would make for a more complete or more speedy review could lie in jurisdictions that were outside a country's set of regional or bilateral agreements.[51]

Moreover, bilateral agreements are focused primarily on enhancing the efficiency of competition authorities and are not intended to relieve the merging parties of unnecessary costs associated with multiple merger review of a single transaction.[52] Nor have these agreements led to any consensus on the goals or scope of antitrust law in general, let alone any consensus on the methodology of merger review.[53] Furthermore, these agreements fail to provide for a dispute resolution mechanism.

Given the rapid proliferation of competition law regimes, achieving coordination and cooperation among the antitrust agencies through bilateral agreements is not the most efficient method. According to Douglas Melamed, achieving coherence through bilateral agreements "with just the antitrust agencies of our eight or ten largest trading partners

[49] *See, e.g.*, WorldCom/Sprint, WorldCom/MCI, MCI/British Telecom, Sprint/France Telcom/Deutsche Telekom joint transactions, the Alcoa/Reynolds merger, among others.

[50] *Id*; *see also DoJ's Klein Calls For Initiative to Set Up Global Competition Organisation*, AFX NEWS, Sept. 14, 2000; Michael L. Weiner, *supra* note 27.

[51] WTO, Report (2000) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, ¶ 58, WT/WGTCP/4, Nov. 30, 2000.

[52] Andre Fiebig, *The Extraterritorial Application of the European Merger Control Regulation*, 5 COLUM. J. EUR. L. 79, 95 (1999).

[53] Douglas H. Ginsburg & Scott H. Angstreich, *Multinational Merger Review: Lessons From Our Federalism*, 68 ANTITRUST L.J. 219, 229 (2000).

poses a sizeable challenge; doing it with 90 or more antitrust agencies will be a formidable task."[54] If 90 countries were to enter into bilateral agreements among themselves, they would need to execute 4005 agreements.[55] It is predicted that by the year 2025 there will be 200 countries with competition laws. In that case, there will be a labyrinth of 19900 bilateral agreements. In addition to the exponential number of bilateral agreements that would need to be concluded, the other major disadvantage of this approach is that it cannot as a practical matter be implemented effectively by competition authorities working within very different economies, legal systems, and experiences.[56] Many competition authorities, primarily those of developing countries, "would lack the capacity to participate effectively in a cat's cradle of bilateral agreements." [57] Bilateral arrangements run the risk of neglecting the interests of developing countries. Thus, seeking effective multilateral cooperation through bilateral agreements is neither an effective nor an efficient option to meet the needs of business, antitrust agencies and developing countries in this rapidly integrating world.[58]

In addition to correcting the above-mentioned limits of bilateralism, multilateral arrangements have the benefits of: i) offering a permanent facilitator for information exchange and coordination among member states; ii) harmonizing laws of more than two states; and iii) building capacity of less mature regimes by offering them a model to adopt.

B. Convergence Through Harmonization at a Multilateral Level

The idea to harmonize competition law at a multilateral level is not something new. The first such initiative finds its origin in the inter-War era when the League of

[54] A. Douglas Melamed, Promoting Sound Antitrust Enforcement in the Global Economy, 4, Speech Before Fordham Corporate Law Institute, 27th Annual Conference on International Antitrust Law and Policy, New York, New York, (October 19, 2000) *available at* <http://www.usdoj.gov/atr/public/speeches/6785.htm> visited on (April 25, 2001). [Hereinafter "Melamed, Promoting Sound Antitrust"].
[55] This number is calculated by using the formula, n * (n-1)/2, where "n" is the number of countries with competition law and entered into bilateral agreements.
[56] Melamed, Promoting Sound Antitrust, *supra* note 54.
[57] *See OECD Antitrust/Trade Conference Shows Disparate Approaches Toward Reconciliation*, BNA ANTITRUST & TRADE REGULATION DAILY NEWS, July 9, 1999. (quoting Leon Brittan, then Vice Chairman, EC Commission.)

Nations "commissioned a series of expert reports to explore the possibility of a system of international control on cartels."[59] Since then, many efforts have been undertaken at regional and international levels. Below is a brief review of such efforts, in order to explore a model of a plausible architectural framework for a future IMCR.

1. Havana Charter

The Havana Charter was designed to create the International Trade Organization (ITO).[60] Although, the Charter was never adopted, it contained a complete chapter dealing with restrictive business practices. Article 46.1 of the Havana Charter reads:

> [e]ach Member shall take appropriate measures and shall co-operate with the Organization to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other objectives set forth in Article 1.[61]

The article encompassed three major principles of competition law, to wit: prevention against measures which: (1) restrain competition; (2) limit access to markets; and (3) foster monopolistic control. The framers of the Havana Charter rightly envisaged that its objective of liberalizing trade could effectively be thwarted by private restrictive business practices. Thus, it required the member states to take measures themselves and to "co-operate with the Organization" in preventing such restrictive practices. The Havana Charter vested the ITO with a positive duty to prevent anticompetitive conduct.

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[58] *Id.* (quoting Leon Brittan: With nearly 100 competition agencies, "it would be hardly realistic or, for that matter, efficient to rely exclusively on bilateral agreements to ensure cooperation among competition authorities."); Dominic Bencivenga, *International Antitrust: Bilateral Pacts Seen as Crucial to Enforcement*, N.Y.L.J., Dec. 12, 1996, at 6 (identifying Professor Eleanor M. Fox as espousing this view.)

[59] Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 349 (1997).

[60] Havana Charter for an International Trade Organization, U.N. Conference on Trade & Employment, Final Act and Related Documents, U.N. Doc. E/ CONF. 2/78, U.N. Sales No. II.D.4 (1948).

[61] *Id.* art. 46.

2. The Treaty of Rome (1958)

We have discussed the Treaty of Rome in detail in Chapter III. Suffice it to say here that the Treaty, albeit regional in scope, is by far the most successful effort to harmonize competition laws at a multilateral level.

3. United Nations Conference on Trade and Development (UNCTAD)

After the Havana Charter, another effort by United Nations to harmonize competition law principles was made in 1973 under the aegis of the United Nations Conference on Trade and Development ("UNCTAD"), when the members of the United Nations tabled a proposal to negotiate a Restrictive Business Practices Code. After protracted negotiations, the members reached an agreement in 1980 on a Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices ("the Set").[62] The Set encourages member nations to improve and enforce their national competition laws. It requires multinational enterprises to conform to the competition laws of the nations in which they operate. In addition, it recommends cooperation among competition law enforcing agencies of Member states. In October 2000, the Fourth Review Conference to review and revise the Set adopted a resolution which, *inter alia*, recommended to the General Assembly to subtitle the Set for reference as *UN Set of Principles and Rules on Competition*.[63] The Set is, however, not binding on member states.[64]

The UNCTAD, through its Intergovernmental Group of Expert Meeting on Competition Law and Policy, also publishes a Model Competition Law.[65] In February 2000, the UNCTAD held UNCTAD-X Conference in Bangkok which focused on the importance of competition policy vis-à-vis globalization and liberalization. The Declaration passed at the Conference stressed the need for effective coordination and cooperation among governments and among international institutions in the fields of

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[62] U.N. Doc. T.D.-RBP-CONF-10 (1980), *reprinted in* 19 I.L.M. 813 (1980).

[63] TD/RBP/CONF.5/15 of October 4, 2000, *available at* <http://www.unctad.org/en/subsites/cpolicy/docs/CPSet/cpset.htm>, (last visited on Oct. 3, 2001).

[64] *See* Waller, *supra* note 59, at 351; Eleanor M. Fox, *Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade*, 4 PAC. RIM L. & POL'Y J. 1, 4 (1995).

[65] UNCTAD, Model Law on Competition, TD/RBP/CONF.5/7, *available at* <http://www.unctad.org/en/docs/tdrbpconf5d7.en.pdf>, (last visited on Oct. 3, 2001).

trade, investment, competition and finance, in dealing with global interdependence and development.[66]

4. Organization for Economic Cooperation and Development (OECD)

The Organization for Economic Cooperation and Development was formed in 1961 with the objective to build strong economies in its member states,[67] "improve efficiency, hone market systems, expand free trade and contribute to development in industrialized as well as developing countries."[68] In 1976, the OECD adopted Guidelines for Multinational Enterprises (MNEs) that direct the MNEs to refrain from abusing their dominant position, for example, by means predatory behavior or discriminatory pricing.[69] In 1995, OECD issued recommendations to "strengthen co-operation and to minimize conflicts in the enforcement of competition laws."[70]

Through its Committee on Competition Law and Policy, the OECD has been active in the development of recommendations for best practices in domestic competition law.[71] On March 25, 1998, the Council approved a Recommendation Concerning Effective Action Against Hard Core Cartels.[72] The Council Recommendation applies not only to all OECD countries, but invites non-member countries to associate themselves with the Recommendation, which Brazil has already done. In 2000, the OECD issued a report on Hard Core Cartels which noted a consistency of practice among OECD

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[66] Report of the United Nations Conference on Trade and Development on Its Tenth Session, held in Bangkok, Thailand, From February 12 to 19, 2000, ¶ 1, *available at* <http://www.unctad-10.org/pdfs/ux_td390.en.pdf>, (visited on May 3, 2001).

[67] Presently, there 30 member of the OECD are: Australia (1971), Austria (1961), Belgium (1961), Canada (1961), Czech Republic (1995), Denmark (1961), Finland (1969), France (1961), Germany (1961), Greece (1961), Hungary (1996), Iceland (1961), Ireland (1961), Italy (1961), Japan (1964), Korea (1996), Luxembourg (1961), Mexico (1994), The Netherlands (1961), New Zealand (1973), Norway (1961), Poland (1996), Portugal (1961), Slovak Republic (2000), Spain (1961), Sweden (1961), Switzerland (1961), Turkey (1961), United Kingdom (1961), United States (1961). <http://www.oecd.org/about/general/member-countries.htm>, (visited on April 30, 2001).

[68] <http://www.oecd.org/about/origins/index.htm>, (visited on April 30, 2001).

[69] Annex to the OECD Declaration on International Investment and Multinational Enterprises, OECD Doc. 21 (76) 04/1 (1976), *reprinted in* 75 DEP'T ST. BULL. 83 (1976). *See also* Barry E. Hawk, The OECD Guidelines for Multinational Enterprises, 46 FORDHAM L. REV. 241 (1977).

[70] Revised Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade, July 27-28, 1995 --C(95)130/FINAL, *available at* <http://www.oecd.org//daf/clp/Recommendations/REC8COM.HTM>, (visited on June 23, 2000).

[71] *see* <http://www.oecd.org/daf/clp/>, visited on June 23, 2000).

[72] Recommendation of the Council Concerning Effective Action Against Hard Core Cartels, [C(98)35/FINAL] *available at* <http://www.oecd.org/daf/clp/Recommendations/Rec9com.htm>, (visited on April 30, 2001).

members implementing the Council Recommendation in that all had put into place penalties against price-fixing.[73]

The OECD's Committee on Competition Law and Policy has made substantial contributions in harmonizing competition laws within its member states. It has also touched upon the issue of transnational merger review, which is discussed in Chapter VII.

5. Australia-New Zealand Closer Economic Relations Trade Agreement

On January 1, 1983, Australia and New Zealand entered into the Australian-New Zealand Closer Economic Relations-Trade Agreement[74] (ANZCERTA), which superceded existing treaties regulating trade arrangements between the two countries. ANZCERTA is a trade agreement that eliminated barriers to trade and strengthened the economic relations between the two member countries. Article 1 of ANZCERTA, which enumerate its objectives, states that the development of trade between the two countries should take place *under conditions of fair competition*.[75]

Since ANZCERTA came into force, Australia and New Zealand had substantially harmonized their national competition laws.[76] Before ANZCERTA, the two countries had different competition law regimes. Australian competition law was modeled upon US law with a focus on private enforcement, whereas New Zealand's competition law followed the U.K. model with emphasis on administrative remedies. In an effort to harmonize the two different competition law regimes, New Zealand in 1986 enacted the Commerce Act that in large measure mimicked Australian competition law provisions.[77] The countries further amended their competition laws to facilitate trans-Tasman competition enforcement,[78] even allowing the courts of one country to sit, for certain prescribed

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[73] Report *available at* <http://www.oecd.org/daf/clp/CLP_reports/hcc-e.pdf>, (visited on April 30, 2001).

[74] Australian-New Zealand Closer Economic Relations-Trade Agreement 22 I.L.M. 945 (1983). (although, ANACERTA is a bilateral treaty, but given its regional and trade-related scope I have not dealt with it under bilateral agreements, above.)

[75] *Id.* art. 1.

[76] *See, e.g.*, Tony Dellow & John Feil, *Competition Law and Trans-Tasman Trade*, *in* COMPETITION LAW AND POLICY IN NEW ZEALAND 24, 28 (Rex J. Ahdar ed., 1991) (describing efforts at harmonization in the trans-Tasman trade area); Rex J. Ahdar, *The Role of Antitrust Policy in the Development of Australian-New Zealand Free Trade*, 12 NW. J. INT'L L. & BUS. 317, 321-22 (1991). (analyzing the trade area's first five years); Richard O. Cunningham & Anthony J. LaRocca, *Harmonization of Competition Policies in a Regional Economic Integration*, 27 LAW & POL'Y INT'L BUS. 879, 900 (1996).

[77] Commerce Act of 1986, N.Z. Stat. 5, §§ 4, 36a, 98h, 99a.

[78] *Id.*

purposes, in the other country and to have powers to proscribe contempt of court in the other country's territory.[79]

6. North American Free Trade Agreement (NAFTA)

On January 1, 1994 the three North American countries – the United States, Canada and Mexico – entered into the North American Free Trade Agreement ("NAFTA").[80] The Agreement calls for abolition of virtually all existing restrictions on trade and investment by the end of 2003.[81] It also seeks to harmonize the competition polices of the three signatory states. Articles 1501 to 1505 of Chapter 15 of NAFTA address anticompetitive practices.[82] Article 1501 requires member states to "adopt or maintain measures to proscribe anti-competitive business conduct and take appropriate actions with respect thereto."[83] The article also emphasizes the importance of cooperation on issues of competition law enforcement policy, including mutual legal assistance, notification, consultation and exchange of relevant information.[84]

Both the United States and Canada had strong competition laws before NAFTA came into force. However, Mexico did not have a strong competition law but adopted one, *Ley Federal de Competencia Economica*, in mid-1993. Upon adhering to NAFTA, both Mexico and Canada have made deliberate efforts to harmonize their competition laws with those of the United States.[85] In August 1995, the United States and Canada, in order to further harmonize their competition laws, entered into a NAFTA supplemental agreement "to promote cooperation and coordination between the competition authorities of the Parties, [and] to avoid conflicts arising from the application of the Parties' competition laws."[86]

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[79] *See* Cunningham & LaRocca, *supra* note 76, at 900.
[80] North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-US, 32 I.L.M. 289 (1993).
[81] *Id. at* 309-10 (presenting a schedule for tariff elimination to be completed by Jan. 1, 2008).
[82] *Id.* ch. 15.
[83] *Id.* art. 1501.
[84] *Id.*
[85] *See* Kathleen Murtaugh Collins, *Harmonizing the Antitrust Laws of NAFTA Signatories*, 17 LOY. L.A. INT'L & COMP. L.J. 157 (1994).
[86] Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of their Competition and Deceptive Marketing Practices Laws, art. 1, August 1995; 1995 WL 522861 (N.A.F.T.A.)..

7. MERCOSUR: The Southern Cone

In 1991, Argentina, Brazil, Paraguay, and Uruguay created a Common Market among themselves by signing the Asuncion Treaty.[87] One of the objectives of the Treaty is to harmonize competition policies of the member states. Article 1 of the Treaty provides for "[t]he coordination of macroeconomic and sectoral policies between the States Parties in the areas of foreign trade, . . ., in order to ensure proper competition between the States Parties."[88] To strengthen the integration process, member states have committed to harmonize their legislation in relevant areas.[89]

In December 1996, the MERCOSUR countries signed a protocol that provides for the harmonization and strengthening of competition policy in the region. The protocol provides for an autonomous supranational competition law enforcement agency.[90]

8. WTO Fourth Protocol's Reference Paper on Pro-Competitive Regulatory Principles

At the conclusion of the Uruguay Round of negotiations in 1994, which established the World Trading Organization (WTO), participants were unable to resolve the issues pertaining to basic telecommunications, and therefore agreed to negotiate a protocol to address those issues at a later time. A Negotiating Group on Basic Telecommunications (NGBT) was established by a Ministerial Decision.[91]

Early in the negotiations, the NGBT recognized the need to develop a set of pro-competitive regulatory principles so as to prevent monopolies or former monopolies in the telecommunications industry from engaging in trade restricting anticompetitive

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[87] Treaty Establishing a Common Market Between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, (MERCOSUR), Mar. 26, 1991, 30 I.L.M. 1041.
[88] *Id.* at 1045.
[89] *Id.*
[90] Protocolo de Defesa da Concorrencia no Mercosul, Decision 18/96, Dec. 17, 1996, *reprinted in* 19 Boletim de Integracao Latino-Americana 73 (1996). *See also* Jose Tavares De Araujo, Jr., & Luis Tineo, Harmonization of Competition Policies Among Mercosur Countries, 24 BROOK. J. INT'L L. 441, 442-43 (1998).
[91] Decision on Negotiations on Basic Telecommunications, The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts 461 (GATT Secretariat 1994).

practices.[92] In addition, the negotiators recognized the need for an independent regulatory body to settle disputes between telecommunications service providers.[93] In December 1994, US delegates initiated a dialogue on regulatory principles among selected delegates, which resulted in the drafting of the Reference Paper on Pro-Competitive Regulatory Principles (the "Reference Paper").[94]

The Reference Paper embodies definitions and principles for effective implementation of the commitments filed by WTO member states with respect to basic telecommunications services. It contains six articles that deal with: i) competitive safeguards, ii) carrier interconnection, iii) universal service, iv) public availability of licensing criteria, v) the establishment of an independent regulator, and vi) the allocation and use of scarce resources.

Recognizing the difference in political and legal frameworks, market structures, and level of development among various member states, the drafter of the Reference Paper focused only on effective outcomes – for example, a level playing field for new entrants – and declined to propose any single regulatory system for adoption.[95]

a. Adoption Technique

In order to make the regulatory principles of the Reference Paper binding on a WTO member state, the member state must commit to them as "additional commitments"[96] in its schedule of commitments, pursuant to GATS Article XVIII. Once a member adheres to the Reference Paper, violation of its principles will become subject to the Dispute Settlement System of the WTO.

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[92] GATS, Negotiating Group on Basic Telecommunications, Review of Outstanding Issues, Note by Secretariat, TS/NGBT/W/2, ¶ 15 (July 8, 1994).
[93] *Id.* ¶ 16.
[94] *See* Reference Paper, Fourth Protocol to the General Agreement on Trade in Services 436 (WTO 1997), 36 I.L.M. 354, 367 (1997) [Hereinafter "Reference Paper"]. The Reference Paper was never formally issued as a WTO document.
[95] *See* Laura B. Sherman, *"Wildly Enthusiastic" About the First Multilateral Agreement on Trade in Telecommunications Services*, 51 FED. COMM. L. J. 61, 73 (1998).
[96] General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, The Results of the Uruguay Round of Multilateral Trade Negotiations-The Legal Texts 325 (1994), 33 I.L.M. 1167 (1994). (art. XVIII allows members to file additional commitments. Art. XVIII, in pertinent part, reads: "Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters.")

The adoption technique of the Reference Paper has been most successful in overcoming the resistance of the member states against the harmonization of substantive law. This success can be gauged by the fact that 68 countries (50 per cent of the WTO members) have committed to some or all aspects of Reference Paper as part of their commitments to the Fourth Protocol, even though it was never issued as an official WTO document.[97]

b. Success of the Reference Paper

In August 2000, the United States filed a request for consultations with the Government of Mexico regarding Mexico's commitments and obligations under the GATS with respect to basic and value-added telecommunications services.[98] In its request for consultation, the United States alleged that Mexico failed to honour its GATS commitments and obligation (market access and national treatment) and additional commitments under Article XVIII as set forth in the Reference Paper's sections 1,[99] 2,[100] 3[101] and 5.[102] The two parties held consultations on October 10, 2000, but failed to resolve the dispute. On November 10, 2000, the US requested the Chairman of the

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[97] Background Note by the Secretariat, Telecommunication Services, S/C/W/74 (8 December, 1998) ¶ 20. *See also* Laura B. Sherman, Introductory Note to the Fourth Protocol to the General Agreement on Trade in Services, 36 I.L.M. 354, 357 & n.23 (1997). The countries that originally adopted the Reference Paper were: Argentina, Australia, Austria, Belgium, Brunei, Bulgaria, Canada, Chile, Colombia, Cote d'Ivoire, Czech Republic, Denmark, Dominica, Dominican Republic, El Salvador, Finland, France, Germany, Ghana, Greece, Grenada, Guatemala, Hong Kong, Hungary, Iceland, Indonesia, Ireland, Israel, Italy, Jamaica, Japan, Korea, Luxembourg, Malaysia, Mexico, Netherlands, New Zealand, Norway, Papua New Guinea, Peru, Poland, Portugal, Romania, Senegal, Singapore, Slovak Republic, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Trinidad and Tobago, the United Kingdom, the United States, and Venezuela.(countries are distinguished from governments by the WTO –for example, the EU is one government comprised of fifteen countries).

[98] WTO, Request for Consultations by the United States, MEXICO - MEASURES AFFECTING TELECOMMUNICATIONS SERVICES, (Aug. 29, 2000), WT/DS204/1; S/L/88; 2000 WL 1225266 (W.T.O.). (request for Consultation filed pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes and Art. XXIII of the GATS).

[99] Reference Paper, *supra* note 94, § 1 (to maintain appropriate measures for the purpose of preventing a major supplier of basic telecommunications services from engaging in or continuing anti-competitive practices, such as anti-competitive cross-subsidization.)

[100] Reference Paper, *id.* § 2 (to ensure interconnection with a major supplier at any technically feasible point in the network; under non-discriminatory terms, conditions and rates; in a timely fashion; and at cost-oriented rates that are transparent, reasonable, and sufficiently unbundled; and to provide recourse to an independent domestic body to resolve interconnection disputes within a reasonable period of time.)

[101] Reference Paper, *id.* § 3 (to administer any universal service obligation in a transparent, non-discriminatory, and competitively neutral manner that is not more burdensome than necessary for the kind of universal service defined by Mexico.)

Dispute Settlement Body (DSB) of the WTO to establish a panel, and also requested further consultations with the Government of Mexico.[103] At its meeting on December 12, 2000, the DSB deferred establishment of a panel, but advised the parties to hold further consultations, which they did on January 16, 2001. The consultations once again failed to resolve the dispute, which prompted the US to file, for the second time, on February 13, 2002, a request with the Chairman of DSB for the establishment of a panel.[104]

The above case reflects the success of the Reference Paper, if measured by i) the acceptance of the parties that they have an obligation under it, and ii) by making the WTO Dispute Resolution Mechanism available for any disputes arising under it.

C. Concluding Remarks

While bilateral agreements do improve cooperation and can promote a certain level of convergence through frequent contact between competition agencies, they cannot address global antitrust problems. On the other hand, multilateral efforts made at regional and international levels remain fragmentary. While the Treaty of Rome is the most successful effort at regionally harmonizing competition law, its method of implementation through a supranational institution cannot be duplicated globally. The only effort that has been successful in harmonizing global competition law, albeit on a sector-specific basis, has been achieved through the Reference Paper. The Reference Paper not only harmonizes substantive law, but also provides a dual dispute resolution mechanism: 1) through the establishment of an independent regulatory body for disputes between service providers, and 2) through the Dispute Settlement Body of the WTO for disputes arising from violation of member states' obligations under it. The need for an effective dispute resolution together with a flexible method of adoption lead us to formulate an IMCR proposal based on the Reference Paper model.

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[102] Reference Paper, *id.* § 5 (to ensure that its regulatory body is not accountable to any supplier of basic telecommunications services and that the regulator's decisions and procedures are impartial with respect to all market participants.)

[103] WTO, Request for the Establishment of a Panel by the United States, MEXICO - MEASURES AFFECTING TELECOMMUNICATIONS SERVICES (Nov. 16, 2000), WT/DS204/2; 2000 WL 1717047 (WTO).

[104] WTO, Request for the Establishment of a Panel by the United States, MEXICO - MEASURES AFFECTING TELECOMMUNICATIONS SERVICES (Feb. 18, 2002), WT/DS204/3. At the time of submission of this thesis (March 4, 2002), the DSB did not hold a meeting to decide on the request of the US.

The OECD offers another forum for negotiating a multilateral treaty on antitrust. It has already given the antitrust community a "first generation" instrument for cooperation in the form of a 1995 and 1998 Recommendations. It provides a basic framework for cooperation among antitrust authorities of the member countries. Perhaps unfortunately, however, the failure of the OECD to succeed with its proposed Multilateral Agreement on Investment suggests that the OECD may not be best suited to sponsor an IMCR.

It has been argued that the similar level of development among the member states of the OECD would make it relatively easier to establish consensus when compared with the diverse membership of the WTO. However, that argument has not proven effective. At the OECD's Conference on Trade and Competition held at Paris on June 29-30, 1999, the US and EU could not agree on the inclusion of competition policy in the next round of multilateral trade talks. The EU delegation was spearheaded by Sir Leon Brittan, the then-Vice President of the European Commission, while the U.S delegation lead by Joel I. Klein, the then-Assistant US Attorney General for the Antitrust Division.[105] The two leaders presented diametrically opposing views. Brittan warned that if negotiations did not begin immediately "this issue [would be] dead for another 10 years." Klein, on the other hand, insisted that "it [was] far too early to move in that direction." According to Frederic Jenny, the divergence of opinions was really a question of methodology : "[o]ne believes in negotiating before agreeing" on the solutions to be found, and the other believes in exploring alternative solutions "before agreeing to negotiate."[106]

The OECD's limited membership is its principal weakness "as a vehicle for enhancing convergence on more focussed matters among the broad range of antitrust laws and agencies in today's world."[107] Thus, the natural choice of institution to house a future IMCR is the WTO. In the next chapter, we will review the WTO's institutional framework, its Dispute Resolution Mechanism and its ongoing role in internationalizing competition law.

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[105] *OECD Antitrust/Trade Conference Shows Disparate Approaches Toward Reconciliation*, BNA ANTITRUST & TRADE REG. DAILY NEWS, July 9, 1999.
[106] *Id.*
[107] A. Douglas Melamed, Promoting Sound Antitrust Enforcement in the Global Economy, 5, Speech before Fordham Corporate Law Institute, 27th Annual Conference on International Antitrust Law and Policy, New York, New York, (October 19, 2000) *available at* <http://www.usdoj.gov/atr/public/speeches/6785.htm>, (visited on April 25, 2001).

VI
The WTO as the Custodian for the IMCR

In this Chapter, we will review the WTO's institutional framework, its dispute resolution mechanism, and its ongoing role in internationalizing competition law. Moreover, we will review the position of the US and EU concerning whether the WTO can act as the custodian of international competition law.

A. Creation of the WTO

On April 15, 1994, some 132 countries concluded the Uruguay Round of trade negotiations[1] at Marrakesh, Morocco, *inter alia,* by entering into an Agreement Establishing the World Trade Organization (the "WTO Agreement").[2] The WTO

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[1] The "Uruguay Round" refers to the trade negotiations begun at Punta Del Este, in 1986, and concluded formally in Marrakesh, Morocco in April 1994.

[2] Marakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, The Results of the Uruguay Round of Multilateral Trade Negotiations– The Legal Texts 1 (1994), 33 I.L.M. 1144 (1994). [Hereinafter "WTO Agreement"]; Other Multilateral Trade Agreements on trade in goods concluded at the Uruguay Round were:

1. Agreement on Agriculture;
2. Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement");
3. Agreement on Textiles and Clothing;
4. Agreement on Technical Barriers to Trade ("TBT Agreement");
5. Agreement on Trade-Related Investment Measures ("TRIMs Agreement");
6. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Antidumping Agreement");
7. Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 ("Customs Valuation Agreement");
8. Agreement on Preshipment Inspection;
9. Agreement on Rules of Origin;
10. Agreement on Import Licensing Procedures;
11. Agreement on Subsidies and Countervailing Measures ("SCM Agreement"); and
12. Agreement on Safeguards.

Agreement provides for "the common institutional framework for the conduct of trade relations among its members."[3] Annexes 1 to 3 to the WTO Agreement are agreements and associated legal instruments which are an integral part of the WTO Agreement and are binding on all of its members.

The WTO is responsible for administering the following three agreements which form the basis of contemporary international trade law:

(1) the General Agreement on Tariffs and Trade (GATT 1947)[4], as modified by the Uruguay Round of negotiations (GATT 1994); [5]

(2) the General Agreement on Trade in Services (GATS);[6] and

(3) the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).[7]

The WTO Agreement envisaged a "single undertaking" trade system in which members of the WTO are required to accept all results of the Uruguay Round, with the exception of Plurilateral Trade Agreements (PTAs) listed in Annex-4 to the WTO Agreement.[8]

The WTO forms the legal and institutional foundation of a multilateral trading system. It is *not* a "best endeavors" organization, and is the only international economic institution that imposes legally binding contractual obligations (including policy bindings contained in each member's schedules) and provides an enforcement mechanism, built into its system for resolving disputes, to enforce those contractual obligations.[9]

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[3] *Id.* art. II (1).

[4] The General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A11; 55 U.N.T.S.194.

[5] The Uruguay Round of negotiations subsequently modified the GATT 1947. General Agreement on Tariffs and Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Results of the Uruguay Round of Multilateral Trade Negotiations–The Legal Texts 20 (1994); 33 I.L.M. 1154 (1994).

[6] General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, The Results of the Uruguay Round of Multilateral Trade Negotiations–The Legal Texts 325 (1994); 33 I.L.M. 1167 (1994).

[7] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, The Results of the Uruguay Round of Multilateral Trade Negotiations– The Legal Texts 365 (1994); 33 I.L.M. 1197 (1994).

[8] Kevin C. Kennedy, *The Gatt-Wto System at Fifty*, 16 WIS. INT'L L.J. 421, 444 (1998).

[9] Richard Blackhurst, *The Capacity of the WTO to Fulfill its Mandate* 31, 32 *in* THE WTO AS AN INTERNATIONAL ORGANIZATION (Anne O. Krueger, ed. Chicago & London: The University of Chicago Press, 1998).

1. Organizational Structure

a. *Membership*

Membership of the WTO is open to any country that is a party to the GATT, adheres to all Uruguay Round Agreements, and submits schedules of market access commitments for industrial goods, agricultural goods, and services.[10] Out of a potential membership of one hundred and fifty-two countries and territories in 1947, seventy-seven governments became founder members, and as of February 2002, there were 144 members, over 30 observer countries, and 7 observers to the General Council.[11] The General Council of the WTO, which as of February 2002, has 27 cases to review, approves accession to the WTO.[12]

b. *Ministerial Conference*

The Ministerial Conference is the highest WTO body, which is empowered to take all necessary actions to carry out the functions of the WTO. It has the authority to take decisions on all matters under any of the Multilateral Trade Agreements.[13] The Ministerial Conference meets at the ministerial level at least once every two years. It has already met four times: 9-14 December 1996 (Singapore), 18-20 May 1998 (Geneva), November 30 – December 3, 1999 (Seattle, WA), and from November 9-14, 2001 (Doha, Qatar).

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[10] *See* John J. Alissi, *Revolutionizing the Telephone Industry: The World Trade Organization Agreement on Basic Telecommunications and the Federal Communications Commission*, 13 CONN. J. INT'L L. 485 (1999).

[11] *See The Organization, Members and Observers* <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>, (last visited on March 2, 2002). In November, 2001, the fourth Ministerial Conference approved the accession applications of People's Republic of China, and Chinese Taipei.

[12] The Countries awaiting accession, as of February 2002, are: Algeria, Andorra, Armenia, Azerbaijan, Bahamas, Belarus, Bhutan, Bosnia Herzegovina, Cambodia, Cape Verde, Kazakstan, Lao People's Democratic Republic, Lebanon, Former Yugoslav Republic of Macedonia, Nepal, Russian Federation, Samoa, Saudi Arabia, Seychelles, Sudan, Tajikistan, Tonga, Ukraine, Uzbekistan, Vietnam, Yemen, and Federal Republic of Yugoslavia. *See* <http://www.wto.org/english/thewto_e/acc_e/workingpart_e.htm>, (last visited on March 2, 2002).

[13] WTO Agreement, *supra* note 2, art. IV.

c. *General Council*

The General Council, the WTO's main working body, is composed of all members of the WTO. It performs all the duties of the Ministerial Conferences, including supervision of accession to WTO process while the latter is not in session.[14]

The General Council supervises the work of three councils, which are responsible for different portfolios. The council responsible for Trade in Goods oversees the functioning of the Multilateral Agreements listed in Annex-1A to the WTO Agreement. The council for Trade in Services is responsible for the functioning of the GATS, while the Council for Trade-Related Aspects of Intellectual Property Rights oversees the functioning of the TRIPs Agreement.

d. *The Secretariat*

Article VI of the WTO Agreement provides for the establishment of a Secretariat, which is headed by a Director-General. The Ministerial Conference appoints, establishes the powers, duties, conditions of service, and term of the office of the Director-General.[15]

2. **Dispute Resolution Mechanism**

At the Uruguay Round of trade negotiations, the members of the WTO also concluded a Dispute Settlement Understanding (DSU).[16] Pursuant to the DSU, members of the WTO have agreed to use the WTO Dispute Settlement Body (DSB) to resolve disputes arising from the non-compliance of the WTO obligations. The DSB is composed of all the WTO members and oversees the operation of the dispute settlement system. There are essentially four phases of dispute resolution: i) consultation, ii) panel proceeding, iii) appeal, and iv) implementation.

a. *Consultation*

Under the consultation phase, the complaining party seeks consultation with the party alleged to have violated the WTO Agreement, or any of its constituent agreements.

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[14] *Id.* art. IV (2).
[15] *Id.* art. VI.
[16] *See* William J. Davey, *Legal Developments in the WTO*, 90 AMERICAN SOCIETY OF INT'L LAW PROCEEDINGS 412, 415-416 (1996).

The goal of this phase is to resolve the dispute either by mediation or by using the good offices of the Director General. If consultation fails to resolve the dispute, the complainant may request the DSB to form a Panel to rule on the dispute. The request for the establishment of a Panel can be made sixty days after the request for consultation or sooner if the parties do not agree to consultation. The DSB is required to constitute the Panel, at the latest, the second time the request appears on its agenda.

b. Panel Proceedings

Once the DSB decides to form the Panel, three panelists are selected with the agreement of the parties. If the parties fail to agree on the selection of the panelists within twenty days, the Director-General may then appoint the panelists. The panelists generally hold two meetings with the parties, wherein the parties provide written briefs and responses to questions posed by the panelists and/or other party/(ies). The meetings result in the issuance of an interim report by the Panel. The Panel then holds a third meeting with the parties to hear their objections to its interim report, after which the Panel issues its final report which must be delivered within six months of the constitution of the Panel, and in no case more than nine months after its constitution. Generally, the final report is composed of recommendations designed to remedy the violation of WTO obligations.

The final report of the Panel is referred, by default, to the DSB for adoption unless there is consensus to the contrary, or if an appeal is launched by any party.

c. Appeal

The appeal from the final report of the Panel is heard by an Appellate Body of seven members.[17] Three members of the Appellate Body hear and determine any individual appeal. The Appellate Body confines its review to the issues of law and legal interpretations developed by the Panel. It receives briefs from the parties and holds an oral hearing. Through its report – which must be issued within sixty days or at the most ninety days of the appeal – the Appellate Body can reverse, modify or affirm the Panel's decision, but cannot remand the case to the Panel. The report of the Appellate Body is automatically adopted by the DSB within thirty days from the date of issuance of the report, unless there is consensus to the contrary.

d. Implementation

Once the DSB adopts the Panel's or, as the case may be, the Appellate Body's report, the party found to be in violation of the WTO agreement(s) is required to file promptly a plan for implementing the recommendations of the Panel or Appellate Body with the DSB. It is expected of the party that the recommendations will be implemented within a reasonable period of time, that is, not more than fifteen months.

B. Competition Law in the WTO

Article III of the WTO Agreement spells out the mandate of the WTO. In particular it ascribes the following five functions to the WTO:

i) to administer and implement the multilateral and plurilateral trade agreements that together make up the WTO;

ii) to act as a forum for multilateral trade negotiations;

iii) to administer arrangements for the settlement of disputes;

iv) to review national trade policies; and

v) to cooperate with the IMF and the World Bank with a view to achieving greater coherence in global economic policy-making.[18]

To ensure free competition in the international market is not one of the original functions of the WTO. However, several suggestions have been advanced to expand the current mandate of the WTO. More specifically function four – to review national trade policies – has been suggested to include competition policies, investment policies, as well

[17] Appellate Body Members are generally appointed for a four-year term. The appointments were made according to the Dispute Settlement Understanding (DSU) which stipulates that the Appellate Body shall "comprise persons of recognized authority with demonstrated expertise in law, international trade and the subject matter of the WTO agreements generally." The DSU also requires that the Appellate Body be broadly representative of the WTO membership. These appointments were based on a proposal by a Selection Committee, comprising the Director-General, and the chairmen of the General Council, the DSB, the Council for Trade in Goods, the Council for Trade in Services, and the TRIPS Council, after consultations with the WTO Members.

[18] WTO Agreement, *supra note* 2, art. III.

as polices toward corruption in government procurement, and core labor standards. The two main reasons that have been put forward for expanding the WTO's mandate are globalization, and WTO's dispute resolution mechanism.[19]

As we have noted in Chapter I, with the rapid integration of the world economy, a growing share of domestic output is being traded internationally. An increasing number of firms – not only multinational but also small and medium-sized – in both developed and developing countries are spreading their activities such as sourcing, marketing and investment across national boundaries. There is a need to ensure that the multilateral WTO rules, designed to reduce uncertainty surrounding transnational transactions, reflect the changes brought about by the process of globalization and other modern commercial realities. Moreover, as the nation-states' economies are integrated more closely, trading partners are likely to feel strongly the "spillover effects" of others' domestic policies, such as competition policies.[20]

Another reason put forward for expanding the WTO's mandate is its effective enforcement and dispute resolution mechanisms. Even if dispute settlement procedures fail to secure resolution, deterrence in the form of multilaterally approved trade sanctions is available to the WTO. A desire to gain access to the WTO's dispute resolution mechanism is said to be the main reason to expand its mandate to include the protection of intellectual property (despite the existence of the World Intellectual Property Organization), and to include the core labour standards (despite the existence of the International Labour Organisation).[21] But this view is challenged by others like Blackett and Howse.[22] Of course, there remains an important question as to how the WTO ought to operate in linkage with other agencies. However, as concerns competition law, there is no existing international agency that poses this problem.

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[19] Richard Blackhurst, *supra note* 9, at 46.
[20] *Id.* at 47.
[21] *Id.*
[22] *See* Robert Howse & Kalypso Nicolaidis, *Legitimacy and Global Governance: Why Constitutionalizing the WTO Is a Step Too Far, in* ROGER PORTER ET AL. EFFICIENCY, EQUITY, LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENIUM 227 (Washington: Brookings, 2001); Adelle Blackett, *Defining the Contemporary Role of the State: WTO Treaty Interpretation, Unilateralism, and Linkages,* (unpublished manuscript on file with the author).

1. WTO's Working Group on Interaction Between Trade and Competition Policy

The member states of the WTO believe that the WTO is "the unique forum for global trade rule-making and liberalization."[23] The basic rule of trade is preservation of free and unfettered competition. Recognizing the link between trade and competition policy, the WTO's first Ministerial Council meeting in Singapore on December 13, 1996, adopted a Declaration to establish a *Working Group to Study the Interaction Between Trade and Competition Policy.*[24] The Working Group met for the first time in July 1997, and since then met regularly to discuss:

i. the relevance of fundamental WTO principles of national treatment, transparency, and most-favoured-nation treatment to competition policy and vice versa;
ii. approaches to promoting cooperation and communication among Members, including in the field of technical cooperation; and
iii. the contribution of competition policy to achieving the objectives of the WTO, including the promotion of international trade.[25]

At the beginning of the year 2001, the Group also agreed to do the following points, as suggested by delegations:

i. address concerns by some developing countries regarding both the general impact of implementing competition policy on their national economies and the particular implications that a multilateral framework on competition policy might have for development-related policies and programmes;
ii. continue to explore the implications, modalities and potential benefits of enhanced international cooperation, including in the WTO, in regard to the subject-matter of trade and competition policy; and
iii. continuing focus on the issue of capacity building in the area of competition law and policy.[26]

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[23] WTO, Doha Ministerial Declaration, *adopted on* Nov. 14, 2001, WT/MIN(01)/DEC/W/1 (Nov. 14, 2001), ¶ 4, *available at* <http://www-heva.wto-ministerial.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm>, (visited on Nov. 24, 2001).

[24] WTO, Singapore Ministerial Declaration, *adopted on* Dec. 13, 1996, WT/MIN(96)/DEC (Dec. 18, 1996), ¶ 20, *available at* <http://www.wto.org/english/news_e/pres96_e/wtodec.htm>, (visited on May 2, 2001).

[25] WTO, Report (2000) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, ¶ 1, WT/WGTCP/4, (Nov. 30, 2000).[Hereinafter "WTO, Report 2000"].

[26] WTO, Doha WTO Ministerial 2001: Briefing Notes, *available at* <http://www-heva.wto-ministerial.org/english/thewto_e/minist_e/min01_e/brief_e/brief13_e.htm>, (visited on Nov. 24, 2001).

Commenting on the interplay between trade and competition, the Working Group noted that the principles of national treatment and most-favoured-nation treatment fit squarely within the basic tenet of competition policy that it protect competition rather than competitors.[27] Moreover, it was concluded that basic principles of the WTO are more essential than ever in the current era of globalization, because they provide the basis for effective international cooperation in the field of competition law.[28]

The Working Group believes that there should be a multilateral agreement on competition principles. Not only is such an agreement essential to prevent global anticompetitive practices, but it will also be "an efficient vehicle to enhance the level of compatibility as well as the familiarity and mutual trust between national competition authorities that [is] vital to meaningful cooperation." The Group noted that: "[i]f one [were] seeking to encourage cooperation between countries at different levels of development, inevitably, one would have to go beyond a purely bilateral or regional approach."[29]

In the Fourth Ministerial Conference held in Doha from November 9-14, 2001, the member states took up the question of the desirability of developing a multilateral framework on competition policy, and agreed that in the period until the Fifth Ministerial Conference the Working Group should focus on the clarification of:

> core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them.[30]
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> After the Fifth Ministerial Conference the member states will negotiate on the terms of the multilateral framework for competition policy, on the basis of a decision to be taken, by explicit consensus, at the Fifth Conference as to the modalities of negotiations.[31]

One should note, of course, that a global framework for merger review is conspicuous by its absence.

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[27] WTO, Report (1999) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, ¶ 12, WT/WGTCP/3, (Oct. 11,1999).
[28] *Id.* ¶ 11.
[29] WTO, Report 2000, 25, ¶ 58.
[30] Doha Ministerial Declaration, *supra* note 26, ¶ 25.

2. EU's Support for Competition Law in the WTO

The EU has been and continues to be an ardent supporter of competition law within the WTO framework. Even before the WTO was created, Sir Leon Brittan, the then Vice-President and Competition Commissioner of the European Commission, speaking at the World Economic Forum in early 1992, stressed the need to develop international competition rules and enforcement mechanisms within the GATT framework.[32] Brittan advocated a more expansive role for the GATT in drafting and enforcing competition rules, which would eventually "take some of the strain from a sole reliance on trade law at the international level."[33]

The European Commission on June 18, 1996 proposed that the WTO develop international antitrust standards, so as to address the cross-border effects of anticompetitive practices that foreclose the benefits arising from trade and investment liberalization as well as regulatory reforms.[34] The Commission's proposal outlined the following four points:

i. Countries could adopt domestic rules to control mergers, prevent abusive monopoly power and address other restrictive agreements, as well as adequate instruments to investigate, enforce and impose sanctions on them;

ii. Countries could identify a core of common principles and work towards their adoption at the international level. The principles would promote equal conditions of competition worldwide, pave the way for bodies overseeing competition to coordinate global enforcement, and promote a gradual worldwide convergence of competition laws;

iii. Countries could develop an instrument to exchange information and notify each other of investigations to reduce overlap and keep each other informed when investigating the same case; and

iv. The WTO's rules for settling disputes could be used if a country fails to set up adequate competition rules or fails to react to a request by another country to investigate a case.[35]

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[31] *Id.* ¶ 23.
[32] *EC Commissioner Recommends Larger Role for GATT in Developing Competition Policy*, BNA ANTITRUST & TRADE REGULATION DAILY, Feb. 10, 1992.
[33] *Id.*
[34] *WTO: European Commission to Urge WTO to Spearhead World Antitrust Battle*, BNA ANTITRUST & TRADE REGULATION DAILY, June 19, 1996, at d4.
[35] *Id.*

In its recent communication to the WTO Working Group, the European Community provided the following outline for a binding Multilateral Framework Agreement on Competition Policy.[36]

1. Core Principles of Competition Law and Policy

    a. Agreement to have a competition authority endowed with sufficient enforcement powers;
    b. Competition law to be based on the principle of non-discrimination on grounds of nationality of firms;
    c. Transparency as regards the legislative framework, including as regards any sectoral exclusions;
    d. Guarantees of due process; and
    e. Agreement to treat "hard-core" cartels as a serious breach of competition law.

2. Cooperation Modalities

    a. Case specific cooperation on anti-competitive practices of an international dimension:
        i. Exchanges of information; and
        ii. Consultations and Exchanges of views on cases affecting the important interests of another WTO Member.

    b. General exchanges of information and experiences:
        i. Facilitating exchanges of information on national laws, practices and developments;
        ii. Exchanges of experiences and discussions on competition policy issues with an impact on international trade;
        iii. Voluntary "Peer Reviews" of Member's competition policies; and
        iv. Joint analysis and discussion of global competition issues affecting the world economy.

3. Specific Support for Competition Institutions in Developing Countries.

    a. Enhanced and better co-ordinated approach to technical assistance for capacity building. Development of a WTO work programme, including:
        i. Stocktaking;
        ii. Demand-driven needs assessment;
        iii. Co-ordinated and integrated responses; and
        iv. Monitoring and Evaluation

[36] Communication from the European Community and its Member States, WT/WGTCP/W/152, (Sept. 25, 2000).

b. Enforcement Assistance for Developing countries.

This proposal of the EU Commission is much more detailed and ambitious than its 1996 proposal. However, the proposal calls for case-specific cooperation on anticompetitive practices of an international dimension, and does not specifically mention transnational mergers. Nevertheless, global mergers, like GE-Honeywell, affect "important interests" of other WTO members and do affect the world economy. They could therefore give rise to new cooperation modalities under the EU proposal.

Commenting on the Doha Declaration, the EU Trade Commissioner, Pascal Lamy noted that "the elements for a multilateral framework on competition [proposed by the Ministerial Declaration] correspond to those which were proposed by the EU. They reflect a realistic and progressive approach towards the development of competition disciples at multilateral level."[37] The Commissioner further noted that "the Doha mandate rightly focuses attention on the need to respond to the particular interests and concerns of developing countries," and "explicitly recognises the need for flexibility and enhanced technical assistance."[38] The EU, however, indicated at the Conference that the "developing countries should be in a position to decide - before the end of negotiations - whether they wish to subscribe or not to the commitments under a competition agreement."[39]

3. US' Opposition for Competition Law in the WTO

The United States is opposed to any effort to negotiate a multilateral treaty on

[37] WTO Ministerial, Doha: Assessment of Results for EU, Memo, Doha, (Nov. 14, 2001), *available at* <http://trade-info.cec.eu.int/europa/2001newround/pl4.php>, (visited on Nov. 24, 2001).
[38] *Id.*
[39] *Id.*

competition law under the aegis of the WTO.[40] Joel Klein, former US Assistant Attorney General for the Antitrust Division, gave four reasons for opposing a competition law negotiation within the WTO.

First, the WTO is too large and diverse and therefore it would be very difficult to negotiate sound antitrust rules. Klein noted that a "WTO competition policy debate would have to balance many (often diverse) national interests, with the possibility of positions shifting in response to trade-offs in other trade negotiations related to agriculture, services, intellectual property, or any of the myriad fields currently covered by WTO agreements."[41] Second, the negotiations are most likely to achieve a minimum set of acceptable principles that would lead to the adoption of lowest common denominator standards, which would weaken existing, more effective rules.[42] Third, it is likely that sensitive business confidential information, essential to the proper resolution of many competition issues, will not be adequately protected by WTO bureaucrats.[43] Finally, it is inappropriate that the decisions of national competition authorities be second-guessed by trade dispute panels ill-equipped to deal with complex economic and fact-intensive competition issues.[44] Further supporting the position of the United States, Douglas Melamed noted that nearly 20 WTO member countries have a population of 500,000 or less. He questioned how many officials these countries could devote to their as-yet-nonexistent antitrust agencies, and what sort of enforcement policies and priorities

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[40] *See* Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U. L. REV. 1781, 1788 (2000); Joel I. Klein, *Anticipating the Millennium: International Antitrust Enforcement at the End of the Twentieth Century*, *in* 1998 ANNUAL PROCEEDINGS OF THE FORDHAM CORPORATE LAW INSTITUTE: INTERNATIONAL ANTITRUST LAW AND POLICY 9, 9-10 (Barry Hawk ed., 1998). However, Klein has endorsed a global competition Initiative to deal on a multilateral level with the panoply of world competition issues. *See* Joel I. Klein, Time for a Global Competition Initiative?, Speech at the EC Merger Control Tenth Anniversary Conference (Sept. 14, 2000), *available at* <http://www.usdoj.gov/atr/public/speeches/6486.htm> (visited on April 25, 2001). *See also* Daniel K Tarullo, Norms and Institutions in Global Competition Policy, 94 Am. J. Int'l L. 478 (2000). (argues against the WTO as the custodian of competition principles because; among other reasons, the WTO panel will look at competition issues with "trade related and market-access oriented" lens.).

[41] Joel I. Klein, Acting Assistant Attorney General, Antitrust Division, Address: A Note of Caution with Respect to a WTO Agenda on Competition Policy (Nov. 18, 1996) *available at* <http://www.usdoj.gov/atr/public/speeches/jikspch.htm>, (last visited on Oct. 2, 2001); *see also* Daniel Tarullo, *Wrong Lesson from Boeing*, FIN. TIMES, Aug. 13, 1997, at 12; Joel I. Klein, *No Monopoly on Antitrust*, FIN. TIMES, Feb. 13, 1998, at 20.

[42] Klein, A Note of Caution, i*d.*

[43] *Id.* (there is apparently significant concern among government officials that confidential business information relevant to fact-intensive competition analyses could be used to advance trade-related objectives).

they should devise.[45] In the wake of the Doha Declaration, the United States Trade Representative and the US antitrust agencies have remained silent on the prospects of establishing a multilateral framework for competition policy under the WTO umbrella.

4. **Response to the US Opposition**

Klein's first argument, that the WTO is too large and diverse to negotiate sound antitrust rules runs counter to the position the US took when it negotiated for the adoption of the Reference Paper on Pro-competitive Regulatory Principles for telecommunications under the WTO. The large and diverse membership of the WTO was used to justify broad disciplines that could be differentially applied. Indeed, as is noted above, the Reference Paper already addresses competition law principles explicitly. However, when it comes to forming international competition disciplines, the nature of WTO membership is perceived to be an obstacle. With the growing interdependence of nation-states on each other, even an economic super-power cannot afford to blow hot and cold as it pleases. The large membership of the WTO makes it truly an international organization, and thus suitable for trade-related competition law disciplines whose territorial scope are global in nature.

It bears emphasis that the absence of competition law disciplines within the WTO itself give rise to potential trade barriers. If, as in the case of GE-Honeywell, one jurisdiction is prepared to block the entry of firms from another jurisdiction following merger review, those firms cannot benefit from most favoured nation treatment or national treatment. On the other hand, if one jurisdiction is lax in merger enforcement and allows a dominant position to be enhanced and maintained, firms from that country's trading partners will find that the benefits of open trade are rendered nugatory. One cannot compete as an exporter in a market that is within the grip of domestic market power, as was recognized in the Reference Paper. In short, open trade, which is premised on the benefits of competition, requires something approximating a level playing field or

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[44] A. Douglas Melamed, *International Antitrust in an Age of International Deregulation*, 6 GEO. MASON L. REV. 437, 440-41 (1998).(summarizing the views of Joel Klein.)

[45] A. Douglas Melamed, Antitrust Enforcement in a Global Economy, 9, Speech before Fordham Corporate Law Institute, 25th Annual Conference on International Antitrust Law and Policy, New York, (October 22, 1998) *available at* <http://www.usdoj.gov/atr/public/speeches/2043.htm>, (visited on April 24, 2001).

competition law enforcement. This speaks in favour of including a framework of competition disciplines within the WTO.

At first instance, the argument that negotiations would achieve lowest common denominator standards seems cogent. However, the experience with the Reference Paper has shown that the US had been able to achieve the drafting of the regulatory standards that were not the "lowest common denominator" and were acceptable to it. Reference Paper standards are compatible with differing policies and enforcement capacity. Competition law disciplines could be like this. Unlike environmental disciplines, which may entail costly national investment, competition law disciplines would be primarily market-opening and cost-lowering. They need not be characterized by a "race to the bottom."[46]

With respect to the confidentiality of information argument, there is perhaps a presumption that the WTO would become a supranational institution with the authority to review mergers. However, this is not the case in our proposal. Under our scheme, there would be a Lead Jurisdiction to conduct merger review. Other jurisdictions reviewing the merger would provide information to the Lead Jurisdiction, subject to appropriate safeguards as to its confidentiality, and with the knowledge and consent of the merging parties. For a transnational merger, exchange of information at a transnational level is essential to overcome the problem of asymmetric information presented to different competition authorities, and to prescribe structural remedies, if needed, that are fair to every jurisdiction.

It is the WTO's DSB that would have jurisdiction only if the member states were to violate the terms of the IMCR, just as the WTO has authority to decide on matters pertaining to the violation of the Reference Paper, which the US itself has used. It is interesting to mention here that during the review of Boeing-McDonnell Douglas merger

[46] Eleanor M. Fox, *The Central European Nations and the EU Waiting Room --Why Must the Central European Nations Adopt the Competition Law of the European Union?*, : 23 BROOK. J. INT'L L. 351, 358 (1997).

by EU Commission, President Clinton referred to the WTO's dispute resolution mechanism as an appropriate means to resolve the conflict between the US and the EU.[47] Finally, in response to the argument that there are too many small WTO member states lacking the resources to enforce antitrust laws, surely they also need protection against anticompetitive conduct. Indeed, one could argue that marginalized small countries are most vulnerable to international anticompetitive conduct, and thus would benefit most from an overarching international treaty.

In a globally integrated market-place, the governance structure should provide the weaker players with means to look out for their interests. A multilateral framework would provide a security blanket to a small country by giving it the option of requesting that the Lead Jurisdiction conducting the investigation take account of its concerns.

C. Concluding Remarks

We have seen that owing to its mandate, global membership, DSB, and experience with the Reference Paper, the WTO is the appropriate body to be the custodian for a future IMCR. Moreover, after the Fourth Ministerial Conference it is now evident that WTO member states recognize the imminent need for a multilateral framework on competition policy, and for the first time ever have agreed to establish such a framework in the near future. Although, the Doha Ministerial Declaration has not made any specific reference to the need for an IMCR, the stage has been set for addressing that need.

In the next chapter, we will review some of the important proposals hitherto advanced for an international merger control regime. Based on the review of the proposals, we will then be in a position to advance a proposal of our own.

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[47] *See EC Tells US to Heed Future European Antitrust Concerns; Start Up WTO Division*, BNA ANTITRUST & TRADE REG. DAILY, July 25, 1997, at D6. (while announcing approval of the Boeing-McDonnell Douglas merger July 23, Van Miert expressed amazement at President Clinton's comment that EU and US differences could be addressed in the WTO.)

VII
Proposals Advanced for Transnational Merger Review

It is fair to say that Sir Leon Brittan is the contemporary pioneer in advocating internationalizing antitrust law. In his famous address to the World Economic Forum, Brittan recommended that a mechanism to coordinate the review of transnational mergers be established. He suggested that the then-GATT should have authority to nominate a jurisdiction which is best situated to review a transnational merger, and that the GATT's dispute settlement mechanism be used to provide a basis for producing a fair analysis of the merits of the transaction.[1]

In addition to Brittan's proposal, a number of proposals for harmonizing transnational merger review at an international level have been advanced in the last decade. The proposals include a complete international antitrust code, several set of

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[1] *EC Commissioner Recommends Larger Role for GATT in Developing Competition Policy*, BNA ANTITRUST & TRADE REGULATION DAILY (Feb. 10, 1992); *see also* L. Brittan, Competition Policy in the European Community: the New Merger Regulation, EC Chamber of Commerce, New York (March 26, 1990); L. Brittan, Hersch Lauterpacht Memorial Lecture, Cambridge University, Jurisdictional Issues in EEC Competition Law 32-33 (Feb. 8, 1990). Brittan suggested a treaty between the EEC and the US promoting consultation, mutual assistance and cooperation, under which:
[d]isagreements should be discussed frankly and, wherever possible, only one party should exercise jurisdiction over the same set of facts. . . . We have to accept that there will be scenarios, I hope rare, where even if the Treaty is applied in good faith, no agreement will be reached. Arbitration is a possibility, but I find it hard to believe that the US or the E.C. would be willing to give up the opportunity of having the last word about fundamental aspects of market behavior and structure in their respective territories. *Id.*

principles, and an agreement on standardized premerger notification form.[2] Between these two extremes are proposals for the harmonization of substantive and procedural elements of the merger review process, within and without an international organizational framework. In this Chapter, we will review the most significant of these proposals. Where proposals have gone beyond the realm of merger review, we will limit our discussion only to the suggestions concerning transnational mergers. The review of the proposals is intended to identify the strengths and shortcomings in the proposals hitherto advanced, so as to be able to formulate a more comprehensive proposal.

A. International Competition Policy Advisory Committee

In November 1997, the then US Attorney General, Janet Reno, and Assistant Attorney General for the Antitrust Division, Joel I. Klein, formed the International Competition Policy Advisory Committee ("ICPAC" or "Advisory Committee") to look into the issues attendant upon multijurisdictional merger review, among other topics. The Advisory Committee issued its Final Report[3] on February 28, 2000, which contained the following recommendations for reforming the transnational merger review process.

1. Bridging the Differences Between Systems

The Advisory Committee noted that there are more than 60 countries around the world that have merger control laws. In reviewing mergers, these countries deploy different substantive standards, reflecting divergent policy goals. The use of such divergent substantive standards by multiple agencies reviewing a single merger can and does produce inconsistent outcomes and conflicting or burdensome remedies, thereby

[2] For an example of complete antitrust code, *see* Draft International Antitrust Code as a GATT-MTO-Plurilateral Trade Agreement (International Antitrust Code Working Group Proposed Draft 1993), published and released July 10, 1993, 64 ANTITRUST & TRADE REG. REP. (BNA) No. 1628 (Special Supp. Aug. 19, 1993). [Hereinafter the "Munich Group"]; For an example of a set of principles, *see* Eleanor M. Fox, *International Antitrust: Against Minimum Rules; for Cosmopolitan Principles*, ANTITRBUL, March 22, 1998; 1998 WL 16568441; For examples of an agreement of standardized premerger notification form, *see* J. William Rowley & A. Neil Campbell, *Multi-jurisdictional Merger Review—Is it Time for a Common Form Filing Treaty?*, *in* POLICY DIRECTIONS FOR GLOBAL MERGER REVIEW 9-53 (Special Report, Global Forum for Competition and Trade Policy, 1999); *see also* OECD's Report on Notification of Transnational Mergers, DAFFE/CLP(99)2/FINAL (Feb. 1999).

[3] US DOJ, International Competition Policy Advisory Committee, *Final Report*, at 33 (2000), *available at* <http://www.usdoj.gov:80/atr/icpac/finalreport.htm>, (visited on Jan. 04, 2001). [Hereinafter "ICPAC, Final Report"].

increasing transaction costs. The challenges posed by the growth of merger review regimes, in the Advisory Committee's opinion, can "best be addressed by facilitating, where possible, substantive harmonization and convergence of substantive standards and approaches to merger review."[4] The Advisory Committee suggested three steps to facilitate the convergence process and to minimize transaction costs and conflicts:

a. Increased transparency;

b. Development of disciplines to guide review of mergers with significant transnational and spill over effects; and

c. Continued enhancement of cross-border cooperation.

a. Increased Transparency

The Advisory Committee recommended that nations should increase transparency in the application of their merger review principles, practices, and procedures by publishing guidelines and notices explaining the manner in which mergers will be analyzed. It urged the publication of annual reports, statements, speeches, and articles describing changes in the relevant legislation, regulations and policy approaches, case decisions, and clearly articulated rationales for challenging or refraining from challenging significant transactions. At a multinational level, a survey should be conducted to compile an explanatory report of all the jurisdictions with merger regulations to identify the principles they employ.

b. Development of Disciplines for Merger Review

The Advisory Committee identified the following disciplines as appropriate to merger review.

i. Nations should apply their laws in a non-discriminatory manner and without reference to firms' nationalities.

ii. With the limited exception for national security concerns, mergers should be analyzed on pure competition law principles. Where non-competition factors are considered in merger analysis, such factors should be applied

[4] *Id.* at 42.

transparently, narrowly tailored to achieve their ends, and only after competition analysis has been completed.

iii. Competition agencies should be independent of political pressures and should conduct the merger review free of "parochial" political concerns.

iv. Nations should recognize that the interests of competitors to the merging parties are not necessarily aligned with consumers' interests. Therefore, authorities should curb the disruptions posed to potentially procompetitive mergers by competitor-driven processes.

Irrespective of a transaction's "center of gravity" – where the transaction has a significant anticompetitive effect on a local economy – the local antitrust agency has a legitimate interest in reviewing the transaction and imposing a remedy. However, in the event of conflicting outcomes, remedies should be tailored to cure anticompetitive effects on the domestic economy only, and should not unduly burden the transaction. Furthermore, where the remedy has extraterritorial effects, the agency crafting such a remedy should be inform itself as to relevant foreign practices.

c. Continue to Enhance Cross-Border Co-operation

In order to enhance cross-border cooperation among antitrust agencies, a transparent legal framework that contains appropriate safeguards to protect the privacy and fairness interests of private parties should be established by all nations. This could be achieved by each nation developing a "Protocol" comprising a set of key features, such as a description of how an antitrust agency would conduct cross-border coordinated merger investigations, model waivers authorizing the exchange of statutorily protected information between competition agencies during a merger review, and a policy statement outlining safeguards established in the reviewing jurisdiction to protect confidential information. In particular:

i. Where agencies use a confidentiality waiver they should affirm in the policy statement that information obtained under such a waiver would not be disclosed to third parties, and would be used only to the extent it is legally required to do so.

ii. Jurisdictions should also consider adopting a policy to provide notice to the parties – either before or after the fact – when such parties' documents are shared with another jurisdiction. Such notice would give the parties an opportunity to explain how any transmitted information could be misinterpreted.[5]

2. Enhanced Work Sharing: Seamless Multijurisdictional Merger Review

The Advisory Committee envisaged creating a nearly seamless multijurisdictional merger review process as the ultimate goal of all the efforts toward expanded cooperation and coordination.[6] The Advisory Committee noted that:

> a seamless system of international merger review is the best way to cut back transaction costs, preserve scarce prosecutorial resources, subject potentially anticompetitive transactions to thorough review, minimize parochial actions, and account fully for global competitive effects.[7]

In order to achieve the seamless system of international merger review, the Advisory Committee recommended work-sharing arrangements among jurisdictions which may be accomplished in incremental steps. Through an integrated work-sharing approach, the enforcement efforts of one agency could be sufficient to remedy the antitrust concerns of other jurisdictions. The objective was to reduce burdensome duplication, while preserving the right of antitrust agencies to take their own measures, as necessary, if they believe that the substantive analysis or remedies diverge from their preferred approach.[8] Work sharing can function at both the remedy and review stages.

a. Work Sharing at the Remedy Stage

In order to reap the benefits of cross-border cooperation, each jurisdiction should conduct its own review of the proposed transaction and participate at least in the formulation of remedies. The coordination of remedies is useful when they could affect conduct in more than one jurisdiction or when their feasibility is being considered by other jurisdictions. Cooperation and coordination at the remedy stage is important to

[5] *Id.* at 75.
[6] *Id.*
[7] *Id.*

avoid "conflicting remedies as well as avoiding a mix of remedies that may overly burden an otherwise competitively benign or efficiency-enhancing transaction."[9]

b. Work Sharing at the Review Stage

The cooperation and coordination established at the remedy stage may usefully be taken to a deeper level, the review stage. In appropriate cases, it may be feasible to limit the number of jurisdictions conducting independent second-stage reviews of a proposed transaction. For example, where the concerns of Country A are likely to be the same as and subsumed by the concerns of a more distinctly affected investigating jurisdiction, it may be appropriate for Country A to refrain from independent investigation. To minimize the number of agencies that would conduct second-stage review, cross-border consultation would need to be established before the expiration of the initial review period. For such consultation, however, a broad waiver would be required from the merging parties at the initial filing stage.[10]

Minimizing the number of agencies to conduct second-stage review may not always be feasible under prevalent merger control regimes, which limit the review periods. A defined review period would preclude Country A from being able to negotiate its own remedies if it felt that the reviewing jurisdiction did not adequately address its concerns or imposed a remedy that diverged from a preferred approach.[11] However, minimizing the number of agencies may be useful in situations where no remedy is available to Country A or there is a sufficient level of confidence in the reviewing jurisdiction.[12]

Where more than one jurisdiction decided to proceed with second-stage review, there is however a possibility that the reviewing jurisdictions may reach different conclusions. To cure such a problem, the Advisory Committee went one step further and recommended the *Lead Jurisdiction* model, where the *coordinating agency* would coordinate the investigation of a proposed merger, consider the views of each interested jurisdiction, and recommend remedies to address the concerns of all interested

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[8] *Id.* at 83.
[9] *Id.* at 76.
[10] *Id.* at 78.
[11] *Id.* at 78, 83-84.
[12] *Id.*

jurisdictions. The assessment of the *coordinating agency* would be binding on it, but could either serve as a recommendation to other interested jurisdictions or be binding on those jurisdictions as well.[13]

Assuming that a sufficient amount of substantial and procedural convergence among merger review regimes has been attained, the Advisory Committee envisaged an even higher level of work sharing where "the coordinating agency would be required to accept the mantle of *parens patriae* for world competition."[14] The coordinating agency would endeavor to evaluate procompetitive and anticompetitive effects of a proposed transaction on a global scale, taking into account not only the net effects within its borders but all of the merger's costs and benefits to competition. Guided by a neutral welfare standard, the coordinating agency would then design remedies to address concerns of all interested jurisdictions.

The Advisory Committee noted that such an advanced level of work sharing is a "distant vision." At present no agency should be obliged to take into consideration anticompetitive or procompetitive effects that may occur beyond the reviewing jurisdiction's borders; however, competition agencies should consider that the transactions they review may also potentially generate spillover effects in other jurisdictions.[15]

3. Reform of the Merger Review Process

The Advisory Committee noted that while merger control regimes have the potential to create benefits for society, these regimes also impose significant transaction costs on international transactions. The Advisory Committee therefore focused its attention on unnecessary and unduly burdensome costs imposed by merger control regimes that bear little or no relationship to the goals of antitrust enforcement.[16] The Committee thus proposed a second category of reform efforts that seek to reduce transactions costs by rationalizing the merger control process.[17]

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[13] *Id.* at 79& 84.
[14] *Id.* at 80 & 84.
[15] *Id.* at 81 & 84
[16] *Id.* at 9 & 95.
[17] *Id.* at 9.

a. *Casting the Merger Review Net Appropriately: Notification Thresholds*

Based on its study, the Advisory Committee recommended that nations, while establishing their premerger notification thresholds, should seek to screen out mergers that are unlikely to generate appreciable anticompetitive effects within the reviewing jurisdiction. This can be accomplished by establishing *objectively based notification thresholds*. For instance, threshold tests could include an *appreciable nexus to the jurisdiction*, such as transaction-related sales or target assets in the jurisdiction. Moreover, jurisdictions should set notification thresholds *only as broadly as necessary* to ensure the reporting of potentially problematic transactions, and should also ensure that merger regimes are transparent.

b. *Authority to Override Thresholds*

To ensure that potentially anticompetitive transactions do not escape scrutiny under merger review systems, the Advisory Committee recommended that competition agencies should be given the authority to pursue potentially anticompetitive transactions even if they do not satisfy premerger notification thresholds.

c. *Filing Fees*

The Advisory Committee also noted that notification thresholds should be revised bearing in mind that filing fees currently constitute a significant source of revenue for numerous competition agencies. To ensure that these competition agencies will be able to pursue their enforcement missions vigorously, it is imperative to provide the agencies with alternative sources of funding to offset the loss of any funds that may result from revision of notification thresholds or by "delinking" of filing fees.

d. *Two-Stage Review Process*

Detailed filing requirements may impose significant and sometimes unnecessary or unduly burdensome costs on proposed transactions, particularly those posing no harm to competition. To ensure that every transaction that triggers a notification obligation is not unduly burdened, the Advisory Committee recommended that merger review should be conducted in two stages. The two-stage review process would enable competition agencies to identify and focus on transactions that raise competition issues while allowing those that present no anticompetitive concerns to proceed expeditiously.[18]

e. *Review Periods and Timing*

The Advisory Committee recommended that the first-stage review should be conducted within one month or 30 days following notification. For transactions warranting a second-stage review, the Advisory Committee recommended that the process should not be open-ended and that jurisdictions should adopt non-binding but notional time frames. Time frames for second-stage review may vary depending on the relative complexity of the transaction.[19]

f. *Triggering Events*

In order to coordinate multijurisdictional filings efficiently and to facilitate cooperation, the Advisory Committee recommended that nations should harmonize rules pertaining to events that trigger the premerger notification obligation. This can be accomplished by eliminating definitive agreement requirements and post-execution filing deadlines and encouraging all jurisdictions to permit filings at any time after the execution of a letter of intent, contract, agreement in principle, or public bid.

g. *Notification Forms and Information Requests*

To eliminate excessive information requirements, while at the same time ensuring that competition agencies have sufficient information to identify competitively sensitive transactions, the Advisory Committee recommended that initial information requests seek the minimum amount of information necessary to make a preliminary determination of whether a transaction raises competition issues sufficient to warrant further review.

Recognizing that there is a trade-off between the amount of information initially supplied and the time frame in which clearance is to be granted, the Advisory Committee recommended the option of a "short-form long-form" for the notifying parties. The short-form may be used where the merging parties believe that the transaction does not raise anticompetitive concerns, and the long-form may be used when they believe that the

[18] *Id.* at 108.
[19] *Id.* at 114.

transaction may have the potential to raise anticompetitive concerns. The long-form would require information concerning the products produced, supplied, or distributed by the parties and the overlapping or vertical markets in which the parties operate. [20]

4. International Mediation of Competition Disputes

The Advisory Committee recommended that the US Government and other interested nations and international organizations consider developing a new mediation mechanism as well as some general principles that might govern how international disputes, at least sovereign competition policy disputes, might be evaluated under such a mechanism. The members of the mediation panel would be drawn from a roster of internationally respected antitrust and competition experts. [21]

5. Separate Statement by Eleanor Fox

Professor Eleanor Fox, Member of the Advisory Committee, filed a separate statement[22] wherein she embraced the recommendations of the Advisory Committee but wished to go beyond them. She noted that globalization has presented an international challenge, and thus "it is time for the internationalist insights to be applied to the competition policy."[23]

Nationalism and clashes between systems are no exception, and there is a limit to which laws can or should be converged. Referring to the Boeing/McDonnell Douglas case as an example of systems clash, she recommended "international dispute resolution" to resolve such international systems clashes in the future. She noted that in the absence of formal protocols for resolving the clash, the more restrictive nation always prevails.

Moreover, such absence of rules may lead to granting the "nation at the center of gravity a trumping right to enjoin or allow the merger (while interested nations might retain the right to implement more modest, tightly tailored relief)." However, she suggested that such right of priority should be linked with the requirement for the privileged jurisdiction to accept the mantle of *parens patriae* for world competition.

[20] *Id.* at 157-8.
[21] *Id.* at 30 & 301.
[22] *Id.* Annex 1-A.
[23] *Id.*

Accordingly, "it would be obliged to count all costs of the merger, even those outside of its borders, as if they fall within its borders."[24]

With respect to pre-notification filing, she recommended "mutual recognition of premerger notification filings when the market of the would-be regulating nation would be subsumed by the broader global market."[25]

6. **Critique/Comments**

The recommendations made by the Advisory Committee are most constructive, but fail to address adequately the institutional setting within which they should be implemented. The Advisory Committee simply recommended a "Global Competition Initiative" to foster dialogue directed toward greater convergence of competition law among interested governments and international organizations.[26] However, a forum that lacks international personality and the ability to impose and enforce contractual obligations on its members, also lacks the ability to provide speedy and effective implementation of the recommendations of the Advisory Committee.

Under the Work-Sharing rubric, the Advisory Committee recommended the *Lead Jurisdiction* model for the review of transnational mergers, but left it for the distant future. Such a model inherently assumes that there is a supranational framework which sets priority rules for the selection of the Lead Jurisdiction and can settle disputes among jurisdictions as to which should take the Lead.

Professor Fox made a crucial contribution to the debate when she emphasized the need for national antitrust authorities to broaden their perspectives – from national consumer welfare to global consumer welfare – if they are to take on the Lead Jurisdiction role in a globalized world.

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[24] *Id.*; *see also* Eleanor M. Fox, *Extraterritoriality and Merger Law: Can All Nations Rule the World?*, ANTITRUST REPORT 2, (Dec. 1999).

[25] *Id.*

[26] In the Advisory Committee's view, the United States and other nations should continue to use – but not be limited to – existing international organizations and venues such as the WTO, the Organization for Economic Cooperation and Development (OECD), and the United Nations Conference on Trade and Development (UNCTAD), that have productive programs on competition policy under way. Indeed, the Advisory Committee recommends that the United States explore the scope for collaborations among interested governments and international organizations to create a *new* venue where government officials, as well as private firms, nongovernmental organizations (NGOs), and others can consult on matters of competition law and policy. The Advisory Committee calls this the "Global Competition Initiative." *Id.* at 282.

Although I agree with Professor Fox that international rules and a dispute resolution mechanism should be developed for identifying the Lead Jurisdiction, I do not think that in the absence of such rules and dispute resolution mechanism the "nation at the center of gravity" would become the Lead Jurisdiction. In fact, we are in need of the rules that should appoint the nation at the center of gravity as the Lead Jurisdiction. It is the absence of such rules that allows the nation which imposes the most restrictive remedy to prevail. The GE-Honeywell case is an example of such a problem. The EU does not purport to be the nation at the center of gravity of the GE-Honeywell merger, yet the EU Commission managed to block the merger. The fate of proposed mergers would continue to depend on decisions made by nations away from the center of gravity of the transaction unless a mechanism were developed to appoint the nation at the center of gravity to be Lead Jurisdiction, and to entrust it with a responsibility to act as *parens patriae* for other affected nations.

Professor Fox also recommended for "mutual recognition of premerger notification filings when the market of the would-be regulating nation would be subsumed by the broader global market." While mutual recognition is desirable, it is not currently feasible. Such a recommendation assumes that countries are administering voluntary rather than mandatory premerger notification regimes. For one jurisdiction to be satisfied with the filing in another requires the ability of the "recognizing jurisdiction" to forgo its own filing requirement. However, premerger notification in most jurisdictions is a mandatory process that does not currently offer such flexibility.

One might imagine that countries might agree to implement legislative changes allowing for the waiver of notification requirements, if functionally equivalent notification has been filed in another jurisdiction. However, if one bears in mind, for example, the differences between the EU and US filing requirements, it is currently difficult to imagine that the two jurisdictions could simply rely on each other's forms. In essence, Fox's proposal would require the development of a common notice form that could provide information concerning impacts in all affected jurisdictions. Such a form is, to quote the ICPAC majority, a "distant vision."

Assuming that all nation-states were to adopt the recommendations of the Advisory Committee and that there were complete harmonization of merger control laws at the national level, there would still be a need for an overarching international framework for the resolution of disputes. In my opinion, the Advisory Committee should have gone a step further to recommend a multilateral framework for merger review with an embedded dispute resolution mechanism under the auspices of the WTO.

B. Draft International Antitrust Code: The Munich Group

In July 1993, a group of antitrust scholars published a Draft International Antitrust Code (the "Antitrust Code" or "the Code") for adoption as a GATT–MTO–Plurilateral Trade Agreement.[27] The Antitrust Code was more an agreement than a code.[28] It required member states of then not-yet-existent WTO to enact minimum antitrust standards into their domestic law. It proposed standards that addressed horizontal arrangements, vertical restrictions, mergers, and abuse of dominant position. The Code was divided into eight parts and contained 21 sections. Part 3 of the Code dealt with mergers, while Part 8 set forth provisions for the establishment of an International Antitrust Authority (IAA). Below is a brief overview of the Code's provisions dealing with mergers.

1. Scope and Notification Thresholds

The Code would be applicable only to concentrations/mergers with an international dimension and affecting at least two countries party to the Code.[29] A merger was deemed not to have an international dimension where:

a. the aggregate worldwide turnover of all the undertakings concerned is less than 0.1 per cent of the GNP of the member country affected by the merger; or

[27] The members of the Munich Group were: Dr. Josef Drexl, Professor Wolfgang Fikentscher, Professor Eleanor M. Fox, Dr. Andreas Fuchs, Andreas Heinemann, Professor Ulrich Immenga, Dr. Hans Peter Kunz-Hallstein, Professor Ernst-Ulrich Petersmann, Professor Walter R. Schluep, Professor Akira Shoda, Professor Stanislaw J. Soltysinski, Professor Lawrence A. Sullivan. Munich Group, *supra* note 2, sec. IX. At the time when the Munich Group released the Code, the WTO was not yet established and they referred to it as the Multilateral Trade Organization (MTO).

[28] *See* Daniel J. Gifford, *The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Awry*, 6 MINN. J. GLOBAL TRADE 1, 4 (1997).

[29] Munich Group, *supra* note 2, Comment to art. 8. (Concentration includes mergers and restructuring).

b. more than 90 per cent of the aggregate worldwide turnover of all the undertakings concerned is made outside the territory of the member country affected by the merger.[30]

2. **Premerger Notification Procedure**

A merger with an international dimension and affecting at least two member countries would be notified to the national competition authority as well as the IAA by the acquirer prior to its becoming effective. The Code envisaged one-step notification filing and prescribed a compulsory waiting period of three months before consummating the merger.[31] However, the three month waiting period could be relaxed by national antitrust authority in order to prevent serious harm to one or more parties to the merger. Where more than one national antitrust authority is concerned with the matter, the relaxation should be given with the consent of all the authorities involved. Such relaxation may be subject to conditions and obligations in order to preserve effective competition. Further, the Code recommended a standardized form to be used for notification to the IAA.[32]

3. **Appraisal of Concentrations**

Article 11 of the Code stipulated that any merger "which creates or increases the power of one or more undertakings concerned, either separately or jointly, to impede effective competition in the relevant market, shall be prohibited by the National Antitrust Authority."[33] The national antitrust authority, while appraising a merger, should take into consideration the following factors:

a. the competitive structure of all the markets concerned, including the actual or potential competition from undertakings located either within or outside the territory of the National Antitrust Authority;

b. the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their

[30] *Id.* art. 9.
[31] *Id.* art. 10, sec. 2.
[32] *Id.* art. 10.
[33] *Id.* art. 11.

access to supplies or markets, any legal or other barriers to entry as well as supply and demand trends for the relevant goods and services.[34]

4. Decision-Making

The national antitrust authorities would complete the review of a merger within three months from the date of receipt of complete information. Where additional investigation is required, the time for decision-making would be extended for a further term of three months. Decisions would be made by the consensus of all the national antitrust authorities notified. Failing such consensus, the authorities should decide in conformity with the instructions issued by the IAA.[35] The IAA, while issuing instructions to national authorities, should take into consideration public interest asserted by the member countries and the economic effects of the transaction on the international market.[36]

5. Global Welfare/ Interest of Other Nations

The Munich Group advocated enhancing global welfare instead of national welfare. It recommended that the national authorities while reviewing a merger should take into consideration relevant markets even beyond their territorial boundaries.[37] The Munich Group further recommended that where a merger is found by a national antitrust authority to be anti-competitive, the national authority may nevertheless clear the merger if justified by the overwhelming public interest of the member countries affected, provided there is no unreasonable harm caused to legitimate interests of other affected member countries.[38] For granting clearance to anticompetitive mergers on the grounds of overwhelming public interest, the Code recommended that there should be a separate public body.[39]

[34] *Id.*
[35] *Id.* art. 11, sec. 4.
[36] *Id.*
[37] *Id.* art. 11, sec. 1.
[38] *Id.* art. 12, sec. 1.
[39] *Id.* art. 12, sec. 2.

6. International Antitrust Agency

The Munich Group recommended the establishment of an International Antitrust Agency (IAA) within the institutional framework of the WTO. The IAA was to be headed by a President, who should be an expert in antitrust law, appointed for a non-renewable term of six years. The IAA was to be composed of a Council of twenty members, whose appointment and legal status would be equal to that of the President. To ensure that the IAA remain independent of any political influences, the Code recommended that it should not accept instructions from any government.[40]

The IAA would have the following powers:

a. Right to ask for action by a national antitrust authority (NAA);

b. Right to bring action against NAA, and private parties before the national law courts;

c. Right to appeal even though it was not a party to the case in the first instance; and

d. Right and duty to sue member country before the International Antitrust Panel (IAP) where the member country breaches its obligations under the Code.[41]

7. International Antitrust Panel

The Munich Group recommended the establishment of an International Antitrust Panel (IAP), which was to be a permanent body to operate within the framework of the WTO's Dispute Settlement Body. The members of the IAP, who must have experience in the field of national and international antitrust laws, was to be appointed by the member countries on the basis of consensus for a term of six years renewable once.[42]

The IAP would have jurisdiction to hear cases between member countries concerning violation of the Antitrust Code.[43] All member countries, private parties that would be effected by the decision of the IAP, and IAA would have the right to be heard

[40] *Id.* art. 19, sec. 1.
[41] *Id.* art. 19, sec. 2.
[42] *Id.* art. 20, sec. 1.
[43] *Id.* art. 20, sec. 2.

before the IAP. The IAP would make its decision on purely legal grounds, which would be legally binding on member countries.[44]

8. Critique/Comments

The Code would have lead to the creation of a supranational institution, IAA, with powers to adjudicate disputes among antitrust authorities. We have learned in Chapter-III, while reviewing EC merger control law, that it is close to impossible for nation-states to cede their authority over merger review to a supranational institution. In addition to my foregoing preliminary comment, below are my specific comments on the Code's provisions concerning mergers.

a. *Notification Thresholds*

The Code employed an unprecedented criterion for notification thresholds. Under the Code, a merger is deemed to have an international dimension if the aggregate worldwide turnover of all the undertakings concerned is more than 0.1% of the Gross National Product (GNP) of a member country affected, or if more than ninety percent of the aggregate worldwide turnover of all the undertakings concerned is made outside the territory of the member country affected by the merger. The use of GNP of the member country and aggregate worldwide turnover[45] of the merging parties have a potential to give expansive scope to the number of countries which would have jurisdiction over any transnational merger, yet at the same time may not capture mergers with global dimension.

In the year 2000, the GNP of the countries in the world varied between \$ 0.2 billion (Tonga & Vanuatu) and \$ 9,299 billion (United States).[46] 0.1% of the United States' GNP is \$ 9.299 billion, whereas 0.1% of Tonga's GNP is \$ 20,000. Under the first prong of the threshold criterion, a US company, for example, the New York Times,

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[44] *Id.* art. 20, sec. 3 & 4.

[45] Commenting on the use of turnover in threshold, the code explained that: "the threshold turnover requirements are intended to limit the application of the concentration control provisions to significant structural changes the impact of which on the market goes beyond the national borders of any Party to the Agreement." *Id.* Comment 2 to art. 9.

[46] *See Basic Indicators*, *available at* < http://www.itu.int/ITU-D/ict/statistics/at_glance/basic00.pdf >, (last visited on Nov. 6, 2001).

would not be able to buy even a book store in Tonga without triggering the latter's international notification thresholds.

Under the second prong of the test every country from which the merging parties draw over ten percent of their aggregate turnover would have to be notified – which again would mean that even small mergers with no potential to harm competition would have to be reported. On the other hand, a merger between two multinational companies conducting business, say, in 25 countries and drawing their world-wide revenue in equal percentage from those counties (*i.e.*,4 %) would surely be a merger global in nature and yet would escape the second prong of the test. Under this criterion, whether a merger is notifiable depends on the distribution of the total aggregate turnover of the merging parties rather than its likely adverse impact on the local market.

b. Premerger Notification Procedure

The Code recommended one-step notification filing. Given that a majority of mergers do not raise anticompetitive concerns, one-step notification would put an unnecessary burden on the merging parties by requiring detailed information, without allowing for clearance after nominal information is furnished in the case of benign transactions.

c. Time for Decision-Making

The Code prescribed a three months period for decision-making which could be extended for a further period of three months. To take six months for making a final decision could in some cases adversely affect efficiency-enhancing and pro-competitive mergers, especially in high-tech industries where the life cycle of products is relatively short.

d. Separate Body for Providing Exemptions

The Code provided for a separate body with powers to trump the decision of the national antitrust authority on the basis of an overwhelming public interest. Such a scheme provides for subordination of merger review based on pure competition grounds to non-competition grounds, and provides a back-door for political and lobby groups to distort the competitive process.

e. *Lack of Mechanism for Coordination and Dispute Resolution*

The Code provides that antitrust authorities should make the final decision on the basis of consensus. However, it failed to provide any procedure for coordination and cooperation among the agencies. The absence of a coordination procedure would invariably give rise to gridlock among authorities, thereby setting the stage for the IAA to issue instructions for dispute resolution. There should be a mechanism for coordination among antitrust agencies which should help avoid disputes in the first place.

C. OECD

In 1994, the OECD's Competition Law and Policy Committee published a report entitled *Merger Cases in the Real World – A Study of Merger Control Procedures,*[47] prepared by Richard Whish and Diane Wood (the "Whish/Wood Report"). The Whish/Wood Report undertook a study of several transnational mergers in order to highlight regulatory problems associated with such transactions.[48] Chapter IV of the Report reviewed the motivations, advantages and disadvantages of greater cooperation and convergence in merger review for competition agencies and merging parties. It concluded that while substantive harmonization was premature, the time was ripe for enhanced co-operation on procedural aspects of a merger review. The Report recommended:

i. Establishing a waiver system in which merging parties would allow exchange of confidential information among competition agencies in exchange for expedited consideration or reduced fees;

ii. Drawing up guidelines for the joint treatment of the confidential information of merging parties by multiple competition agencies;

iii. Requiring merging parties to identify for each agency all the competition agencies that have been notified of the transaction;

[47] Richard P. Whish and Diane P. Wood, *Merger Cases in Real World: A Study of Control Procedures* (Paris: OECD, 1994).
[48] Report on Notification of Transnational Mergers, DAFFE/CLP(99)2/FINAL (Feb. 1999) *available at* <http://www.oecd.org/pdf/M00013000/M00013730.pdf>, (last visited on Nov. 5, 2001).

iv. Creating a model merger notification filing form, which requires common information in a single format, and country-specific information as annexes where appropriate;

v. Harmonizing of time periods for completion of merger review; and

vi. Disseminating information to the public in an efficient manner.

In February 1999, the OECD's Competition Law and Policy Committee released a *Report on Notification of Transnational Merg*ers, which incorporated the Whish/Wood recommendation concerning the creation of a model merger notification form. The Notification Report contains as annex, *a Framework for a Notification and Report Form for Concentrations*, which synthesized the common elements of notification forms used by the OECD Members. The Notification Report noted that the Framework could have two benefits:

> In the longer run, as countries adopt new or amended reporting forms, the Framework could promote harmonisation in notification forms. [. . .] In the shorter run, to the extent that competition agencies have discretion to modify information requirements on a case-by-case basis, the Framework may assist them in this process, thereby enhancing efficiency in merger enforcement.[49]

1. Critique/Comments

The Whish/Wood Report made positive recommendations with respect to procedural harmonization of the merger review process. But did not go far enough to address the complete range of problems presently faced by business and antitrust authorities. In particular, the Report failed to deal with the need for dispute settlement. Simply put, it would not make a significant contribution to meet the challenges posed by a case like GE-Honeywell.

D. American Bar Association

In September 1991, the Special Committee on International Antitrust Law of the American Bar Association issued its Report (the "Report") which dealt with transnational

[49] *Id.* ¶ 11.

mergers, in addition to other issues attendant upon international antitrust.[50] The Report devoted two chapters, chapters 7 and 8, *Conflicts in International Merger Enforcement*, and *International Mergers: A Comparative Analysis of Substantive Law*, respectively, to the study of transnational merger review process. The Report made the following recommendations which are reproduced at some length:[51]

1. Reporting Requirements

a. Nations should strive for greater harmonization regarding the timing [triggering event] and content of their various premerger notification requirements. In particular, same type of information should be required in each jurisdiction.

b. There should be a two-step reporting requirement: initial filing and second request. The bipartite reporting scheme reduces the burden on the merging parties. However, such a scheme is only workable where the waiting period [before which transaction can be consummated] can be suspended pending compliance with the second information request.

c. The quantity of information requested by an agency should not exceed what is reasonable and necessary for that agency's investigation.

2. Conflicts in Enforcement/ Enhanced Inter-Agency Consultation

a. Agencies should be sensitive to the comparative interest of other states at the beginning of the consideration of a merger with a foreign element.

b. Agencies should also consider, likewise at the beginning of the review, the location of the relevant assets and the effectiveness and extraterritorial impact of any remedy they may wish to impose.

c. When a merger has been notified to more than one jurisdiction, immediate consultation should take place between the agencies notified. Those that indicate a potential interest in review should consult. A frank discussion of the relative interests involved and the location of assets ought to persuade all but the truly interested jurisdictions to defer. The remaining jurisdictions, if more than one, should consult throughout the course of the review to minimize conflicting or duplicative requirements on the parties; and, at the end, use best efforts to avoid imposing a remedy that conflicts with the policy of other state or states.

d. The consultation among agencies should also be expanded to deal with the extent to which a similar substantive approach can be achieved in each

[50] American Bar Association Section of Antitrust Law, Report of the Special Committee on International Antitrust (Chicago: 1991). [Hereinafter "the ABA Report"].

[51] *Id.* at 205-8, 224-6.

reviewing jurisdiction. Such discussion should include definition of appropriate antitrust markets, ranking of evaluative factors and the like.

e. In cases where a merger attracts different treatment from different agencies, the opportunity should be sought (perhaps at regularly scheduled OECD Committee on Competition Law and Policy meetings) to analyze whether the different approaches or conclusions were warranted. Much can be learned from after-the-fact analysis in a search for harmony.

f. In any event, efforts should be increased to achieve better inter-agency understanding through more frequent consultations, joint education programs and other exchanges, including temporary secondments.

g. An attempt should be made at the agency level, probably through the OECD, to develop a model merger definition so as to achieve a standard scope for the application of national merger control laws.

h. There should be a treaty on the coordination of merger review among the countries with developed merger control laws.

3. Confidential Information

a. Confidentiality laws should be amended so as to allow agencies to share confidential information, subject to appropriate safeguards.

4. Private Suits

a. With respect to private parties' right to challenge a transnational merger, the Committee recommended that a court hearing private challenge to an international merger be legislatively instructed to apply principles of moderation and restraint before taking jurisdiction. The Committee further recommended that the multilateral agreement which the Committee proposed, should also contain provision for consultation between sovereign governments where a private suit touches another sovereign state's interest, and for the court to be informed of the results of the consultation and encouraged to follow them.

5. Discovery Abroad

a. A foreign state should not object to discovery requests by an agency for evidence in its territory if such request (i) has been duly notified to that state, (ii) relates to an investigation which does not represent an unreasonable exercise of extraterritorial jurisdiction, and (iii) relates to evidence reasonably necessary to the investigation which cannot adequately be obtained in the territory of the requesting agency.

b. The interagency consultation should be used for the purposes of harmonization and cooperation in questions of discovery.

c. Failing such consultations, talks should be pursued with a view to bilateral or multilateral agreements to allow for the taking of evidence abroad with the active cooperation of foreign state under appropriate safeguards.

6. Agencies to Publish Detailed Merger Enforcement Guidelines

a. The principal agencies should each publish and regularly update non-binding merger enforcement guidelines ("MEG's").

b. At the drafting stage the MEG's should be the subject of detailed inter-agency consultation with a view to the elimination of unnecessary differences in approach. Publication of MEG by all agencies would increase understanding of different approaches and thereby facilitate the process of resolving conflict or seeking greater convergence.

c. To enhance certainty (perhaps the greatest friend of business) MEG's should describe each agency's merger enforcement policy in sufficient detail and scope to be of real use in business planning. This means that MEG's should deal with what constitutes a "merger," the jurisdiction's anticompetitive threshold, and the agency's approach to market definition, evaluative criteria, vertical and conglomerate mergers, joint ventures, defenses and exceptions (including the approach to efficiencies) and procedural matters.

d. In jurisdictions that do not employ a pure competition test, a section of the MEG's should be devoted to the most explicit possible description of the circumstances in which non-competition factors will be used in regulating a merger. Each of such factors should be fully described.

7. Critique/Comments

Whereas all of the recommendations of the Special Committee are worth embracing, the Report has a number of significant lacunae:

1. The Report failed to provide any mechanism that can facilitate interagency coordination. In a multilateral setting, a central institution which can act as a hub and bring all agencies that have an interest in reviewing a transaction together is a better mechanism than agencies coordinating bilaterally among themselves. A competition authority may disclose some information to one agency and other information to another. Coordination facilitated through a central hub would ensure transparency and non-discrimination, which are not guaranteed in the absence of a hub.

2. The Report recommended a multilateral treaty on coordination of merger review among countries with developed merger control laws only. Although enacting a treaty among countries with similar levels of development is a practical approach,

I nevertheless think that if countries with less developed merger control laws were allowed to join the treaty, it would not only help them develop their laws but would also expand the territorial reach of the treaty thereby making the treaty more effective.

3. The Report recommended "after-the-fact analysis" where the agencies differ in their decisions with respect to the review of a merger. By suggesting after-the-fact analysis, the Report failed to provide for a dispute resolution mechanism in the multilateral coordination treaty. Once again, the Boeing-McDonnell Douglas and GE-Honeywell cases instruct us there is an absolute need for a forum where competition authorities can resolve their differences with respect to their decisions on a particular merger. While after-the-fact analysis is a useful tool for the development of international merger control law, it fails to ensure the provision of a just and effective remedy to the merging parties. Therefore, I think that the Special Committee should have recommended a dispute resolution mechanism within its proposed treaty.

E. Campbell and Trebilcock

A. Neil Campbell & Michael J. Trebilcock[52] (hereinafter "Campbell and Trebilcock") proposed three models to reduce interjurisdictional conflict in international merger reviews:

1. Harmonization of Domestic Laws;
2. Use of Lead Review Jurisdiction; and
3. The Establishment of a Supranational Decision-making Institution.

1. Harmonization of Domestic Laws

Campbell and Trebilcock used the term harmonization to mean "development of similar laws in multiple jurisdictions, each of which would retain its own domestic merger review institutions."[53] Harmonization can be procedural, substantive or both.

[52] A. Neil Campbell & Michael J. Trebilcock, *Interjurisdictional Conflict in Merger Review*, *in* COMPETITION POLICY IN THE GLOBAL ECONOMY: MODALITIES FOR COOPERATION 89 (Leonard Waverman et al. eds., London & NY: Routledge, 1997). [Hereinafter "Campbell and Trebilcock"].
[53] *Id.* at 106.

According to Campbell and Trebilcock, procedural harmonization is easier to attain, but it would leave many potential benefits unrealized.

a. *Procedural Harmonization*

i. Premerger Filing

Campbell and Trebilcock recommended that efforts should be made to harmonize premerger filing requirements. They suggested a two-stage filing process: light initial filing and a subsequent detailed request, if needed. At the initial filing stage, the merging parties should be required to identify to each competition agency all other agencies that have been notified about the transaction. Such disclosure would facilitate the coordination among the agencies.[54]

ii. Waiting Period

Campbell and Trebilcock recommended elimination of the waiting period before which a transaction may be consummated. They noted that the difference in waiting periods in different jurisdictions is arbitrary and eliminating such waiting periods would "reduce logistical complications without undermining the basic function they fulfill."[55]

iii. Fixed Time Limits for Decision-Making

Most of the uncertainty relating to mergers emanates from the open-ended time frames for merger review in various jurisdictions. If all jurisdictions agreed on a common set of time limits, uncertainty for merging parties would be reduced dramatically. Campbell and Trebilcock recommended the EU style approach, in which the "first-phase" inquiry is completed within one month, and in case the "second-phase" inquiry is opened, the investigation must be completed within four months.

iv. Confidentiality Rules

[54] *Id.*
[55] *Id.* at 107.

Campbell and Trebilcock suggested relaxation in the rules pertaining to the exchange of confidential information among competition agencies. Such relaxation is necessary in order to have a meaningful exchange of information among agencies reviewing a single transaction.[56]

Campbell and Trebilcock noted that though harmonization of procedure would be a useful advance, it would, however, fail to cure the possibility of divergent determination by various competition agencies reviewing a single transaction. This limitation on the benefits of procedural harmonization would encourage harmonization at a deeper level, that is, substantive harmonization.

b. Substantive Harmonization

Campbell and Trebilcock remarked that international mergers do not posses special characteristics which would warrant different treatment from that given to domestic mergers. Thus, there should be a single substantive standard to review domestic and international mergers. In order to achieve such substantive harmonization, Campbell and Trebilcock recommended that competition agencies should commit themselves to promulgating merger enforcement guidelines. Alternatively, an international body of antitrust law experts should be commissioned to formulate a non-binding Model Merger Review Law, like the Uniform Commercial Code in the United States. A credible Model Merger Review Law could be expected to exert some influence on policy-makers, enforcement authorities, courts and tribunals.[57]

Campbell and Trebilcock believed that even if substantive harmonization were achieved, the potential for divergent rulings by national competition authorities would still exist. Harmonization of domestic laws does "not go to the heart of concerns over potential inter-jurisdictional conflicts in merger review."[58] Therefore, one should consider moving beyond domestic decision-making models.[59]

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[56] *Id.*
[57] *Id.* at 107-8.
[58] *Id.* at 107.
[59] *Id.* at 108.

2. Use of Lead Review Jurisdiction

Campbell and Trebilcock noted that bilateral cooperation agreements do not always effectively cover geographic markets affected by transnational mergers. Obviously, a merger may concern a geographic market – perhaps even "the world" – extending beyond the scope of the two jurisdictions that have concluded the bilateral agreement. To over come the limits of bilateralism, Campbell and Trebilcock suggested the use of a Lead Review Jurisdiction Model negotiated under a multilateral framework.[60] They offered the following three different variants of the Lead Review Jurisdiction Model.

a. *Lead Jurisdiction As a Coordinating Agency*

Drawing an analogy to the multi-jurisdictional securities filing regime in Canada and the United States, Campbell and Trebilcock envisaged the Lead Jurisdiction to play the role of a coordinating agency. Under this model, the jurisdiction which is designated as the Lead Jurisdiction would gather information, solicit comments from other agencies affected by the transaction, assess the relevant market(s) and the likely competitive effects therein. The assessment made by the coordinating agency (Lead Jurisdiction) would operate merely as a recommendation to the other agencies involved.

There is, however, one major problem crept in such a model: how does one go about identifying the Lead Jurisdiction? Campbell and Trebilcock acknowledged the generalized use of the "effects test," which tends to produce more than one Lead Jurisdiction. Such jurisdictions should coordinate among each other with the view to minimizing the number of competition agencies which would conduct the merger review. Campbell and Trebilcock noted that private party actions and rules of confidentiality are barriers to the adoption of a coordinating agency model. Although such a model would reduce transaction costs, it would not prevent divergent outcomes. Thus, the Lead Jurisdiction should have more powers than merely that of a coordinating agency in order to eliminate the possibility of divergent outcomes.[61]

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[60] *Id.* at 108-9.
[61] *Id.* at 110.

b. Lead Jurisdiction Appointed Through Consultation

A Lead Jurisdiction appointed through consultation model would entail a multilaterally agreed upon set of rules which would identify a Lead Jurisdiction with powers to decide over a merger. Such a model would eliminate the possibility of divergent outcomes of a single merger transaction reviewed by various jurisdictions, but would require that the Lead Jurisdiction be granted adequate powers to implement appropriate remedies.

Given the potential that the national authorities would disagree – for example, over the scope of geographic market or on the center of gravity of the transaction – the chances that national authorities would reach a consensus to appoint a Lead Jurisdiction with the decision-making power are bleak. Campbell and Trebilcock, therefore, offered another variant of the Lead Jurisdiction approach.[62]

c. Lead Jurisdiction Appointed by an International Authority

Where parties to a merger and enforcement agencies agree that a supranational geographic market exists, but fail to agree after consultation on a single Lead Jurisdiction, Campbell and Trebilcock suggested giving the merging parties and each national enforcement agency the right to bring the issue before a specialized supranational panel. The role of the panel would be to identify, by employing prior agreed comity rules and a methodology for defining geographic markets, the appropriate Lead Jurisdiction. All signatories to this jurisdictional set of rules would be obliged to accept the panel's decision as binding. The panel would adjudicate on the identification of the Lead Jurisdiction under a strict time frame (*e.g.*, four weeks from the expiry of consultation), so as to prevent excessive delay which could undermine procompetitive mergers.[63]

Campbell and Trebilcock warned that the "political difficulties involved in getting countries to cede responsibility for review of mergers to a Lead Jurisdiction should not be underestimated, particularly where binding determinations are contemplated."[64] The

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[62] *Id.* at 111.
[63] *Id.*
[64] *Id.* at 112.

countries may find it more acceptable to cede authority for substantive decision-making to an international agency than to the antitrust agencies of other jurisdictions.

3. Decision-Making by Supranational Institution

Campbell and Trebilcock acknowledged that the most ambitious approach for eliminating interjurisdictional conflicts is to transfer substantive decision-making responsibility to an international merger review authority. Campbell and Trebilcock proffered two variants of such a model: a 'strong form' and a 'weaker form.'

a. Supranational Investigation and Adjudication

This model is inspired by the European Commission's role under the EC Merger Regulation. Under such a model, a merger meeting certain notification thresholds would be reviewed by a supranational authority against a supranational set of merger rules.[65] The signatories to the supranational set of merger rules would cede their authority over those mergers to the supranational authority, which would have the final investigatory and adjudicatory powers.

b. Supranational Dispute Resolution

Under the weaker variant of the Decision-Making by Supranational Institution model, Campbell and Trebilcock suggested parallel domestic agency reviews coupled with a supranational appeal or dispute resolution process in the event of divergent determinations.

Campbell and Trebilcock stressed the need for "common substantive standards," for "in the absence of common substantive standards it is entirely possible that divergent outcomes will result when the national agencies are correctly applying their own domestic merger control laws."[66] Furthermore, in order to have an effective multilateral dispute resolution mechanism it is important to have specified governing substantive

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[65] *Id.* at 113 ("it is important to recognize that developing a supranational set of merger rules is a much more modest undertaking than a comprehensive World Competition Code.")
[66] *Id.*

norms.[67] Given the time sensitivity of mergers, it would be essential to develop a procedure to resolve disputes in a time-efficient manner.

4. Critique/Comments

Campbell and Trebilcock offered three proposals to reduce interjurisdictional conflict in international merger reviews. Although all the proposals proffered have some merit to them, none standing alone, with the exception of decision-making by a supranational authority, would efficiently reduce overly burdensome transactional costs or, eliminate the chances of divergent outcomes associated with the multiple review of transnational mergers. I will comment on each model separately below.

a. *Harmonization of Domestic Law*

i. Procedural Harmonization

Under procedural harmonization, Campbell and Trebilcock failed to comment on the harmonization of triggering events, as did the Munich Group. No procedural harmonization can be meaningful without the harmonization of triggering events. If triggering events are not harmonized, compulsory waiting periods within which a merger cannot be consummated or time periods for decision-making cannot be harmonized.

ii. Substantive Law Harmonization

Under substantive law harmonization, Campbell and Trebilcock suggested that there should be a single substantive standard to review domestic and international mergers. To them, there is no difference between domestic and international mergers. Such a common standard will fail to take into account the interests of the other jurisdictions involved and will run afoul of the negative comity principle and global consumer welfare approach.[68]

[67] *Id.* (alluded to ineffectiveness of GATT dispute resolution mechanism in the absence of specified governing substantive norms governing agricultural subsidies.)

[68] *See* R. S. Khemani, *International Merger Activity: Some Concerns of Developing and Emerging Economies, in* POLICY DIRECTIONS FOR GLOBAL MERGER REVIEW, *supra* note 2, 103 at 107. (Negative comity requires that country A takes into account in its antitrust enforcement effects of anticompetitive conduct by domestic firms on competition in country B.)

Finally, Campbell and Trebilcock themselves concluded that even if procedural and substantive harmonization were achieved, it would not eliminate the potential for divergent rulings by national competition authorities.

b. Lead Review Jurisdiction Models

Under the Lead Jurisdiction models, with the exception of Lead Jurisdiction as a coordinating agency, Campbell and Trebilcock envisaged that the Lead Jurisdiction would act as a supranational authority,[69] and therefore failed to provide for a dispute resolution mechanism in case the affected jurisdictions disagree with the decision of the Lead Jurisdiction. However, under the Lead Jurisdiction model, countries need not cede their authority to a Lead Jurisdiction to review a merger. Rather they can be cast as full participants in the review process under the leadership of the Lead Jurisdiction.

Moreover, under the Lead Jurisdiction models, Campbell and Trebilcock made a Lead Jurisdiction appointed through consultation and a Lead Jurisdiction appointed by an International Authority part of the same scheme. That is, competition agencies should first coordinate and consult among themselves to appoint the Lead Jurisdiction, and in the event the agencies cannot reach an agreement, they should approach an International Authority, which would adjudicate on the matter within "four weeks *from the expiry of consultations*."[70] A two tier process, involving consultation and adjudication by an international authority, simply to identify the Lead Jurisdiction is time consuming and inefficient.

c. Decision Making by Supranational Institution

The 'strong form,' a Supranational Investigation and Adjudication, is very ambitious as is recognized by Campbell and Trebilcock themselves. We have learned from the European Union's experience that creating a supranational investigation and adjudication body for merger review at the global level is currently near impossible.

The 'weaker form' of Supranational Dispute Resolution is more plausible. Under this model domestic agencies would conduct parallel review of a merger, and in case the

[69] Campbell & Trebilcock, *supra* note 52, at 112. (the political difficulties involved in getting countries to cede responsibility for review of mergers to a lead jurisdiction should not be underestimated, particularly where binding determinations are contemplated.)

agencies were to reach to different conclusions, a supranational body would resolve the differences. For this model to work effectively, Campbell and Trebilcock stressed the need for common substantive standards or specified governing substantive norms.

It is not inconceivable that even by using common substantive standards, competition agencies reviewing effects of a merger in different geographic markets may come up with different conclusions. How would the supranational body resolve the differences by using the national consumer welfare approach rather than the global consumer welfare approach? If national antitrust agencies were to conduct merger review using the global consumer welfare approach, how would they evaluate the impact of a merger beyond their national borders, in the absence of information provided and concerns raised by other jurisdictions? These questions raise serious doubts as to the efficacy of this model.

F. Eleanor M. Fox

Professor Eleanor Fox is perhaps the most prolific writer on the internationalization of antitrust law. Her writings[71] and her participation in high profile working groups – such as ICPAC, the ABA's Special Committee on International Antitrust Law, and the Marx-Planck Institute – studying issues relating to the internationalization of antitrust law make her the most respected scholar in this area. Here we will analyze her recent proposal on the harmonization of the transnational merger control regime.[72]

Professor Fox is of the view that "merger control is out of control."[73] The proliferation of merger control regulations around the world have made such regulations "excessively burdensome in proportion to [their] benefits." Most merger control regimes bring within their purview foreign firms with minimum value of sales and no assets in the jurisdiction. For transnational mergers, "the transaction costs of deciding if and where to

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[70] *Id.* at 111.

[71] *See, e.g.,* Eleanor M. Fox, *Can We Control Merger Control? – An Experiment, in* POLICY DIRECTIONS FOR GLOBAL MERGER REVIEW, *supra* note 2, at 79 [Hereinafter "Fox, *Can We Control*"]; Eleanor M. Fox & Janusz A. Ordover, *The Harmonization of Competition and Trade Law, The case of Modest Linkages of Law and the Limits of Parochial State Action, in* COMPETITION POLICY IN THE GLOBAL ECONOMY, *supra* note 52, at 407; Fox, *International Antitrust: Against Minimum Rules, supra* note 2.

[72] Fox, *Can We Control, id.*

[73] *Id.* at 79.

file, of filing, of producing documents, of visiting the agencies, and of holding the merger in abeyance until the last regulating country opens its gates, amount to billions of dollars a year and are a costly diversion of the energies of management."[74]

Further, competition agencies, while reviewing a merger, do not take into consideration its effects on the international market. That is, the interests of foreign nations and global consumers are presently not taken into account by competition agencies. According to Professor Fox, "there is an absence of vision."[75] If the goal of merger control laws is to expedite pro-competitive and neutral mergers and to prohibit or restrict anticompetitive mergers without imposing prohibitive costs, Professor Fox suggested that there is a better way. She thus proposed the following framework for a transnational merger control regime.

1. Premerger Notification

a. Premerger Notification Form

Professor Fox recommended that nations should agree either on a unified premerger notification form or on mutual recognition of the notification filing made in the country of greatest impact.[76]

Common Form: For transnational mergers, countries should agree to accept a universal form of notification. However, countries should be free to require that domestic firms to use a domestic notification form, and to accept notification on domestic forms from transnational merger partners.[77]

Mutual Recognition: In the alternative of Common Form, countries may agree to give mutual recognition to the first-filed or any previously filed notification in the country of greatest impact. However, countries may require that in order for the notification form to get deference from other countries, it should meet certain minimum standards, and should also require information regarding foreign markets.[78]

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[74] *Id.* at 80.
[75] *Id.*
[76] *Id.* at 86.
[77] *Id.*
[78] *Id.*

b. Common Clearing-House

Inspired by the US states' experience under NAAG's Voluntary Premerger Disclosure Compact,[79] Professor Fox suggested a common clearing-house for receipt of merger filings and their dissemination to interested nation-states.[80] Under a Common Clearing-House regime, there could be either a disinterested clearing-house center, or a Lead Jurisdiction to act as a clearing house. The jurisdiction of first filing could be the Lead Jurisdiction. Merging parties that "opt" into the system would file with the clearing-house, and would waive confidentiality with respect to the premerger information which would be made available to relevant competition agencies. The competition agencies would be bound to use such confidential information only to the extent necessary for merger review.

The clearing-house would announce the fact of filing to interested or potentially interested member nations. Any country receiving the notice of filing could request a copy of the notification if it believed that the transaction met its notification thresholds. The clearing-house would forward a copy of such requests to the merging parties, who could contest the jurisdiction of the requesting country before a copy of the notification was sent to that country. Such a procedure would *"put the burden on nations,"*[81] especially nations marginal to the transaction, instead of on the merging parties, to determine what nations are entitled to notification. Such a system would also save the merging parties the costs of multiple notifications.

The common clearing-house regime could adopt aspects of the universal form or of mutual recognition of premerger notification.

c. Triggering Events

Countries should agree on the events that would trigger filing of a premerger notification.

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[79] See Chap.-II, Section F(b) at page 104 and following, above.
[80] Fox, *Can We Control, supra note* 71, at 86.
[81] *Id.* at 87. (emphasis supplied).

d. Time Periods for Review

Professor Fox suggested a harmonized time frame within which the competition agencies should complete merger review. She recommended an EU style approach, that is, one month for initial review and four additional months for second-phase review, if the merger raises serious anticompetitive concerns. In order to force merging parties to comply promptly with information and discovery requests by the competition agencies, Professor Fox recommended strict penalties for tardy responses.[82]

e. Notification Thresholds

Professor Fox suggested that countries should agree on separate notification thresholds for transnational and national mergers.[83] She recommended turnover or sales within the jurisdiction as a first level threshold. Mergers that met the first level threshold but "produce only a small share (*e.g.*, under 20 per cent) of any defensible relevant market as defined under the US or EU guidelines"[84] should be able to invoke an "escape clause." An escape clause can, however, be invoked only by transnational mergers or transnational mergers that are subject to clearance in a major jurisdiction. Merging parties wishing to invoke the escape clause would file a one-page letter explaining the basis for invoking the clause. The competition agency receiving the letter, upon the showing of good cause, could refuse the operation of the escape clause, thereby bringing the transaction to the normal notification system.[85]

Alternatively, the countries could agree to waive the premerger notification requirement for transnational mergers where neither of the merging parties has assets in the jurisdiction and the merged companies' sales in any market within the jurisdiction that may suffer any plausible competition harm is less than 5 % or 10 % of their total sales.[86]

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[82] *Id.*
[83] Such an inference is drawn from the language: "Countries should agree to thresholds below which no premerger filing for transnational mergers is required." *id.* at 87, and "[t]he escape clause could be available only for transnational mergers." *id.* at 88.
[84] *Id.*
[85] *Id.*
[86] *Id.*

2. Substantive Standards and Begger-Thy-Neighbour Policies

Professor Fox suggested that countries should be free to apply their own substantive approaches and analytical methodologies to mergers in order to determine the merger's effects on competition within their borders. However, she proposed three qualifications on this principle:

a. Countries should agree on a common legal standard to be applied for merger review. Where the countries wish to deviate from such a commonly-agreed standard they should state the respects in which the deviation will take place. The common standard may be expressed in the following terms: mergers that create or increase market power so as to cause significant harm to competition are prohibited.

b. Countries should agree not to assert a "national champion policy" to exempt or justify a merger that causes significant harm to competition in external markets, at least where one other nation has concluded that the merger is anticompetitive and seeks its prohibition.

c. If a merger with significant external effects is justified on non-competition grounds (*e.g.*, environmental concerns or national security), the competition analysis should be separately provided and the non-competition override should be clearly stated.[87]

3. Resolution of Conflicts

In order to resolve the divergent outcomes of multijurisdictional review of transnational mergers, Professor Fox suggested that countries should agree to a set of principles or methodologies for resolving such disputes. She recommended the development of a set of priority rules:

a. Priority may be given to the decision of the jurisdiction which is the "center of gravity" of the merger, or which has the greatest contacts to the merger, as long as that jurisdiction's merger laws are non-parochial (*e.g.*, no national-champion trump); or

[87] *Id.*

b. A rule of proportionality may be employed, whereby a nation which is less significantly affected by the merger may not be allowed to order relief broader than necessary to cure the specific harms inflicted within its borders; or

c. A rule could be developed prohibiting a nation from enjoining a merger credibly cleared and supported by a country in which the merger has greater impact.

4. **Critique/Comments**

a. Premerger Notification

Professor Fox recommended either the use of a universal premerger notification form or mutual recognition of the notification filing made in the country of greatest impact.[88]

In her Common Form proposal, she allowed countries to accept domestic notification form if a party to a transnational merger chooses to use it. Use of a domestic form for transnational mergers would, however, fail to require the merging parties to disclose the identity of all other competition agencies that have been notified of the transaction. Such an omission would fail to cure Professor Fox's "absence of vision" concerns,[89] which means that competition agencies reviewing "a merger do not reflect on international market effects of the transaction."[90] Competition agencies can reflect on the effects of the transaction on the international market only if they are informed of other jurisdictions where the merging parties conduct substantial business. Allowing countries to accept a domestic notification form for transnational mergers without requiring additional information concerning all affected jurisdictions, would defeat the very purpose of having a unified form.

In her Mutual Recognition of Notification filing, Professor Fox envisioned a significant leap of faith on the part of countries. In the absence of a supranational merger policing agency, there is no guarantee that the jurisdiction where notification is filed

[88] *Id.* at 86.
[89] *Id.* at 80.
[90] *Id.*

would take appropriate measures to cure any anticompetitive effects in other countries. What if in their first-filed notification or notification to the country of greatest impact, the merging parties omit, whether deliberately or inadvertently, to mention impacts in another country whose notification thresholds would require notification therein? How would a country whose identity is omitted in the first-filed notification address its anticompetitive concerns? It should be acknowledged that this concern is partly taken care of by Professor Fox's Common Clearing-House proposal, discussed next.

b. Common Clearing-House

The Common Clearing-House plan is inspired by the US states' experience. The states of the US are homogenous in almost all respects – language, level of development, culture, and socio-political aspects. Mimicking the States' experience at a global level is ambitious for the near future. Most of the competition agencies in the world, including that of the US, rely on filing fees for their operation. To let go of filing fees would be one concern and objection of the countries in agreeing to a common clearing-house scheme. Moreover, the clearing-house is an "opt-in" system, operative only at the option of merging parties, not at the option of countries.

Further, it is not clear if the clearing-house is obliged to notify the fact of filing to member nations only or to non-member nations, which may otherwise have a legitimate interest in the transaction as well. If the obligation extends only to member nations, then there is a possibility that non-member nations that bear a substantial effect of the merger may not be notified and therefore the interests of that nation may be compromised. If the obligation extends to non-member nations as well, then would non-member nations abide by the Common Clearing-House treaty, especially if the non-member nations require their own compulsory premerger notification?

Simple announcement of the fact of filing would not allow the countries to gauge the transaction against their thresholds in order to decide whether to request the copy of notification from the clearing house. It is only from the copy of the notification that a competition agency may be able to ascertain whether the transaction meets its notification thresholds.

Professor Fox presented her Clearing-House proposal at the ICPAC hearings. In the Final Report of the ICPAC, the Advisory Committee refused to accept her proposal on the following grounds:

> Although other members found merit in the proposal, it was noted that a number of issues needed to be resolved. For example, sufficient information would have to be produced in the initial filing to enable all potentially affected jurisdictions to determine whether a notification obligation is triggered and whether a jurisdiction has an enforcement interest in the transaction. It was noted that this business information is confidential and is not in the public domain. A clearinghouse system would require the broad dissemination of this confidential information to jurisdictions with varying degrees and capabilities of assuring adequate protection.[91]

As is rightly pointed out by the members of the Advisory Committee, the initial filing would require an enormous amount of information from the merging parties in order to enable the affected jurisdictions to determine whether the notification obligation is triggered in their jurisdiction. Such a system would as a matter of fact "put the burden" on the merging parties instead of on the "nations," as claimed by Professor Fox. Moreover, if authority of a nation to review the merger is contested by merging parties, this would cost more than simply filing a notification. In addition, it is not clear whether the Clearing-House or the Lead Jurisdiction would be the only agency reviewing the merger.

c. Notification Thresholds

Professor Fox recommended three different criteria upon which notification thresholds may be based: (i) turnover; (ii) sales; and (iii) assets in the jurisdiction and a percentage of total sales of the merging parties.

The third criterion that is suggested for transnational mergers is two-pronged: (a) assets in the jurisdiction; and (b) 5 or 10 percent of the total sales of the merged entity in the jurisdiction. "Assets in the jurisdiction" is perhaps the only criterion that differentiates between domestic mergers and transnational mergers. Domestic mergers would have to have assets within the jurisdiction, whereas in transnational mergers,

[91] ICPAC, Final Report, *supra* note 3, at. 9 & n.24.

foreign companies may or may not have assets within the jurisdiction. This is an essential criterion to legitimately brings transnational mergers within the ambit of national merger control laws. The proliferation of merger control regimes has a tendency to "sweep into their ambit mergers of foreign firms that have a minimum value of sales in the jurisdiction,"[92] the "assets in the jurisdiction" criterion can curb such undesirable effects.

However, Professor Fox has teamed the "assets in the jurisdiction" criterion with the percentage of the total sales of the merged companies, (a criterion also suggested by the Munich Group). Although the second half of the criterion would also curb the reach of domestic premerger notification requirement, such a criterion may not allow some small countries to catch mergers between companies with high total sales. For instance, it is not inconceivable that a merger between two large oil companies might create a near monopoly situation in a small country, yet give rise to combined sales of the merged companies in that small country of less than 5 or 10 percent of their total combined sales.[93]

d. Substantive Standards

Professor Fox's approach to substantive standards seems entirely appropriate and should be endorsed.

e. Resolution of Conflicts

The priority rules give clear importance to the Lead Jurisdiction. Under such rules, however, if countries fail to agree on a jurisdiction that is the center of gravity of the transaction, or has the greatest contacts with it, no mechanism is provided to resolve that disagreement. The "rule of proportionality" only seems to regulate the decision-making power of the countries that are less significantly affected by the merger. It does not resolve the conflict where, for example, two countries both bear similarly significant effects of the merger, and one country decided to enjoin it, while the other decided to

[92] Fox, *Can We Control, supra* note 71, at 79.

clear it. However, the question as to which country is subject to the greatest impact may itself become an issue in dispute. This is in fact likely to be a problem since, ex hypothesis, the "permitting" jurisdiction has found insignificant anticompetitive effects, and the "blocking" jurisdiction has come to the opposite conclusion for its own territory. This concern suggests that the clear identification of a lead jurisdiction would be critical to the success of the tests Fox proposes.

G. Eleanor M. Fox and Janusz A. Ordover

Professor Fox and J. Ordover[94] set forth principles for converging substantive antitrust law. In formulating their principles they drew inspiration from the notions of world welfare, appropriate sovereignty and national autonomy.[95] By world welfare, they meant "the aggregate level of consumer benefits and profits realized by consumers and firms in all pertinent countries."[96] The principles offered cover the following major topics relating to competition law: cartels, market access, vertical restraints and other foreclosing restraints, monopolization and abuse of dominant position, and mergers. For mergers, Fox and Ordover suggested the following principles:

i. Nations should maintain and enforce a law against anti-competitive mergers.
ii. Anti-competitive harm anywhere in the community of contracting nations should be treated as seriously as harm within the regulating nation's borders.
iii. If a nation designates a process for the authorization of certain anti-competitive mergers under specified circumstances, such process and the decision-making thereunder should be transparent, the criteria necessary for a grant of approval should be clear, anti-competitive harm to nationals should not be treated more seriously than harm to non-nationals, and gains from anti-competitive harm to non-nationals should not be permitted to weigh in the balance in favour of approval of the merger.

[93] *See, e.g.*, in the Matter of Exxon Corporation and Mobil Corporation, Docket No. C-3907 Nov. 30, 1999; 1999 WL 1417018 (F.T.C.). (the proposed merger between Exxon and Mobile would substantially lessen competition in the importation, terminaling and marketing of gasoline and other light petroleum products in the Territory of Guam, ¶ 49). The information on how much would the sales in Guam amounts to the total sales of the merged companies is however not available. But given the combined world revenues of Exxon and Mobile of approximately US$ 233 billion, the sale from Guam, it is fair to say, may not be more than US$ 23 billion – 10 percent of the merging companies total sales.
[94] Fox and Ordover, *The Harmonization of Competition and Trade Law, supra* note 71, at 407-38.
[95] *Id.* at 415.
[96] *Id.* at 416.

iv. Nations' enforcement authorities should adopt a common form of premerger notification and a common waiting period, and should provide and make available at the merger parties' option, a central filing system for mergers with an international dimension.[97]

1. Critique/comments

Professor Fox and Ordover advocated the need for nationalism to give way to globalism, and the notion of national welfare to be replaced with global welfare.[98] They recommended that nations should have transparent criteria for granting approval to anticompetitive mergers under specified circumstance. Perhaps what they meant by "specified circumstances" are circumstance which give rise to industrial policy and national security concerns, among others. They also recommended that antitrust enforcers should treat anticompetitive effects occurring beyond national borders as seriously as occurring within the national border. As to procedural aspects, they recommended that nations should harmonize premerger notification forms and waiting periods, and provide a central filing system available at the option of merging parties.

I agree in principle with the recommendations made by Professor Fox and J. Ordover. However, with respect to their recommendation in favour of central filing regime for transnational mergers, in my view it should be mandatory for merging parties rather than optional. Leaving such a system to be invoked at the option of the merging parties would fail to reap the benefits of harmonization: clarity and certainty.[99]

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[97] *Id.* at 428.
[98] *Id.* at 415.
[99] For more comments on central filing regime, see section F.4.b, above.

H. Baker, Campbell, Reynolds & Rowley

Donald I. Baker et al.[100] [hereinafter "the Baker Group"] proposed an International Merger Review System ("IMRS") for countries with developed domestic merger control laws. The objective of the IMRS is to save public and private transaction costs which result from the review of a transnational merger by multiple jurisdictions.[101]

While the Baker Group recognized that it would be difficult to amend domestic competition laws in most jurisdictions, particularly in the US and EU, this difficulty should not prevent the development of worthwhile harmonization proposals.[102] In their opinion, one successful approach towards harmonization could be formulation of a treaty that would leave existing merger review regimes untouched, while proposing an "overlay" of standardized timing rules, filing forms, information sharing protocols and procedures for transactions having a clear international dimension.[103] Such a treaty would not attempt to harmonize substantive standards for assessing mergers. It may begin as a bilateral or trilateral arrangement amongst jurisdictions which already have well developed MOU relationships, such as the United States, the European Union and Canada. The treaty should have a fairly open accession procedure, which would facilitate the growth of the system as more jurisdictions join it.[104] Their IMRS proposal has the following twelve core components.

1. Pre-filing Consultations With Merging Parties

The signatories to the IMRS should encourage officials of their competition authority to be available to the merging parties to give advice on jurisdictional, substantive, remedial, timing, or other procedural issues. Information received or advice

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[100] Donald I. Baker, et al., *The Harmonization of International Competition Law Enforcement*, *in* COMPETITION POLICY IN THE GLOBAL ECONOMY, *supra* note 52, at 439. [Hereinafter the "Baker Group"]; *see also* Donald I. Baker, *Antitrust Merger Review in an Era of Escalating Cross-Border Transactions and Effects*, *in* POLICY DIRECTIONS FOR GLOBAL MERGER REVIEW, *supra* note 2, at 71 (Donald Baker individually proffered a proposal for harmonizing procedural elements of merger review. Although, his proposal is not discussed here, but it was considered and summarized in the table of proposals appended at the end of the text.) [hereinafter "Donald Baker"]; *see also* J. William Rowley & A. Neil Campbell, Multi-jurisdictional Merger Review—Is it Time for a Common Form Filing Treaty? in POLICY DIRECTIONS FOR GLOBAL MERGER REVIEW, *supra* note 2, at 9.

[101] Baker Group, *id.* at 464.

[102] *Id.* at 463.

[103] *Id.*

[104] *Id.* at 488 & n.142.

given by the competition authority may be disclosed to other competition agencies of the IMRS member countries once the IMRS review of the transaction has begun.

2. Pre-notifiable Transactions

Any transaction which is subject to a premerger notification regime in two or more of the IMRS jurisdictions would be mandatorily subject to review under the IMRS rather than a domestic review procedure. Where a transaction is subject to substantive review in two or more IMRS jurisdictions, the merging parties may "opt" into the IMRS in order to avoid multiplicity of country-specific procedural regimes. The competition agencies would also have the option to "bump" a transaction with an international dimension from the domestic review process into the IMRS process.

Once a transaction becomes subject to the IMRS review, all signatory jurisdictions in which the merging parties (or their legal affiliates) have assets or sales should be entitled to prompt notification of the transaction.

3. Disclosure of Domestic Notifications

Members of the IMRS should be required to include in their standard domestic premerger notification form a requirement that merging parties list all foreign agencies to which the transaction has previously been notified and to promptly disclose any future notifications.[105]

4. Two Stage Premerger Notification

The premerger notification under the IMRS would consist of two stages. The objective of stage one filing would be to "weed out transactions which clearly do not require extensive review."[106] In stage one, the parties would have the option of using either a Short Form or a Long Form. During the mandatory waiting period after a Short Form filing, the competition agency in receipt of Short Form could request a Long Form filing instead.

[105] *Id.* at 475.
[106] *Id.* at 476.

The second stage notification process would allow a competition agency to conduct a detailed investigation in order to determine whether to challenge or seek restructuring of the transaction. During the second stage, the parties would furnish information by using the standardized Supplementary Request form.[107]

5. Time Limits

To reduce uncertainty and to allow the merger review process to move expeditiously, the Baker Group recommended a tight but attainable time limit, during which time the transaction could not be closed, for each of the major stages of the IMRS process. They suggested the following time limits:

(a) *Stage One with Short Form.* Two weeks from the submission of a complete filing.

(b) *Stage One with Long Form.* One month from the submission of a complete filing.

(c) *Stage Two.* One month (with an agency option to extend by a further two or three weeks in complex cases) from receipt of a complete response to a Supplementary Request.

(d) *Contested Proceedings.* Four months from the initiation of the formal proceeding by the enforcement agency.

(e) *Consent Proceedings.* Two months from the commencement of the proceeding.

All time limits should be extendable indefinitely with the consent of the merging parties.[108]

6. Notification Forms (Stage One)

The standard Short Form and Long Form should be divided into:

(a) *Common information requirements.* A single response would be submitted to all reviewing agencies.

[107] *Id.*
[108] *Id.*

(b) *Parallel information requirements.* Each reviewing agency would receive a separate but similarly-structured annex containing data or responses relevant to that jurisdiction.

(c) *Unique information requirements.* Each jurisdiction would have the option of designing customized annexes for obtaining information relevant only to its particular domestic merger control law.[109]

Competition agencies should be prepared to participate in discussions with merging parties in order to reduce the scope of a filing. However, common information requirements should be waived only with the consent of all reviewing agencies.[110]

7. Supplementary Requests for Information (Stage Two)

The competition agencies of IMRS member states should agree to work during the second stage review process from a comprehensive standardized Supplementary Request questionnaire. The competition agencies should try to keep customized additions to a minimum, whenever possible.[111]

8. Information Sharing and Confidentiality

The IMRS member states should amend their existing confidentiality rules in the following three respects:

(a) *Transmission of Information.* Each competition agency should have complete authority (but not any obligation) to disclose confidential information to other IMRS agencies reviewing a transaction.

(b) *'Downstream' Confidentiality Protection.* Each competition agency should be obliged to keep strictly confidential all non-public information received in confidence from another IMRS agency. Retransmitting the information to other government agencies should also be prohibited.

(c) *Third Party Access.* Third parties should be precluded by law from using freedom of information requests, discovery procedures or other means to

109 *Id.*
110 *Id.* at 477.
111 *Id.*

access non-public information which has been transmitted by, or received by, an agency reviewing a transaction under the IMRS.[112]

9. Interagency Communications

IMRS agencies involved in reviewing a particular transaction should interact according to the following framework:

(a) *Notification.* The following events merit formal notification to other agencies:

  (i) An agency requests a Long Form filing after receipt of a Short Form filing.

  (ii) An agency issues a Supplementary Request.

  (iii) An agency commences a formal contested or consent proceeding.

  (iv) An agency closes its investigation.

(b) *Informal discussions.* Agencies should be encouraged, but not required, to communicate regularly with each other during the course of an IMRS review (especially at the case officer level).

(c) *Formal Consultations.* Agencies should be required to participate in consultations at the following times during an IMRS review:

  (i) One week prior to the expiry of the Stage One waiting period, with a view to identifying agencies having moderate or no interest in a Stage Two review.

  (ii) One week prior to issuing a Supplementary Request, with a view to identifying opportunities for collaborations and efficient information gathering.

  (iii) At the request of any reviewing agency, at any other time, with respect to information sharing, substantive issues or possible remedies for addressing competition concerns.[113]

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[112] *Id.*
[113] *Id.* at 477-8.

10. Enforcement Guidelines

In order to promote transparency (and possible future convergence of merger laws), the IMRS member states should publish enforcement guidelines comprising substantive key issues, any unique features of their domestic laws and significant process matters.[114]

11. Announcement of Filings and Decisions

Under the IMRS, the merging parties should be required at the commencement of an IMRS review to publicly announce the proposed transaction in each reviewing jurisdiction in order to allow interested third parties to have timely input. Similarly, every competition agency which reviews the transaction should have a responsibility for publicly announcing when it has either closed an investigation or commenced formal proceedings.[115]

12. Clearance and Authorizations

The Baker Group strongly recommended that the IMRS jurisdictions should make available to merging parties either Clearances modeled upon the Canadian Advance Ruling Certificate system,[116] or Authorizations modeled upon the Australian Authorization system.[117] Clearances reduce uncertainty as to whether a transaction would

[114] Each nation's guidelines to address the following topics: (1) the definition of a "merger"; (2) applicability of the law of oligopoly concerns (i.e. 'collusion-enhancing' mergers) and to vertical and conglomerate mergers and joint-ventures; (3) market definition, including the treatment of supranational economic markets; (4) the anti-competitive threshold, including any public interest elements; (5) the factors considered in assessing anti-competitive effects, with special attention to how entry barriers and foreign competition are approached; (6) the availability of failing firm, efficiency or other defences/justifications for anti-competitive mergers; (7) any other unique and important features of the domestic law; and (8) significant process matters. *Id.* at n.193.

[115] *Id.*

[116] A clearance would involve the enforcement agency binding itself not to challenge a transaction on the basis of the information provided by the merging parties and perhaps other sources. It would provide an expeditious method for approving mergers which do not appear to raise serious competition concerns. *Id.*

[117] Authorization mechanism could be initiated by merging parties in situations where potential competition concerns are apparent but they seek an early and definitive ruling that the transaction will not be blocked. In exchange for going through a time-limited, predominantly public hearing process with broad standing rights for interested third parties, success on an application would insulate a transaction from any future challenge by either federal or state enforcement agencies in the relevant jurisdiction and would extinguish any private rights of action which would otherwise exist. *Id.*

be blocked, while Authorization should reduce uncertainty as to whether a transaction would be subject to a possible future challenge.[118]

13. Critique/Comments

The IMRS proposed by the Baker Group is only for the countries with *well developed* merger control systems, and it only harmonizes procedural aspects of transnational merger review. The IMRS would not need any new supranational institution for its enforcement. Of the twelve core components, only four raise significant concerns.

a. Pre-filing Consultations with Merging Parties

While pre-filing consultation between the merging parties and competition agency would reduce uncertainty as to whether a notification is required, in addition to clarifying other substantive and procedural issues, if mandatory it would put unnecessary strain on the scarce resources of competition authorities. Too much emphasis on a "fix-it-first" methodology can tend to produce a deal-making culture within the antitrust agency. Such a culture is ultimately antithetical to transparent and coordinated international review, since the deals done by one agency may differ from the deals done by another. Merger enforcement guidelines to be issued by competition agencies should be detailed and explanatory enough so as to minimize the need for pre-filing consultation. It should, of course, be acknowledged that the Baker Group did recommend the publication of guidelines and informal consultations solely for the purposes of clarifying their application are entirely appropriate.

b. Pre-notifiable Transactions

The proposal identified three types of international pre-notifiable transaction. Type one is mandatory, and includes transactions that must be notified in two or more IMRS jurisdictions. The other two types involve international premerger notification either at the option of the merging parties, or at the option of competition agencies.

Once a transaction becomes subject to the IMRS review, all signatory jurisdictions in which the merging parties (or their legal affiliates) have assets or sales

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[118] *Id.*

should be entitled to prompt notification of the transaction.[119] However, the proposal failed to mention who would give notification of the transaction to other jurisdictions once the transaction is subject to the IMRS review. Will it be the merging parties or the competition agencies? The proposal thus had a lacuna, which may be filled either by proposing a central clearing-house model or by a coordinating agency model.

c. Disclosure of Domestic Notifications

The proposal required the merging parties to list all foreign competition agencies to which the transaction has previously been notified and to disclose promptly any future notifications. Such a requirement has merit, as it would allow competition agencies to coordinate with other agencies, whether IMRS members or not, in reviewing the transaction. However, the Baker Group suggested that this requirement be included in the domestic pre-notification form rather than the form to be used under the IMRS. In my opinion, the requirement that merging parties list all foreign agencies to which the transaction has been notified should be met in the IMRS notification form.

d. Concluding Remarks

The Proposal ignored the need to harmonize triggering events and notification thresholds. As previously mentioned, the harmonization of triggering events lies at the core of procedural harmonization, as it would synchronize the compulsory waiting periods before consummating a merger, and time limits for initial and second phase reviews. Failing to align the review process by various competition agencies would make the process staggered and therefore unharmonized.

Coordination of triggering events could take one of two forms. It could involve common triggering event criteria, such as those of the US HSR Act. In the alternative, it could involve a requirement that all countries "trigger" their review processes upon the first notification in a domestic jurisdiction and subsequently maintain the same timetable for review.

Similarly, notification thresholds need to be standardized or coordinated in order to achieve the convergence of results among various merger control regimes. Failure to

[119] *Id.* at 475.

coordinate triggering events and thresholds is likely to jeopardize the viability of the proposal and its avowed objective of saving public and private transaction costs associated with the review of a transnational merger by multiple agencies.

I. Andre Fiebig

Andre Fiebig[120] proposed an international merger control regime within the WTO framework to filter out transnational mergers that pose no real threat to competition but are notified in and reviewed by the competition authorities of several jurisdictions.[121] His proposal is based on the finding that at least 95 per cent of the merger transactions which are reported do not substantially lessen competition, or create or strengthen a dominant position.[122] This high volume of benign transactions falls within the net of premerger notification, because most of merger control regimes employ what he called "surrogate criteria" to establish threshold: sales volume of the parties involved in the transaction, a combination of assets and sales volume, or a combination of sales and market share.[123] In his view, the use of surrogate criteria casts the premerger notification net too broadly. Fiebig's WTO premerger control regime would have the following components:

1. *WTO Premerger Office*

There would be a premerger control office within the WTO framework, (the "WTO Premerger Office") with the authority to review merger transactions which are notifiable in more than one country. The objective of the WTO Premerger Office would be to assist business and regulators by identifying those transactions which present no threat to competition. The WTO Premerger Office would not usurp the sovereignty of the national regulators, and would have no authority to conduct substantive review of a

[120] Andre Fiebig, *A Role for the WTO in International Merger Control,* 20 NW. J. INT'L L. & BUS. 233 (2000).
[121] *Id.* at 234.
[122] *Id.* at 238-243.
[123] Examples of countries that employ sales volume criterion are: Argentina, Austria, Belgium, the European Community, Germany, Hungary, Italy, Poland, the Netherlands and Switzerland. Countries that employ a combination of assets and sales volumes criterion include: Canada, Ireland, Mexico, South Korea, and the United States. While Greece, Portugal, Spain, Taiwan and Turkey employ a threshold based on a combination of sales and market shares. *Id.* at 238-39.

merger transaction.[124] In order to avoid the public and private costs associated with multiple unnecessary filings, the primary task of the WTO Premerger Office would be to identify the jurisdictions in which transactions requiring premerger notification would have no anticompetitive effects.[125]

2. ***International Merger Control Regime***

The merger control regime proffered by Fiebig is elective in nature, that is, parties would have the option of either filing premerger notification in all affected jurisdictions or submitting one filing with the WTO Premerger Office.[126] The parties that elect to notify the WTO Premerger Office would do so before notifying the national antitrust authority. Using the WTO prescribed form, the parties would have the responsibility to identify all the jurisdictions where the proposed transaction meets the premerger notification thresholds. The decision reached by the WTO Premerger Office would only cover countries mentioned in the notification form submitted to it.

The countries adhering to the WTO Premerger Notification Agreement would abide by the decision reached by the WTO Premerger Office, and would amend their national competition laws so as to exempt transactions ruled upon by the WTO Premerger Office as presenting no threat to competition within their territory.[127] However, member countries could overrule the decision of the WTO Premerger Office on the showing of substantial and legitimate reasons. Such an exemption may be invoked by a member country only where the merging parties have more than 10 per cent of the market share in that country.[128]

3. ***Drawbacks***

Fiebig himself noted some of the flaws in his proposal. He pointed out that the regime he proposed would add another layer of regulation to those transactions that actually do have anticompetitive effects in some countries, or a country. In addition,

[124] *Id.* at 247.
[125] *Id.* at 248.
[126] *Id.* at 249.
[127] *Id.* at 249-50.
[128] *Id.* at 251.

notification to the WTO Premerger Office would further delay the consummation of an uncontroversial transaction because the parties would then have to respect the waiting periods of the respective national agencies as well as that of the WTO Office. Another flaw Fiebig recognized was a lack of clear standard to identify "innocuous" transactions.[129]

4. *Critique/Comments*

Fiebig proffered quite an intriguing proposal for supranational coordination.[130] By limiting the scope of the regime so that it serves only to screen out harmless mergers, Fiebig proposed "to sidestep the sovereignty debate and political opposition (especially by the United States) to international antitrust coordination in WTO."[131]

However, despite his repeated assertions that his proposal could gather the necessary political agreement of nations, it seems to me that Fiebig under-estimated the difficulty of achieving consensus around his proposal. After all, his proposal would attribute a major new role to the WTO: that of gatekeeper to national antitrust agencies. It is currently unrealistic to imagine that national antitrust authorities, such as the DoJ or FTC, would allow a supranational agency to review transactions in order to determine whether the national agency would be allowed to review it. Such a review by a supranational agency amounts to issuing an opinion on the application of domestic substantive law.

Assuming that the proposal would become a reality and that every transnational merger would be notified to the WTO Premerger Office, imagine the workload placed on the WTO Office and risk of back-log. Moreover, as pointed out by Fiebig himself, what standard would the WTO Premerger Office use to ascertain whether a transaction is innocuous?

Fiebig did not address filing fees to be deposited with the WTO Premerger Office. In the absence of filing fees, how would the machinery of the WTO Premerger Office support itself? Furthermore, his proposal would cut filing fees submitted to domestic

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[129] *Id.* at 252.
[130] Eleanor M. Fox, *Foreword: Mergers, Market Access and the Millennium*, 20 NW. J. INT'L L. & BUS. 203 (2000).
[131] *Id.*

agencies. The cut in filing fees alone would make it difficult to gather the necessary political will of nations to become party to such an international merger control regime.

The proposal suggested amending domestic competition laws to exempt transactions ruled upon by the WTO Premerger Office. Such an amendment would remove the domestic agencies' discretion to have jurisdiction over a transaction. An exemption could be invoked by competition authorities only where either of the parties to the transaction has more than 10 per cent of the market share in its jurisdiction and on the showing of substantial and legitimate reasons. However, such an exemption must assume a unified premerger notification rule; that is, all the member countries are using a common "market share" criterion, which suggests a higher degree of integration than Fiebig explicitly acknowledged.

What gives birth to Fiebig's proposal is the use of disparate "surrogate criteria" by different countries for casting the premerger notification net. An easier solution would be a multilateral treaty under which signatories would substitute tighter, more narrowly cast, notification threshold criteria for what Fiebig taking to be overly loose ones.

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VIII
International Merger Control Regime

A. Implications of the Review of the Proposals

The review of existing proposals suggests that there is no real emergent consensus on the contours of an international merger control regime. To begin with, the proposals were geared toward achieving different objectives. Whilst most of the proposals did not offer any clear statement of objective, the ones that provided such a statement span the following spectrum: to reduce merger transaction costs by rationalizing the merger review process through targeted problem-solving in individual merger regimes;[1] to reduce interjurisdictional conflicts in international merger reviews;[2] to expedite pro-competitive and neutral mergers and to prohibit anticompetitive mergers, and to do so without imposing excessive costs;[3] to create and international merger review system for countries with well developed domestic merger control systems;[4] and to harmonize procedural elements of merger review.[5]

Most of the proposals failed to allocate any role to an international organization for facilitating the enforcement of proposed international merger control regimes. Only ICPAC suggested a role for the OECD. The Munich Group and Prof. Fox suggested that the WTO house their proposed regimes. Below is a comparison of the recommendations

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[1] ICPAC. (for the sake of convenience only name of the prospers are provided here. For complete citation of the proposals please see the previous chapter.)
[2] Campbell & Trebilcock.
[3] Eleanor M. Fox.
[4] Baker Group..
[5] Donald Baker.

with respect to the various possible features of an IMCR made in the proposals that we reviewed in the last chapter.[6]

1. ***Procedural Elements***

a. Premerger Filing Stages:

A majority of the proposals suggested a two-tier filing system.[7] Only the Munich Group suggested a single-tier filing system. A two-tier notification procedure, as used in the US, is beneficial both for competition agencies and for merging parties. I would, therefore, recommend a two-tiered filing system in a future IMCR.

b. Harmonized Premerger Notification Form:

This is one element upon which all proposals formed consensus, while only the Munich Group was silent on this issue. While a harmonized premerger notification form is a desirable goal, a notification form cannot in fact be harmonized without first harmonizing underlying procedural and substantive elements of merger control laws. How can a form be harmonized when one jurisdiction requires filing in two stages, while the other requires filing in one stage? How can market shares be presented in a harmonized form when one jurisdiction uses HHIs to calculate market concentration, while the other uses a five-firm concentration ratios (CR5)? We first need to harmonize procedural and substantive elements of merger control laws before we can have a harmonized premerger notification form. In this respect, OECD's *Framework for a Notification and Report Form for Concentrations* would be the most useful starting point.

c. Requirement to Disclose other Agencies Involved:

Two proposals[8] suggested mandatory disclosure, and three proposals[9] suggested voluntary or no disclosure, of other antitrust agencies involved in merger review.

[6] Adre Fiebig's proposal has not been compared here, as it was too radical for comparison with the other proposals.
[7] ICPAC; Campbell & Trebilcock; Baker Group; Donald Baker; ABA.
[8] Baker Group; Campbell & Trebilcock.
[9] ICPAC; Donald I. Baker; ABA.

The requirement to disclose which other antitrust agencies are involved or notified of the transaction is essential to ensure coordination and cooperation among the reviewing agencies. How can one antitrust agency coordinate and/or cooperate with other antitrust agencies when it does not know who else is reviewing the transaction? In the U.S, the HSR Act now provides for voluntary disclosure of other antitrust agencies notified of the transaction, while Form CO under the EC Merger Regulation does not require such disclosure. Disclosure of other agencies involved or notified should be made mandatory, and become a requirement in a future IMCR.

d. Waiting Period Before Consummation:

Three proposals[10] suggested compulsory waiting periods, subject to derogation, whilst two proposals[11] suggested elimination of compulsory waiting periods.

In a multijurisdictional merger review, a compulsory waiting period is useful to ensure that all reviewing agencies have certainty as to the minimum period during which a transaction will not be consummated. However, where all reviewing jurisdictions give clearance to the proposed transaction, there is no reason why the transaction should not be allowed to proceed. Thus, a compulsory waiting period, waived automatically provided once clearance is obtained by all reviewing agencies, should become part of a future IMCR.

e. Fixed Time Limits for Decision-Making:

All but the American Bar Association's proposal suggested fixed or notionally binding time limits for decision-making. In order to increase certainty, and to preserve possible pro-competitive effects of mergers, particularly in high-tech industries, there should be fixed or notionally binding time limits for decision-making. EU style time limits (one month for initial review and four months for second stage review), suggested in a number of the proposals, should be part of a future IMCR.

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[10] ICPAC; Munich Group; Fox & Ordover.
[11] Campbell & Trebilcock; and ABA.

f. Disclosure of Confidential Information:

A majority of proposals[12] suggested changes in domestic confidentiality laws in order to allow competition agencies to exchange confidential information, subject to appropriate safeguards. Only ICPAC recommended exchange of information only with the permission of merging parties.

No cooperation or coordination among antitrust agencies can take place without exchange and sharing of confidential information. Leaving the mechanism of cooperation and coordination dependent on the wishes of merging parties would allow a prisoner's dilemma situation to prevail, resulting in a sub-optimal protection of consumers. The primary function of competition agencies is to ensure that markets remain competitive, so as to preserve consumer welfare. Competition agencies should not be required to seek the permission of merging parties to perform their basic function. If the exchange of confidential information among regimes entrusted to maintain confidentiality is an impediment to a merger, so be it. However, the exchange and use of such information should be subject to appropriate safeguards. The unwarranted disclosure of confidential information by a foreign agency so as to favour its domestic competitors ought to be the basis for a trade remedy.

g. Triggering Events:

Only three proposals[13] addressed the issue of triggering events and recommended that they be harmonized. No procedural harmonization is possible without the harmonization of triggering events. Consider the analogy of a hundred-meter race, where the athletes represent competition agencies, the distance represents the time period for decision-making, the gun-shot that sets-off the race represents the triggering event. Can we say that the athletes are running in *the same* race when each athlete starts the race at a different gunshot? Just as a single gunshot is required to start a race, so too there should be harmonized triggering event to start a harmonized merger review. I would recommend triggering events used under the US HSR Act in a future IMCR. An alternative would be to say that the race begins for all with the first gunshot. Countries could maintain

[12] Campbell & Trebilcock; Eleanor M. Fox; Baker Group; Donald I. Baker; ABA.

differing triggering event criteria but be required to begin review upon the first common notification to a WTO Competition Office created under an IMCR.

h. Notification Thresholds

Only four proposals[14] addressed the issue of notification thresholds, out of which three proposals recommended thresholds based on assets and sales.

Notification thresholds based on assets and sales seems to capture more successfully transactions that raise competition concerns rather than those based solely on turnover or aggregate worldwide revenue of merging parties. According to one commentator, merger control regime that is based on turnover thresholds will "inevitably" capture mergers that normally do not raise any competition concerns.[15] On the other hand, such a regime may not capture firms that "occupy important, or potentially important, positions in a market but generate relatively low levels of turnover. Thus, quite a few significant 'new economy' transactions have not been reviewable by the [EU] Commission. Even the AOL/Time Warner merger valued at $ 160 billion on its announcement barely qualified for review under the [EC] Merger Regulation."[16]

Moreover, public international law arguably requires a transaction to have "effect" within the borders of a nation-state in order for the state to assume jurisdiction over the transaction, irrespective of whether the thresholds are met.[17] Thus, to ensure that notification thresholds would mostly capture transactions having effect within a nation-sate, a future IMCR should have notification thresholds based on assets and sales within a nation-state, similar in principle to the merger control regime of the US

[13] ICPAC; Eleanor M. Fox; and ABA.

[14] ICPAC (Objectively based notification thresholds; Sales and assets); Munich Group (0.1 % or more of GNP of the jurisdiction affected, or 10% of worldwide sales accrue with the jurisdiction); Eleanor M. Fox (based on assets and sales); Baker Group (based on assets and sales).

[15] Rachel Brandenburger & Thomas Jassens, European Merger Control: Do the Checks and Balances Need to be Re-set", Speech Before Fordham Corporate Law Institute's 28th Annual Conference on International Antitrust Law and Policy 22 (October 25-26, 2001) (on file with the author).

[16] *Id.* at 29; AOL/Time Warner, Case No. COMP/M.1845 (2000) (Comm'n); *see supra* Chap. IV, n. 22 and accompanying text.

[17] *See, e.g.,* Genor v. Comm'n, Case T-102/96, 1999 ECR II 7153 (CFI), at ¶ 90. ("Application of the Regulation is justified under public international law when it is foreseeable that a proposed concentration will have immediate and substantial effect in the Community").

i. Nature of the Regimes (Voluntary/Compulsory)

Three proposals[18] suggested that their proposed international merger review treaty be voluntarily adopted by the merging parties, while two proposals[19] recommended that the treaty be compulsory for the merging parties of the states that are party to the treaty.

Under public international law, treaties are concluded among countries, and the subjects of a country party to a treaty are bound to abide by the terms of the treaty. A treaty cannot be made operative at the option of merging parties. On the other side of the coin, if the merging parties wish to opt into the treaty but the jurisdiction where the transaction is notified is not a party to the treaty, it is unclear what law would apply. Making the treaty operative at the option of merging parties creates a situation in which competition agencies must seek permission from the merging parties in order to discharge their primary function. Adhering to general principles of public international law, an IMCR should be compulsory for merging parties that come under the jurisdiction of a country that is party to the regime.

j. Transparency and Merger Enforcement Guidelines

Four proposals[20] recommended transparency in the application of merger review principles, and the publication of Merger Enforcement Guidelines (MEGs). Transparency is the corner-stone principle of multilateralism and should be automatically embedded in any multilateral treaty. To ensure transparent merger analysis, publication of MEGs should become a requirement under a future IMCR.

k. Foreign Nation's Interest/Global Impact

Four proposals[21] recommended that competition authorities while reviewing a merger should take into consideration the impact of a merger on foreign markets. In a global world, Ruggie argues that nation-states have a dual role to play. First, they have separate responsibilities towards their own society, and second, "states are, collectively, the custodians of our common life on this planet – a life the citizens of all countries

[18] Baker Group; Donald Baker; ABA.
[19] Munich Group; and Campbell & Trebilcock.
[20] ICPAC; Fox & Ordover; Baker Group; ABA.

share."[22] Since no other entity competes with or can substitute for the state, in order to successfully manage globalization states must act in a manner that is consistent with their dual role.[23] In the context of multijurisdictional merger review, this dual role of states would require them to assess the effects of a merger even beyond their national borders. A future IMCR should therefore adopt the global consumer welfare criterion for review, which would require that, where relevant, nation-states would assess the effects of a merger on global markets.

l. Central Filing System

Three proposals[24] recommended a central filing system with a disinterested clearing house or with a lead jurisdiction or an international antitrust authority. Two proposals[25] recommended against central filing. Although a single central filing system is a desirable goal to be achieved in the future, it is presently not achievable. However, central filing with an international organization operating parallel to domestic filing is presently conceivable and indeed necessary to facilitate coordination among antitrust agencies.

m. Dispute Resolution Mechanism

Four proposals[26] suggested dispute resolution of some sort. ICPAC suggested mediation by mediators selected from a roaster of internationally respected antitrust law experts. The Munich Group recommended an International Antitrust Authority to be entrusted with powers to resolve any dispute. Professor Fox suggested rules of priority or proportionality to resolve disputes. Campbell & Trebilcock suggested supranational adjudication.

Dispute resolution is an integral part of a cooperation and coordination mechanism. As noted in Chapter I, an international organization performing a dispute

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[21] ICPAC; Eleanor M. Fox; Fox & Ordover; and ABA.

[22] John G. Ruggie, *Globalization and Global Community: The Role of the United Nations*, J. Douglas Gibson Lecture, School of Policy Studies, Queens University, Kingston, Ontario (20 Nov. 2000) available at http://qsilver.queensu.ca/sps/WorkingPapers/files/ruggie.html (last visited on Feb. 24, 2002).

[23] *Id.*

[24] Munich Group; Eleanor M. Fox; and Fox & Ordover.

[25] ICPAC; and ABA.

[26] ICPAC; Munich Group; and Eleanor M. Fox.; Campbell & Trebilcock.

resolution role should be viewed "as assisting states in resolving their cooperation dilemmas, rather than acting as an authoritative enforcer of rules and norms. By providing guidance on how to interpret international agreements and the specifics of state behaviour, *dispute resolution is properly seen as one more type of information provision*."[27] (emphasis supplied).

Availability of necessary information is a *sine quo non* for conducting sound antitrust analysis of a transnational merger. A dispute resolution mechanism is also essential to the efficient enforcement of the provisions of a multilateral treaty.

n. Interagency Coordination

Six proposals[28] recommended inter-agency coordination at all levels of merger review. Two proposals were silent on the issue. Interagency coordination is essential to overcome the free-rider problem (promoting a national champion) and prisoner's dilemma (disparate merger review) that undercut the supply of global consumer welfare. Moreover, the American and the European experience with interagency coordination demonstrated that it can yield positive results. Interagency coordination should thus form the core of a future IMCR.

o. Pre-filing Consultation

Only two proposals[29] suggested pre-filing consultation between competition authorities and merging parties. ICPAC recommended against mandatory pre-filing consultations and instead suggested that notification thresholds should be made transparent enough that no pre-filing consultations are needed.

Notification thresholds and triggering events should be transparent, and MEGs should be detailed and explanatory enough that no pre-filing consultation are needed. A future IMCR should rely upon the publications of detailed MEGs in order to make the merger review process transparent, predictable and objective.

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[27] Lisa L. Martin, *The Political Economy of International Cooperation*, *in* GLOBAL PUBLIC GOODS, INTERNATIONAL COOPERATION IN 21ST CENTURY 51, 52 (Inge Kaul et al. eds., New York: Oxford University Press, 1999).

[28] ICPAC; Munich Group; Campbell & Trebilcock; Baker Group; Donald Baker; and ABA.

p. *Public Notification of Filing and Decisions*

Only ICPAC recommended that competition authorities should inform the public of premerger notifications and subsequent decisions. The Baker Group recommended that merging parties should be responsible for publicly announcing the proposed transaction in each reviewing jurisdiction, while competition authorities should be responsible for publicly announcing either closing of the investigation or commencing of the formal proceedings by them. Other proposals were silent on this issue.

Parties to a transnational merger are already burdened with the compliance costs of multijurisdictional merger review. Placing an additional public disclosure requirement on the merging parties – over and above those that already exist under securities law – would create an undue burden. I support ICPAC's recommendation that the competition authorities should be responsible for informing the public of premerger notifications and of their decisions.

2. *Model for an IMCR: Supranational Institution vs. a Lead Jurisdiction*

Only two proposals suggested a Lead Jurisdiction model. ICPAC recommended that one jurisdiction should coordinate the investigation and make an assessment of the proposed transaction. The assessment of the coordinating agency would be binding on it but either could serve as a recommendation to other interested jurisdictions or could be binding on those jurisdictions as well.[30] The Lead Jurisdiction would be selected through consultation among all reviewing jurisdictions.

Campbell & Trebilcock also suggested a Lead Jurisdiction model, in which the Lead Jurisdiction should coordinate and review the merger, and the assessment made by it would operate merely as a recommendation for other agencies. The Lead Jurisdiction would be selected either by consultation among reviewing jurisdictions or be appointed by an international authority.

Only two proposals suggested creating a supranational institution. Campbell & Trebilcock recommended a supranational institution, like the EU Commission, that would

[29] Baker Group; and ABA.

be responsible for supranational investigation and adjudication. The Munich Group recommended the creation of an International Antitrust Authority that would enforce the treaty obligations of the members, and an International Antitrust Panel that would resolve disputes among national competition authorities.

One can go so far as to say that a choice of a model for an IMCR depends on how one defines "law." A legal pluralistic conception, drawn on the theoretical contribution of Lon Fuller, is particularly helpful to this discussion. Traditionally, law has been defined as an expression of the sovereign's will. Legal pluralism challenges this "dominant monist image of law as derivative of the political state and its progeny."[31] Fuller defines law as the "enterprise of subjecting human conduct to the governance of rules." [32] He questions the perception of law as a "one-way projection of authority, emanating from an authorized source and imposing itself on the citizen."[33] Instead, he stresses the significance of "cooperative effort – an effective and responsible interaction – between lawgiver and subject"[34] "Law is not, like management, a matter of directing other persons how to accomplish tasks set by a superior, but it basically a matter of providing citizenry with a sound and stable framework for their interactions with one another . . ."[35]

The traditional definition of law has also been challenged by the process of globalization and the fact that citizens are now subject to more than one sovereign's will. For instance, in the context of transnational mergers, merging parties are subjected to multiple merger control regimes. Multiplicity of sovereigns as opposed to *the sovereign* defies the traditional concept of law.

The Lead Jurisdiction model fits to Fuller's conception of law as a "cooperative effort", better than does the effort to recreate a single "sovereign" supranational oversight

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[30] ICPAC, Final Report, *supra* Chap.-VII, note 3, at 8 & 84.
[31] Martha-Marie Kleinhans & Roderick A. Macdonald, *What is a Critical Legal Pluralism*, CANADIAN JOURNAL OF LAW AND SOCIETY, 12 no. 2, 25-46 (Fall 1997) .
[32] L.L. FULLER, THE MORALITY OF LAW, 106 rev. ed. (New Haven, Conn: Yale University Press, 1969). For commentary on Fuller's conception of law *see* REDISCOVERING FULLER: ESSAYS ON IMPLICIT LAW AND INSTITUTIONAL DESIGN (Willem J. Witteveen & Wibern van der Burg, eds., Amsterdam University Press, 1999). *See also* Robert Wolfe, *Rendering Unto Caesar How Legal Pluralism and Regime Theory Help in Understanding "Multiple Centres of Power," in* WHO IS AFRAID OF THE STATE? CANADA IN A WORLD OF MULTIPLE CENTRES OF POWER 383 (Smith Gordon & Daniel Wolfish, eds., Toronto: Uni. of Toronto Press, 2001), also *available at* : http://policy.queensu.ca/~wolfer/Papers/Renderin.pdf, (last visited on Feb. 28, 2002); Robert Wolfe, *See you in Geneva? Democracy, the Rule of Law and the WTO, available at:* http://policy.queensu.ca/~wolfer/Papers/ISAruleof%20law.pdf, (last visited on Feb. 28, 2002).
[33] *Id.* at 192 .
[34] *Id.* at 219.

agency. Proponents of a supranational institution model for an IMCR might argue that the principle of subsidarity is adequate to ensure cooperative effort. It is consistent with subsidarity that where a merger involves markets in more than one nation-state, a supranational body receives review jurisdiction. While the principle of subsidarity seems to support granting authority to a supranational body, the principle is only functional within the borders of a nation-states or a union of states, like the EU, where a hierarchy of different institutions is already established and legitimized and where sovereignty reposes, at least notionally, at a single level.

Moreover, we have learned from the experience of the EU that creating a global supranational authority at a global level is neither practically feasible nor politically likely, at present or in the near future. On the other hand, nation-states should have some sort of "order" among themselves so as to manage the global markets effectively. The European experience of coordination between EU Commission and the EFTA's Surveillance Authority, and the American experience of coordination between the NAAG and the federal antitrust agencies instruct us that the Lead Jurisdiction approach works effectively where more than one antitrust agency has competence over a merger. In addition, the US antitrust authorities are also practicing the Lead Jurisdiction model in coordinating with antitrust agencies of other countries. For instance, "in FederalMogul Corp. – T&N Plc, the FTC coordinated review efforts closely with the enforcement agencies in the United Kingdom, Germany, France and Italy. The German Federal Cartel Office raised concerns that the merger threatened competition in dry bearings. The FTC included in its consent agreement a provision for divesting dry bearing units partly to satisfy German concerns and to allow Federal-Mogul to avoid entering a separate divestiture proceeding in Germany."[36]

Additionally, the recent reform of the EU's competition policy has emphasized decentralization of power and allowing the "best-suited' jurisdiction to take charge of a matter and coordinate and cooperate with other affected national competition authorities.

Thus, American and European experiences, and the record of coordination among

[35] *Id.* at 210.
[36] Merit E. Janow, *Transatlantic Cooperation on Competition Policy*, *in* ANTITRUST GOES GLOBAL, WHAT FUTURE FOR TRANSATLANTIC COOPERATION? 29, 51-52 (Evenett, et al. eds., Brookings Institution Press: Washington, D.C., 2000).

antitrust agencies, further supports our preference for formulating an IMCR based on the Lead Jurisdiction model. The model offers a democratic, socially responsible and organic form of governance.

a. *A Democratic Form of Governance*

The Lead Jurisdiction model preserves the autonomy of nation-states, since the states party to an IMCR would actively participate in merger review, and would have a say in its final outcome. Active participation by all affected nation-states represents a democratic form of governance. Moreover, because the Lead Jurisdiction would be responsible to and monitored by all other affected jurisdictions, it would be less likely to yield to the influence exerted by local merging parties in shaping the outcome of the merger review. The model thus also protects national competition agencies from "capture."

b. *A Socially Responsible Form of Governance*

The Lead Jurisdiction model would eliminate the problem of asymmetric information (or prisoner's dilemma faced by national competition authorities in the absence of any mechanism for information sharing). The Lead Jurisdiction will act as a *parens patriae* for other affected jurisdictions, which both undercuts the incentives to promote a national champion (free-rider problem), and promotes global consumer welfare. Since the model protects the world's consumers rather than national consumers alone it is a socially responsible form of governance.

c. *An Organic Form of Governance*

The Lead Jurisdiction model eschews duplication of efforts by multiple jurisdictions reviewing the same subject matter. It preserves global resources and avoids waste, and is thus an organic form of governance

3. ***Substantive Law***

Five proposals[37] recommended harmonization of substantive law pertaining to mergers. For effective coordination and cooperation among antitrust agencies, I think, there should be a consensus on broad substantive principles governing mergers. Moreover, harmonization of common substantive standards for merger analysis is also essential to align the objectives of merger control regimes.

Smets and Cayseele explain the problem caused by differing objectives by using the principal-agent model. According to them, competition authorities are principals who want availability of low-priced, high-quality goods for consumers within their jurisdictions, while merging parties are agents who are supposed to provide those goods. In a multijurisdictional merger review, the merging parties have to comply with different sets of regulations. This causes a "common agency" problem, which means that there are different principals regulating one single agent. "When the principals have conflicting objectives, the agent will try to give different signals to each principal and everybody will be worse off."[38] Smets and Cayseele illustrate this by giving the example of relationship among a physician, a patient, and the social security system. The physician in this example serves as a common agent of two principals: his patient and a social security system. "While the patient wants the best possible medical care independent of costs, social security wants the physician to examine his patient at the lowest possible cost because of its budget restriction. Consequently, the physician will adopt a middle course that is optimal for neither the patient nor the social security system."[39] The implication of this analogy for multijurisdictional merger review is that where there is a large divergence among national merger control regimes (principals), the merging parties (agent) will give different information to each national antitrust agency, which will result in sub-optimal protection of global consumer welfare.

Thus, the development of common substantive principles would not only result in reduced costs (both for merging parties and competition authorities) and optimal protection of global consumer welfare but would also furnish the basis for enhanced

[37] ICPAC; DIAC; Campbell & Trebilcock; Eleanor M. Fox; and ABA.
[38] *See* Hilde Smets & Patrick Van Cayseele, *Competing Merger Policies in a Common Agency Framework*, 15 INT'L REV. L. & ECON. 425, 434 (1995).

participation by member states working within the Lead Jurisdiction model. No cooperation or coordination is possible if all member states are singing from their own hymn book. The common principles would become a benchmark for transparency and for judging the performance of the Lead Jurisdiction.

B. A Draft IMCR

In this section we will propose a draft of common substantive principles as well as procedures for conducting transnational merger review based on the principles that emerged from the foregoing analysis. We therefore need a set of two documents. The first document – which would form the Agreement on Competition Law within the WTO framework – embodies the core substantive competition law principles that will provide the general basis for reviewing all anticompetitive behaviour. The entirety of competition law is beyond the scope of this thesis, but it is assumed that merger review would only form part of a broader WTO competition framework. Adherence to general competition principles by the member states would ensure prevention of anticompetitive behaviour at a domestic level, which may have negative implications for trade at a global level. As concerns the evaluation of mergers we will employ the US "substantial lessening of competition" test as opposed to the EU "creating or strengthening of a dominant position" test, but this would of course be subject to negotiation. The second document – an annex on Transnational Merger Review attached to the Agreement on Competition Law – would cover the procedural aspects of conducting transnational merger review using the Lead Jurisdiction model.

[39] *Id.*

1. Draft Agreement on Competition Law

WHEREAS the liberalization of trade and opening of domestic markets to foreign participants under the WTO trade regime has produced increasing integration and globalization of the world economies.

AND WHEREAS absence of competition law enforcement can impose anti-competitive costs on neighbours and, as a consequence, on the world trading system and on the citizen, consumers of the world.[40]

AND WHEREAS the process of globalization has placed inward and outward limits on the reach of national antitrust laws.

AND WHEREAS these limits can only be overcome through the collective action of nation-states cooperating and coordinating among each other in good faith.

AND WHEREAS there are clear benefits of assessing transnational business conduct, wherever it takes place, by the same or compatible criteria.[41]

NOW THEREFORE the Member States of the WTO enter into this Agreement on Competition Law Principles (hereinafter referred to as the "the Agreement"). The Agreement is subject to the WTO's cornerstone principles of multilateralism, *i.e.*, non-discrimination, transparency, most favoured nation treatment, and national treatment.

1. Prohibited and Void Practices and Transactions

1.1 Practices and Transactions: Prohibited and Void
Every contract, combination in the form of cartels, alliances or otherwise, or conspiracy, in restraint of trade or commerce within the territory of the Member State, or with other Member state, is prohibited and void.

1.2 Contracts in Restraint of Trade: Prohibited and Void
To monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce is prohibited and transactions resulting from monopolization are void.

1.3 Consolidation of Markets
No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the assets or stock or other share capital of another corporation engaged also in commerce, where such an acquisition would be likely

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[40] This phrase is taken from Eleanor M. Fox & Janusz A. Ordover, *The Harmonization of Competition and Trade Law, The case of Modest Linkages of Law and the Limits of Parochial State Action, in* COMPETITION POLICY IN THE GLOBAL ECONOMY: MODALITIES FOR COOPERATION 407 (Leonard Waverman, et al., eds., London & NY: Routledge, 1997).

[41] This phrase is adopted from Fox & Ordover, *id.* at 408.

to substantially lessen competition, to restrain commerce in the global market or to create a monopoly of any line of commerce.

Comment:

These general standards are derived from the Sherman Act on the basis that they are the most general and stem from the most influential of domestic jurisdictions. Whereas the US deals with these standards through criminal law, other jurisdictions do not. The EU sanction is often to declare a transaction void. The formulation proposed here retains flexibility in this regard. It may be salutary to define the terms "practice" and "transaction."

2. Implementation and Enforcement by Members States.

2.1 Each member state shall proscribe the prohibited and void practices enunciated in this Agreement in accordance with its domestic competition laws.

2.2 Each Member State shall establish an independent agency responsible for the adequate and effective enforcement of its competition law.

2.3 When assessing the anti-competitive effects of a transaction or practice Member States shall have reference only to consumer welfare including where relevant global consumer welfare. Upon notification to the WTO Competition Council Member States may exceptionally invoke risks to national security, public health, safety, and the environment to exempt a practice or transaction from the application of this Agreement.

Comment:

The implementation requirements would be subject to the filing of commitments and exceptions as in the case of the Reference Paper on Procompetitive Regulatory Principles

3. Annexes to the Agreement

3.1 The Member States shall elaborate the principles laid down in the Agreement by adding Annexes to this Agreement.

3.2 In elaborating the principles enshrined herein, due regard should be given to the promotion of global consumer welfare.

3.3 The Annexes shall contain procedures for cooperation and coordination among the Member States, in addition to other necessary elements that may be required.

2. *Draft Annex on Transnational Merger Review*

WHEREAS the opening of markets allows businesses to expand across national borders through mergers and acquisitions.

AND WHEREAS mergers with transnational effects are becoming subject to an increasing number of merger control regimes.

AND WHEREAS the application of more than one set of merger control laws to a single transaction poses challenges for merging parties, competition authorities and to the sovereignty of nation-states.

AND WHEREAS increasingly disparate national merger control laws have contributed to uncertainty, high compliance costs for merging parties, legal complexity and bilateral disputes.

AND WHEREAS the objective of the world's merger control laws is to preserve competition within a global marketplace.

AND WHEREAS in a globalized market global consumer welfare should take priority over national consumer welfare.

AND WHEREAS there is a need for a coordinated review of transnational mergers that would alleviate unnecessary burdens imposed on businesses by proliferating merger control regimes, reduce inherent inefficiencies in disparate review, provide the means to prevent, in its incipiency, global abuse of dominance, and promote and protect global consumer welfare.

NOW THEREFORE the Member States of the WTO pursuant to their Agreement on Competition Law adhere to this Annex on Model Principles for Transnational Merger Review.

1. Scope

1.1. This Annex shall be applicable whenever a merger, as defined below, affects the global market.

2. Definitions

2.1. "Arbitration Panel" means a panel of five members drawn from a rooster of antitrust and competition law experts of international repute registered with the WTO Competition Office and having no more than one member that is citizen of a Member States party to a dispute.

2.2. "Competition Authority" means the agency of the Member State notified by the Member State to the WTO Competition Office as responsible for domestic merger review, and solely responsible for any communication with the WTO Competition Office.

2.3. "Lead Jurisdiction" under this Annex means a competition authority selected, in accordance with the criteria laid down in section 14, by competition authorities of the Member States and that receives premerger notification of a merger pursuant to this Annex.

2.4. "Merger" means any acquisition of securities or assets, whether by contract or any other means of direct and indirect control of the whole or part of one of another commercial legal entity.

2.5. "Transnational Merger" means any merger that has effects in more than two Member States through a discernible impact on the domestic market.

3. Interface with Domestic Law

3.1. Each Member State shall take appropriate measures to give the force of law to this Annex within the territory under its jurisdiction.

3.2. Where the domestic law of a Member State is inconsistent with the provisions of this Annex, the Member State shall take necessary action to remove such inconsistency in a reasonable period of time.

4. Establishment of a WTO Competition Office

4.1. A Competition Office under the auspices of the WTO shall be established within one year from the date of receipt of the tenth Member State's specific commitment to adhere to this Annex.

5. Duties of the WTO Competition Office

The WTO Competition Office shall:

5.1. Receive a copy of premerger notification filings from the parties to a Transnational Merger and shall record such filings in an official register which shall be accessible to all Member States.
5.2. Receive "expressions of interest" to be the Lead Jurisdiction in a particular merger from the competition authorities of Member States and shall notify receipt of such expression(s) of interest to all other competition authorities of the Member States that have been notified of the merger.
5.3. Facilitate discussion concerning the selection of a Lead Jurisdiction among competition authorities that have been notified of the merger.

5.4. Receive a copy of all responses to each notified merger that have been sent to the Lead Jurisdiction from other Member States.
5.5. Keep an up-to-date list of the Member States that adhere to this Annex, and shall transmit to the Member States any revision or addition to it.

6. Duties of Member States' Competition Authority

The competition authority of each Member State party to this Annex shall:

6.1. Give notice that it is a party to this Annex.
6.2. Advise merging parties to file with the WTO Competition Office where the merger is notified in more than two Member States party to the Annex and affects the global market.

7. Notification Thresholds

7.1. Member states shall take appropriate measures to establish their premerger notification thresholds on the basis of assets and sales of the merging parties within their jurisdiction.

Comment:

Annual net sales shall be calculated according to the most recent regularly prepared annual statements of income and expense. Total assets shall be calculated according to the most recent regularly prepared balance sheet. The value of the acquisition shall be calculated, according to the aggregate value of assets or voting securities of the acquired party and of the acquiring party.

8. Notification Form

8.1. When filing notification with the WTO Competition Office, the merging parties shall use the form prescribed by the Office.
8.2. Member States may accept notification by merging parties on two types of forms: Long Form and Short Form.
8.3. A Working Group on Merger Notification Forms shall be established to develop common forms applicable to transnational mergers and to be used by all Member States

9. Filing Procedure

9.1. Member States shall take appropriate measures to ensure that domestic notification procedures applicable to transnational mergers include provisions for initial filing and subsequent requests for additional information by its competition authority.
9.2. Where the merging parties ascertain that premerger notification must be filed in more than two Member States party to this Annex, they shall also file notification with the WTO Competition Office.

10. Triggering Events

10.1. Member States may allow merging parties to file premerger notification upon the execution of a letter of intent or an agreement in principle.

11. Decision-Making and Waiting Period

11.1. Every Member State that has been notified of a merger directly by the parties or by the WTO Competition Office shall conduct initial review of the merger within 30 days of notification.

11.2. Where a Member State wishes to conduct a second-phase investigation, it shall within 35 days of notification inform the WTO Competition Office of its intentions to do so, and if it wants to be the Lead Jurisdiction it should within 35 days of notification file an expression of interest with the WTO Competition Office

11.3. The Lead Jurisdiction must complete its second-phase investigation within four months from the date of receipt of a complete response to its request for additional information.

11.4. Merging parties shall not give effect to the merger unless the Lead Jurisdiction has given its final clearance and that no other Member State has challenged the decision of the Lead Jurisdiction within 7 days of clearance.

11.5. The decision by the Lead Jurisdiction shall be binding on all the Member States, unless challenged within 7 days from the date of the date of deliverance of the decision and brought with the dispute resolution mechanism of section 18.

12. Standard of Lead Jurisdiction Review

12.1. The Lead Jurisdiction shall assess the merger according to the principles laid down in the Agreement on Competition Law, and in particular shall take account of global consumer welfare and responses to the merger of the Member States.

Comment

Section 12. makes negative comity and global consumer welfare the standard principles to gauge the validity and legitimacy of the decision rendered by the Lead Jurisdiction. Recognizing that there may be situations where concerns of the Member States affected by a merger may not be completely addressed by the Lead Jurisdiction, section 12. guides the Lead Jurisdiction to address, in descending order, the concerns of nation-states which host the maximum number of consumers, or from where the merging parties draw majority of their revenues. Such a principle is necessary to avoid stultification of the whole process by a Member State suffering minimum effect of the transaction vis-à-vis other Member States.

13. Coordination among Competition Agencies of the Member States

13.1. As soon as competition authorities are notified of a merger falling within the purview of this Annex, they shall coordinate with other authorities, and inform them of any intention to a request for additional information.

13.2. Upon a request for additional information and after the Lead Jurisdiction has been selected, the Lead Jurisdiction must, at all times during the merger review, coordinate with and inform all other competition authorities, and the WTO Competition Office of steps it is taking. In particular, the Lead Jurisdiction should inform and consult with other competition authorities with respect to the following:

13.2.1. the legal and economic analysis it intends to apply to the merger;

13.2.2. specific actions to be taken by the Lead Jurisdiction in response to the concerns filed by other competition authorities;

13.2.3. remedies proposed by the merging parties; and

13.2.4. remedies proposed by the Lead Jurisdiction.

13.3. An electronic network shall be established through the WTO Competition Office for exchange of information among competition authorities.

14. Selection of the Lead Jurisdiction

14.1. Where more than one Member State files an expression of interest with the WTO Competition Office to be the Lead Jurisdiction, such Member States shall coordinate with Member States that have received notification to select the Lead Jurisdiction. In selecting the Lead Jurisdiction, priority shall be given to the jurisdiction which:

14.1.1. is likely to be most adversely affected by the proposed merger;

14.1.2. is in a position to commit resources to the investigation;

14.1.3. is the principal place of business of the merging parties:

14.1.4. has expertise in mergers involving the specific industry in issue; and

14.1.5. can coordinate effectively with the other Member States.

14.2. The Member States shall select the Lead Jurisdiction within two weeks after the completion of initial review by all the Member States.

Comment

Where a Member State that ought to be the Lead Jurisdiction (State A) has cleared the merger in the initial review and other Member states wish to conduct a second-phase investigation, State A owing to it right to be consulted during all stages of the merger review will become an advocate of the merging parties thereby preventing any political maneuvering, which the State A may engage. For instance, in the Boeing-McDonnell Douglas case, the EU would have been the Lead Jurisdiction. The EU as the Lead Jurisdiction would have had to consult with the US during all stages of its merger review including structuring of remedies for the Boeing-McDonnell Douglas. This mechanism would have avoided the political pressure put on the EU by the US, and the potential for a trade war by the two jurisdictions.

15. Confidentiality Laws

15.1. Member States shall take appropriate measures to amend their confidentiality laws so as to allow competition authorities to share confidential information concerning mergers with competition authorities of other Member States.

15.2. When a competition authority discloses confidential information regarding a merger to a private party, this shall be deemed to be a disguised barrier to trade subject to the complaint procedure of the WTO Dispute Settlement Understanding.

16. Merger Enforcement Guidelines

16.1. Competition authorities shall publish detailed Merger Enforcement Guidelines ("MEGs") and shall update them regularly.

16.2. While drafting the MEGs, a competition authority shall seek comments from the competition authorities of other Member States, with a view to harmonizing substantive approaches to merger review.

16.3. The MEGs should clearly identify a jurisdiction's procedure, notification thresholds, and the competition authority's approach to market definition, evaluative criteria, vertical and conglomerate mergers, joint ventures, defenses and exceptions including the approach to efficiencies.

16.4. Member States that allow exceptions for clearing or blocking a merger on non-competition grounds, should devote a section of the MEGs to an explicit description of the circumstances in which non-competition factors will be used in reviewing a merger. These exceptions must be notified to the WTO Competition Office if they are to be effective.

Comment

MEGs would eventually harmonize the steps of merger analysis, and would therefore eliminate the chances of divergent outcomes owing to different techniques employed for merger analysis by competition authorities.

17. Private Suits

17.1. Member States that allow private parties a right to challenge a merger should provide in legislation that the competition authority, or a court/tribunal empowered to hear such private suit must dispense with frivolous suits and render final decisions within a reasonable delay.

18. Dispute Resolution Mechanism

18.1. Any breach of the provisions of this Annex shall be subject to the WTO Dispute Settlement Understanding.

18.2. Arbitration

Where the Member States disagrees with the decision of the Lead Jurisdiction, and an agreement cannot be reached through coordination and consultation during the second-phase review, an Arbitration Panel shall be constructed to facilitate resolution of differences.

18.3. Where a panel finds that a Lead Jurisdiction has failed to apply the standards of review enunciated in section 12, it shall conclude that the Lead Jurisdiction's decision is void, and may substitute its own decision for it.

18.4. Where the Lead Jurisdiction has come to a decision that is consistent with section 12, the arbitration panel should defer to the Lead Jurisdiction's decision.

Comment

Judicial Review Standard: Arbitration Panels cannot simply be court of appeals or there will be no incentive to take Lead Jurisdictions seriously.

19. Filing Fees

19.1. Member States shall decide upon the filing fees be paid to the WTO Competition Office by the merging parties at the time of establishing the Competition Office.

19.2. Filing fees may be revised by the Member States every four years.

C. Test Case for the IMCR

To test the efficacy of the proposed IMCR, let us review the case of GE-Honeywell and try to ascertain how the enhanced mechanism for coordination would have affected the outcome.

The US Department of Justice after five months of investigation, and evaluation, employing the substantial lessening of competition test, cleared the merger on May 2, 2001. Looking at the horizontal business of the merging parties, the DoJ found that the production of military helicopter engines, and the provision of maintenance, repair and overhaul (MRO) services for certain Honeywell aircraft engines and auxiliary power units (APUs) was the relevant product market in which competition would be substantially lessen if the merger were allowed to proceed. The DoJ required that the merging parties divest Honeywell's helicopter engine business and authorize a new third party MRO service provider for certain models of Honeywell aircraft engines and APUs as a condition for the clearance of the merger. In its press release announcing the conditions for clearance, the DoJ did not comment on the vertical or conglomerate effects of the merger.[42]

The EU Commission received notification of the merger on February 5, 2001, and on March 5, 2001 it decided to open second-phase investigation into the case. In its review, the EU Commission focused on vertical and conglomerate effects of the merger. Of particular relevance was GE's aero engineering business and its aircraft finance lease arm, GE Capital Aviation Services (GECAS). The Commission found that the merger would create dominant positions in the markets for the supply of avionics, non-avionics and corporate jet engines and would strengthen GE's incumbent dominant position in jet engines for large commercial and regional jet engines.[43] The core element of the Commission's merger analysis was the combination of GE's financial strength and vertical integration into aircraft purchasing, financing and leasing with Honeywell's

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[42] *Justice Department Requires Divestiture in Merger Between General Electric and Honeywell, available at* <http://www.usdoj.gov/atr/public/press_release/2001/8140.htm>, (visited on July 22, 2001).
[43] *The Commission Prohibits GE's Acquisition of Honeywell,* Press Release by the E.U. Commission, *available at*: <http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/939|0|RAPID&lg=EN>, (visited on July 21, 2001).

dominant position in avionics and non-avionics products and commercial jet engines markets. On July 3, 2001, the Commission blocked the merger.[44]

From the above it is obvious that the different conclusions reached by the US DoJ and EU Commission had more to do with their varying approaches to merger analysis rather than the differences between the procedural elements of their merger control laws. The DoJ analyzed only the horizontal dimension of the merger, and therefore assessed the effects of it in a specific and limited relevant market. The EU Commission, on the other hand, analyzed all three dimensions of the merger: horizontal, vertical, and conglomerate.

If the proposed IMCR were in force, the following would have occurred. Since both the EU and the US did not clear the GE-Honeywell merger in the initial review, a Lead Jurisdiction to conduct the second-phase review would have to be selected. Assuming that both jurisdictions seek to be the Lead Jurisdiction, and both were equally affected by the merger and have expertise and resources to conduct merger review, the US would have been selected as the Lead Jurisdiction under section 14.1.3 of the IMCR being the principal place of business of both of the merging parties.

As the Lead Jurisdiction, the US DoJ would have to act as *parens patriae* for all other member states, and thus would have to consider anticompetitive effects of the merger in the markets of all the affected member states. In the GE-Honeywell case, the relevant market was indeed global. The EU Commission would have advised the DoJ to assess vertical and conglomerate dimensions of the merger (in accordance with the Merger Enforcement Guidelines published under section 16 of the IMCR) in addition to its horizontal dimension. Let us assume that the DoJ would agree to assess all dimensions of the merger. In such a case, the core difference that resulted in different outcomes could have been resolved and the probability of making mutually acceptable final outcome of the merger would have significantly been increased. On the other hand, if the DoJ would refuse to take EU's advice to assess vertical and conglomerate dimensions of the merger, that would have resulted in violation of the IMCR, appealable before the DSB of the WTO.

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[44] *Id., See also*, Drauz, Götz, *Unbundling GE/Honeywell: The Assessment of Conglomerate Merger Under the EC Competition Law*, 15 Speech Before Fordham Corporate Law Institute, 28th Annual Conference on International Antitrust Law and Policy 15 (October 25-26, 2001) (on file with the author).

Let us assume further that the DoJ considered all three dimensions of the merger, but that the EU Commission and the DoJ still could not agree on the final outcome of the merger analysis. By this stage, broad differences pertaining to product market definitions and steps to be followed in merger analysis would have been resolved by virtue of adherence to the IMCR. The EU Commission and the DoJ would differ on narrow and clearly defined issues. Reasonable people do differ on some issues, and that is where arbitration, under section 18 of the IMCR, would come into play.

The IMCR would cure the problem of limited cooperation provided under the US-EU Bilateral Cooperation Agreement. Under the US-EU agreement, the parties collaborate if and when the competition authorities "identify common competition concerns that might require a jointly pursued remedial action."[45] In the GE-Honeywell case, the two authorities could not identify common competition concerns, and therefore cooperation under the bilateral agreement was paralyzed. Under the IMCR, the obligation of member states to cooperate and consult is not dependent on the identification of common competition concerns. It is absolute and stays in place until a final decision is reached. This obligation to cooperate and consult also preserves the sovereignty of member states, as they have a say in the final outcome of the merger review.

[45] *The Commission Opens Full Investigation into the General Electric/Honeywell Merger*, *available at*: <http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/298|0|AGED&lg=EN&display=>, (last visited on Feb. 28, 2002).

Conclusion

One factor driving globalization – the growth in transnational mergers and acquisitions, and the concomitant overlap of national merger control regimes – is the backdrop of this thesis. The limits on national merger control regimes and the growing gap in global governance reflecting those limits form the problem to which this thesis is directed. Paradoxically, disparate review of a transnational merger by multiple jurisdictions results in both a limit on and an extension of the reach of national merger control laws. For instance, in the GE-Honeywell case, the US merger control regime, which permitted the merger, was paralyzed by the EU Commission's decision to block the merger. This illustrates both the limitation of domestic regimes – in this case that of the US – and their possible extraterritorial reach – in this case that of the EU.

The major effect of contemporary multijurisdictional merger review is that it undermines global consumer welfare, which is a global public good. Since each jurisdiction assesses effects within its own markets rather than effects on the world's markets, no jurisdiction focuses on assessing the impact of transnational mergers on global markets. To ensure the optimal supply of global consumer welfare, a cooperative effort among nation-states is required. In the context of multijurisdictional merger review, this entails ensuring that each jurisdiction participates in a collective effort to assess global consumer welfare within a multilateral framework.

The lacuna in global governance has understandably and deservedly attracted great attention and become a subject of discussion in a number of fora. For instance, the International Competition Network (ICN), established in October 2001, by antitrust chiefs of thirteen nations, has a multijurisdictional merger review process as a top item on its agenda. The Fourth Ministerial Conference of WTO, which met in Doha in November 2001, recognized for the first time the need for a multilateral framework governing competition law.

This thesis has sought to identify the contours that an international merger control regime (IMCR) could take. To achieve this goal, it has conducted a comprehensive and detailed analysis of the two most mature merger control regimes, that of the US and the EU. In doing so, the thesis went through what I might call a "*passage obligatoire*" canvassing the structure of and rationale for those regimes. The comparison of those regimes proved critical to working out how a future transnational merger control regime ought to be shaped. It reveals, for example, that any future regime will have to embrace two differing orientations to merger law: one, that of the US, which presumes that markets generally are competitive and polices "market failure", whenever monopolization occurs; and the other, that of the EU, which employs competition law to enable the creation of a common market.

Having characterized the principal existing regimes, the thesis then went on to consider the range of proposals for a multilateral merger control structure that have been advanced heretofore with a view to assessing their strengths and weaknesses. After assessing the proposals the thesis offered a proposal for an IMCR, which is based on two sets of theoretical underpinnings: a theory of public goods and a legal pluralist approach to institutional design.

Consumer welfare – the ultimate objective of both trade and antitrust regimes – is a public good. The proposal offered by the thesis took into account two kinds of problems that can arise in the supply of public goods: the free-rider problem and prisoner's dilemma situations. In the context of multijurisdictional review of transnational mergers, promotion of national champions gives rise to a free-rider problem (when the loss to global consumers outweighs the benefits which may accrue to national consumers), while a prisoner's dilemma is created by provision of asymmetric information by merging parties to different antitrust agencies. While the merging parties have information about their global business they only provide information to antitrust authorities concerning the market within the latter's jurisdiction. Such limited information focuses the attention of the antitrust agency on the impact of the merger within its domestic markets, so that the agency fails to consider the merger's impact on the world's consumers. This prevents the optimal result, namely global consumer welfare.

Having identified that these problems lead to the under-supply of global consumer welfare, the thesis moves on to address solutions that could optimize the supply of the public good.

Consumer welfare is what Inge Kaul et al. have called "final public good" because it is the "outcome" rather than a "good" in the standard sense. These authors have called mechanisms that facilitate the good's production "intermediate public good." The thesis have identified three intermediate public goods, namely: the global merger control regime itself, the type of legal instrument that embodies the regime, (for instance, treaty or MoU) and the institutional setting that facilitates the functioning of the regime.

The review of the existing proposals revealed that the problem of regime design boiled down to a choice between advocates of a global supra-national authority for reviewing transnational mergers and advocates of a mechanism of coordination and cooperation for reviewing mergers among affected nations headed by a lead jurisdiction.

This is where the thesis draws upon the second theoretical postulate, namely a legal pluralistic account of institutions. Legal pluralism challenges the traditional concept of law as the expression of the sovereign's will. Instead it perceives the multiple settings in which the legal norms are elaborated and interpreted as together capable of providing the citizenry with a sound and stable framework for their interactions inter se. The traditional concept of law is challenged by the process of globalization and by the disparate review of transnational mergers where a single corporate citizen is subjected to more than one sovereign's will. The legal pluralist perspective provides both a more accurate and a more practical approach to this new reality. A lead jurisdiction model for a future merger regime is a model most consistent with the postulates of legal pluralism. Creating a supranational body was not preferred both because it would forfeit the autonomy of nation-states over the review a transnational merger, and because it refuses to acknowledge and preserve the differences among competition law regimes.

The legal pluralist approach has implications for the second intermediate public good identified, namely the type of instrument required to embody the regime. Rather than proposing a binding multilateral treaty, the thesis proposes a rather less rigid form of legal instrument, the precedent for which is Reference Paper on Pro-Competitive Regulatory Principles. The Reference paper is incorporated into individual member states' commitments under WTO's Fourth Protocol on Telecommunications. Because it need not be implemented uniformly, the Reference Paper acknowledges the differences among political and legal frameworks, market structures and levels of development of the various member states of the WTO. Additionally, the adoption technique offered by the Reference Paper has been successful in overcoming the resistance of the member states against harmonization of substantive law.

The third intermediate public good identified was the institutional setting in which the regime is to function. The thesis proposes establishing a Competition Office within the WTO Framework that would facilitate merger review and coordination by the lead jurisdiction with other affected nations. The WTO was preferred to host the proposed merger control regime over the OECD or any other international organization because its mandate, its global membership, dispute resolution mechanism and its experience with the Reference Paper stands it in better stead than any other existing international organization. Under the proposal, the WTO's role would be that of facilitator of the lead jurisdiction review process rather than that of reviewing agency. The choice of WTO is also consistent with the legal pluralist approach, albeit indirectly, in that the WTO takes account of differing legal and political framework of its member states.

The proposal offered is expected to meet the following tests: 1) it would alleviate unnecessary burdens imposed on businesses by the proliferation of merger control regimes; 2) it would reduce inherent inefficiencies in the disparate review of a single merger by several jurisdictions; 3) it would provide the means to prevent, in its incipiency, global abuse of dominance; and 4) it would favour global consumer welfare.

Throughout, the attempt has been to strike a balance between existing practices and elements necessary for an effective future regime. This thesis should not be judged by the criterion of whether it recommends an ideal regime for an ideal world. Rather, it should be seen as providing a pathway toward a comprehensive global merger control regime out of the confines of existing institutional constraints characterizing the application of multiple domestic competition laws.

The emergence of an IMCR would contribute to "embedding" global markets within a legitimate scheme of global governance rooted in the existing authority of sovereign states. Its institutional form would not "constitutionalize" ultimate transnational authority over global mergers. There is no lawful basis for doing so within the existing framework of the WTO. But it would require states to ensure that a global consumer welfare standard, which represents a global public good, becomes the focus of coordinated Lead Jurisdiction assessment. In this way, an IMCR could help to reinforce the overall architecture of the UN framework and fill a gap in governance that is growing with the success of global market integration.

Whereas the current round of trade negotiations launched at Doha last year for the first time included a competition law agenda, it is unlikely that a merger regime will be one of the outcomes. Nevertheless, my hope is that this thesis by elaborating a more detailed and flexible lead jurisdiction proposal than has been offered heretofore, will help to focus future discussion. The gap in global governance I identified might not be filled soon, but it will have to filled eventually for the sake of the overall legitimacy of the global trading environment.

Finally, this thesis seeks to foster further debate on these important global issues and sets an agenda for future research. The hoped for continuation of its inquiry would be to identify steps needed to implement an IMCR within the general framework of a new global competition law regime.

Summary of the Proposals Reviewed and the IMCR

	ICPAC	Munich Group	ABA	Campbell & Trebilcock	Eleanor Fox	Fox & Ordover	Baker Group	Donald Baker	IMCR
Recitals	To reduce merger transaction costs	n/a	n/a	To reduce inter-jurisdictional conflicts in international merger reviews	To expedite pro-competitive and neutral mergers and the to prohibit anticompetitive mergers, and to do so without imposing excessive costs	n/a	International Merger Review System (IMRS) for countries with well developed domestic merger control systems	To harmonize procedural elements of merger review	To coordinate review of transnational mergers to minimize the chances of divergent outcomes & to relieve parties of unnecessary compliance costs
Structural Elements									
Role for an International Organization	n/a (but OECD may facilitate)	Housed within the WTO framework	n/a	n/a	n/a	n/a	n/a	n/a	Housed within the WTO framework
Lead Jurisdiction for merger review	Yes (assessment by L.J. could serve as a recommendation to other agencies)	N/A		Yes (assessment by LJ would serve merely as a recommendation for other agencies)	n/a	n/a	n/a	n/a	Yes (assessment by the L.J. would be binding on other member states)
Supranational Institution for decision-making	No	Int'l Antitrust Agency (IAA) within the Institutional Framework of WTO		Yes (supranational investigation & adjudication, like the EU Commission)	n/a	n/a	n/a	n/a	No (the WTO Competition Office would only facilitate review process conducted by the LJ
Nature of the regime	n/a	Compulsory	Voluntary	Compulsory	n/a	n/a	Compulsory as well as optional, depending on the nature of the transaction	Opt-in basis	compulsory for merging parties that come under the jurisdiction of a country that is party to the IMCR
Interagency Coordination	At all stages of merger review	Yes	Yes	Yes	n/a	n/a	Yes	Yes	Yes

	ICPAC	Munich Group	ABA	Campbell & Trebilcock	Eleanor Fox	Fox & Ordover	Baker Group	Donald Baker	IMCR
Substantive Elements									
Common Substantive law principles	Yes (common definitions be established)	Yes	Yes (efforts be made through coordination & consultation to harmonize substantive elements of merger review)	Yes (a single substantive standard to review domestic and international mergers, as well as harmonization of economic theories applicable)	Yes (countries should agree to apply a commonly-agreed legal standard)	n/a	Clearances and authorizations, based on Canadian and Australian models, respectively	n/a	Yes
Confidential Information Rules	Protocol for waiver by parties	n/a	subject to appropriate safeguards, laws should be amended to allow agencies to share confidential information	Should be relaxed to permit meaningful exchange of information between agencies	Should be relaxed to allow dissemination of the pre-merger information, and the recipient agencies would be bound to use it only for merger review	n/a	Confidentiality rules should be amended w.r.t.: transmission of information; downstream confidentiality protection; & third party access	Some basic understanding or guidelines (so that all agencies can have some confidence that they are seeing the same information)	laws should be amended to allow agencies to share confidential information, subject to appropriate safeguards
Transparency/ Publications of MEGs	Yes	n/a	Yes	n/a	n/a	Transparency recommended when authorizing anticompetitive mergers	Yes (recommended publication of MEGs)	n/a	Yes (MEGs should be published by the member states)
Foreign Nation's Interest/ Global Impact	Yes (antitrust authorities should cooperate to take account of global effects)	Yes	Yes	n/a	Yes	Yes	n/a	n/a	Yes (global consumer welfare approach)
Notification Procedure									
Filing Procedure	Two Tiered	Single Tier	Two Tiered	Two Tiered	n/a	n/a	Two Tiered	Single Tier	Two Tiered
Central Filing System	No	Parallel filing with IAA & national agencies	n/a	n/a	Yes	Yes	n/a	n/a	Central filing with the WTO Competition Office operating parallel with domestic filing

	ICPAC	Munich Group	ABA	Campbell & Trebilcock	Eleanor Fox	Fox & Ordover	Baker Group	Donald Baker	IMCR
Pre-filing consultation	No	n/a	Yes		n/a	n/a	Yes	n/a	No
Harmonized notification forms	Two forms: Short form & Long – parties free to choose any form	n/a	Yes	Yes	Yes (or mutual recognition of first filed notification)	Yes	Yes	Yes	Two forms: Short form & Long – parties free to choose any form
Requirement to identify other agencies involved	n/a	n/a	n/a	Yes	n/a	n/a	Yes	n/a	Yes
Public notification of filing and decisions	Yes (by antitrust agencies)	n/a	n/a	n/a	n/a	n/a	Merging parties should announce the proposed merger, & antitrust agency make its decisions public	n/a	Yes(by antitrust agencies)
Triggering Events	Harmonized	n/a	Harmonized	n/a	Harmonized	n/a	n/a	n/a	Harmonized
Notification Thresholds	Based on sales and assets	Based on GNP of the affected jurisdiction & worldwide aggregate turnover of merging parties	n/a	n/a	Based on turnover/ sales or assets and sales	n/a	Based on assets and sales	n/a	Based on assets and sales
Decision Making Procedure									
Compulsory Waiting period	Yes, but subject to derogation	Three months subject to derogation	n/a	Should be eliminated	n/a	Yes (common waiting period)	n/a	n/a	Yes, but subject to derogation
Time limits for decision making	30 days for initial review Nonbinding but notional time frames for second stage review	3 months for complete review, with the possibility of extension for another 3 months	n/a	EU style time limits	EU style time limits	n/a	Yes	Yes (common deadlines)	EU style time limits
Dispute Resolution Mechanism	Mediation for sovereign policy disputes	Through IAA	n/a		Principles & methodologies for settling disputes	n/a	n/a	n/a	WTO dispute settlement mechanism & arbitration

Bibliography

Statutes and Regulations

Clayton Act, ch. 323, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12-44 (1982)).

EC Merger Regulation, Council Regulation No. 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings, 1989 O.J. (L 395) 1, *reprinted as corrected in*, 1990 O.J. (L 257) 14, and amended by Council Regulation (EC) No. 1310/97, 1997 O.J. (L 180) 1.

Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (current version at 15 U.S.C. §§ 41-77 (1982))

Sherman Anti-Trust Act, Ch. 647, 26 Stat. 209, (1890) codified as amended at 15 U.S.C.A. §§ 1-7, (2000).

The Celler-Kefauver Antimerger Act, ch. 1184, 64 Stat. 1125 (1950) (current version at 15 U.S.C. §§ 18, 21 (1988), amended by Pub. L. No. 46-349, § 6(a), 94 Stat. 1154 (1980))

The Hart-Scott-Rodino Antitrust Improvements Act, Pub.L. No. 94-435, 90 Stat. 1383 (1976).

The Constitution.of the United States

Treaties, Bilateral Agreements, and International Materials

Agreement Between the Government of the United States and the Government of Australia Relating to Cooperation on Antitrust Matters, Apr. 27, 1999, U.S.-Austl., *reprinted in* 4 TRADE REG. REP. (CCH) ¶ 13,502.

Agreement Between the Government of the United States and the Government of Japan Concerning Cooperation on Anticompetitive Activities, Oct. 7, 1999, U.S.-Japan, *reprinted in* 4 TRADE REG. REP. (CCH) ¶ 13,507.

Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1991, U.S.-E.U., *reprinted in* 4 Trade Reg. Rep. (CCH) P 13,504; 1995 O.J. (L95) 47 , corrected at 1995 O.J. (L 131) 38.

Agreement Between the Government of the United States of America and the Government of the Federative Republic of Brazil Regarding Cooperation Between Their

Competition Authorities in the Enforcement of Their Competition Laws, Oct. 26, 1999, U.S.-Braz., *reprinted in* 4 TRADE REG. REP. (CCH) ¶ 13,508.

Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws, Aug. 3, 1995, U.S.-Can., *reprinted in* 4 TRADE REG. REP. (CCH) ¶ 13,503.

Agreement Between the Government of the United States of America and the Government of the State of Israel Regarding the Application of Their Competition Laws, Mar. 15, 1999, U.S.-Isr., *reprinted in* 4 TRADE REG. REP. (CCH) ¶ 13,506.

Agreement Between the Government of the United States of America and the Government of the United Mexican States Regarding the Application of Their Competition Laws, July 11, 2000, U.S.-Mex., *reprinted in* 4 TRADE REG. REP. (CCH) ¶ 13,509.

Agreement Between the Government of The United States of America and the Government of Canada Regarding the Application of their Competition and Deceptive Marketing Practices Laws, art. 1, August 1995; 1995 WL 522861 (N.A.F.T.A.).

Agreement on the European Economic Area, 1994 O.J. (L1) 446.

Australian-New Zealand Closer Economic Relations-Trade Agreement 22 I.L.M. 945 (1983).

Convention Establishing the European Free Trade Association, Jan. 4, 1960, 370 U.N.T.S. 5.

EU, Protocol 24 on Cooperation in the Field of Control of Concentrations, 1994 O.J. (L1) 188.

Framework Agreement for Commercial and Economic Cooperation Between the European Communities and Canada, July 6, 1976, E.U.-Can., 1976 O.J. (L 260) 2.

Havana Charter for an International Trade Organization, U.N. Conference on Trade & Employment, Final Act and Related Documents, U.N. Doc. E/ CONF. 2/78, U.N. Sales No. II.D.4 (1948).

North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289 (1993).

The Single European Act, 1987 O.J. (L 169) 1; 25 I.L.M. 503.

Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 .

Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11.

Treaty of Amsterdam, 1997 O.J. (C340) 1.

Treaty of Nice, 2001 O.J. (C80) 70.

Treaty on European Union, 31 I.L.M. 247.

WTO, Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, The Results of the Uruguay Round of Multilateral Trade Negotiations-- The Legal Texts 365 (1994); 33 I.L.M. 1197 (1994).

WTO, Decision on Negotiations on Basic Telecommunications, The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts 461 (GATT Secretariat 1994).

WTO, General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, The Results of the Uruguay Round of Multilateral Trade Negotiations– The Legal Texts 325 (1994), 33 I.L.M. 1167 (1994).

WTO, General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, The Results of the Uruguay Round of Multilateral Trade Negotiations –The Legal Texts 325 (1994); 33 I.L.M. 1167 (1994).

WTO, Laura B. Sherman, Introductory Note to the Fourth Protocol to the General Agreement on Trade in Services, 36 I.L.M. 354 (1997).

WTO, Marakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, The Results of the Uruguay Round of Multilateral Trade Negotiations – The Legal Texts 1 (1994), 33 I.L.M. 1144 (1994).

WTO, Singapore Ministerial Declaration, Adopted on 13 December 1996, WT/MIN(96)/DEC (18 December 1996), also *available at* http://www.wto.org/english/news_e/pres96_e/wtodec.htm visited on May 2, 2001.

WTO, The General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A11; 55 U.N.T.S.194.

Cases

Arrow- Hart & Hegeman Elec. Co. v. FTC, 291 U.S. 587 (1934).

Atlantic Richfield Co. v. USA Petroleum, Co., 495 U.S. 1097 (1990).

Boeing/McDonnell Douglas Case, Case No. IV/M. 877 (1997); 1997 O.J. (L336) 16.

Boise Cascade Corp. v. FTC, 637 F.2d 573 (9th Cir. 1980).

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

California Dental Ass'n v. FTC, 526 U.S. 756 (1999).

California v. American Stores Co., 495 U.S. 271 (1990).

California v. Frito-Lay, 474 F.2d 774 (9th Cir. 1973).

Cargill, Inc. v. Monfort of Colorado, 479 U.S. 104 (1986).

Consolidated Gold Fields v. Anglo American Corp., 698 F. Supp. 487 (S.D.N.Y.), *aff'd,* 871 F. 2d 2525 (2nd Cir.) *on remand*, 713 F. Supp. 1457 (S.D.N.Y), *cert. denied*, 492 U.S. 939 (1989).

Continental Can 1972 J. O. (L7) 25, *on appeal* Europemballage Corp. & Continental Can Co. v. EC Commission, Case 6/72 [1973] E.C.R. 215, [1973] CMLR 199.

Cast Iron and Steel Rolls, 1984 O.J. (L317) 1, [1984] 1 CMLR 694;

E.I. DuPont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984).

Franco-Janpanese Ballbearings, 1974 O. J. (L343) 19, [1975] 1 CMLR D8.

FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34 (D.D.C. 1998).

FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997).

FTC v. Western Meat Co., 272 U.S. 554 (1926).

General Foods Corp., 103 F.T.C. 204 (1984).

Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945).

Gibbons v Ogden, 22 U.S. (9 Wheat) 1 (1824).

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

Hoffmann La Roche & Co AG v. Commission, Case 87/76, [1979] E.C.R. 461.

Imperial Chemical Industries Ltd. v. Commission, Case 48/49, [1972] ECR 619.

In re Uranium Antitrust Litig., 617 F.2d 1248 (7th Cir. 1980).

In the Matter of Exxon Corporation, a corporation, and Mobil Corporation, Docket No. C-3907 November 30, 1999; 1999 WL 1417018 (F.T.C.).

Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876 (5th Cir. 1982).

International Shoe Co. v. FTC, 280 U.S. 291 (1930).

JCSAT/SAJAC, Case No. IV.M.346, 1993 O.J. (C 219) 1.

British American Tobacco Co., Reynolds Indus. v. Commission, joined Cases 142 & 156/84, , 1987 E.C.R. 4487.

Kali und Salz, cases 68-94 and 30-95, ECR 1998 p.I 1375; 1998 O.J. (C 209) 2.

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

Mahle GmbH & Metal Leve SA, 5 Trade Reg. Rep. (CCH) ¶ 24,291 (D.D.C. 1997).

Mannesmann/Hoesch, 1993 O.J. (L114) 34.

Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979)

Maple Flooring Assn. v. United States, 268 U.S. 563 (1925).

Montreal Trading Ltd. v. Amax, Inc., 661 F.2d 864 (10th Cir. 1981).

MSG Media Services, 1994 O.J. (L364) 1.

Nordic Satellite Distribution, 1996 O.J. (L53) 20.

Northern Pacific Railway Co. v. United States, 356 U.S. 1 (1958).

Northern Sec. Co. v. United States, 193 U.S. 197 (1904).

People v. North River Sugar Ref. Co., 7 N.Y.S. 406 (Sup. Ct. 1889), *aff'd,* 121 N.Y. 582, 24 N.E. 834 (1890).

Preserved Mushrooms, 1975 O. J. (L29) 26; [1975] 1 CMLR D83.

Reiter v. Sonotone Corp., 442 U.S. 330 (1979).

Royal Bank of Canada/Bank of Montreal, Case IV/M.1138, 1998 O.J. (C 144) 4.

Standard Oil Co. v. United States, 221 U.S. 1 (1911).

Swift & Co. v. FTC, 272 U.S. 554 (1926).

Thatcher Mfg. Co. v. FTC, 272 U.S. 554 (1926).

Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir. 1976).

United States v. Addyston Pipe & Steel Co., 175 U.S. 211 (1899);

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

United States v. American Tobacco Co., 221 U.S. 106 (1911).

United States v. CIBA Corp., 1970 Trade Cas. (CCH) ¶ 73,269 (S.D.N.Y. 1970).

United States v. Columbia Steel Co., 334 U.S. 495 (1948).

United States v. El Paso Natural Gas Co, 376 U.S. 651 (1964).

United States v. General Dynamics Corp., 415 U.S. 486 (1974).

United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898).

United States v. Nippon Paper Indus. Co., 109 F.3d 1, 8 (1st Cir. 1997), *rev'g* 944 F. Supp. 55 (D. Mass. 1996).

United States v. Philadelphia National Bank, 374 U.S. 321 (1963).

United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

United States v. Von's Grocery Co., 384 U.S. 270 (1966).

Wabash, St. Louis & Pac. Ry. Co. v. Illinois, 118 U.S. 557 (1886).

Wood Pulp, 1985 O.J. (L85) 1, [1985] 3 CMLR 474, *on appeal* A. Ahlström Osakeyhtiö v. Commission, Cases 89/85 etc. [1988] ECR 5193, [1988] CMLR 901.

Books

ANTITRUST GOES GLOBAL, WHAT FUTURE FOR TRANSATLANTIC COOPERATION? (Evenett et al. eds., Washington, D.C.: Brookings Institution Press, 2000).

AREEDA, PHILLIP & TURNER, DONALD W., ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATIONS, (Boston: Little Brown, 1978).

AREEDA, PHILLIP, ANTITRUST ANALYSIS, PROBLEMS, TEXT, CASES (Boston: Little Brown, 1967).

BAEL, I. VAN & BELLIS, J., COMPETITION LAW OF THE EUROPEAN COMMUNITY (Oxfordshire: CCH, 3rd ed., 1994).

BORK, ROBERT H., THE ANTITRUST PARADOX (New York: Basic Books Inc., 1978).

COMPETITION POLICY IN THE GLOBAL ECONOMY: MODALITIES FOR COOPERATION (Leonard Waverman et al. eds., London & NY: Routledge, 1997).

COOK, C.J. & KERSE, C. S., E.C. MERGER CONTROL (London: Sweet & Maxwell, 2nd ed. 1996).

COOKE, TERENCE E., MERGERS AND ACQUISITIONS (New York: Basil Blackwell Inc, 1986).

DAVIDSON, KENNETH M., MEGAMERGERS, CORPORATE AMERICA'S BILLION DOLLAR TAKEOVERS (Cambridge, Mass.: Ballinger, 1985).

DELLOW, TONY & FEIL, JOHN, COMPETITION LAW AND TRANS-TASMAN TRADE, IN COMPETITION LAW AND POLICY IN NEW ZEALAND (Rex J. Ahdar ed., 1991).

DICKEN, PETER, GLOBAL SHIFT: THE INTERNATIONALIZATION OF ECONOMIC ACTIVITY (London: P. Chapman, 2nd ed., 1992).

FULLER, L.L. THE MORALITY OF LAW, 106 rev. ed. (New Haven, Conn.: Yale University Press, 1969).

KINTNER, EARL, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES (New York: Chelsea House Publishers, 1978-85).

FINE, FRANK L., MERGERS AND JOINT VENTURES IN EUROPE: THE LAW AND POLICY OF THE EEC (London: Graham & Trotman, 2nd ed., 1994).

FINGLETON, JOHN, ET AL., COMPETITION POLICY AND THE TRANSFORMATION OF CENTRAL EUROPE (1996).

FORDHAM CORPORATE LAW INSTITUTE, EUROPEAN AMERICAN ANTITRUST & TRADE LAW (Barry E. Hawk ed., 1988).

GLOBAL PUBLIC GOODS, INTERNATIONAL COOPERATION IN 21ST CENTURY (Inge Kaul et al. eds., New York: Oxford University Press, 1999).

GREIDER, WILLIAM, ONE WORLD, READY OR NOT (New York: Simon & Schuster, 1997).

HANEY, L. H., BUSINESS ORGANIZATION AND COMBINATION (New York: Macmillan, 1923).

HAWK, BARRY, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE (Prentice Hall Law & Business, Supp 1990).

HOVENKAMP, HERBERT, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE (St. Paul, Minn.: West Pub. Co., 1994).

KALINOWSKI, JULIAN O. VON, ANTITRUST LAWS AND TRADE REGULATIONS (1993).

LASOK, D. & BRIDGE, J., INTRODUCTION TO THE LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES (London: Butterworths; St. Paul, Minn.: Mason Pub., 3rd 1982).

LEWIS, DAVID W. P., THE ROAD TO EUROPE (New York: P. Lang, 1993).

LIMITS TO COMPETITION, THE GROUP OF LISBON, (Cambridge, Mass.: The MIT Press, 1995).

MARTIN, DAVID D., MERGERS AND THE CLAYTON ACT (Berkeley, CA: Uni. of California Press, 1959).

MATTELART, ARMAND, NETWORKING THE WORLD 1794-2000 (Minneapolis, London: Uni. of Minnesota Press, 2000).

MERGERS AND ACQUISITIONS, CURRENT PROBLEMS IN PERSPECTIVE (Michael Keenan & Lawrence J. White eds., Lexington, Mass.: Lexington Books, 1982).

MITINICK, BARRY M., THE POLITICAL ECONOMY OF REGULATION (New York: Columbia University Press, 1980).

NOYES, W.C., A TREATISE ON THE LAW OF INTERCORPORATE RELATIONS (Boston: Little Brown, 1909).

NUGENT, NEILL, THE GOVERNMENT AND POLITICS OF THE EUROPEAN UNION (Durham, NC: Duke University Press, 3rd ed. 1994).

OHMAE, KENICHI, THE BORDERLESS WORLD: POWER AND STRATEGY IN THE INTERLINKED ECONOMY (New York: Harper Business, 1990).

OJALA, MARJO, THE COMPETITION LAW OF CENTRAL AND EASTERN EUROPE (1999).

OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS (New York: The Free Press, 1975).

OLSON, MANCUR, THE LOGIC OF COLLECTIVE ACTION (Cambridge, MA: Harvard University Press, 1971).

PINDER, JOHN, EUROPEAN COMMUNITY: THE BUILDING OF A UNION (2d ed. 1995).

POLICY DIRECTIONS FOR GLOBAL MERGER REVIEW (Special Report, Global Forum for Competition and Trade Policy, 1999).

REDISCOVERING FULLER: ESSAYS ON IMPLICIT LAW AND INSTITUTIONAL DESIGN (Willem J. Witteveen & Wibern van der Burg, eds., Amsterdam University Press, 1999).

ROWLEY, J. W. & BAKER, D. I., THE INTERNATIONAL MERGERS, THE ANTITRUST PROCESS (London: Sweet &Maxwell, 2nd ed., 1996).

SASSEN, SASKIA, CITIES IN A WORLD ECONOMY (Thousand Oaks, Calif.: Pine Forge Press, 1994).

SASSEN, SASKIA, THE GLOBAL CITY: NEW YORK, LONDON, TOKYO (Princeton, N.J.: Princeton University Press, 1991).

SCHUMPETER, J., CAPITALISM, SOCIALISM AND DEMOCRACY (1962).

STEINER, PETER O., MERGERS: MOTIVES, EFFECTS, POLICIES (Ann Arbor: Uni. of Michigan Press, 1975).

STEVENS, W.H., INDUSTRIAL COMBINATIONS AND TRUSTS (New York, The Macmillan company, 1913).

SULLIVAN, LAWRENCE A., HANDBOOK OF THE LAW OF ANTITRUST (St. Paul: West Pub. Co., 1977).

THE ANTITRUST IMPULSE, AN ECONOMIC, HISTORICAL AND LEGAL ANALYSIS (Theodore P. Kovaleff, ed., New York: M.E. Sharpe, 1994).

THE GLOBALIZATION OF WORLD POLITICS (John Baylis & Steve Smith eds., 1997).

THE PARANOID STYLE OF AMERICAN POLITICS (Alfred A. Knopf, ed., New York, 1965).

THE POLITICAL ECONOMY OF THE SHERMAN ACT (E. Thomas Sullivan ed., Oxford: Oxford University Press, 1991).

THE WTO AS AN INTERNATIONAL ORGANIZATION (Anne O. Krueger, ed. Chicago & London: The University of Chicago Press, 1998).

THORELLI, HANS , THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION (Baltimore Johns Hopkins Press, 1955).

WARD, PETER C., FEDERAL TRADE COMMISSION: LAW, PRACTICE, AND PROCEDURE (1994).

Guidelines and Recommendations

DOJ, Antitrust Division Relationships With Other Agencies and With the Public, DIVISION MANUAL, Chapter VII-1 (3rd ed., 1998) *available at* <http://www.usdoj.gov/atr/foia/divisionmanual/ch7.pdf> (visited on Apr. 14, 2001).

DOJ, Antitrust Enforcement Guidelines for International Operations, 55 ANTITRUST AND TRADE REG. REP. (BNA) No. 1391 (Nov. 17, 1988) (Special Supp.).

DOJ, Antitrust Guide for International Operations, (Jan. 26, 1977), *reprinted in* ANTITRUST AND TRADE REG. REP. (BNA), No. 799, at E-1 (Feb. 1, 1977).

DOJ, Merger Guidelines 1968, *reprinted in* 2 TRADE REG. REP. (CCH) p 4510 (1982).

DOJ, Merger Guidelines 1982, 4 TRADE REG. REP. (CCH), June 14, 1982, ¶¶ 13,102.

DOJ, Merger Guidelines 1984, 4 TRADE REG. REP. (CCH), June 29, 1984, ¶¶ 13,103.

DOJ/ FTC, Antitrust Enforcement Guidelines for Int'l Operations, 68 ANTITRUST AND TRADE REG. REP. S-1 (BNA) No. 1707 (Apr. 06, 1995) (Special Supp.), also *available at* the DoJ's website <http://www.usdoj.gov/atr/public/guidelines/internat.htm> (visited on Feb. 8, 2001).

DOJ/FTC, Merger Guidelines 1992, *available at* the DoJ's website at <http://www.usdoj.gov/atr/public/guidelines/horiz_book/toc.html> & FTC's website at <http://www.ftc.gov/bc/docs/horizmer.htm> (visited on Feb. 7, 2001).

EC, Commission Notice on the Concept of Concentration under Council Regulation 4067/89 on the Control of Concentrations Between Undertakings, 1998 O.J. (C 66) 5 (EEC).

EC, Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law. 1997 O.J. (C 372).

FTC, Program for Federal-State Cooperation in Merger Enforcement, 57 Fed. Reg. 8127 (1992), *reprinted in* 4 TRADE REG. REP. (CCH) P 13,212.

FTC, Protocol For Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General, 1851 ANTITRUST & TRADE REG. REP. (Mar. 12, 1998); 66 ATTR 325; 25 No. 2 NAAG ANTITRUST REP. 1 (Mar./ Apr., 1998).

NAAG, Guidelines for Vertical Restraints, 4 TRADE REG. REP. (CCH) ¶ 13,400 (1985).

NAAG, Horizontal Merger Guidelines, 4 TRADE REG. REP. (CCH) ¶ 13,405 (1987).

NAAG, Horizontal Merger Guidelines, 4 TRADE REG. REP. (CCH) ¶ 13,406 (1993); 64 ANTITRUST & TRADE REG. REP. (BNA) Special Supp. at 357 (Apr. 1, 1993).

NAAG, Voluntary Pre-Merger Disclosure Compact, 1345 ANTITRUST & TRADE REG. REP., (Dec. 17, 1987); 53 ATRR 943.

NAAG, Voluntary Pre-Merger Disclosure Compact, 1656 ANTITRUST & TRADE REG. REP., (Mar. 24, 1994).

OECD, Recommendation of the Council Concerning Effective Action Against Hard Core Cartels, [C(98)35/FINAL], also *available at* http://www.oecd.org/daf/clp/Recommendations/Rec9com.htm (visited on Apr. 30, 2001).

OECD, Revised Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade, July 27-28, 1995 - C(95)130/FINAL, also *available at* http://www.oecd.org//daf/clp/Recommendations/REC8COM.HTM (visited on June 23, 2000).

UNCTAD, Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, U.N. Doc. T.D.-RBP-CONF-10 (1980), *reprinted in* 19 I.L.M. 813 (1980).

UNCTAD, UN Set of Principles and Rules on Competition, TD/RBP/CONF.5/15 of 4 Oct. 2000, also *available at* http://www.unctad.org/en/subsites/cpolicy/docs/CPSet/cpset.htm (visited on May 3, 2001).

WTO, Reference Paper on Regulatory Prinicíples, Fourth Protocol to the General Agreement on Trade in Services, 36 I.L.M. 354 (1997).

Reports and Studies

ABA, Section of Antitrust Law, Merger Standards Under Antitrust Laws, Monograph No. 7 (1981).

ABA, Section of Antitrust Law, Report of the Special Committee on International Antitrust (Chicago: 1991)

Boast, Molly S., Report from the Bureau of Competition, Mar. 29, 2001, *available at* <http://www.ftc.gov/speeches/other/boastmollys.html> (visited on Apr. 12, 2001).

Draft International Antitrust Code as a GATT-MTO-Plurilateral Trade Agreement (International Antitrust Code Working Group Proposed Draft 1993), published and released July 10, 1993, 64 Antitrust & Trade Reg. Rep. (BNA) No. 1628 (Aug. 19, 1993) (Special Supp.).

Final Report, International Competition Policy Advisory Committee, US DoJ, (2000), *available at* <http://www.usdoj.gov:80/atr/icpac/finalreport.htm> (visited on Jan. 04, 2001).

FTC, Economic Report on Corporate Mergers, (1969).

FTC, Report on the Merger Movement: A Summary Report V (1948).

ITU, Americas Telecommunications Indicator 2000, (Geneva, ITU, 2000), executive summary *available at* <http://www.itu.int/ITU-D/ict/publications/americas/2000/sum_e/sum_e.pdf> (visited on Sept. 6, 2001).

ITU, Basic Indicators, *available at* <http://www.itu.int/ti/industryoverview/at_glance/basic99.pdf> (visited Jan, 12, 2001).

OECD, Contribution from the Commission of the European Union, *Efficiency Claims in Mergers and Other Horizontal Agreements*, OCDE/GD(96)65, Competition Policy Roundtables, Les tables rondes sur la politique de concurrence, No. 4 *available at* <http://www.oecd.org/daf/clp/Roundtables/EFFC09.HTM>, (visited on Apr. 15, 2001).

OECD, Globalisation and Competition Policy: Attacking Cartels and Defending Market Liberalisation, Report *available at* <http://www.oecd.org/daf/clp/CLP_reports/hcc-e.pdf>, (visited on Apr. 10, 2001).

OECD, Report on Notification of Transnational Mergers, DAFFE/CLP(99)2/FINAL (Feb. 1999) *available at* <http://www.oecd.org/daf/clp/CLP_reports/notifmergers.pdf>, (visited on Jan. 16, 2001).

OECD, Report on Notification of Transnational Mergers, DAFFE/CLP(99)2/FINAL (Feb. 1999), *available at* <http://www.oecd.org/daf/clp/CLP_reports/hcc-e.pdf>, (visited on Apr. 30, 2001).

Report of the United Nations Conference on Trade and Development on Its Tenth Session, Held in Bangkok, Thailand, From 12 to 19 February 2000, *available at* <http://www.unctad-10.org/pdfs/ux_td390.en.pdf> , (visited on May 3, 2001).

Tarasofsky, Abraham & Corvari, Ronald, Corporate Mergers and Acquisitions, Evidence on Profitability, A study prepared for the Economic Council of Canada (1991).

Temporary National Economic Committee, Final Report and Recommendations, S. Doc. No. 35, 77th Cong., 1st Sess. (1941).

Temporary National Economic Committee, Investigation of Concentration of Economic Power, A Study of the Construction and Enforcement of the Federal Antitrust Laws, 76th Cong., 3d Sess. (Senate Comm. Print, Monograph No. 38, 1941).

United Nations, World Investment Report 2000: Cross-border Merger and Acquisitions and Development, at 140 (New York: United Nations, 2000).

Whish, Richard P. & Wood, Diane P., Merger Cases in Real World: A Study of Control Procedures (Paris: OECD, 1994).

WTO, Report (1999) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, WT/WGTCP/3, (Oct. 11,1999).

WTO, Report (2000) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, WT/WGTCP/4, (Nov. 30, 2000).

Speeches, Addresses and Remarks

Baer, William J., *New Myths and Old Realities: Perspectives on Recent Developments in Antitrust Enforcement*, Remarks before the Bar Association of the City of New York (Nov. 17, 1997); 1997 WL 728608.

Brandenburger, Rachel & Jassens, Thomas, European Merger Control: Do the Checks and Balances Need to be Re-set", Speech Before Fordham Corporate Law Institute's 28th Annual Conference on International Antitrust Law and Policy 22 (Oct. 25-26, 2001) (on file with the author).

Brittan, Leon, *Jurisdictional Issues in EEC Competition Law,* Hersch Lauterpacht Memorial Lecture, Cambridge University (Feb. 8, 1990).

Carl, Mogens Peter, (Director General, DG TRADE, Brussels), *Towards Basic Rules on Trade-Related Competition Policy*, Mar. 2, 2001, *available at* <http://europa.eu.int/comm/trade/speeches_articles/sp_mpc01.htm>, (visited on Apr. 20, 2001).

Drauz, Götz, *Unbundling GE/Honeywell: The Assessment of Conglomerate Merger Under the EC Competition Law* , Speech Before Fordham Corporate Law Institute, 28th Annual Conference on International Antitrust Law and Policy, New York, New York, (Oct. 25-26, 2001) (on file with the author).

Goldman, Calvin S., *Emerging Procedural and Substantive Issues for Mergers with Cross-Border Effects,* Remarks before ABA Section of Antitrust Law, Advanced International Antitrust Workshop, (Washington, D.C., Jan. 1999) (Unpublished manuscript on file with the author).

Klein, Joel I., *A Note of Caution with Respect to a WTO Agenda on Competition Policy* (Nov. 18, 1996) *available at* <http://www.usdoj.gov/atr/public/speeches/jikspch.htm>, (visited on Oct. 2, 2001).

Klein, Joel I., *Anticipating the Millennium: International Antitrust Enforcement at the End of the Twentieth Century, in* 1998 ANNUAL PROCEEDINGS OF THE FORDHAM CORPORATE LAW INSTITUTE: INTERNATIONAL ANTITRUST LAW AND POLICY 9 (Barry Hawk ed., 1998).

Klein, Joel I., *Time for a Global Competition Initiative*?, Speech at the EC Merger Control Tenth Anniversary Conference (Sept. 14, 2000), *available at* <http://www.usdoj.gov/atr/public/speeches/6486.htm>, (visited on Apr. 25, 2001).

Lamy, Pascal, *Good Governance in the Public and Private Sectors Against the Background of Globalisation*, Introductory remarks at OSCE Seminar, Brussels, January 30, 2001, *available at* <http://europa.eu.int/comm/trade/speeches_articles/spla49_en.htm>, (visited on Apr. 20, 2001).

Melamed, A. Douglas, *Antitrust Enforcement in a Global Economy*, Speech before Fordham Corporate Law Institute, 25th Annual Conference on International Antitrust Law and Policy, New York, (Oct. 22, 1998) *available at* <http://www.usdoj.gov/atr/public/speeches/2043.htm>, (visited on Apr. 24, 2001).

Melamed, A. Douglas, *Promoting Sound Antitrust Enforcement in the Global Economy*, Speech before Fordham Corporate Law Institute, 27th Annual Conference on International Antitrust Law and Policy, New York, New York, (Oct. 19, 2000) *available at* <http://www.usdoj.gov/atr/public/speeches/6785.htm>, (visited on Apr. 25, 2001).

Miert, Karel Van, EC Competition Commissioner, *The Transatlantic and Global Implications of European Competition Policy,* Speech before North Atlantic Assembly Meeting - Palais Egmont, Brussels, (February 16, 1998) *available at* <http://europa.eu.int/comm/competition/speeches/text/sp1998_054_en.html>, (visited on Apr. 30, 2001).

Nannes, John M., *Last Year and this Year: The View from the Antitrust Trenches*, address before New York State Bar Association, Antitrust Law Section Annual Meeting, New York, New York (January 27, 2000) *available at* <http://www.usdoj.gov/atr/public/speeches/4086.htm>, (visited on Apr. 25, 2001).

Pitofsky, Robert, Prepared Statement of the Federal Trade Commission, Before the Committee on the Judiciary, Subcommittee on Antitrust, Business Rights, and Competition, United States Senate (July 24, 1997); 1997 WL 414858 (F.T.C.).

Pitofsky, Robert, prepared Remarks, *Staples and Boeing: What They Say About Merger Enforcement at the FTC* (Washington, D.C. Sept. 23, 1997) *available at* <http://www.ftc.gov/speeches/pitofsky/STAPLESspc.htm>, (visited on Apr. 13, 2001).

Ruggie, John G., *Globalization and Global Community: The Role of the United Nations*, J. Douglas Gibson Lecture, School of Policy Studies, Queens University, Kingston, Ontario (20 Nov. 2000) available at <http://qsilver.queensu.ca/sps/WorkingPapers/files/ruggie.html>, (visited on Feb. 24, 2002).

Schaub, Alexander, Contiunued Focus on Reform: Recent Developments in EC Competition Policy Speech Before Fordham Corporate Law Institute, 28th Annual Conference on International Antitrust Law and Policy, New York, New York, (Oct. 25-26, 2001) (on file with the author).

Stark, Charles S., *Improving Bilateral Antitrust Cooperation,* Speech at a Conference on Competition Policy in the Global Trading System: Perspectives from Japan, the United States, and the European Union, Washington, DC, (June 23, 2000) *available at* <http://www.usdoj.gov/atr/public/speeches/5075.htm> (visited on Apr. 25, 2001).

Wolfe, Robert, *See you in Geneva? Democracy, the Rule of Law and the WTO, available at:* http://policy.queensu.ca/~wolfer/Papers/ISAruleof%20law.pdf, (last visited on Feb. 28, 2002).

Law Journal Articles

60 Minutes With Laurel A. Price, Chair, National Association of Attorneys General Multistate Antitrust Task Force, 62 ANTITRUST L.J. 247 (1993).

Afonso, Margarida, *A Catalogue of Merger Defenses Under European and United States Antitrust Law*, 33 HARV. INT'L L.J. 1, 65 (1992).

Ahdar, Rex J., *The Role of Antitrust Policy in the Development of Australian-New Zealand Free Trade*, 12 NW. J. INT'L L. & BUS. 317 (1991).

Alissi, John J., *Revolutionizing the Telephone Industry: The World Trade Organization Agreement on Basic Telecommunications and the Federal Communications Commission*, 13 CONN. J. INT'L L. 485 (1999).

Aman, Jr., Alfred C., *Introduction to Symposium, The Globalization of Law, Politics and Markets*, 1 IND. J. GLOBAL LEGAL STUD. 1 (1993).

Aman, Jr., Alfred C., *Proposals for Reforming the Administrative Procedure Act: Globalization, Democracy and the Futherance of a Global Public Interest*, 6 IND. J. GLOBAL LEGAL STUD. 397 (1999).

Aman, Jr., Alfred C., *The Earth as Eggshell Victim: A Global Perspective on Domestic Regulation*, 102 YALE L.J. 2107 (1993).

Aman, Jr., Alfred C., *The Globalizing State: A Future-Oriented Perspective on the Public/Private Distinction, Federalism, and Democracy*, 31 VAND. J. TRANSNAT'L L. 769 (1998).

Araujo, Jr., Jose Tavares & Tineo, De Luis, *Harmonization of Competition Policies Among Mercosur Countries*, 24 BROOK. J. INT'L L. 441 (1998).

Austin, Arthur, *Antitrust Reaction to the Merger Wave: The Revolution v. the Counterrevolution,* 66 N.C. L. REV. 931 (1988).

Austin, Arthur, *The Emergence of Societal Antitrust*, 47 N.Y.U. L. REV. 903 (1972).

Baer, William J. & Balto, David A., *The Politics of Federal Antitrust Enforcement*, 23 HARV. J.L. & PUB. POL'Y 113 (1999).

Baer, William J., *Reflections on Twenty Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, 65 ANTITRUST L.J. 825 (1997).

Ballam, Deborah A., *The Evolution of the Government-Business Relationship in the United States:Colonial Times to Present*, 31 AM. BUS. L. J. 553 (1994).

Beeman, Earl Ray, *The EEC Merger Regulation: Preparing for a Common European Market*, 19 PEPP. L. REV. 589 (1992).

Bok, Derek C., *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226 (1960).

Brzezinski, Carolyn, *Competition and Antitrust Law in Central Europe: Poland, the Czech Republic, Slovakia and Hungary*, 15 MICH. J. INT'L L. 1129 (1994).

Castaneda, Gabriel and Ugarte, Fernando Sanchez, *Mexico Still Setting the Pace for Latin America*, 1 GLOBAL COMPETITION REV. 12 (Feb./Mar. 1998).

Cho, Whie-kap, *Korea's Economic Crisis: The Role of Competition Policy*, 27 INT'L BUS. LAW. 495 (1999).

Clanton, David A., *Recent Merger Developments: Coming of Age Under the Guidelines*, 53 ANTITRUST L.J. 345 (1984).

Collins, Kathleen Murtaugh, *Harmonizing the Antitrust Laws of NAFTA Signatories*, 17 LOY. L.A. INT'L & COMP. L.J. 157 (1994).

Collins, Wayne D., *The Coming of Age of EC Competition Policy*, 17 YALE J. INT'L L. 249 (1992).

Cunningham, Richard O., & LaRocca, Anthony J., *Harmonization Of Competition Policies in a Regional Economic Integration*, 27 LAW & POL'Y INT'L BUS. 879 (1996).

Davey, William J., *Legal Developments in the WTO*, 90 AMERICAN SOCIETY OF INT'L LAW PROCEEDINGS 412 (1996).

Delbruck, Jost, *Globalization of Law, Politics, and Markets – Implications for Domestic Law – A European Perspective*, 1 IND. J. GLOBAL LEGAL STUD. 9 (1993).

Ethan Schwartz, *Politics As Usual: The History Of European Community Merger Control,* 18 Yale J. Int'l L. 607 (1993).

Fiebig, Andre, *A Role for the WTO in International Merger Control,* 20 NW. J. INT'L L. & BUS. 233 (2000).

Fiebig, Andre, *The Extraterritorial Application of the European Merger Control Regulation*, 5 COLUM. J. EUR. L. 79 (1999).

First, Harry, *The Intersection of Trade and Antitrust Remedies*, 12-FALL ANTITRUST 16 (1997).

Flaherty, John P., & Lally-Green, Maureen E., *The European Union: Where Is It Now?*, 34 DUQ. L. REV. 923 (1996).

Fox, Eleanor M. & Sullivan, Lawrence A., *Antitrust-Retrospective and Prospective: Where are We Coming From? Where are We Going?,* 62 N.Y.U. L. Rev. 936 (1987).

Fox, Eleanor M., *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U. L. REV. 1781 (2000).

Fox, Eleanor M., *Antitrust Regulation Across National Borders: the United States of Boeing Versus the European Union of Airbus*, 16 BROOKINGS REVIEW, No. 1, at 30; 1998 WL 10684773.

Fox, Eleanor M., *Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade*, 4 PAC. RIM L. & POL'Y J. 1 (1995).

Fox, Eleanor M., *The Central European Nations and the EU Waiting Room--Why Must the Central European Nations Adopt the Competition Law of the European Union?*, : 23 BROOK. J. INT'L L. 351 (1997).

Fox, Eleanor M., *Equality, Discrimination, and Competition Law: Lessons From and For South Africa and Indonesia*, 41 HARV. INT'L L.J. 579 (2000).

Fox, Eleanor M., *Foreword: Mergers, Market Access and the Millennium*, 20 Nw. J. Int'l L. & Bus. 203 (2000).

Friedberg, James J., *The Convergence of Law in an Era af Political Integration: The Wood Pulp Case and the Alcoa Effects Doctrine*, 52 U. PITT. L. REV. 289 (1991).

Fugate, Wilbur L., *The Department of Justice's Antitrust Guide for International Operations*, 17 VA. J. INT'L LAW 645 (1977).

Fugate, Wilbur L., *The New Justice Department Antitrust Enforcement Guidelines for International Operations-A Reflection of Reagan and, Perhaps, Bush Administration Antitrust Policy*, 29 VA. J. INT'L L. 295 (1989).

Ginsburg, Douglas H. & Angstreich, Scott H., *Multinational Merger Review: Lessons From Our Federalism*, 68 ANTITRUST L.J. 219 (2000).

Golden, Brian, *The Evolution of Horizontal Mergers and the 1992 Merger Guidelines*, 28 NEW ENG. L. REV. 159 (1993).

Griffin, Joseph P., *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 ANTITRUST L.J. 159 (1999).

Halverson, James T., *Harmonization and Coordination of International Merger Procedures*, 60 ANTITRUST L.J. 531 (1991).

Harriman, Susan, Note, *Parens Patriae Actions on Behalf of Indirect Purchasers: Do They Survive Illinois Brick?*, 34 HASTINGS L.J. 179 (1982).

Hawk, Barry E. & Laudati, Laraine L., *Antitrust Federalism in the United States and Decentralization of Competition Law Enforcement in the European Union: A Comparison*, 20 FORDHAM INT'L L.J. 18 (1996).

Hawk, Barry E., *The EEC Merger Regulation: The First Step Toward One-Stop Merger Control*, 59 ANTITRUST L.J. 195 (1990).

Hawk, Barry E., *The OECD Guidelines for Multinational Enterprises*, 46 FORDHAM L. REV. 241 (1977).

Hinton, Eric F., *European Community Competition Law, Subsidiarity, and the National Courts*, 11 BYU J. PUB. L. 301 (1997).

Hovenkamp, H., *State Antitrust in the Federal Scheme*, 58 IND. L. J. 375, 383 (1983).

Karpel, Amy Ann, *The European Commission's Decision on the Boeing-McDonnell Douglas Merger and the Need for Greater U.S.-EU Cooperation in the Merger Field*, 47 AM. U. L. REV. 1029 (1998).

Kauper, *The 'Warren Court' and the Antitrust Laws: of Economics, Populism, and Cynicism*, 67 MICH. L. REV. 325 (1968).

Kennedy, Kevin C., *The Gatt-Wto System at Fifty*, 16 WIS. INT'L L.J. 421 (1998).

Kovacic, William E., *Capitalism, Socialism, and Competition Policy in Vietnam*, 13 ANTITRUST 57 (Summer 1999).

Kovacic, William E., *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 BROOK. J. INT'L L. 403 (1997).

Kovacic, William E., *Institutional Innovations in Competition Policy in Peru: INDECOPI After Five Years*, 1 INT'L ANTITRUST BULL. 34 (Summer 1998).

Kovacic, William E., *Merger Enforcement in Transition: Antitrust Controls on Acquisitions in Emerging Economies,* 66 U. CIN. L. REV. 1075 (1998).

Kleinhans, Martha-Marie & Macdonald, Roderick A. *What is a Critical Legal Pluralism*, CANADIAN JOURNAL OF LAW AND SOCIETY, 12 no. 2, 25-46 (Fall 1997) .

Lande, Robert H., Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged, 34 HASTINGS L.J. 65 (1982).

Luz, Kathleen, *The Boeing-McDonnell Douglas Merger: Competition Law, Parochialism, and the Need for a Globalized Antitrust System,* 32 GEO. WASH. J. INT'L L. & ECON. 155 (1999).

May, James, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. PA. L. REV. 495 (1987).

McCurdy, *The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869-1903*, 53 BUS. HIST. REV. 304 (1979).

Melamed, A. Douglas, *International Antitrust in an Age of International Deregulation*, 6 GEO. MASON L. REV. 437 (1998).

Miller, Jeffrey A., *The Boeing/McDonnell Douglas Merger: The European Commission's Costly Failure to Properly Enforce the Merger Regulation*, 22 MD. J. INT'L L. & TRADE 359 (1999).

Minda, *The Lawyer-Economist at Chicago: Richard A. Posner and the Economic Analysis of Law*, 39 OHIO ST. L. REV. 439 (1978).

Morris, John R., *International Trade and Antitrust: Comments*, 61 U. CIN. L. REV. 945 (1993).

Mureiko, William R., *A Public Goods Approach to Calculating Reasonable Fees Under Attorney Fee Shifting Statutes,* [1989] Duke L.J. 438.

O'Toole, Thomas P., *"The Long Arm of The Law"--European Merger Regulation and Its Application To The Merger of Boeing & McDonnell Douglas*, 11 TRANSNAT'L LAW 203 (1998).

Opi, Sergio Baches, *Merger Control in the United States and European Union: How Should the United States' Experience Influence the Enforcement of the Council Merger Regulation?,* 6 J. TRANSNAT'L L. & POL'Y 223 (1997).

Pakpahan, Normin, *Indonesia: Enactment of Competition Law*, 27 INT'L BUS. LAW. 491 (1999).

Peck, Brian, *Extraterritorial Application of Antitrust Laws and the U.S.-EU Dispute Over the Boeing and McDonnell Douglas Merger: From Comity To Conflict? An Argument for a Binding International Agreement on Antitrust Enforcement and Dispute Resolution,* 35 SAN DIEGO L. REV. 1163 (1998).

Peritz, Rudolph J., *The 'Rule of Reason' in Antitrust Law:Property Logic in Restraint of Competition*, 40 HASTINGS L.J. 285 (1989).

Pitofsky, Robert, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979).

Posner, Richard A., *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

Ridyard, Derek, *An Economic Perspective on the EC Merger Regulation*, 11(6) EUR. COMPETITION L. REV. 247 (1990).

Rill, James F., *Creating and Maintaining Competition in a Common Market: The Future Of Antitrust in an Integrated World Economy,* 1992 U. CHI. LEGAL F. 263 (1992).

Rose, Jonathan, *State Antitrust Enforcement, Mergers, and Politics*, 41 WAYNE L. REV. 71 (1994).

Sassen, Saskia, *Towards a Feminist Analytics of the Global Economy*, 4 IND. J. GLOBAL LEGAL STUD. 7 (1996).

Scher, Irving, *Emerging Issues Under the Antitrust Improvements Act of 1976*, 77 COLUM. L. REV. 679 (1977).

Scherer, F. M., *Sunlight and Sunset at the Federal Trade Commission*, 42 ADMIN. L. REV. 461 (1990).

Sherman, Laura B., *"Wildly Enthusiastic" About the First Multilateral Agreement on Trade in Telecommunications Services*, 51 FED. COMM. L. J. 61 (1998).

Sims, Joe & Herman, Deborah P., *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 ANTITRUST L.J. 865 (1997).

Singham, Shanker, *US and European Models Shaping Latin American Competition Law*, 1 GLOBAL COMP. REV. 15 (1998).

Sklar, Martin J.,*Sherman Antitrust Act Jurisprudence and Federal Policy-Making in the Formative Period, 1890-1914*, 5 N.Y.L. SCH. L. REV. 791 (1990).

Smets, Hilde and Cayseele, Patrick Van, *Competing Merger Policies in a Common Agency Framework*, 15 INT'L REV. L. & ECON. 425 (1995).

Starr, Crystal Jones, *Community-Wide V. Worldwide Competition: Why European Enforcement Agencies are Able to Force American Companies to Modify Their Merger Proposals and Limit Their Innovations*, 17 WIS. INT'L L.J. 145 (1999).

Stephens, Laura L., Note, *Nonprofit Hospital Mergers and Section 7 of the Clayton Act: Closing an Antitrust Loophole*, 75 B.U. L. REV. 477 (1995).

Sullivan, E. Thomas, *The Antitrust Division as a Regulatory Agency: An Enforcement Policy in Transition*, 64 WASH. U. L.Q. 997 (1986).

Supanit, Sutee, *Thailand: Implementation of Competition Law*, 27 INT'L BUS. LAW. 497 (1999).

Symposium, In Commemoration of the 60th Anniversary of the Establishment of the Antitrust Division of the Department of Justice, 39 ANTITRUST BULL. 813 (1994).

Tarullo, Daniel K., *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT'L L. 478 (2000).

Terrill, Roman, *What Does 'Globalization' Mean?*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 217 (1999).

Thieffry, Patrick, *The New EC Merger Control Regulation*, 24 INT'L LAW 543 (1990).

Waller, Spencer Weber, *Prosecution By Regulation: The Changing Nature Of Antitrust Enforcement*, 77 OR. L. REV. 1383 (1998).

Waller, Spencer Weber, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343 (1997).

Walton, Leigh, *Letter of Intent, Representing the Growing Business*, SE77 ALI-ABA 609 (June 1, 2000).

Weiler, Joseph H. H., *The Transformation of Europe*, 100 YALE L. J. 2403 (1991).

Yu, Tianlong, *An Anti-Unfair Competition Law Without a Core: An Introductory Comparison Between U.S. Antitrust Law and the New Law of the People's Republic of China*, 4 IND. INT'L & COMP. L. REV. 315 (1994).

Newsletters, Magazines and Journals

A Trustbuster Looks Back, Joel Klein Reflects on His Tenure as Antitrust Chief, Business Week, Oct. 2, 2000, at 52; 2000 WL 24485455.

ABA Panel Probes International Guides Immediately After Release by Government, ANTITRUST AND TRADE REG. REP. 491 (BNA) No. 1708 (Apr. 13, 1995).

Agami, Abdel M. *Cross-Border Mergers among Multinational Businesses*, 9 MULTINATIONAL BUS. REV. Issue 1, at 7787; 2001 WL 18417211.

Bencivenga, Dominic, *International Antitrust: Bilateral Pacts Seen As Crucial to Enforcement*, N.Y.L.J., Dec. 12, 1996, at 6.

Boyle, Jane, *BA's Merger by any Other Name*, AUSTL. FIN. REV., June 12, 2001, at 14; 2001 WL 21618523.

BP Amoco Signs Deal With FTC, Acquires ARCO, 98 OIL & GAS J., Issue 17, Apr. 24, 2000, at 26; 2000 WL 14257159.

Brady, Diane, *Why Service Stinks*, BUS. WK., Oct. 23, 2000, at 118; 2000 WL 24485866.

Brewis, Janine, *M&A in the Fast Lane*, CORP. FIN. IIII, Apr. 1, 2000; 2000 WL 11921050.

Capell, Kerry, *First Aid for Queasy Investors*, BUS. WK., July 9, 2001, at 50; 2001 WL 2207993.

Chetwynd, Catherine, *Travel Decisions - Airline Alliances - Promiscuous Times in the Mile-high Club*, FIN. DIRECTOR, Sept. 11, 2000, at 21; 2000 WL 14181865.

Conybeare, John A. C., *Public Goods, Prioner's Dilemma and the International Political Economy*, 28 INTERNATIONAL STUDIES QUARTERLY 7 (1984).

Cowie, Michael G. & Novotna, Monica, *Premerger Notification in Central and Eastern Europe*, 12 ANTITRUST 19 (Summer 1998).

Debra L. Golbe and Lawrence J. White, *Catch a Wave: The Time Series Behavior of Mergers,* THE REVIEW OF ECONOMICS AND STATISTICS 493 (1993).

Emmett, Arielle, *The Gamers and the Gun-Shy*, AM. NETWORK, Dec. 1, 2000, at 2529; 2000 WL 10795218.

Evers, Liesbeth, *Why the Big Just Keep on Getting Bigger*, NETWORK NEWS, Nov. 1, 2000, at 30; 2000 WL 7834882.

Fox, Eleanor M., *Extraterritoriality and Merger Law: Can All Nations Rule the World*, ANTITRUST REPORT, Dec.1999, at 2.

Fox, Eleanor M., *International Antitrust: Against Minimum Rules; For Cosmopolitan Principles*, ANTITRBUL, Mar. 22, 1998; 1998 WL 16568441.

Fox, Eleanor M., *Lessons From Boeing: A Modest Proposal To Keep Politics Out of Antitrust,* ANTITRUST REPORT, Nov. 1997, at 19.

Fox, Eleanor M., *The New Merger Guidelines: Blueprint for Microeconomic Analysis*, 27 ANTITRUST BULL. 519 (1982).

Frederickson, Adam, A Strategic Approach to Multi-jurisdictional Filings, 4 EUR. COUNSEL 23 (Dec. 1999/Jan. 2000).

FTC News, Press Release, *21.6.95; National Ass'n of Attorneys General*, 22 ANTITRUST REPORT, May/June 1995.

Garten, Jeffrey E., *As Business Goes Global, Antitrust Should, Too*, BUS. WK. , Nov. 13, 2000, at 38; 2000 WL 24486348.

Garten, Jeffrey E., *Megamergers are a Clear and Present Danger*, BUS. WK., Jan. 25, 1999, at 28; 1999 WL 8225752.

Garten, Jeffrey E., *The Mind of the C.E.O.*, BUS. WK., Feb. 5, 2001, at 106; 2001 WL 2205246.

Garten, Jeffrey E., *The War for Better Quality is Far From Won*, BUS. WK., Dec. 18, 2000, at 32; 2000 WL 24487129.

Gold, Steve, *AT&T, BT May Scrap Concert JV*, NEWSBYTES, July 2, 2001; 2001 WL 23415924.

Greenberg, Joshua F. et al., *Addressing the Antitrust Aspects of Mergers*, 841 PLI/CORP 77, at 100; PLI Order No. B4-7058; (Mar. 9-11, 1994).

Griffin, Joseph P., *EC/U.S. Antitrust Cooperation Agreement: Impact on Transnational Business*, (Summer, 1993) LAW AND POLICY IN INTERNATIONAL BUSINESS, 1051.

Grounded Again: Airlines in Turbulence: Falling Traffic, Rising Losses, Striking Pilots, Failed Mergers. Some Everyday Problems for the World's Airlines, ECONOMIST, July 7. 2001; 2001 WL 7319682.

Hardin, G., *The Tragedy Of Commons* (1968) SCIENCE 162, at 1244.

Harrington, Anthony, *Business Travel Decisions - Cosy Club Class*, FIN. DIRECTOR, June 6, 2001, at 6; 2001 WL 10783139.

Jenks, J., *Recent Legislation and Adjudication on Trusts*, 12 Q. J. ECON. 461 (1898);

List, Peter, *The Few Become Fewer*, 14 GLOBAL FIN., Issue 6, June 01, 2000, at 3847; 2000 WL 12860905.

Litner, John & Butters, John, *Effect of Mergers on Industrial Concentration, 1940-47*, 32 REV. ECON & STAT. 30 (1950).

McCarty, James E., *The FTC 1984, Merger Enforcement at the Federal Trade Commission*, 467 PLI/CORP 213 (December 13, 1984).

McDermott, Kathleen E., *U.S. Officials Provide Competition Counseling to Eastern Europe*, 5 ANTITRUST 4 (Fall/Winter 1991)

Merger Control: Boeing Working Towards Accommodation with European Commission, EUR. REP., July 12, 1997.

Miert, Karel Van, *Competition Policy in Relation to the Central and Eastern European Countries - Achievements and Challenges*, 1998/2 EC COMP. POL'Y NEWSL. 1.

Oprescu, Georghe & Rohlck, Eric D., *Competition Policy in Transition Economies: the Case of Romania*, 1999/3 EC COMP. POL'Y NEWSL. 62.

Palim, Mark R.A., *The Worldwide Growth of Competition Law: An Empirical Analysis*, 43 ANTITRUST BULL. 105 (1998).

Roberts, Ricardo, *Banking M&A Expert Sounds Off: Former Federal Reserve Economist Discusses His New Book*, MERGERS & ACQUISITIONS REP., June 25, 2001, Item 01176003; 2001 WL 6855933.

Rubis, Leon *Overdue Diligence for M&As*, 46 HRMAGAZINE, Issue 6, June 1, 2001, at 12; 2001 WL 10647015.

Samuelson, Paul A., *Diagrammatic Explanation of a Theory of Public Expenditure*, 376 REV. ECON. & STATISTICS 350 (1955).

Schaub, Alexander, *International Cooperation in Antitrust Matters: Making the Point in the Wake of the Boeing/MDD Proceedings*, EC COMPETITION POLICY NEWSLETTER, Feb. 1998, at 4.

Sikora, Martin, *Cross-Border Deal of the Year*, MERGERS & ACQUISITIONS: DEALMAKERS J., Feb. 1, 2001; 2001 WL 9054535.

Snieckus, Darius, *JP Morgan: More Oil Mergers Looming on Horizon*, 99 OIL & GAS J., Issue 10, Mar. 5, 2001, at 25; 2001 WL 9152111.

Taverna, Michael A., *Failed Mega-Merger Causing Shock Waves*, 155 AVIATION WK. & SPACE TECH., No. 2, July 9, 2001, at 27; 2001 WL 7150775.

Till, Francis, *Vodafone Increases its Interest in Asia*, NAT'L. BUS. REV., Mar. 2, 2001; 2001 WL 12146136.

Torres, Amelia, *Kimberly-Clark Plays Down EU Fears on Scott Deal*, REUTER BUS. REP., Sept. 21, 1995, at Financial Report.

United, bmi British Midland Press for 'Open Skies' Agreement, 11 WORLD AIRLINE NEWS, Issue: 25, June 22, 2001; 2001 WL 7664153.

Weiner, Michael L., *Conflict and Cooperation: Meeting the Challenge of Increasing Globalization,* 12-Fall ANTITRUST 4 (1997).

Wings of Change, ABIX - AUSTRALASIAN BUSINESS INTELLIGENCE: THE AUSTRALIAN, July 10, 2001; 2001 WL 24671438.

Woods, Lynn, *The World is Merging on Up: Mergers and Acquisitions Activity Increased Again in 2000*, 11 BUSINESS WITHOUT BORDERS, No. 110, at 14 (col. 1).

Wolfe, Robert *Rendering Unto Caesar How Legal Pluralism and Regime Theory Help in Understanding "Multiple Centres of Power," available at* : <http://policy.queensu.ca/~wolfer/Papers/Renderin.pdf>, (last visited on Feb. 28, 2002).

News Items and Press Releases

Airlines' Alliance Takes Off, EVENING NEWS - SCOT., July 11, 2001, at B5; 2001 WL 24049271.

Boff, Richard B. Du & Herman, Edward S., *Mergers, Concentration, and the Erosion of Democracy*, 53 MONTHLY REV., Issue 1, at 1429; 2001 WL 12550411.

Bolande, H. Asher, *Asia's Tech Trends: A Region in Transformation*, ASIAN WALL ST. J., June 19, 2001, at N1; 2001 WL-WSJA 22051289.

Brittan, L., Competition Policy in the European Community: the New Merger Regulation, EC Chamber of Commerce, New York (Mar. 26, 1990).

Carney, Brian M., *Loggerheads: Mario Monti, Central Planner*, ASIAN WALL ST. J., July 9, 2001, at 6; 2001 WL-WSJA 22052519.

Cattell, Brian, *BT Sets Terms for Stake Sale in Japan, Spain*, DAILY DEAL, May 3, 2001; 2001 WL 20232890.

China's Auto Industry at the Crossroad, ASIAPORT DAILY NEWS, May 18, 2001, at 01; 2001 WL 2581920.

Clinton Warns European Commission Over Boeing, McDonnell Douglas Merger, BNA ANTITRUST & TRADE REGULATION DAILY, July 18, 1997.

Dahlburg, John-Thor, *Europe Panel Rejects Boeing Merger Plan*, L.A. TIMES, July 5, 1997, at A1

Dingfelder & Brickels, Sandra, *To Protect Consumers, The FTC Means Business*, 45-JAN FED. LAW. 24 (1998).

DOJ's Klein Calls for Initiative to Set Up Global Competition Organization, AFX NEWS, Sept. 14, 2000.

Drozdiak, William, *EU Blocks Merger of GE, Honeywell; Trade Tension Rises*, HOUS. CHRON., July 4, 2001, at 1; 2001 WL 23612304.

FDI-Linked Cross-Border M&As Grew Unabated in 2000, <http://www.unctad.org/en/press/pr0116en.htm>, (last visited on Feb. 28, 2002).

EC Commissioner Recommends Larger Role for GATT in Developing Competition Policy, BNA ANTITRUST & TRADE REGULATION DAILY (Feb. 10, 1992).

EC Commissioner Recommends Larger Role for GATT in Developing Competition Policy, BNA ANTITRUST & TRADE REGULATION DAILY, Feb. 10, 1992.

EC Tells U.S. to Heed Future European Antitrust Concerns; Start Up WTO Division, BNA ANTITRUST & TRADE REGULATION DAILY, July 25, 1997, at d6.

Enforcement: IBA Conference Participants Focus on Practical Effects of Globalization, BNA ANTITRUST & TRADE REGULATION DAILY, Nov. 17, 2000.

Ford Might Buy Volvo Truck Division to Protect Brand, DET. NEWS, Mar. 30, 2000, at 03; 2000 WL 3472521.

Foreign Firms to Drive Car Industry, DAILY YOMIURI/YOMIURI SHIMBUN, Apr. 3, 2000; 2000 WL 4645544.

France Telecom to Offload Sprint Stake, IR. INDEPENDENT, June 1, 2001; 2001 WL 4417444.

FTC/DOJ Announce Revised Guidelines on Efficiencies in Mergers, Apr. 8, 1997, *available at* <http://www.ftc.gov/opa/1997/9704/effpress.htm> (visited on Feb. 15, 2001).

Ghadar, Fariborz & Ghemawat, Pankaj, *Hey, Deutsche Telekom: Bigger Isn't Necessarily Better*, WALL ST. J., July 27, 2000, at A22; 2000 WL-WSJ 3038134.

Glaxo, Smithkline Continue Drug Company Merger Trend, HOUS. CHRON., Jan. 18, 2000, at 3; 2000 WL 4275775.

Guidera, Jerry & Walsh, Campion, *FTC to Approve BP Amoco-Arco Merger With Phillips Deal*, DOW JONES NEWS SERV., Apr. 11, 2000, at 11:32:00.

Guttman, Robert J., *What they said: Competition Commissioner Mario Monti,* EUR. (DOW JONES), July 1, 2000, at S1S3; 2000 WL 20682281.

ILO: 300,000 Finance Jobs to be Lost in Europe in 3 Years, DOW JONES INT'L NEWS, 06:48:00, Feb. 3, 2001.

Iritani, Evelyn, *Global Mergers Pushing the Boundaries of Antitrust Law Regulation*, LOS ANGELES TIMES, Nov. 5, 2000, at C1; 2000 WL 25915626.

Justice Department Requires Divestiture in Merger Between General Electric and Honeywell, <http://www.usdoj.gov/atr/public/press_release/2001/8140.htm>, (visited on July 22, 2001).

Kellaway, Lucy, *EC Ministers Hand Brussels the Power to Vet Large Mergers*, FIN. TIMES, Dec. 22, 1989, at 2.

Klein, Joel I., *No Monopoly on Antitrust*, FIN. TIMES, Feb. 13, 1998, at 20.

Longworth, R. C., *Behind Closed Doors Global Regulators Mold Economic Future*, CHICAGO TRIBUNE, Nov. 17, 2000; 2000 WL 3734483.

Mammoth Air Merger Poised for Take-Off, SUNDAY BUS. POST, June 24, 2001; 2001 WL 8743169.

Monti Cites Use of Competition Policy in Integration of EU States' Economies, BNA ANTITRUST AND TRADE REGULATION DAILY, Nov. 3, 2000, at D5.

Morgan Stanley Chief Sees More Fin Services Mergers, DOW JONES INT'L NEWS SERV., 02:06:00, Nov. 17, 1998.

OECD Antitrust/Trade Conference Shows Disparate Approaches Toward Reconciliation, BNA ANTITRUST & TRADE REG. DAILY NEWS, July 9, 1999.

OECD Antitrust/Trade Conference Shows Disparate Approaches toward Reconciliation, BNA ANTITRUST & TRADE REGULATION DAILY NEWS, July 9, 1999.

Oneworld Extends its International Lead With Addition of New African Affiliate, <http://www.oneworldalliance.com/pressroom/releases/details.cfm?dID=151>, (visited on July 14, 2001).

Pitofsky, Robert *Conference Board: Current and Former Enforcement Officials Plot New Directions in Competition Policy*, BNA ANTITRUST & TRADE REGULATION DAILY NEWS, Mar. 8, 1999, at d2.

Pitofsky, Robert, *Coke and Pepsi Were Going Too Far*, N.Y. TIMES, July 27, 1986, at F2, col. 1.

Rice, Robert, *Brittan Urges Basic Competition Rules*, FIN. TIMES, Nov. 8, 1993, at 3.

Sheehan, Paul, *Global Warning*, SYDNEY MORNING HERALD, Mar. 31, 2001, at 32; 2001 WL 18179361.

Shishkin, Philip, *Barred Merger Signals U.S.-EU Divergence*, WALL ST. J. July 5, 2001, at A4; 2001 WL-WSJ 2868557.

Shobokshi, Hussein, *Challenges of Globalization Confront Arab Economies*, MIDDLE EAST NEWSFILE, Mar. 29, 2001; 2001 WL 10778522.

SkyTeam Celebrates First Anniversary With New Member and Cargo, KOREA HERALD, June 29, 2001; 2001 WL 20830283.

Tarullo, Daniel, *Wrong Lesson from Boeing*, FIN. TIMES, Aug. 13, 1997, at 12

The Commission Opens Full Investigation into the General Electric/Honeywell Merger, <http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/298|0|AGED&lg=EN&display=>, (last visited on Feb. 28, 2002).

The Commission Prohibits GE's Acquisition of Honeywell, Press Release by the E.U. Commission <http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/939|0|RAPID&lg=EN > (visited on July 21, 2001).

The Great Merger Wave Breaks, EDGE (AUSTL.), Jan. 01, 2001; 2001 WL 2167212.

Trans-Atlantic Differences Hurt GE Deal, O'Neill Says, WALL ST. J., July 6, 2001, at A2; 2001 WL-WSJ 2868688.

Tyson, Laura D'Andrea, *"McBoeing" Should be Cleared for Takeoff*, WALL ST. J., July 22, 1997, at A14.

Welcome Aboard: Canada 3000 Moving Quickly to Merge CanJet and Royal, available at http://www.canoe.ca/AirMergers/mar29_canada3000-cp.html (visited July 15, 2001).

West, Karen, *Boeing Intensifies Merger Negotiations With EU*, SEATTLE POST-INTELLIGENCER, July 11, 1997, at B1.

West, Karen, *EU Panel Rejects Boeing Merger*, SEATTLE POST-INTELLIGENCER, July 17, 1997, at C1.

Wilke, John R., *Drumbeat Persists Over Denial of Merger*, Asian Wall St. J., July 6, 2001, at 5; 2001 WL-WSJA 22052407.

WTO: European Commission to Urge WTO to Spearhead World Antitrust Battle, BNA ANTITRUST & TRADE REGULATION DAILY, June 19, 1996, at d4.

WTO, Doha Ministerial Declaration, *adopted on* Nov. 14, 2001, WT/MIN(01)/DEC/W/1 (Nov. 14, 2001), ¶ 4, *available at* <http://www-heva.wto-ministerial.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm>, (visited on Nov. 24, 2001).

WTO, Doha WTO Ministerial 2001: Briefing Notes, *available at* <http://www-heva.wto-ministerial.org/english/thewto_e/minist_e/min01_e/brief_e/brief13_e.htm>, (visited on Nov. 24, 2001).

WTO Ministerial, Doha: Assessment of Results for EU, Memo, Doha, (Nov. 14, 2001), *available at* <http://trade-info.cec.eu.int/europa/2001newround/pl4.php>, (visited on Nov. 24, 2001).