THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE

The Role of the Competition Law and Policy of the EU in the Formation of International Agreements on Competition

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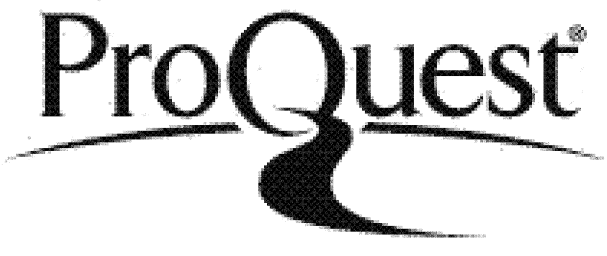
Dissertation submitted in fulfilment of the requirements for the award of a

Ph.D. Degree



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DECLARATION

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ABSTRACT

Competition law is a tool first employed by countries more than a hundred years ago, to address issues relating to restrictions on competition conducted by private firms. Competition law is still predominantly an instrument to resolve national problems while the dominance of market based economies in the last fifty years, particularly following the collapse of the eastern block, in combination with improvements in transport, communications and technology have progressively dismantled national borders and internationalised trade. Trade liberalisation has in turn led to practices by firms that have an effect on the territories of more than one country. Attempts to address this paradox – national rules to address international issues – have appeared on several occasions in the last 80 years at the international, regional and lately bilateral level.

The research question that the thesis addresses is: *What is the role of the competition law and policy of the EU in the formation of international competition rules (norms).*

This question encompasses two main concepts: international agreements with competition elements, and the role of EU competition law and policy. As to the former, four main forms of agreements are discussed in separate chapters of the thesis: bilateral and tripartite enforcement cooperation agreements, bilateral trade agreements with competition provisions, plurilateral trade agreements, and the negotiations over a possible multilateral agreement on competition. As to the latter, the EU is the focus of examination of these agreements. In this regard, the study analyses all the relevant agreements signed by the EU and the socio-political environment under which these agreements are negotiated and (where relevant) applied in practice, as well as the influence that these agreements have had on the conclusion of similar agreements by other countries.

List of Tables

Abbreviations

African, Caribbean and Pacific countries (ACPs)

American Bar Association (ABA)

Antitrust Civil Process Act (ACPA)

APEC Competition Policy and Deregulation Group (CPDG)

ASEAN Consultative Forum for Competition (ACFC)

Asia-Pacific Community (APEC)

Association of South East Asian Nations (ASEAN)

Australian Competition and Consumer Commission (ACCC)

Caribbean Community (CARICOM)

CARICOM Council for Trade and Economic Development (COTED)

CARICOM Single Market Economy (CSME)

Central America Common Market (CACM)

Central America Free Trade Agreement plus Dominican Republic (CAFTA- DR)

Common Market for Eastern and Southern Africa (COMESA)

Court of First Instance (CFI)

Draft International Antitrust Code (DIAC)

East African Cooperation (EAC)

Economic Community of West African States (ECOWAS)

Economic Partnership Agreement (EPA)

Euro-Mediterranean Association Agreement (EMAA)

European Coal and Steel Community (ECSC)

European Competition Network (ECN)

European Community (EC)

European Court of Justice (ECJ)

European Economic Area (EEA)

European Economic Community (EEC)

European Free Trade Area (EFTA)

European Neighbourhood Policy (ENP)

European Union (EU)

Federal Trade Commission (FTC)

Federal Trade Commission Act (FTCA)

Foreign Direct Investment (FDI)

Foreign Trade Antitrust Improvements Act (FTAIA)

Former Yugoslav Republic of Macedonia (FYROM)

Free Trade Agreement (FTA)

Free Trade Agreement of the Americas (FTAA)

General Agreement on Trade in Services (GATS)

General Agreement on Tariffs and Trade (GATT)

Gross Domestic Product (GDP)

International Antitrust Enforcement Assistance Act (IAEAA)

International Bar Association (IBA)

International Competition Network (ICN)

International Competition Policy Advisory Committee (ICPAC)

International Monetary Fund (IMF)

International Trade Organization (ITO)

Latin America Free Trade Association (LAFTA)

Least Developed Countries (LDCs)

MERCOSUR Committee for the Defense of Competition (CDC)

MERCOSUR Trade Commission (TC)

Most Favoured Nation (MFN)

Mutual Legal Assistance Treaties (MLATs)

North American Free Trade Agreement (NAFTA)

Organisation for Economic Cooperation and Development (OECD)

Partnership and Cooperation Agreement (PCA)

Southern African Customs Union (SACU)

Southern African Development Community (SADC)

Stabilisation and Association agreement (SAA)

Technical Assistance and Information Exchange programme (TAIEX)

Trade, Development and Cooperation Agreement (TDCA)

Trade-Related Aspects of Intellectual Property Rights (TRIPS)

United Kingdom (UK)

United Nations Conference on Trade and Development (UNCTAD)

United States of America (US)

West African Economic and Monetary Union (WAEMU)

World Trade Organisation (WTO)

Chapter 1: Introduction, Structure of the Thesis and Method

1.1 Introduction

Modern competition law is a tool first employed by countries more than a hundred years ago in order to address issues relating to restrictions of trade realised by private firms. As a legal instrument used to resolve national problems, competition law continues to be employed by countries. The dominance of market-based economies in the last fifty years, especially following the collapse of the Soviet Union, as well as improvements in transport, communications and technology, and trade liberalisation through the adoption of relevant agreements between states, have however progressively dismantled national borders and internationalised trade.

Along with trade liberalisation came practices conducted by firms that have an effect on the territories of more than one country. Attempts to address this paradox – namely, the adoption of national rules to address international issues – have appeared on several occasions over the last 80 years at the international, regional and (lately) bilateral level. The general aim of this thesis is to observe these attempts and analyse the norms that have been developed: bilateral and tripartite enforcement cooperation agreements, bilateral and plurilateral trade agreements that include competition provisions, and the attempts for the adoption of a multilateral competition code.

A number of topics related to the internationalisation of competition law have been addressed in the relevant literature, mostly in the last 15 years, including among others: the types of practices that may have an effect on multiple countries;[1] the relationship between trade law and competition law; and the debate over the possible inclusion of competition law within the World Trade Organisation (WTO) framework.[2] Lately, a number of studies have focused on the examination of trade agreements with

1 See for instance UNCATD (2005) 'Exclusionary Anti-competitive Practices: Their Effects on Competition and Development' UNCTAD/DITC/CLP/2005/4.

2 See for instance Marsden, P. (2003) A Competition Policy for the WTO (Cameron May); Petersmann, E.U. (1999) 'Legal Economic and Political Objectives of National and International Competition Policies: Constitutional Functions of WTO 'Linking Principles' for Trade and Competition' 34:1 New England Law Review, 145; UNCTAD (2003) 'WTO Core Principles and Prohibition: Obligations Relating to Private Practices, National Competition Laws and Implications for a Competition Policy Framework' UNCTAD/DITC/CLP/2003/2; Fox, E.M. (1999) 'Competition Law and the Millennium Round' 2:4 Journal of International Economic Law, 665; Hoekman B. and P.C. Mavroidis (2002) 'Economic Development, Competition Policy and the World Trade Organisation' World Bank Policy Research Working paper No 2917.

competition elements.[3] The influence of policy networks in the process of internationalisation of competition[4] and the relationship between preferential trade agreements and the attempts to conclude a multilateral agreement on competition have also been explored.[5] There are also works which have compared different domestic competition regimes.[6] Finally, recent papers have discussed the influence of the International Competition Network (ICN) on the internationalisation of competition process.[7] All these studies will be reviewed in the context of the discussion in subsequent chapters.

On the other hand there are no studies available which observe the way in which particular states and/or polities have reacted with regard to the adoption and application of international agreements on competition.[8] For instance, in the case of the European Union (EU), there are only a few recent papers that discuss the position taken by the polity in particular fields of international agreements with competition elements,[9] while most of the works in this field, in the context of the discussion of international agreements with competition elements, make reference to the position taken by the EU. That said, there is no single work that discusses the EU position in all the levels of international cooperation on competition (i.e. unilateral, bilateral, plurilateral regional,

3 Cernat L. (2005) 'Eager to Ink but Ready to Act? RTA Proliferation and International Cooperation on Competition Policy', in Brusick P., A.M. Alvarez and L. Cernat (eds) Competition Provisions in Regional Trade Agreements: How to Assure Development Gains (UNCTAD, Geneva and New York); OECD (2006) 'Competition Provisions in Regional Trade Agreements' OECD Trade Policy Working Paper No 31. COM/DAF/TD(2005)3/FINAL.

4 Maher, I. (2002) 'Competition Law in the International Domain: Networks as a New Form of Governance' 29:1 Journal of Law and Society, 112.

5 Evenett, S.J. (2005) 'What Can We Learn from the Competition Provisions of RTAs?', in Brusick P., A.M. Alvarez and L. Cernat (eds), supra n. 3.

6 See for instance Doern, G. and S. Wilks (eds.) (1996) Comparative Competition Policy: National Institutions in a Global Market (Oxford University Press).

7 See Bode M., and O. Budzinski (2005) 'Competing Toward International Antitrust: The WTO vs. the ICN', Marburg Papers on Economics, 03/2005.

8 Exceptions to this general observation are a number of papers which discuss the internationalisation of competition law from the perspective of developing countries. For instance, see Hoekman B. (1997) 'Competition Policy in the Global Trading System: A Developing Country Perspective' World Bank Policy Research Working Paper No 1735; Hoekman B. and P. Holmes (1999) 'Competition Policy, Developing Countries and the WTO' 22:6 The World Economy, 875. Nonetheless, these works are not focused on a particular developing country.

9 For instance Sepeszi has reviewed the competition provisions of the EU trade agreements. See, Szepesi, S. (2004) 'Comparing EU Free Trade Agreements: Competition Policy and State Aid' ECDPM InBrief 6E), ECDPM, Maastricht. Damro has examined the way that the EC Commission has reacted in the process of negotiation on competition at the WTO. Damro, C. (2006) 'The New Trade Politics and EU Competition Policy: Shopping for Convergence and Co-operation' 13:6 Journal of European Public Policy, 867.

and multilateral).[10] In this regard, this work intends to fill the gap in the relevant literature and evaluate the role of the EU in all levels of international cooperation on competition. Hence, the main question that the thesis will attempt to address is the following: *What is the role of competition law and policy of the European Union in the formation of international competition rules.*

This question encompasses two main concepts: international agreements with competition elements, and the role of EU competition law and policy in the formation of these agreements. As to the former, four main types of agreements will be discussed in separate chapters of the thesis: bilateral and tripartite enforcement cooperation agreements, bilateral trade agreements with competition provisions, plurilateral regional trade agreements, and the negotiations over a possible multilateral agreement on competition. As to the latter, the EU will be the focus of the examination concerning these agreements. The thesis attempts, first, to review the relevant agreements signed by the EU and, second, to observe the environment under which these agreements are negotiated and – where possible - applied in practice.

1.2 Structure of the thesis

Based on these considerations, the thesis is structured as follows:

Chapter 2 attempts to highlight some of the aspects of national competition laws and policies which may have an effect on the way that competition law and policy operates at the international level. In particular, the chapter includes the historical development of competition law and policy and makes reference to the various economic theories that may have an effect on the particular application of competition law. The chapter also discusses the relationship between competition policies and other national policies that may have an effect on its application, and endeavours to observe the way that competition law and sectoral regulations interact in a given territory of a nation. Finally, the chapter provides a discussion on economic globalisation and the way that this particular phenomenon has had an effect on the operation of competition law. In doing so, the chapter includes particular business practices that may have an effect on the territory of more than one state. In sum, the aim of this chapter is to draw

10 An exception would be a recent paper by Ivaldi, and Bertrnad, where the authors discuss the overall policy of the EU on competition in the international environment, nonetheless in much less detailed than the present study. See Ivaldi, M. and O. Bertrand (2006) 'European Competition Policy in International Markets', <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=951594> (last visited on 21 May 2007).

attention to the main factors that have led to the existence of international cooperation between states on competition law and policy, which, in its turn, has led to the negotiation and adoption of international agreements on competition that are discussed in subsequent chapters of the thesis.

Chapter 3 analyses bilateral and tripartite enforcement cooperation agreements in the field of competition law and policy. Mainly based on the relevant agreements signed between the EU and the United States of America (US), the chapter looks at the legal nature and the provisions of the two generations of these agreements, and also attempts to illustrate the debate relating to their usefulness. In the context of this discussion, the chapter analyses the way in which the EU has used this particular legal instrument.

Chapter 4 also looks at bilateral agreements. In contrast to chapter three, it examines bilateral trade agreements that include competition law provisions. The analysis is focused on relevant agreements concluded between the EU and a number of countries; this analysis has a dual aim: first, to discuss the way in which competition law co-exists with other commercial policies included in the text of these agreements; and second, to evaluate the EU policy regarding the use of this particular instrument.

Chapter 5 discusses plurilateral regional trade agreements which include competition provisions. Once more, the starting point of the analysis is the EC Treaty itself, which has been the most successful example of a plurilateral regional trade agreement. The chapter briefly introduces the main features of the EU competition regime and compares it with the competition regimes developed in other similar agreements in various parts of the world. In this context, the chapter also evaluates the role played by the EU in the development of competition regimes in other regional blocs.

Chapter 6 discusses the attempts to adopt a multilateral agreement on competition law and policy, and in particular, it discusses the EU as an actor in the context of these attempts. The discussion includes negotiations over a possible competition agreement in the General Agreement on Tariffs and Trade (GATT), and lately WTO, context, and examines also the alternative forms of multilateral cooperation, particularly the operation of the ICN.

Finally, chapter 7 provides the overall findings of this study with regard to the development of international norms on competition and the role of the EU in the formation - and where relevant – application of these norms. The major finding with

regard to the particular question that this thesis attempts to address is that depending on the particular category of agreements under examination, the role of the EU in the formation of such agreements varies.

1.3 Method

The analysis carried out in the context of this study is doctrinal, in the sense that it is focused on the discussion of legal provisions, by analysing the texts of international agreements and court decisions, where relevant. The discussion is also informed by various theories borrowed from political science and economics. As McCrudden notes, *'...much traditional doctrinal legal analysis now relaxes its view of the autonomy of law, drawing on economic and socio-legal insights increasingly easily'*. [11] Competition law is one of the areas of law where this interaction of law and economics is clearly visible; hence the thesis takes into account economic theories in the context of the discussion of the particularities concerning the application of competition law on a national level. In addition, the process of creation of international rules encompasses various features and theories borrowed from the field of political and social science, and in this regard, the thesis also employs theories, such as policy networks, epistemic communities, and isomorphism, to analyse the process of negotiation and final formation of international agreements, either dedicated to, or which include, competition law.

Three main research tools have been employed for the analysis of the working question of this thesis. These include a review of the relevant literature, which is carried out in the context of the discussion in the chapters which follow. Another analytical tool employed, is that of interviews with academics, competition officials and practitioners, which supplement the primary literature. These discussions have been very informative, as they give a broad idea of what experts believe about the issues addressed in this thesis.[12] This information is further expanded by practical working experience with the International Affairs Unit of the EC Commission's DG Competition and with the Greek Competition Commission, as the official in charge for international issues.[13]

11 McCrudden, C. (2006) 'Legal Research and the Social Sciences' 122 Law Quarterly Review, 632, and particularly pp 635, and 644.

12 In particular, 20 interviews were conducted, of which 11 with EU officials, 4 with UK academics, 2 with EU practitioners, 2 with US practitioners and 1 with business representatives.

13 The views expressed in this study are the author's and do not represent the Greek Competition Authority.

Chapter 2: The National and International Dimensions of Competition Law and Policy

Abstract

The first modern competition statute was enacted in Canada in 1889. Since then, and in view of the fact that competition law has been considered as one of the primary legal tools for the operation of market-oriented economies, the number of states that have adopted such laws has increased dramatically. Indeed, as of 2005, competition rules have been adopted by 101 different states. Nonetheless, the extent to, and the way in, which competition law has been applied in these countries varies. At the same time, due to a number of factors related to the globalisation of markets the number and types of anticompetitive business practices with an international effect have increased. Against this background, the aim of this chapter is threefold: first, to provide an introduction to the origins of competition law; second, to discuss the particular features of competition law which are responsible for the variation in the application of competition law in different countries; and third, to introduce briefly the reasons that have led to the need for international cooperation on, and/or harmonisation of, competition laws.

Section 1 of the chapter discusses the origins of competition law, and notes the increasing number of states that have adopted competition rules. Section 2 describes the development of the various economic theories which have played a role in the evolution and application of competition law, and further observes the broader issue of competition policy by providing an analysis of the legal, political and social factors that may influence the application of competition rules; it also briefly discusses the special case of the operation of competition law and policy in developing countries. Finally, Section 3 introduces the concept of economic globalisation, which has led to the existence of business practices with an international effect, which in turn has led to international cooperation on competition law and policy.

2.1. The origins of competition law

The first known restrictive trade agreement to be examined under common law by the English Courts was Dyer's case in 1414[14] where the court denied the collection of a bond for John Dyer's breach of his agreement not to '*use his art of dyer's craft*

14 (1414) 2 Hen. 5, 5 Pl. 26.

within the town ...for half a year'.[15] Since then, and throughout the next decades, a number of cases were decided by the English courts, and this gradual development of competition-related jurisprudence created an environment in which judicial principles were transformed into statutes. It was England once again which went even further and adopted statutory rules related to restrictive business practices. The Statute of Monopolies[16] was adopted in 1624 following the 1602 decision in the Darcy vs. Allein case,[17] in which the King's Bench unanimously held as void the sole right that Queen Elizabeth I granted to her Groom Darcy to import playing cards into England.[18]

The main question the courts had to address was whether to declare as void any restrictive trade agreement for reasons relating to fairness of trade, or whether a distinction should be made between naked and ancillary (otherwise general and particular) restrictions to trade, where the former would be declared void de facto but the latter should be analysed in order to evaluate their positive and negative effects on the market and then make a decision as to its voidness. With the Mitchel v. Reynolds decision in 1711[19] the court upheld such ancillary restraints since these restraints were limited in time and restricted to a geographical place.[20]

Two further developments strengthened the domination of liberalism in England at that time and the consequent development of competition law. The first was the diffusion of the ideas of Adam Smith who invented the concept of the market economy.[21] The second was the emergence and development of industrialisation. As Gerber puts it, industrialisation *'...changed the unit of competition, replacing the individual artisan or group of artisans with salaried labourers and the organised unit of machine-based production'*.[22] It also changed the competition process itself, replacing quality and dependability as keys of commercial success with the rationalization of

15 Gellhorn W. and W.E. Kovacic (1994) Antitrust Law and Economics in a Nutshell (West Publishing) at 4. For a more elaborate analysis of the way that common law addressed restrictive to trade agreements see Goodnow, F.J (1897) 'Trade Combinations at Common Law' 12:2 Political Science Quarterly, 212; Trebilcock M. (1986), The Common Law of Restraint of Trade, (Toronto: Carswell), chapter 1.

16 21 Jac. 1, c.3.

17 (1602) 11 Co. Rep. 84b.

18 Gellhorn and Kovacic, supra n. 15, at 10. See also Furse M. (2004) Competition Law of the EC and the UK (Oxford University Press, 4th edition), at 4-5.

19 (1711) 1 P.Wms. 181. See Gellhorn and Kovacic ibid, at 5

20 On the development of the "restraint of trade" doctrine, see S.B.T. (1966) 'Petrol Solus Agreements: British Common Law of Restraint of Trade in a New Context' 52:4 Virginia Law Review, 690, at 697 – 702, where the author notes that by the beginning of the 20th century agreements were only rarely declared void by the courts on the basis of the doctrine.

21 See section 2.2.1 below.

22 Gerber, D. (2000), Law and Competition in the Twentieth Century: Protecting Prometheus (Oxford University Press), at 22.

production: the main aim was to maximise production while minimising cost. A consequence of this phenomenon was that the size of a firm became increasingly important, in the sense that factories demanded increasingly larger organisations.[23]

These changes in the structure of society demanded a relevant response from the law and thus, a number of statutes were enacted in Continental Europe to regulate combinations by large companies which were restrictive to trade. In France, where the social revolution of 1789 was built upon the notion of freedom and its protection, the law of June 14-17, 1791, declared as unconstitutional, hostile to liberty and void agreements of members of the same trade that fixed the price of an industry or its labour.[24] Two main features of the French society at the time led to the adoption of such a statute. The first was the belief that the political system should change in order to constrain the king and the government from wielding power according to their discretion. Those who inspired the revolution further believed that law would be the only way to control such power. In the same intellectual context, albeit later, the Austrian penal code of 1852, provided that *'...agreements... to raise the price of a commodity...to the disadvantage of the public...'* should be punished as misdemeanours. A subsequent law of April 7, 1870 abolished the penalties but still declared such agreements to be void.[25]

Thus, the idea of excessive restriction of trade by dominant private firms and/or legal monopolists[26] was disseminated in some of the important trading countries of continental Europe throughout the 18th and 19th centuries. That said, there was no international consensus on whether business firms could restrict trade with their practices, or put differently, *'privatise public interest'*.[27] In contrast with the examples given above, during this same period, German civil law clearly validated agreements between firms to raise prices.[28] On the other hand, the Depression which emerged in 1873 (the *'Panic of 1873'*) following the crash of the Vienna stock market, and which spread throughout Europe and the United States, altered once more the conception of

23 Ibid.

24 Walker, F. (1905) 'The Law concerning Monopolistic Combinations in Continental Europe' 20:1 Political Science Quarterly, 13, at 27. It has to be noted that industrial combinations were not per se prohibited. Only combinations injurious to the welfare of the community were prohibited. See ibid, at 39.

25 Walker, ibid, at 22 and 38.

26 Braudel F. (1979) The Wheels of Commerce: Civilization and Capitalism15th–18th Century (vol. 2. New York: Harper & Row), at 445-455.

27 Brady R.A. (1945) 'The Role of Cartels in the Current Cultural Crisis' 35:2 The American Economic Review, 312, at 314.

28 Walker, supra n. 24 , at 38.

the competitive process. Managed competition came to alter perceptions about liberalism in general and consequently ideas of free competition. Under huge pressure concerning prices and profits, firms had to co-operate by forming cartels in order to survive. As Gerber informs us, with the exemption of Austria,[29] *'[B]y the 1890s, cartels were considered 'natural' parts of the economic landscape in many parts of the Continent'*.[30]

2.1.1. Canada and the US: first modern competition statutes to be enacted

In contrast to continental Europe, where towards the end of the 19th century the idea of competition was losing favour, Canada, enacted in 1889[31] what is known as the first competition-related legislation of modern times: *The Act for the Prevention and Suppression of Combinations formed in restraint of Trade.*[32] More importantly, a year later, the most famous legal statute on competition law, the Sherman Act,[33] was enacted in the US. The Act took its name from Senator Sherman who at the time expressed the opinion that the statute *'does not announce a new principle of law, but applies old and well recognised principles of common law'*.[34] The adoption of the Sherman Act was a reaction to the prevailing domination of trusts. With the conclusion of the American Civil War, a number of changes occurred in the US market: rapid growth of the economy; an explosion of urban communities; the improvement of transportation and communications linked smaller communities; and new technologies enabled manufacturers to meet the increasing demands by exploiting economies of scale.[35] Nonetheless, in subsequent years declining economic growth and continuous entry by new competitors created major problems for big firms. Fixed costs were too high and, as it was very difficult to cease the operation of established firms in order to avoid over-production, these firms were seeking ways to limit competition in the markets they

29 Where in the 1890s there was a lively debate as to the way that the problem of cartels should be addressed, and where relevant draft legislation was issued. See Gerber, supra n. 22, at 54-60.

30 Ibid, at 26

31 For an overview of the particular circumstances of the time that led to the enactment of the law, see Bliss M. (1991) 'The Yolk of the Trusts: A Comperison of Canada's Competitive Environment in 1889 and 1989', in Khemani R.S., and W.T. Stanbury (eds), Historical Perspectives on Canadian Competition Policy (The Institute for Research on Public Policy, Halifax N.S) at 240-242; Benidickson , J. (1993) 'The Combines Problem in Canadian Legal Thought' 43:4 The University of Toronto Law Journal, 799.

32 S.C. 1889, 52 Vic., c. 41.

33 15 U.S.C., paras 1-7

34 Quoted in Gellhorn and Kovacic, supra n. 15 , at 21.

35 Fox E.M. and L.A. Sullivan (1987) 'Antitrust – Retrospective Prospective: Where Are We Coming From? Where Are We Going?' 62 New York University Law Review, 936, at 938.

operated. The solution was to cooperate with rivals in order to fix output, prices, and market shares, initially in the form of pools, and when this proved insufficient, in the form of trusts.[36]

The trust phenomenon first appeared in railroads, the first business to experience the modern type of *'business bigness'*.[37] Railroads were capital intensive. Capital requirements of railroad construction precluded competitive services to scarcely settled territories.[38] Given the absence of competition, railroads were able to discriminate on rates imposed and services provided to clients, and to destroy competitors through predation. Furthermore, a consequence of big business was the creation of trusts, which could become dominant in several markets. A typical example was the trust of the Standard Oil company, which in the 1880s was controlling a number of markets, including fuel oil, sugar, lead, and whiskey.[39]

This dominance in the US economy of what Rostow calls *'a tiny group of Titans'*[40] led to furious complaints in the country, initially by farmers and subsequently by labourers and small entrepreneurs.[41] Given the vast number of citizens who were affected by these strategies of the big firms, the adoption of an Act which would attempt to mitigate the effects of this situation was among the priorities in the agenda of both major parties; hence the enactment of the Sherman Act in 1890.[42] What is noteworthy is that instead of opting for regulation that would allow the government to extensively intervene in markets and change their structure, Congress took as an assumption that the competitive market itself should be the principal regulator of price and output and of wages, interest and profits.[43]

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36 Ibid, at 938-940.

37 At the time, in the US as well as in the UK railroads were privately owned. See Chadler A.D. (1977) The Visible Hand: The Managerial Revolution in American Business (Harvard University Press), at 89-91.

38 Gellhorn and Kovacic, supra n. 15, at 15.

39 Ibid, at 16.

40 See Rostow.E. (1960) 'British and American Experience With Legislation Against Restraints of Competition' 23:5 The Modern Law Review, 477, at 481-2.

41 Ibid.

42 For a detailed historical analysis of the events that led to the enactment of Sherman Act, see Peritz R.J.R (1996) Competition Policy in America, 1888-1992: History, Rhetoric, Law (New York: Oxford University Press).

43 See Rostow, supra n. 40, at 482.

The Sherman Act, itself also influenced by the common law restraint of trade doctrine,[44] contains two main prohibitions. Section 1 declares illegal *'Every contract, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations...'* Section 2 prohibits monopolies or attempts to monopolise, and combinations or conspiracies to monopolise, any part of interstate or foreign trade. In the next twenty years, and amid considerable reactions by the business side that questioned the ability of Sherman Act to follow the evolution of *'modern business'*,[45] courts started shaping the terms of the Act.[46]

Furthermore, in 1914, the Clayton Act was enacted, with specific provisions prohibiting exclusive dealing agreements, particular tying agreements and interlocking directorates, and mergers achieved by purchasing stock.[47] Since then, competition law, or antitrust law as it is termed in the US, has developed enormously, becoming a central feature in the development of the US economy and society and going through several stages of legislative interpretation in the process.[48]

By reviewing the origins and socio-political and economic values behind the development of US competition law and policy, Peritz argues that the enforcement of competition law in the US has been built around two (sometime conflicting) notions of competition, the first being the expression of individual liberty, free of government intervention, and the other reflecting rough equality in the context of a competitive environment free of excessive economic power, and based on arguments of fair

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44 According to the former Chairman of the Senate judiciary Committee, G. Hoar, 'We have affirmed the old doctrine of the common law in regard to all interstate and international commercial transactions'. Quoted in Dana, W. F. (1902) 'The Supreme Court and the Sherman Anti-Trust Act' 16:3 Harvard Law Review, 178, at 180.

45 For an early analysis of the provisions of Sherman Act, see Morawetz V. (1910) 'The Sherman Anti-trust Act' 11:1 American Economic Association Quarterly, 321.

46 Kovacic W.E. and C. Shapiro (2000) 'Antitrust Policy: A Century of Economic and Legal Thinking' 14:1 Journal of Economic Perspectives, 43.

47 See 15 U.S.C. para 13.

48 For instance, Kovacic and Shapiro have identified the following five distinct periods in the development of US competition law. The first, 1890- 1914, was where the courts slowly started applying the provisions of Sherman Act without a consistent economic analysis. The second period identified was the period from 1915 to 1936, where a rule-of-reason analysis was frequently used by the courts in competition cases. That said, this period was characterised by lack of competition enforcement. The third period, 1936- 1972, was dominated by the Structure-Conduct- Performance paradigm of the Harvard School. From 1973 to 1991, the enforcement of antitrust rules was based on the efficiency explanation for a number of phenomena, as the theories of the Chicago School were dominant in US government and courts. Finally, from 1992 to date, the authors argue that economic analysis in competition cases has been focused on game theory models. In addition antitrust enforcement has also been focused on innovation issues. See Kovacic and Shapiro supra n.46 . For a brief presentation on the main elements of the various economic theories which have dominated American antitrust thought for certain periods, see Appendix I.

competition.[49] In either case, what characterises the application of US competition law - at least in the last 70 years - is the use of various economic theories which, depending on the particular preference of the US governments, have been used to support the particular enforcement agenda of US antitrust. Due mainly to this characteristic, along with its longevity and extended application by US courts and authorities, US antitrust is considered probably the most influential single national competition legislation in the world.[50]

2.1.2. Competition in the 20th Century in Europe

Back in Europe, ideas about competition which lost favour towards the end of the 19th century were once more considered in the interwar period, leading to the enactment of the first anti-cartel law in Germany in 1923, and later such laws in Sweden (in 1925) and in Norway (in 1926).[51] Nonetheless, the Great Depression of 1929 and the Second World War led to the disappearance of competition law in Europe.

Following the Second World War (WWII), the United Kingdom (UK) and Germany were the first European countries to adopt competition laws. Both countries adopted such laws under the pressure of the US, nevertheless it has been documented that the extent to which such pressure was the most important factor leading to the adoption of these rules varies. In particular, while in the case of the UK the adoption of competition law was a response to the need of the country to secure as much US aid as possible, [52] in Germany, the need for competition legislation was debated since the 1920s, with the development of ordoliberalism, and this development, along with pressures by the allies, equally contributed to the enactment of the German competition law in 1958.[53]

On a regional level, following WWII, and in particular in 1951, six European countries (France, Italy, Belgium, the Netherlands, Luxemburg and Germany), signed the European Coal and Steel Community (ECSC) agreement, whose main aim was to

49 Peritz, supra n. 42, at 301.

50 Maher, I. (2004) 'Regulating Competition' in Parker, C., C. Scott, N. Lacey, and P. Braithwhaite (eds.) Regulating Law, (Oxford University Press), 187, at 194.

51 Gerber, supra n. 22, at 115, and 155-158. The author also notes that in the 1930s a number of countries, including Czechoslovakia, Poland, Yugoslavia and Denmark, adopted some sort of competition law, which was nevertheless not used in practice, or its application was little known outside the borders of these countries. Ibid, at 163.

52 Ibid, at 214.

53 Ibid. at 268, where the author notes that by 1947 both the US and the UK had in place occupation laws which aimed at breaking up the German industrial 'giants'.

prevent Germany from re-establishing its dominance in the production of coal and steel. Only ten years previously this domination contributed to the well-known detrimental effects of WWII.[54]

Competition law was included in the list of issues that the signing countries attempted to address with the conclusion of ECSC. In particular, Article 65 banned cartels, while Article 66 included a provision on concentrations (i.e. mergers), and another on the abuse of a dominant position by firms. As Gerber argues, while the US did not officially take part in the negotiations - since the negotiators wanted to avoid the danger that the project would be seen as US-controlled - it played at least a limited role, as it provided the drafters of the Treaty with basic ideas, with which nevertheless, and with the exception of the merger-related provisions, they were already acquainted.[55]

The most important element of the ECSC competition rules is that it was the first time in the relatively short history of competition law and policy when such rules were included in a plurilateral regional agreement. To this end, and despite the fact that the impact of the actual enforcement of the ECSC competition rules on the development of European competition law was limited,[56] the ECSC introduced the '*Trans-European*' model of competition law[57] and led to the inclusion a few years later of competition rules in the Treaty of Rome, which established the European Economic Community (EEC).

2.1.3. The Treaty of Rome

The Treaty of Rome was signed in March of 1957,[58] and in terms of competition it included a general provision which set the enactment of a competition law as one of the focal aims of the Community. Article 3(g) reads: '*the institution of a system ensuring that competition in the common market is not distorted*'. Two other provisions were devoted to private anticompetitive practices. Article 85 prohibited anticompetitive agreements (but also provided a limited exemption: Article 85 (3)) and Article 86 prohibited the abuse of a dominant position. Furthermore, and due to the fact that EC competition law was to be applied to the various EU Member States, two articles of the

54 Bebr G. (1953) 'The European Coal and Steel Community: A Political and Legal Innovation' 63 Yale Law Journal, 1.

55 See Gerber, supra n. 22, at 342.

56 Ibid.

57 Ibid, at 335.

58 See Treaty establishing the European Community as Amended by Subsequent Treaties. Rome, 25 March 1957, <http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/pdf/12002E_EN.pdf> (last visited on 21 May 2007).

Treaty were devoted to practices conducted by Governments, but which could have a substantial effect on competition in the region: Article 90 of the Rome Treaty included provisions on public undertakings and Article 92 included provisions concerning state aids. Provisions relating to the control of mergers were not included in the Treaty, due to the failure of the founding members of the Community to find a consensus on this issue.

The system of competition in the EU is discussed in some more detail in Chapter 5, in the context of the examination of plurilateral trade agreements which include competition, and the EU (international) competition policy will be the focal point of subsequent analysis of this study, in view of the main question that this thesis attempts to address, which is the role of the EU competition law and policy in the formation of international agreements on competition.[59]

2.2. The expansion of competition law and policy worldwide, and factors that lead to varied application of competition law at the national level

In recent years, one after the other, a number of states embarked on the establishment of competition rules, as competition law and policy have been considered one of the most important mechanisms for the successful implementation of liberal national policies, while, as Chapters 4 and 5 argue, in some cases, and particularly with regard to a number of developing countries, competition rules have been adopted in the context of the participation of these countries in bilateral or plurilateral trade agreements which include competition provisions. A compilation of the databases created by the University of Halle[60] and the International Bar Association (IBA)[61] which include the national statutes on competition enacted by 2005 with the database of the World Bank that includes all the countries with a population exceeding 80000 people, and the level of the income of such countries,[62] provides us with useful statistics regarding the expansion of competition rules, and noteworthy observations as to the identity of

59 See Chapter 5, section 5.2

60 This work has been carried out by Franz Kronthaler and Johannes Stephan, in the context of the EU 6th Framework Programme STREP project 'Competition Policy Foundations for Trade Reform, Regulatory Reform, and Sustainable Development' <http://www.iwh-halle.de/projects/competition_policy/db/index.asp> (Last visited on 21 May 2007).

61 <www.globalcompetitionforum.org> (Last visited on 21 May 2007).

62<http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20420458~menuPK:64133156~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html> (Last visited on 21 May 2007).

countries that have adopted such rules. By 2005, 101 countries, accounting for 49% of countries with a population exceeding 80000 people, had competition rules in place.[63]

Table 2.1: Adoption of competition rules by decade

Period	1889-1900	1900-1910	1910-1920	1920[64]-1930	1930-1940	1940-1950	1950-1960	1960-1970	1970-1980	1980-1990	1990-2000	2000-2005	TOTAL
No of countries that adopted competition	2	-	-	-	-	2	3	2	8	9	60	15	101

As Table 2.1 illustrates, 75 of these 101 countries adopted their competition law in the last 15 years. The collapse of the Soviet Union, as well as the expansion of the EU, has definitely had an impact on the increase in the number of countries adopting competition rules.[65] On the other hand, only 16 out of the 101 countries with competition rules had these rules in place 30 years ago. This list includes the US, Canada, Australia, Germany and the UK,[66] and some other EU Member States. It also includes India, Pakistan, and Chile, where nevertheless competition rules have practically only recently been used. In any case, these statistics may safely lead us to the conclusion that in most of the countries which have adopted competition legislation courts have not had the time to review many competition cases, relevant academia has not had the time to examine and develop competition related principles, and agencies have not had much time to apply competition policy widely.

Consequently, current development of competition law and policy, both in terms of academic literature and in terms of their practical application, has to a great extent taken place in large industrialized countries, which, with greater resources, expertise and longevity, remain an influence and model for new regimes. On the other hand the

63 While another 13 were in the process of adopting such law.

64 As noted above, Germany and Sweden adopted some sort of competition rules in the 1920s and another four countries in the 1930, nonetheless these laws was of little use and therefore the table takes into account the date of the adoption of "modern" competition legislation by these countries.

65 This argument is based on the discussion carried out in chapter 4 of the thesis where it is shown that following the collapse of the Soviet Union, the EU signed a number of agreements with former Soviet Union States and countries which had until then communist regimes in place. In this context such countries adopted competition rules.

66 Which nevertheless adopted a prohibition model only in 1998 with the enactment of the Competition Act. See Morris, D. (2003) 'Dominant Firm Behaviour under UK Competition Law' Paper presented to the Fordham Corporate Law Institute Thirtieth Annual Conference on International Antitrust Law and Policy, New York City 23-24 October 2003, <http://www.competition-commission.org.uk/our_peop/members/chair_speeches/pdf/fordham2003.pdf> (Last visited on 21 May 2007), at 3-8.

development of competition law and policy even in these countries has shown that there is diversity in the way that competition law has been applied on a national level.

This is not to say that there is total disagreement as to the proper content and function of competition law, since most of the industrialised countries accept that provisions on cartels, abuse of dominance and some sort of merger control should be included in their national legislation. Nevertheless, as the next section argues, on several occasions the understanding about the proper evaluation of particular practices varies, and moreover there is no universal agreement as to the scope of competition law, in view of the fact that several sectors of national economies are regulated by sector-specific regulations and not competition.

With the increase in the number of anticompetitive practices, discussed in Section 3, that may have an effect on multiple national markets, this variety in the application of national competition rules may lead to conflicts in cases where more than one national authority claim jurisdiction over a practice and apply different standards on the evaluation of this particular practice.[67] From a more theoretical perspective, in the context of internationalisation of competition the discussion over the factors that lead to diverse application of competition rules is of significant importance, and this importance derives from the fact that, as the section notes, competition law and policy operate in complex economic, socio-political and legal environments of a given country. Accordingly, negotiations at the international level are rarely exclusively dedicated to competition law. In fact, only bilateral enforcement cooperation agreements, discussed in Chapter 3 are solely focused on competition matters. In all other forms of agreements and prospective agreements, competition is only one of the subjects under negotiation. Throughout the next chapters, this observation will become more obvious, both with regard to the examination of bilateral and plurilateral trade agreements which include competition provisions and –mainly- with regard to the negotiations of a multilateral competition law. Hence, the way and extent to which competition law and policy operates on a national level is indicative of whether it is considered as a priority by particular states when they negotiate an international trade related agreement which includes competition provisions.

On the other hand, this diversity in approaches regarding the proper application of competition law may also be seen as a process in which the various ideas about the

67 See for instance below, the brief reference to the GE/Honeywell case, at.p. 53.

nature and aims of competition law and policy are exchanged, and the economic, social, legal and political standards according to which national competition laws apply are observed. While it is not intended here to review in detail the different aspects of this process, the chapter identifies four main factors which lead to such a varied application of competition, which in turn become the subject matter of discourse at the international level.

The first one relates to economics and to the fact that a number of sometimes divergent theories have been used to apply the competition-related rules. The second one relates to the fact that certain sectors of national economies are regulated by sectoral regulation and not competition, and such sectors vary from country to country. The third factor is political and has to do with the relationship between competition law and policy and other national policies which sometimes may have a scope divergent to that of competition law and policy. Finally, the fourth factor is cultural and relates to the social structure and traditions of particular national societies that have an effect on the way that competition law is applied in these countries.

2.2.1. The influence of economics in the application of national competition rules

Probably the most important feature in the application of competition law and policy, at least with regard to industrialised countries such as the US and the EU, is the role of economics in the evaluation of particular business behaviour and its effect on the market. Competition has been very much the work of economists (Adam Smith being the intellectual leader), and economic analysis has been of major influence in the application of competition rules ever since.[68] The particular role of economics in competition law is to define the market in which a practice under examination has taken place, as well as the possible effects that this practice may have on this market.[69]

This is not always an easy task, especially with regard to the evaluation of the effect that alleged anticompetitive practices may have on the market. The main difficulty with the application of economic theories in the field of competition law is

68 The first antimonopoly legal instrument, which received the attention by economists, was the 1824 repeal of the Combination Acts of 1799 and 1800, which forbade either employers or employees to join influence the wage bargain. Informed by the theories developed by Adam Smith, J.R. McCulloch wrote in strong support of the repeal of the act, stressing the necessity of an active antimonopoly program. See Stigler G. (1982) 'The Economists and the Problem of Monopoly' 72:2 The American Economic Review, 1, at 2.

69 See Maher (2004), supra n. 50, at 196, where the author also notes that the inadequacy of economics to answer whether a particular conduct is anticompetitive stems from the fact that in such a situation '...competition law is not purely technocratic in nature but raises political issues such as the balancing of public and private (economic) power where competition law acts as a bridge'. In this respect, competition law encompasses legal, economic and political elements.

that they cannot define *ex ante* the ability of firms to compete with their competitors in a given market. What economic theories are able to do is to provide us with tools to define, measure and evaluate *ex post* the effects of a particular market structure or the effects of a particular practice or strategy by a firm related to prices, outputs, profits and efficiency.[70] Economic theories and models are based on and around assumptions. These assumptions by definition do not cover (all) real world situations. Additionally, when the assumptions are changed the outcomes of the models may look strikingly different, changing for example the price from a monopoly level to a competitive price level.[71] Hence, by definition, economic thinking and economic models are not always perfect guides as to what will be the future effect of a practice (vertical restraint, merger etc) under examination on the markets.

Furthermore, different economic theories may lead to different outcomes when evaluating whether a practice is anticompetitive or not. In this regard Appendix I briefly reviews the main economic schools and theories that have been used in the analysis of competition cases. It shows that economic theories change over time; therefore the approach to law changes within a system and the way that competition law has been applied even in the biggest economies with commitment to competition is diverse. For instance, as noted above,[72] even in the US, which is the country with the most mature competition law in the world, five distinct periods of application of competition law may be identified, while at least the last three of them have been influenced by different schools of economic thought.[73]

In fact, in the field of competition law and policy, and more generally, in the field of broader economic policy, the choice of one economic theory or the other as more appropriate also relates to an extent to the ideology one holds about society. As

70 Nicolaides, P. (2000) 'An Essay on Economics and the Competition Law of the European Community' 27 Legal Issues of Economic Integration, 7, at 10

71 This inability of economics to provide valuable predictions as to the way that markets will operate (i.e. whether a practise by a firm will distract the competitive process) has generated criticism in the relevant literature. It is indicative that as early as 1912, it was expressed by scholars that 'The fundamental reason why nothing has been done ..., with reference to improving the antitrust situation, is that there has never been any consistent or satisfactory course which seemed available. On most subjects, at least two distinct policies are contending for supremacy". See Parker Willis, H. (1912) 'Political Obstacles to Anti-Trust Legislation' 20:6 The Journal of Political Economy, 588, at 588. Along the same lines, and somewhat 87 years later Hughes argued that: 'If economics is a science, then economic behaviour must be predictable. All individuals, whatever their background or idiosyncrasies, must respond in the same way to the same economic stimuli. If we know the factors that they must take into account, then we will be able to predict their actions with certainty'. Hughes, E.J. (1999) 'The Left Side of Antitrust. What Fairness Means and Why it Matters' 77 Marquette Law Review, 265, at 280.

72 Kovacic and Shapiro, supra n.46.

73 Harvard School, Chicago School, and game theory. See Kowacic and Shapiro, ibid., and Appendix I.

Page notes[74] there are two competing ideologies that have an effect to the formation of economic policy in general and subsequently competition policy: the evolutionary and the intentional visions. These two ideologies have dominated western culture since the 18th century and have an important effect on the economic theories that have been applied to competition law and policy.

According to the *evolutionary vision*, the individual is intellectually limited, motivated by self-interest, or the interest of his household, rather than the interest of the society in general.[75] In social contexts, like the market, individuals form voluntary relationships and contracts based on their self-interest. Thus the pattern of these relationships is not the result of anyone's plan but the outcome of countless such relationships. Accordingly markets reflect the accumulated preferences of producers and consumers, and thus only the most preferred and most effective patterns will succeed. It follows, that a monopoly situation can only occur if government has intervened and created it, since on the one hand it is not possible the single will of an individual can create it, and even if that happens, then the market will create self-correcting mechanisms, which would break down this monopoly.

Given the limited intellectual ability of individuals (including those who govern), it is not possible to understand the reasons that led to a specific contract pattern or in a market situation in general. Thus, according to the evolutionary vision, the role of the government should be negative: to protect the process of mutual exchange by setting rules of general application to prevent the use of force and fraud and make sure that the agreements are applied. With regard to monopolies, governments should only remove governmental impediments to entry, such as tariffs and exclusive licenses.[76]

In contrast, according to the *intentional vision*, individuals are not motivated by self-interest nor intellectually limited. They will normally act to benefit others. Nonetheless either corrupted individuals with great power, or disparities in access to information and decisional errors may prevent markets from revealing the true preferences of societies.[77] It follows that according to the intentional view, governments have to intervene in such anomalies (like monopolies) in order to correct false outcomes by restructuring the society in accordance with the rational plan.

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74 Page, W.H. (1991) 'Ideological Conflict and the Origins of Antitrust Policy' 66 Tulane Law Review, 3.

75 Coase, R.H. (1979) 'Adam's Smith View of Man' 19 Journal of Law and Economics, 529, at 534.

76 Page, supra n. 74, at 12-14.

77 Ibid, at 13.

This analysis just validates the assumption that as regards economic, political and social sciences there are almost always two or more theories providing one with alternative options as to the proper analysis of a particular issue. In the context of the discussion about competing economic theories that may have an influence on the application of competition law and policy, it has been shown that these theories provide one with guidance as to when the state has to intervene in the market and correct possible anomalies, but that they also create inconsistencies as they may lead to different outcomes concerning the examination of similar, or even identical, practices.

The impact of economics on the particular and sometimes varied application of national competition rules may be also observed in the well-documented divergence as to the way the EU competition rules have been applied compared to the US rules. This divergence has mainly occurred because of the influence of ordoliberalism on the enforcement of the EU competition law, and the market integration goal, which has been the primary economic goal of the European Union.

In particular, as is noted in Appendix 1, according to the ordoliberal school of thought, analysis of restrictive to business practices should be focused on whether such practices may reduce the opportunity of other competitors to compete (put differently reduce their economic and political freedom). In this regard, as opposed to the US competition law enforcement,[78] the extent to which these practices have an effect on overall societal efficiency has been on many occasions of secondary importance in the EU.[79]

This trend has been observed in the application of competition rules in the EU on vertical restraints, where the EC Commission has been allegedly over-focused on the protection of competitors, rather the protection of competition and efficiency.[80] It should also be mentioned, nevertheless, that the stricter approach followed by the EU in the field of vertical restraints has to a significant extent been attributed to the accomplishment of the single market, which has been one of the major objectives of the Union.[81] In particular, vertical agreements that offer absolute territorial protection to the distributors have been treated by EC competition law as restricting competition by

78 At least following the dominance of the Chicago School.

79 See UNCTAD (2005) supra n.1, at 100-102; Fox, E.M. (2003) 'Antitrust and Regulatory Federalism: Races Up, Down, and Sideways' 75 New York University Law Review, 1781, at 1785.

80 Hawk, B. (1995) 'System Failure: Vertical Restraints and EC Competition Law' 32 Common Market Law Review, 973; Commanor, W. and P. Rey (1997) 'Competition Policy Towards Vertical Restraints in Europe and the United States' 24 Empirica, 37.

81 Article 2 of the Treaty EC.

object,[82] since such restrictions could isolate national markets and therefore erect barriers to trade between the Member States.[83] That said, the divergence seems to be decreasing in recent years, with the adoption of the 1999 block exemption[84] and the far more rigorous enforcement by the EC Commission on cartel cases.[85]

Likewise, in the last five years there has been convergence in the area of mergers, where, as shown below, serious conflicts arose between the EU and the US in recent years.[86] Such convergence was impelled to a certain extent by the Court of First Instance (CFI), which first questioned the depth of economic analysis by the Commission on three mergers and annulled the relevant Commission's decisions.[87] In response, the EC Merger Regulation was amended and requires one, in the context of the examination of a merger, to examine whether this commercial deal *'would significantly impede effective competition, in the common market or a substantial part of it'* and therefore evaluate whether a particular merger may have an anticompetitive effect on the market, in addition to the *'dominance test'*, which was exclusively applied until the amendment of the Regulation. It is considered that the amendment of the Merger Regulation and the introduction of the new test was a move by the Commission towards a more economic-based analysis in merger cases, and closer to the policy followed by the US.[88]

In a broader context, the introduction of more robust economic analysis in the examination of competition cases has been one of the primary aims of former Commissioner for Competition Mario Monti, an economist, and economic analysis now

82 See Cases 56 and 58/64, Etablissements Consten SA & Grundig-Verkaufs-GmbH v. Commission [1966] ECR 299.

83 Jones, A. and B. Sufrin (2004) EC Competition Law: Text, Cases and Materials (Oxford University Press), at 618-619.

84 Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices [1999] O.J. L336/21. On the reform of the EU policy on vertical restraints, see Subbioto, R. and F. Amato (2002) 'Reform of the European Competition Policy Concerning Vertical Restraints' 69:1 Antitrust Law Journal, 147; Dobson, P. (2005) 'Vertical Restraints Policy Reform in the European Union and United Kingdom' Loughborough University Research Series, Paper 2005:2.

85 Kroes, N. (2005) 'The First Hundred Days'. Speech delivered at the 40th Anniversary of the Studienvereinigung Kartellrecht 1965-2005, International Forum on European Competition Law, Brussels, <http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/05/205&format=HTML&aged=0&language=EN&guiLanguage=en> (last visited on 21May 2007)

86 See Cases Boeing/MDD and GE/Honeywell discussed in section 2.2.1 below.

87 See Case T-310 Schneider Electric SA v Commission of the European Communities, [2002] ECR II-04071; Case T-342/99 Airtours plc v. Commission of the European Communities [2002] ECR II-02585; Case T-5/02, Tetra Laval BV v. Commission of the European Communities, [2002] ECR II-04381.

88 See Akbar, Y and G. Suder (2006) 'The New EU Merger Regulation: Implications for EU-U.S. Merger Strategies' 48:5 Thunderbird International Business Review, 667, in particular at 673-675. In addition the Commission issued more economic based guidelines on horizontal mergers. Commission (EC) Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, [2004] O.J. C 31/5.

plays a much more important role in the application of competition rules in the EU. The appointment of a Chief Economist at the Commission is also a strong indication that economic analysis is becoming more influential in Brussels,[89] and in this regard, it has been noted that the EU law has converged with the relevant US law.

That said, such convergence has not been achieved in the area of unilateral conduct, called abuse of a dominant position by a firm (in the EU), or monopolisation (in the US).[90] In the US, the relevant case law takes the view that only rarely should section 2 of the Sherman Act apply, since, on the basis of the principles developed by the Chicago School,[91] what a dominant firm does is almost always rational and good for the market, while even in cases where the dominant firm acts irrationally, the market itself has the inherent ability to correct any anomalies and therefore the role of the enforcement agencies should be minimal.[92]

In the EU, Commissioner Kroes has recently stated that *'[A]rticle 82 enforcement should focus on real competition problems: In other words, behaviour that has actual or likely restrictive effects on the market'*,[93] opening therefore the road for more robust application of economic analysis in Article 82 cases, something which is also noted in the recent Discussion Paper on the application of article 82, which notes that *'[T]he essential objective of Article 82 when analysing exclusionary conduct is the protection of competition on the market as a means of enhancing consumer welfare and*

89 Monti, M. (2004) 'A reformed Competition Policy: Achievements and Challenges for the Future' Speech delivered at the Center for European Reform, Brussels, 28 October 2004, <http://www.cer.org.uk/pdf/speech_monti_oct04.pdf> (last visited on 21 May 2007); Levy, N. (2005) 'Mario Monti's Legacy in EC Merger Control' 1:1 Competition Policy International, 99.

90 Pate, H. (2004) 'Antitrust in a Transatlantic Context- From the Cicada's Perspective'. Speech presented at "Antitrust in a Transatlantic Context" Conference, Brussels, Belgium, June 7, 2004, <http://www.usdoj.gov/atr/public/speeches/203973.pdf> (last visited on 21 May 2007); Vickers, J. (2005) 'Abuse of Market Power' 115 The Economic Journal, 244; Motta, M. and A. De Streel (2003) 'Exploitative and Exclusionary Excessive Prices in EU Law' in Elerman C-D and I. Atanasiu, European Competition Law Annual 2003: What Is an Abuse of a Dominant Position? (Hart Publishing); Kallaugher, J. and B. Sher (2004) 'Rebates Revisited: Anti-competitive Effects and Exclusionary Abuse Under Article 82' 25:5 European Competition Law Review, 263, and particularly pp 268-272 where the authors discuss ordoliberalism and its influence on EU policy.

91 See Appendix I.

92 See Fox, E (2006) 'Monopolization, Abuse of Dominance and the Indeterminacy of Economics: The US/EU Divide' Utah Law Review 725, at 728. See also Rosch J.T. (2007) 'I Say Monopoly, You say Dominance: The Continuing Divide on the Treatment of Dominant Firms, is it the Economics?' Speech Delivered at the at the International Bar Association Antitrust Section Conference Florence, Italy September 8, 2007, <http://www.ftc.gov/speeches/rosch/070908isaymonopolyiba.pdf> (last visited on 1 October 2007) at 5-10.

93 See Kroes, N. (2005) 'Preliminary Thought of Policy Review on Article 82' Speech delivered at the Fordham Corporate Law Institute, 23 Sptember 2005, <http://europa.eu/rapid/pressReleasesAction.do? reference=SPEECH/05/537&format=HTML&aged=0&language=EN&guiLanguage=en'> (last visited on 21 May 2007), at 2.

of ensuring an efficient allocation of resources'.[94] Nevertheless, in contrast to its position under US law, according to the relevant case law of the Commission itself and the EU Courts on abuse of dominance cases, the dominant firm has a special responsibility to ensure that its conduct does not weaken competition in the common market, and therefore EC competition law, as evolved in the last 50 years, also looks at the structure and openness of the market when it reviews relevant cases.[95] To this end, the application of EC competition law in abuse of dominance cases differs from the relevant US practice,[96] and in simple terms, it means that the Commission may continue being more aggressive in the enforcement of competition law on practices conducted by dominant firms than the US authorities and courts.

2.2.2. The legal aspect of competition law: competition law vs. sectoral regulation

While the previous subsection has attempted to highlight the extent to which different economic analyses may have an effect on the particular application of competition law, this one briefly introduces the debate over the relationship between competition law and sectoral regulation, with the aim of describing the extent to which competition law regulates national markets. Put differently, the aim of this brief analysis is to highlight the fact that competition law is only one of the legal tools employed by countries to regulate their internal trade conducted by private firms. On the other hand, several sectors of the economy of industrialised countries with mature competition systems are even exempted from the application of competition rules and are regulated by sectoral regulation, instead of competition law. A recent Organisation for Economic Cooperation and Development (OECD) study explored such sectors in a number of OECD Member States and found that sectoral regulation is common in industrialised countries (Members of the OECD) in sectors like media, services, infrastructure, transport, and energy. Even more rigid regulation, which sometimes excludes the

94 Commission (EC) (2005) 'Discussion Paper on the Application of Article 82 of the EC Treaty to Exclusionary Abuses', Public consultation document , <http:// ec.europa.eu/comm/competition/ antitrust/others/discpaper2005.pdf> (last visited on 21 May 2007), para 53.

95 See Fox, supra n. 92 at 728; See also Mertikopoulou, V. (2007) 'DG Competition's Discussion Paper on the Application of Article 82 of the EC Treaty to Exclusionary Abuses: 'The Proposed Economic Reform From a Legal Point of View' 28:4 European Competition Law Review, 241. Both authors argue that despite the fact that the Discussion Paper introduces a more economic based approach regarding the application of Article 82, the relevant case law of the Courts should and will continue taking into account the openness and structure of the market factors.

96 See also Rosch, supra n.92.

operation of competition law, is usually applied in sectors such as agriculture, health, and employment.[97]

On the theoretical side, the main difference between competition law and sectoral regulation is the following: Competition law is based on the presumption that markets generally work well and the operational decisions should be left to the firms involved in the markets. It is therefore concerned with the dispersal and decentralization of public and private power. On the opposite side, regulation follows the assumption that that there is a need for direct or indirect government supervision on the markets; this argument is based on a number of alternative and sometimes overlapping theoretical and practical justifications.[98]

A first such justification is the concept of *market failure*, a situation where markets may not work due to a number of reasons that cannot be addressed by competition law in its narrow sense. For instance, with regard to public goods, such as national defence, public education, or lighthouses, the government must assume responsibility for the production of the goods and recover its expenses through the tax base.[99] Another example of market failure is that of natural monopolies, i.e. a situation where due to economies of scale or scope, only one firm can survive.[100] Market failure could also occur in cases where asymmetries of information may enable incumbent suppliers to exploit consumers, either by using these asymmetries to persuade consumers to buy at excessive prices or by creating too high barriers to entry and thus putting themselves in a dominant position in the market. These issues are addressed by

97 OECD (2004) 'Regulating Market Activities by Public Sector', OECD Competition Committee, DAF/COMP(2004)36.

98 For instance Prosser argues that there can be 'no single model or objective for utilities regulation'. In other words he suggests that competition cannot replace a whole web of acts and initiatives the sectoral regulator exercise. Prosser, T. (1997) Law and The Regulators (Oxford University Press, New York), at 4; On the role of regulation in general see Baldwin, R. and M. Cave (1999) Understanding Regulation: Theory, Strategy and Practice (Oxford University Press, New York). On the role of regulation on various sectors of the economy, see Amato, G. and L. Laudati (eds) (2001) The Anticompetitive Impact of Regulation (Edward Elgar Publishing); On energy see Albers, M. (2002) 'Energy Liberalisation and EC Competition Law' 25 Fordham International Law Journal, 909; on postal services, see OECD (2001) 'Promoting Competition in Postal Services' 3:1 OECD Journal of Competition Law and Policy, 7 ; on pharmaceuticals, see Danzon P. and Li-Wei Chao (2000) 'Does Regulation Drive out Competition in Pharmaceutical Markets?' XLIII Journal of Law and Economics, 311; on Air Transport, see Abeyratne, R. (2001) 'Competition and Liberalisation in Air Transport' 24:4 World Competition, 607. It should be pointed out nevertheless that the dichotomy between regulation and competition has been questioned in recent years, on the basis of the fact that competition law itself may be considered as a form of regulation. See Maher (2004), supra n. 50 , at 288-289.

99 Crampton, P.S. and B.A. Facey, (2002) 'Revisiting Regulation and Deregulation Through the Lens of Competition Policy', 25:1 World Competition, 25, at 32.

100 Typical examples of natural monopolies were telecommunications, water, and natural gas. Nonetheless with the improvements in technology and the globalisation of markets traditional natural monopolies (like telecommunications or electricity production and retailing) have been opened up to competition in a number of countries.

consumer protection rules such as labelling, product liability, product safety, and deceptive marketing laws.[101] Finally, market failure could occur due to externalities, that is situations where *'the costs and benefits of producing and consuming certain products, are not fully considered or internalized in the production and consumption calculus.'*[102]

A second justification for the use of regulation instead of competition law is the special interest–based regulation, which occurs in occasions where special interest groups manage to influence the government and secure the adoption of legislation harmful for the average consumer and detrimental for the economy in general.[103] Crampton and Facey provide us with a number of examples of such regulations: supply management schemes (broadly used in agriculture), labour codes, investment and procurement laws, licensing regimes, and foreign ownership restrictions.[104]

Discussing the relationship between competition and regulation, Baldwin and Cave divide competition transition into three phases: The first phase, called the pre-competition phase, refers to those markets where competition has not been used or is just emerging and regulation is used in order to prohibit monopolistic activities by dominant firms.[105] The second phase is that of emerging competitive markets, where regulation (i.e. price regulation) can still exist for the settlement of the remaining monopolistic firms and at the same time competition policy can be used for the competitive parts of the market. Finally in phase three, fully competitive markets will not need economic regulation and general rules of competition policy can completely control the market.[106] According to this idea, each market should be regulated (by using sectoral regulation, the combination of the former with competition policy or, finally, just competition rules) depending on which phase of transition it is.[107]

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101 Crampton and Facey, supra n. 99 , at 33; Particularly on the EU, see Weatherill, S. (2005) EU Consumer Law and Policy (Edward Elgar Publishing).

102 Crampton and Facey, ibid. at 33-34. A typical example of such a situation is environmental legislation. Another example is supply network externalities, that is a situation where the cost of providing services to additional consumers, reduces the total cost of the network. The dominance of Microsoft Windows operating system over the one provided by Apple is a typical example.

103 Stigler, G. (1971) 'The Theory of Economic Regulation' 2:1 Bell Journal of Economics and Management, 1.

104 Crampton and Facey supra n. 99 , at 35.

105 See for instance the Greek experience in, OECD (2002) 'Regulatory Reform for Greece' 3:4 OECD Journal of Competition Law and Policy, 7.

106 Nevertheless, this distinction is not always an absolute one in practice, since in terms of competition law the enforcement role of competition agencies includes the element of public interference. See Maher, supra n.50 , at 204-205.

107 Baldwin, R. and M. Cave (1999) supra n. 98, at 222-223; See also Jordana, J. and D. Levi-Faur (2004) 'The Politics of Regulation in the age of Governance', in Jordana, J. and D. Levi-Faur (eds) The Policy of Regulation: Institutions and Regulatory Reforms for the

The figures of Table 2.1 clearly show that half of the countries with a population exceeding 80000 people have not yet adopted competition rules and consequently their markets are in a pre-competitive phase. In addition competition law has been adopted by 75% of the countries with such law in the last 15 years. Thus at least three quarters of the countries with a competition regime are either in phase one (pre-competitive phase) or in phase two (emerging competitive markets). These observations lead us to two main conclusions. Firstly, that on a national level economic activity is regulated much more by sectoral regulation rather than by competition law. Secondly, and most importantly, at the international level differences in national sector specific regulations can have an effect on the ability of foreign firms to enter a market.[108]

It could be argued that there is a mounting perception that national economic regulations should be framed in such a way so as to allow as much market competition as is politically and socially acceptable.[109] Still, the adoption of common regulatory standards on several sectors of the economy (such as telecommunications, energy, pharmaceuticals and agriculture) has been a priority in the agenda of nations when they negotiate at the international organisations, and more relevantly to the present discussion, there is an ongoing discourse at the international level as to the role of competition policy in the adoption and application of sectoral regulation.[110]

2.2.3. The political aspect of competition law: competition policy vs. other national policies

Another important aspect of competition law that has to be examined in the context of the influence of such law on a national socio-political and legal system is the political aspect of competition law, that is, competition policy. It is important to define this concept, which is admittedly a very difficult task. Competition policy has been defined by the WTO working group on the interaction between trade and

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Age of Governance (Edward Elgar Publishing), chapter 1 ; Moschel, W. (2002) 'The Relationship between Competition Authorities and Sector Specific Regulators', in D. Tzouganatos (eds.) EU Competition Law and Policy: Developments and Priorities, Proceedings from Athens Conference, April 19th 2002 (Nomiki Vivliothiki SA), p.19.

108 Ostry, S. (1995) 'New Dimensions for Market Access: Challenges for the Trading System', in OECD, New Dimensions in Market Access in a Globalising World Economy (OECD, Paris) 25, at 26.

109 Jenny, F. (2001) 'Globalisation, Competition and Trade Policy: Convergence, Divergence and Cooperation', in Yang-Ching Chao, Gee San, Chang Fa Lo and Jiming Ho (eds) International and Comparative Competition Law and Policies (Kluwer Law International), at 34-35.

110 For instance, in the case of telecommunications, the relationship between competition policy and sector-specific regulation is an issue discussed under the auspices of the ICN, the OECD and the WTO, while the General Agreements on Trade in Services and the 'Reference Paper' which complements the WTO Telecommunications Agreement include competition provisions.

competition,[111] as the policies which *'comprise the full range of measures that may be used to promote competitive market structures and behaviour, including but not limited to a comprehensive competition law dealing with anti-competitive practices of enterprises'*.[112] Similarly, Doern defines competition policy, as the policy which *'consists of those policies and actions of the state intended to prevent certain restraints of trade by private firms. Stated more positively, it is a policy intended to promote rivalry among firms, buyers and sellers through actions in areas of activity such as mergers, abuse of dominance cartels,..., misleading advertising, and related criminal and economic offences that are held to be anti-competitive'*.[113]

Research conducted in the context of this study through interviews of competition officials, academics and practitioners has proved this argument, as there is great variation on the opinions of the interviewees on what competition policy really is. The only standard characteristic of competition policy as opposed to competition law that the discussants pointed out is that competition policy is a wider circle around competition law. Competition policy encompasses competition law as well as a number of other elements, such as the institutions that enforce competition law, competition advocacy, and industrial policy concerns. Recent research by the OECD demonstrates that even more objectives may be included in the concept of competition policy: de-centralisation of economic decision-making; promotion of small business; fairness and equity; and other socio-political values.[114] By the same token, Sir Leon Brittan, former Commissioner in charge of competition, once stated that, *'[I]ndeed, it can be said that positive competition policy should not be determined in isolation; it must be related to and integrated with economic, industrial and also social policy'*.[115]

The problem with discussing these various (related to public interest) objectives which lie beneath the broad concept of competition law and policy is that these objectives vary across different countries or regions. That said, a general introduction to

111 On the establishment and work of the WTO working group, see below, chapter 6.

112 WTO Working Group on the Interaction between Trade and Competition Policy (1999) 'The fundamental principles of competition policy' WT/WGTCP/W/127, at paragraph 2.

113 Doern, B. (1996) 'Comparative Competition Policy: Boundaries and Levels of Political Analysis' in Bruce Doern and Stephen Wilks (eds), supra n. 6, at 7.

114 OECD Global Forum on Competition (2003) 'The Objectives of Competition Law and Policy' OECD Secretariat Note, CCNM/GF/COMP(2003)3, at paragraphs 3 and 22.

115 Quoted in Willimsky S.M. (1997) 'The Concept(s) of Competition' 18:1 European Competition Law Review, 53, at 54; In a similar vein, Barry Rodger noted the '...Competition law or policy has no fixed content and is dependent to a great extent upon the particular political and social emphases of the legal system in which it operates.' See Rodger, B. (2000) 'Competition Policy, Liberalism and Globalization: A European Perspective' 6 Columbia Journal of European Law, 289, at 304.

some of these indirect objectives of competition policy would be important in the context of our attempt to highlight specificities of national competition regimes that may have an effect on the process of internationalisation of competition law.

As noted above, the notion of public interest has been used to justify the application of sector specific regulations. In a broader context, public interest justifications also allow governments to exempt various practices of private firms from strictly economic approaches and thus minimise the reach of competition law and policy. This is clearly indicated by the OECD study, which points out that all policies taken into consideration in the context of application of competition law are based on the concept of public interest. [116] In this context, public interest is used in a much broader sense. It justifies the exemption of particular practices (and not whole sectors as in the case of sectoral regulation) from the realm of competition rules in accordance with the specific public policy of a government. In some cases, the basis of such exemptions is clearly drafted within the text of the competition laws. In other cases, it cannot be found in the competition related rules, but derives from the general powers of a government.

Using the competition policy of the EU as an example of the former, Giorgio Monti[117] has reviewed a number of cases that have been exempted from the application of Article 81(1) of the EC Treaty, which prohibits anticompetitive agreements between firms. On the basis of Article 81(3), the EC Commission has exempted a number of anticompetitive agreements based on arguments that these agreements would have a beneficial effect on the EC employment, industrial, and environmental policy.[118] As to the latter, it has been documented that a number of Commission decisions to clear mergers in the 1990s have been based on industrial policy concerns and/or political pressure by particular Member States.[119]

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116 Supra n.114.

117 Monti, G. (2002) 'Article 81 and EC Public Policy' 39 Common Market Law Review, 1057.

118 Monti, ibid refers to the following cases: On employment policy, Case 26/76, Metro v. Commission (NoI), [1977] ECR 1875, para 43; Case 42/84, Remia and others v. Commission, [1985] ECR 2545, para 42; Stichting Baksteen, [1994] O.J. L 131/15 paras. 27–28; Synthetic Fibres, [1984] O.J. L 207/17, para 37. On industrial policy, BPCL/ICI, [1984] O.J. L 212/1, para 37; ENI/Montedison, [1987] O.J. L 5/13, para 31; Olivetti/Canon, [1988] O.J. L 52/60, para 54; GEC-Siemens/Plessey, [1990] O.J. C 239/2. On environmental policy, Exxon-Shell, [1994] O.J. L 144/21, paras 67 and 68; Philips-Osram, [1994] O.J. L 378/37, para 25.

119 Schmidt, A. (2001) 'Non-Competition Factors in the European Competition Policy: The Necessity of Institutional Reforms' Centre for Globalisation and Europeanisation of the Economy, Discussion Paper No 13, <http://www.cege.wiso.uni-goettingen.de/Dokumente/Diskussion/discuss_13.pdf.> (last visited on 21 May 2007). The author refers to Nestle/Perrier, [1992] O.J. L 356/1, Mannesmann/Vallourec/Ilva, [1994] O.J. L 192/15, Kali&Salz/MdK/Treuhand, [1994] O.J. L186/38, and Mercedes Benz/Kassbohrer, [1995] O.J. L211/1.

2.2.4. Cultural factors that may have an effect on the adoption and/or application of competition rules

A relevant, but to a great extent separate, issue that has to be addressed is the influence of a culture of a particular country concerning the operation of markets in general and the reach of application of competition rules. This does not necessarily have to do with pure strategic political decisions as seen in the previous section, but mostly with the traditions and patterns of a particular society with regard to markets and trade in general, or with regard to a particular sector of the society.

Historians, anthropologists and sociologists have examined the relationship between geopolitical characteristics of a society and the particular perceptions of these societies on the nature and operation of the markets.[120] With regard to competition law and policy, Fikentscher has expressed accurately the relationship between cultural factors and competition law and policy:

'Americans are inclined to think that in these days the free market system is on its way to pervade the whole world, and many Europeans share this view. Maybe this is so, and should even be welcomed as a step to world-wide democracy and equal chances for every one. But there is also evidence that other cultures are afraid of this. The Muslim World cannot agree to explicit advertising, the Siberians in their great majority fear democracy more than anything else because it leads to the economic destruction of their habitat, North-American Indians wonder at the "frenzy" (panicking as they call it) that comes with the economy-oriented lifestyle of the "Anglos", and many traditional societies fear exploitation and assimilation'.[121]

Along the same lines, and on a more specific basis, the OECD has documented a number of situations where for cultural reasons various practices in different countries are exempted from the application of competition rules. What the OECD calls *'historical relics'* include examples such as the exemption in Norway concerning municipal monopolies of movie theatres, a leftover of a century ago when movie theatres were considered a novelty.[122] In Korea, territorial constraints on rice wine (a

120 For an elaborate review of such studies, see Lie, J. (1997) 'Sociology of Markets' 23 Annual Review of Sociology, 341.

121 Fikentscher, W. (2001) 'Market Anthropology and Global Trade' 1:1 The Gruter Institute Working Papers on Law, Economics, and Evolutionary Biology, 1, at12.

122 OECD Global Forum on Competition (2004) 'Regulatory reform: stock-taking of experience with reviews of competition law and policy in OECD countries and the relevance of such experience for developing countries' CCNM/GF/COMP(2004), at 21.

national specialty) are allowed, in conformity with long-lasting national policies on this matter.[123]

The most illustrative example with regard to this phenomenon is Japan. As a recent study indicates, in Japan policies that promote product market competition have long been compromised by ministerial guidance and explicit exemptions from competition law.[124] One of the most important reasons which have led to this direction is the traditional Japanese practice of 'Keiretsu', which refers to long term closely interconnected relationships among Japanese companies through formal and/or informal relations, and hampers foreign investors from entering the Japanese market.[125]

2.2.5. Competition law in developing and small countries

Almost the whole of the discussion that has been developed until now refers to industrialised countries and polities with mature competition regimes, mainly the EU. Another important question regarding the operation of competition law and policy on a national level relates to the adoption and application of competition rules by developing and small countries. Statistics of Table 2.2 may provide us with some indications as to the type of countries that have adopted competition legislation.

Table 2.2: Level of income[126] and competition law

	Low income	Lower middle income	Lower upper income	Hi income/non OCED member	High income /OECD member	TOTAL
Countries	59	54	40	31	24	208
Countries with	21	25	24	7	24	101

123 Ibid.

124 Hoj, J. and M. Wise, (2004) 'Product Market Competition and Economic Performance in Japan', OECD Economics Department Working Paper No 387, ECO/WKP (2004), at 10.

125 Keiretsu' was the practice that urged the American Company Kodak to go to the WTO Dispute Settlement against the Japanese Company Fuji. Case: Japan - Measure affecting Consumer Photographic Film and Paper, WT/DS44/R; For a comment of the case, see Furse, M. (1999) 'Competition Law and the WTO Report: "Japan- Measures Affecting Consumer Photographic Film and Paper"' 20:1 European Competition Law Review, 9. See also below, chapter 6, section 6.4.

126 According to the World Bank, low income includes countries with a Gross National Income (GNI) of 905 US Dollars, or less; lower middle income, 906 - 3,595 US Dollars; upper middle income, 3,596 - 11,115 US Dollars; and high income, 11,116 US Dollars or more. See the Website of the World Bank, <http://web.worldbank.org/WBSITE/EXTERNAL/.DATASTATISTICS/0,,contentMDK:20420458~menuPK:64133156~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html> (last visited in 21 May 2007).

competition law						
% of countries with competition	36%	46%	60%	23%	100%[127]	49%

With the exception of countries with high income which are not OECD members, there is a direct link between the level of development of a country and whether this particular country has adopted competition legislation. As the table shows, the higher the income of a country the more probable that this country has a competition regime in place.[128] For instance, only 36% of countries with a low income have competition rules in place. On the opposite side of the spectrum, all the OECD members have adopted such rules. What are therefore the reasons for which developing countries seem reluctant to adopt competition rules?

A first obvious reason is that competition law may seem a luxury to countries with very low income. As an EC Commission official interviewee noted, *'[If] you do not have something to eat you should look for a piece of bread and leave competition law aside'.*[129] In a recent paper, Emmert et al, have identified many other possible reasons.[130] These include import substitution policy arguments, according to which developing countries attempt to change the structure and composition of imports in order to develop specialised domestic industries, and, similarly infant industry strategies, through which they attempt to support national industries and/or particular companies (national champions) in order to make them stronger and capable of competing in the international markets.[131] Another point raised by the authors is that developing countries fear that the opening of their market through competition may be

127 Another six countries with an upper middle income participate in the OECD: Czech Republic, Hungary, Mexico, Poland, Slovak Republic and Turkey. All these countries have adopted competition rules, thus the total percentage of OECD members with a competition legislation remains absolute (100%).

128 The only exception to this rule is countries with high income, which are not OECD members. Only 23% of such countries have adopted competition law. Most of these high-income countries without competition law are very small in terms of population. Specifically, the countries of this kind that have not adopted competition rules are following: Andorra, Arruba, Bahamas, Bahrain, Bermuda, Brunei, Vayman Islands, Channel Islands, French Polynesia, Guam, Honk Kong China, Isle of Man, Kuwait, Macao – China, Monaco, Netherlands Antilles, New Caledonia, Puerto Rico, Qatar, San Marino, Saudi Arabia, United Arab Emirates, and Virgin Islands.

129 Interview with EC Commission official, Brussels 15/7/2003.

130See Emmert, F., F. Kronthaler and J. Stephan, (2005) 'Analysis of Statements Made in Favour of and Against the Adoption of Competition Law in Developing and Transition Economies'. Paper presented in Brussels 19 and 20 April 2005, in the context of the EU financed project: Competition Policy Foundations for Trade Reform, Regulatory Reform, and Sustainable Development (hereinafter Emmert at al.).

131 Ibid., at 31. It has to be noted that such policies have been used by industrialised countries in the past. See Chang, H.J. (2002) Kicking away the ladder: Development Strategy in Historical Perspective (Anthem Press, London), chapter 1.

detrimental to their companies, as multinational companies would dominate their markets.[132]

On the other hand, recent research has shown that international cartels may have a substantial negative impact on both consumers and producers of developing countries,[133] and the need for adoption of competition rules has been stressed and supported by various international organisations, like the WTO, the World Bank and the International Monetary Fund (IMF).[134] In any case, this issue (competition law in developing countries) will be further explored throughout the remaining chapters of this thesis in the context of the examination of the various types of agreements which include competition rules, and especially in relation to the negotiations over a possible competition agreement in the WTO context, where developing countries have consistently opposed the proposal of the EU for the conclusion of such an agreement.

2.3. The international aspects of competition law and policy

To this point, the chapter has dealt with the national dimension of competition law and policy, and more specifically, with the economic, legal and socio-political factors that may have an influence on the application of competition rules in different nation states. As noted in the context of the analysis, these factors vary from country to country, and create differences in the application of national competition laws. On the other hand, as this section attempts to expose, a number of factors gradually added international features to competition law and policy. A mixture of economic, socio-legal, and political developments have played an important role in this process.

2.3.1. Economic globalisation, and the appearance of anticompetitive business practices with an international effect

Competition law and policy, along with other forms of commercial law, has acquired international features due to the emergence of economic globalisation.[135] By

132 Emmert et al., ibid, at 38.

133 Levenstein, M. and V. Y. Suslow (2004) 'Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy' 71 Antitrust Law Journal, 801.

134 See for instance, UNCTAD, (2005) 'Review of Recent Experiences in the Formulation and Implementation of Competition Law and Policy in Selected Developing Countries' UNCTAD/DITC/CLP/2005/2, at 2, where it is noted that in the case of Thailand, '...the International Monetary Fund imposed this [adoption of competition law] upon the Thai government as one of the conditions under the stand-by arrangement during the economic crisis (1997-2001)'.

135 Economists would rather use the terms 'international economic integration', referring to the extent to which international economic activity has integrated markets. These are probably over-simplified definitions, in view of the debate regarding the meaning, or even the

the terms '*economic globalisation*', we mean here improvements in technology and communications,[136] liberalisation of international trade,[137] and the subsequent increase of economic flows through the operation of multilateral firms that has appeared at least in the last decades,[138] that have weakened the distinction between the domestic and the international on several fields of economic activity.[139]

With regard to competition law and policy in particular, in view of the liberalisation of international trade through the provisions of the GATT and more recently the WTO, which to a great extent opened up national boarders to multinational firms, and given the fact that in the late 1980s and early 1990s a number of previously communist states started adopting liberal policies, as well as the vast increase in the number of countries which adopted competition legislation,[140] there have been voices which stress that trade negotiations should not be limited to the regulation of policies applied on the border but should also include issues relating to domestic policies, such as subsidies and sector-specific regulations which may have an effect on international trade.[141]

Competition law and policy has been considered one of these domestic policies.[142] The core idea behind such an argument is that ineffective domestic competition policies could be a substantial obstacle in the process of trade

existence of globalisation. See Held, D., D. Golblatt, A.G. McGrew, and J. Perraton (1999) Global Transformations: Politics, Economics and Culture (Stanford University Press), at 2-10, where the authors provide a number of alternative definitions on globalisation; See also, Piccioto, S. (1998) 'Globalisation, Liberalisation, Regulation' Paper delivered at he Conference on 'Globalisation, the Nation-Sate and Violence', Sussex University, 16 April 1998, <http://www.lancs.ac.uk/staff/lwasp/glibreg.pdf> (last visited on 21 May 2007).

136 Rodrik, D. (1999) 'How Far will International Economic Integration Go?' 14:1 The Journal of Economic Perspectives, 177; Archibugi, D. and C. Pietrobelli, (2002) 'The Globalisation of Technology and its Implications for Developing Countries. Windows of Opportunity or Further Burdens?' 70:9 Technological Forecasting and Social Change, 861, where the authors identify in page 864 three main categories of (economic) globalisation: the international exploitation of nationally produced technology, the global generation of innovation, and global technological co-operations.

137 Which has occurred through the abolition of legal barriers on the border and been supported by trade economists. These arguments will be dealt with in some depth in this thesis, first in this chapter, and more elaborately during the discussion about WTO and competition in Chapter 6, below.

138 Nonetheless, there has been argument in the relevant literature that the first signs of economic globalisation occurred in the 15th or 16th century, and became obvious in the beginning of the 19th century. See O'Rourke, K.H. and G. Williamson, (2004), 'Once more: When Did Globalisation Begin?' 8 Journal of European Economic History, 109.

139 Jayasuriya, K. (2001) 'Globalisation, Sovereignty, and the Rule of Law: From Political to Economic Constitutionalism?' 8:4 Constellations, 443, at 446.

140 It is noted that 60% of countries with a competition law adopted such law in the nineties. See Table 2.1.

141 With regard to these arguments from a critical perspective see Krugman, P. (1997) 'What Should Trade Negotiators Negotiate About?' 35:1 Journal of Economic Literature, 113, at 114.

142 Howse, R. (2002) 'From Politics to Technocracy-and Back Again: The Fate of the Multilateral Trading Regime' 96:1 American Journal of International Law, 94, at 96.

liberalisation,[143] an argument mainly based on the assessment that whereas trade policies and international reforms aim to open up the markets and allow as much competition as possible, the role of competition policy is to prevent private firms from distorting this competitive environment.[144]

Along the same lines, it has been observed that efficiency gains from a trade perspective were pursued through the realisation of comparative advantage, whereas competition policy should be used to secure these gains through the elimination of losses created by a single seller who has monopolised the market or by a group of sellers who act in a collusive way.[145] On the other hand, through the opening up of national markets with the limitation of tariffs and other boarder barriers, the ability of multilateral firms to operate in multiple national markets has also been increased. This assumption may be confirmed by the dramatic increase of foreign direct investment (FDI) in the last few decades.

As figures compiled by the United Nations Conference on Trade and Development (UNCTAD) show, in the last thirty years foreign direct investment (FDI) has been multiplied by almost 30 times. In particular, these figures show that with regard to inward flows the global FDI in 1975 was 27314 million US Dollars (USD), while in 2005 these flows reached 916277 million USD. The relevant numbers concerning outward FDI was 28702 million USD in 1975, and 778725 million USD in 2005.[146] The impact of this increase in the number and influence of multinational firms has become palpable on a number of legal and political fields,[147] competition policy being one of them.

These developments have also been reflected in trade economics, which by the early 1990s was dominated by the classical and neoclassical trade theories that take for granted that labour and capital moving from country to country are immobile and that

143 OECD (2001) 'Trade and Competition Policies- Options for a Greater Coherence' (OECD, Paris).

144 Jenny, (2001), supra n.109, at 37.

145 Graham, E. (2002) 'The Relationship Between International Trade Policy and Competition Policy', in Z. Drabek (eds.), Globalization Under Threat: The Stability of Trade Policy and Multilateral Agreements (Edward Elgar Publishing), p 225, at 228.

146 See the UNCTAD database on FDI, <http://stats.unctad.org/FDI/TableViewer/tableView.aspx> (last visited on 21 May 2007).

147 This statement does not take into consideration the debate over the possible negative effects of multinational companies, a debate that has been developed especially among developing countries. See for instance Jacoby, N.H. (1975) 'Multinational Corporations and National Sovereignty', in P.M. Boarman and H. Schollhammer (eds.) Multinational Corporations and Governments. Business-Government Relations in an International Context (Praeger Publishers, New York), at 6-7. It also has to be pointed out that this thesis only deals with competition related issues to business practices. Hence, it will not touch upon, unless it becomes relevant, other legal disciplines such as (not exclusively) intellectual property, corporate governance, money laundering, telecommunications, energy, environmental, transport, tax, and banking regulations which may also deal with business practices.

the comparative advantage is static, and base their results only on the exchanged final products.[148] Another strand of academic literature, also known as New International Trade Theory came to point out that several other factors have an effect on international trade. According to this line of argument, factors such as research and development, the product lifecycle, oligopoly and economies of scale also have an influence on the creation of each country's comparative advantage.[149]

Thus the focus is shifted from inter-industry trade, that is trade between industries which belong to different domestic markets, to intra-industry,[150] inter-firm,[151] and intra-firm trade.[152] These new theories are mainly based on the argument that not only the final products but also intermediate goods as well as technological knowledge are exchanged.[153] The most striking element of these theories is that the analytical tools used for the examination of the international trading system (such as oligopoly and economies of scale) are the same as the ones used for the analysis of competition law and policy issues.[154] In other words, industrial organisation aspects have been introduced in the analysis of international trade.

It was against this background that a number of scholars started looking at the relationship between competition law and policy and international trade. The relevant research agenda includes the examination of both private practices that may have an international effect, and hybrid public-private practices that may have the same effect. These two types of anticompetitive practices are discussed briefly in the following section.

148 Gilpin, R. (1987) The Political Economy of International Relations (Princeton University Press) at 177.

149 These concepts were first introduced by Dixit and Stiglitz in 1977. See Dixit, A. and J.E. Stiglitz (1977) 'Monopolistic Competition and Product Diversity' 67:3 The American Economic Review, 297; See also Krugman, P. (1983) 'New Theories of Trade Among Industrial Countries' 73:2 The American Economic Review, 343, at 343-344; Dixit, A (1984) 'International Trade Policies for Oligopolistic Competition' 94, The Economic Journal, 1.

150 For example it has been shown that in trade between developed countries some countries import some automobile models while exporting other models. See Gilpin, supra n. 148, at 176.

151 That is the trade between firms, irrespective of governmental intervention. These theories are based on the phenomenon of oligopolistic multinational firms and the internationalisation of production in the second half of the twentieth century. See Gilpin ibid.

152 This is a consequence of the creation of multilateral enterprises which are involved through subsidiaries and joint ventures on various levels of production and in several countries.

153 Gilpin, supra n. 148, at 177.

154 For a brief analysis of these factors, see Scherer, F.M. and R.S. Balous, (1994) 'Unfinished Tasks: The New International Trade Theory and Post Uruguay Round Challenges', Research Paper, British-North American Committee, Issues Paper No. 3. at 9-15.

2.3.2 Anticompetitive practices that have an international effect

With the increase of multilateral firms, came practices that have an effect on the territory of multiple national markets. Of these practices, the most directly linked to international trade are anticompetitive practices that have an exclusionary effect, thus hindering the entrance and expansion of foreign firms in the markets where the anticompetitive practices take place.[155] This discussion lies at the heart of the debate regarding the international aspects on competition as, apart from more general political concerns and particularities of different free trade settings, the need for international cooperation on competition law, and/or the harmonisation of competition rules exists because of the existence of such practices. The following section reviews three types of anticompetitive agreements that may have an effect on trade: cartels, vertical restraints, and cross-border mergers.[156]

i. International cartels

There is growing consensus among academics and politicians in the last 40 years that cartels are the most blatant of anticompetitive practices, and prohibition of hard core cartels, which may be defined as agreements between firms to allocate shares in international markets, increase prices and reduce imports,[157] is included in any modern competition law, as there is wide spread recognition that their effects can be very harmful to consumers.

According to the OECD, cartels produce overcharges at a level of 10% and they cause overall harm amounting to 20% of the affected commerce.[158] To give a more specific example, in two recent cartel cases, the lysine and citric acid cartels, investigated by the US Department of Justice it was calculated that prices were raised by 70% and 30% respectively,[159] and this is obviously a price difference that may have a substantial effect on consumers. Recent research also indicates that anti-cartel

155 Marsden, P. (2003) A Competition Policy for the WTO (Cameron May), Chapter 3, and especially pp. 91-108.

156 The list of these practices is not exhaustive, as it may also encompass the abuse of the dominant position by a firm, which may use such position in a national market to limit the ability of foreign firms to enter this market.

157 This definition does not include export cartels, which are similar to hard core cartels agreements between firms that are authorised by states, or exempted from national competition rules. See Evenett, S.J. M.C. Levenstein and V. Y. Suslow (2001) 'International Cartel Enforcement, Lessons from the 1990s' 24:9 World Economy, 1221, at 1223. These types of cartels will be further explored in the context of the negotiations for a multilateral agreement at the WTO, in Chapter 6 of the thesis.

158 OECD (2002) Fighting Hard-Core Cartels: Harm, Effective Sanctions and Leniency Programme (OECD Paris), at 77.

159 Klein, J.I. (1999) 'Luncheon Address' delivered at the Anti-Cartel Enforcement Conference, Westin Grand Hotel, Washington, D.C. September 30, 1999, <http://www.usdoj.gov/atr/public/speeches/3727.htm> (last visited on 21 May 2007).

enforcement is active in a number of countries, like the US, Canada, the EU and its Member States, Australia, Israel, Japan, and Korea.[160]

In parallel, the number of cartels which have an effect on the markets of multiple countries has substantially increased too. During the 1990s, over forty cartels with an international effect have been prosecuted in the EU and the US.[161] As far as the EU is concerned, among the 28 cartels whose members were fined by the Commission between the years 1986 and 2002, fifteen (accounting for 58%) were caught in cooperation with the Antitrust Division of the US Department of Justice and the Canadian Bureau of competition, and one of them was caught in cooperation with the Japanese authorities.[162]

International cartels have also detrimental effects on developing countries. As Levenstein, Suslow and Oswald have showed, in 1997, developing countries imported $54.7 billion of goods from a sub-sample of 19 industries that had seen a price-fixing conspiracy during the 1990s. These imports represented 5.2% of total imports and 1.2% of gross domestic product (GDP) in developing countries.[163] These cartels were active in the markets of steel, vitamins, fax paper, sugar, cement - therefore they were products used by a great proportion of world population.

On the other hand, as another recent OECD report suggests, at least one out of three (hard-core) international cartels remain undetected,[164] and various reasons may be playing a role here. One of them is that the more sophisticated the enforcement against cartels becomes the more sophisticated these agreements between firms become too, making detection more difficult. OECD suggests that there have been cases where the parties in a cartel agreement have established mechanisms of prevention and punishment of cheating.[165]

It follows that some sort of coordination is needed between different states in order to address the problems caused by international cartels. In view of these

160 OECD (2005) 'Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation' (OECD, Paris).

161 See Evenett, Levenstein and Suslow, supra n. 157, at 1225.

162 Commission (EC) (2006) 'The Fight Against Cartels', <http://europa.eu.int/comm/competition/citizen/cartel_stats.html> (last visited 21 March 2007). Such cooperation has been informal, while competition authorities have not been yet able to overcome problems relating to the exchange of confidential information, which would increase effectiveness. See Chapter 3 below.

163 Levenstein, M., V. Suslow and L. Oswald, (2003) 'International Price Fixing Cartels and Developing Countries: A Discussion of Effects and Policy Remedies', William Davidson Working Paper, No 538, at 1.

164 Other estimations indicate that one out of seven cartels remain undeterred. See OECD (2002), supra n. 158 , at 73.

165 Ibid, p. 79; See also Griffin, J.M. (2000) 'An Inside Look At A Cartel At Work: Common Characteristics of International Cartels', Presented the American Bar Association Section of Antitrust Law 48th Annual Spring Meeting, Washington D.C. April 6, 2000, <http://www.usdoj.gov/atr/public/speeches/4489.htm> (Last visited on 21 May 2007).

observations, and, as shown throughout the thesis, at least officially, enforcement of competition rules in cartel cases is probably the most important aim of any international agreement devoted to competition law and policy, and cartel deterrence is included in the agenda of any international organisation (such as the WTO, OECD and the ICN) which works on competition law and policy.

ii. Vertical restraints

Another business practice that could have an effect on the markets of more than one country is vertical restraints. Vertical restraints may be defined as agreements or concerted practices entered into between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services.[166] In view of the expansion of multinational firms, the impact of such agreements may be significant on an international level.

An indicative example is the automobile industry. The automobile market is global, in the sense that a limited number of manufacturers dominate the sales of motor vehicles internationally. These manufacturers have organised dealership networks, which at least in industrialised nations is the only way of promoting and selling their products.[167] A consequence of the existence of global distribution systems is the fact that manufacturers have to face different rules relating to dealerships in different nations.[168] In addition, it can be observed that the planning and operation of its distribution network by a manufacturer may have an effect on all the countries where its product is finally sold.

A separate issue, with regard to the international effect of vertical restraints, may arise because of the existence of exclusive distribution agreements in the territory of one country, for instance between firms A and B, which may make it impossible for another foreign firm C to enter the market where A and B operate. A notable example here could be vertical *Keiretsu* in Japan, which according to US firms prevent the foreign

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166 Commission (EC) (2003) 'Glossary of Terms Used in Competition Related Matters', <http://ec.europa.eu/comm/competition/general_info/glossary_en.html#aV> (last visited on 21May 2007).

167 Maxton, G.P. and J. Wormland (2004), Time for a Model Change: Re-engineering the Global Automotive Industry (Cambridge University Press), at 164.

168 As Maxton and Wormald have shown in the case of the automotive industry, the relevant laws vary considerably in the US, the EU and Japan. See ibid, at 168

investors from entering the Japanese market. [169] In fact, a similar situation is also faced in the EU, where, for instance, exclusive distribution agreements between car manufacturers and dealers in various Member States make it difficult or even impossible for dealers from other Member States to penetrate the markets of the Member States where such agreements take place.[170]

iii. Multijurisdictional mergers

A third business practice that may have an effect on the international market place is cross-border mergers and acquisitions. With the expansion of multinational firms, the number of such mergers has increased dramatically. As Gugler et al. have calculated, 21.7% of all mergers and acquisitions with a value of at least 1 million US dollars that were concluded internationally until 1998 involved firms registered and operating in different countries.[171] It follows, that these transactions had an effect on the economic environment of more than one jurisdiction and therefore in many instances more than one jurisdiction were interested in reviewing them. With regard to the operation of competition law, there are two sets of problems relating to this issue: one procedural and one substantive.

The procedural problem is related to the different notification procedures (in terms of deadlines to notify the merger and provide the required information) that apply in different states where the mergers have to be notified, which may cause both additional costs and legal unpredictability to the undertakings involved in the transaction. A notable example is the 1989 *Gillette/Wilkinson* transaction, which was notified in 14 jurisdictions.[172] Another characteristic example is the one given by McDavid and Marshall regarding the attempts of a Canadian firm (Alcan Inc.) to merge with a rival firm. Alcan had to hire competition lawyers from 35 different firms and file

169 Noted above, in section 2.2.4.

170 See for instance SEP et autres/Peugeot SA, EC Commission Decision, of 5/10/2005, Cases F-2/36.623/36.820/37.275.

171 Gugler, K., D.C. Muller, B. B. Yurtoglu, and C. Zulehner (2003) 'The Effects of Mergers: An International Comparison' 21 International Journal of Industrial Organisation, 625, at 632-633.

172See generally, OECD (1994) 'Merger Cases in the Real World: A Study of Merger Control Procedures' (OECD, Paris). It has to be pointed out though, that this merger occurred before the entrance into force of the EU merger regulation, and thus the number of authorities that had to be notified is probably greater than it would be today where the 'one-stop-shop' principle of the regulation greatly reduces the number of notifications.

sixteen competition notifications in eight different languages, all with different deadlines, information requirements and processes for approval.[173]

On the substantive side, the problem relates to the different standards that two jurisdictions may apply in the review of the same transaction. Notable examples regarding this issue include the conflict that occurred between the EU and the US in relation to the mergers between Boeing/MDD and GE/Honeywell.

The *Boeing/MDD* case related to the attempt by two American companies (Boeing and McDonnell Douglas) to merge in December of 1996. This merger would have created the largest aerospace company in the world[174]. The US Federal Trade Commission (FTC) cleared the merger without conditions on 1 July 1997.[175] However this was not the case with the European Commission. Basing its jurisdiction on the financial thresholds of the 'Community dimension' clause of the Merger Regulation, according to which no physical presence in the EC is required,[176] it made clear that it would block the merger. At this point, the American government intervened and threatened the EU that, if the Commission blocked the merger, the US would wage a commercial war against the EC by going to the WTO or by imposing trade sanctions.[177] A more serious conflict was finally avoided, as the Commission decided to clear the merger on 30 July 1997 subject to some commitments that Boeing offered.[178]

On the other hand, the *GE/Honeywell* case concerned the merger between GE (the leading aircraft engine maker) and Honeywell (the leading avionics/non-avionics manufacturer). The merger would have created or strengthened a dominant position in different relevant markets where the two companies were involved. Despite the fact that during the merger review the US and EU agencies cooperated very closely, they did not come up with the same decision. While the Antitrust Division of the US Department of Justice reached an agreement with GE and Honeywell regarding the Division's antitrust

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173 McDavid, J.L., and L. K. Marshall, (2001) 'Antitrust Law: Global Review Regimes'. The National Law Journal, < http://www.hhlaw.com/publications/pdf/McDavidMarshall_NLJ_sep25_01.pdf> (last visited 21 March 2007).

174 For an analysis of the facts of the case see Boeder T.L, and G. J. Dorman (2000), 'The Boeing /Mc Donnell Douglas Merger: The Economics, Antitrust Law and Politics of the Aerospace Industry' 1: XLV Antitrust Bulletin, 119.

175 See 'Letter to Marc G. Schildkraut, Esquire and Benjamin S. Sharp, Esquire Regarding the Proposed Acquisition of McDonnell Douglas Corporation by The Boeing Company' available at the FTC website: <http://www.ftc.gov/os/caselist/9710051.htm> (last visited on 21 May 2007).

176 Griffin, J. P. (1994), 'EC and US Extraterritoriality: Activism and Cooperation' 17 Fordham International Law Journal, 353, at 360.

177 Kaczorowska, A. (2000), 'International Competition Law in the Context of Global Capitalism' 21:2 European Competition Law Review, 117.

178 Boeing/McDonnell Douglas [1997], O.J. L336/16.

concerns related to the proposed merger,[179] the European Commission blocked the merger,[180] prompting strong reactions from the other side of the Atlantic.[181] The divergence with respect to this specific case is related to the correctness of the 'portfolio effect theory', a variety of different means by which a merger may allegedly create or strengthen a dominant position in non-overlap markets.[182]

These cases highlight two of the observations made in the previous section of the chapter: first, that the understanding of the operation of competition law and policy may vary in different countries; and second, that in cases where very crucial policy issues are involved (namely, in both cases, economic and employment policy in the very sensitive field of the aviation sector) and different national regulators claim jurisdiction, political considerations, such as the need to create and/or protect national champions, may have an obvious effect on the particular application of the rules by these regulators.

With the expansion of multinational enterprises the opinion could be expressed that mergers have already been a problem for international trade since the relevant market in the assessment of some mergers has already been identified as the 'global market' and furthermore as we saw in the analysis of the Boeing/MDD case reasons mostly related to the industrial policy of different countries in important sectors of their economies could lead to very serious conflicts between national governments.[183]

2.3.3 Governmental and hybrid practices

The discussion developed in the context of this section has highlighted the fact that a number of business practices that have traditionally been considered as falling under the realm of competition law may have a significant effect on multiple national markets. Apart from those practices, there are also competition-related governmental practices that may also have an influence on the operation international trade. These may include industrial policy considerations, which may imply the lack of law,

179 US DoJ 'Justice Department Requires Divestitures in Merger between General Electric and Honeywell' press release of 2 May 2001

180 Commission (EC) 'The Commission Prohibits GE's Acquisition on Honeywell', press release of 3 July 2001, IP/01/939

181 US DoJ 'Statement by Assistant Attorney General Charles A. James on the EU's Decision Regarding the GE/Honeywell Acquisition' press release of 3 July 2001.

182 Giotakos, D., L. Petit, G. Garnier, and P. De Luyck (2001) 'General Electric Honeywell- An insight into the Commission's investigation and decision' 3 Competition Policy Newsletter, 5; Patterson, D. E, and C. Shapiro (2001) 'Trans-Atlantic Divergence in GE/Honeywell, Causes and Lessons' <http://faculty.haas.berkeley.edu/shapiro/divergence.pdf> (last visited on 21 May 2007).

183 This argument was also expressed at the first ICN conference See ICN (2003) 'A Report on the First Annual Conference of The International Competition Network', Naples, 28-29 September 2002, at 4.

exemptions and exclusions from the application of competition rules or lack of enforcement or strategic enforcement of law, with the aim of strengthening particular firms, and creating national champions that would be able to compete at the international level.

This type of discretionary application of competition law in favour of particular firms is an aspect that has been already discussed in the context of the application of competition rules on a national level; nonetheless it may also have an effect on the ability of foreign firms to compete in national markets where such policies are applied.[184] This argument is relevant, for example, to the complaints raised mainly by the US that the entry or expansion of US firms in the Japanese markets was hindered due to exclusionary anticompetitive practices conducted by Japanese firms, sometimes with the support of the Japanese government. It has been documented that such situations have occurred in the auto industry, the flat glass market, the paper industry, the soda ash industry, the electronic equipment market, and the film market.[185]

These policies may also be incorporated in the various regulations adopted by countries on particular sectors of the economies. On an international level, it has been argued that sector specific regulation may have an effect both on the ability of foreign firms to enter a market and on consumer welfare.[186] As will be briefly exposed in Chapter 6 the relationship between competition law and sectoral regulation is an issue included in the agendas of both the WTO and the ICN. In addition, a number of sector specific WTO agreements, such as the Reference Paper on Telecommunications and the Agreement on Services, include competition related provisions.[187]

2.3.4. The need for international cooperation on competition

As observed in the second section, variety of national policies which influence the particular application of national competition rules, along with the internationalisation of economic activity and the consequent appearance of business

184 See International Competition Policy Advisory Committee (2000), 'ICPAC Final Report to the Attorney General and the Assistant Attorney General for Antitrust', (hereinafter ICPAC report) <http://www.usdoj.gov/atr/icpac/finalreport.htm> (last visited on 21May 2007), at 206.

185 Ibid., at 211-215

186 See for instance Anderson, R.D., and P. Holmes (2002) 'Competition Policy and the Future of the Multilateral Trading System' 5:2 Journal of International Economic Law, 531, at 539-540 and ICN(2005) 'Report of the Working Group on Antitrust Enforcement in Regulated Sectors to the fourth ICN Annual Conference', Bonne, June 2005, <http://www.internationalcompetitionnetwork.org/media/library/conference_4th_bonn_2005/Interrelations_Between_Antitrust_and_Regulation.pdf> (last visited on 21 May 2007)

187 See below, chapter 6, section 6.4.

practices that have an effect on multiple markets, have a major impact on the international legal system. This assumption stems from the fact that on the one hand there are varied national competition laws and – more importantly - policies, and on the other there are competition law related international problems which have to be solved through cooperation of the affected states. As the thesis argues, in the field of competition, as in every field of international cooperation, such cooperation may take two main forms: first formal cooperation through the adoption of international agreements, and second informal, through the exchange of ideas and information between competition officials. This section discusses the elements which lead to this broad classification, and further introduces the working question that the thesis attempts to address, i.e. *the role of competition law and policy of the EU in the formation of international agreements on competition.*

i. Sovereignty and its implications for the internationalisation of competition law

International political order is based on the concept of state sovereignty.[188] State sovereignty emerged with the peace of Westphalia in 1648, which marked the abandonment of the idea of the hierarchical structure of the society, on the top of which was the Pope and the Emperor, and was characterised by the coexistence of a variety of states, each sovereign within its territory and free from any external authority or organisation. It reflected a conception of the international political order that gradually extended itself from its European roots to encompass most of the world. It was a conception built around the central importance of a particular type of political actor: the territorial sovereign state.[189] The model mostly stems from the presumption that *'the coherence of society has to be provided through the unitary power of the state. Since the split of multitudes of individuals and the disorder of society cannot create collective reason, it is the homogeneity and unity 'of the state' and its sovereign power, which forges and represents the quasi-transcendental destiny of society'.* [190]

From a legal perspective, the main consequence of such a system is that sovereign states are solely responsible for the regulation of any matter that arises within

188 Burley, A.-M. (1992) 'Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine' 92:8 Columbia Law Review, 1907, at 1923-1926; Dabbah, M. (2003) The Internationalisation of Antitrust policy (Cambridge University Press), at 141-142.

189 March, J.G. and J.P. Olsen (1998) 'The Institutional Dynamics of International Political Orders' 52:4 International Organization, 943, at 944.

190 Preub, U. (1999) 'Political Order and Democracy: Carl Schmitt and his Influence' in Ch. Mouffe, (ed.), The Challenge of Carl Schmitt (New York: Verso), 167. Cited by Jayasuriya, supra n. 139, at 445.

their territory,[191] and that they are the primary subjects of international law.[192] Both these assumptions have a major impact on the process of internationalisation of competition law, and in fact are the basis for the two sets of solutions put forward with regard to practices conducted by business firms, as well as hybrid practices that have an effect on the territories of multiple states.

The former assumption leads to unilateral solutions, which in the field of competition law and policy take the form of extraterritorial application of national competition laws. As argued in the following chapters, in the field of competition law, a number of countries, the US being the prime example, have used their national laws to address problems caused by anticompetitive practices that have an international effect.[193] The latter assumption, the fact that sovereign states are the primary subjects of international law, is the basis for the conclusion of international agreements with which contracting parties state that they agree on particular competition law related commitments;[194] such agreements are the focal point of subsequent discussion in the thesis.

ii. Types of formal international cooperation: classification of international agreements, and introduction of the working question

In the field of competition law, attempts to reach a multilateral agreement go back to the first half of the previous century; nevertheless, while they are still active, no consensus has been reached on a binding relevant agreement.[195] In this absence of a central international legislative and judicial body, alternative forms of formal cooperation have been developed. As the thesis argues, there are three distinct types of agreements which are devoted to or contain competition provisions, something that validates the argument that international law has been increasingly fragmented with the conclusion of various types of agreements, some of which also establish dispute settlement mechanisms.[196] These categories include bilateral enforcement cooperation

191 Philpott, D. (1995) 'Sovereignty: An Introduction and Brief History', 48 Journal of International Affairs, 353, at 356-357.

192 Shaw, M. (2004) International Law (Cambridge University Press, 5th edition), at 175- 223.

193 On the concept of extraterritoriality, see below, chapter 3, section 3.2.4.

194 And in this regard, international agreements have been considered to be equivalent of a contract. Guzman, A.T. (2005) 'The Design of International Agreements' 16:4 European Journal of International Law, 579, at 585.

195 See the discussion in Chapter 6.

196Koskenniemi, M. and P. Leino (2002) 'Fragmentation of International Law? Postmodern Anxieties' 15 Leiden Journal of International Law, 553, at 556; See also UNCTAD (2006) Fragmentation of International Law: Difficulties Arising from the

agreements, bilateral trade agreements which include competition provisions and plurilateral-regional trade agreements which include competition rules. These agreements, along with the negotiations over the possible adoption of a multilateral competition agreement, are the focal point of further discussion.

In reviewing these agreements, the aim of the thesis is twofold. First, it attempts to identify the types of norms that have been included in the agreements, both substantive and procedural, and this exercise is mainly a textual one. In the same context nevertheless, the thesis also discusses the role of the particular categories of agreements in the creation of international competition norms.[197] Furthermore, the thesis examines the legal status of the agreements, i.e. whether the agreements oblige the signing parties to apply the agreed clauses (hard law) or whether the parties just express an intention to cooperate (soft law). Another issue addressed is the extent to which the provisions found in these agreements harmonise the competition laws of the contracting parties, or whether they simply provide mechanisms for enforcement cooperation. Finally, most of the agreements discussed in the thesis are trade agreements which include a chapter on competition law and policy, and therefore the role of competition law and policy in the broader group of issues addressed by these agreements is also discussed.

The second and main aim of the thesis is to evaluate the role of the EU in the formation of such agreements. Instead of reviewing the influence of the EU in the development of international competition norms as a whole, the thesis evaluates the policy of the EU with regard to the various distinct types of international agreements which are dedicated to competition, or include competition provisions. While the textual analysis is of major relevance here too, since it can on certain occasions lead to the assessment of the extent to which the EU has succeeded in imposing its competition law on its co-signing countries by including competition provisions similar to EU law, this discussion is also political.

This assumption is based on the argument that the international system is based both on international law and the balance of power, which operate between, rather than

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Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, A/CN.4/L.682, in particular at 10-17.

197 The analysis of the various forms of cooperation shows that at least to date, while competition law has been included in bilateral and regional-plurilateral agreements, it has not survived the more complicated multilateral negotiations.

above sovereign states.[198] To this end, various international relations theories have been developed with the aim of describing – and to a certain extent predicting - the way in, and extent to, which countries cooperate.[199] Some of these theories, such as policy networks, epistemic communities, isomorphism and realism, are employed in different parts of the study in the context of the discussion about the negotiations on or provisions of the agreements. Such policy considerations are more clearly taken into account in the context of the discussion about the role of the EU in the formation of multilateral competition rules, where, in the absence of a binding international agreement on competition, the relevant discussion is devoted to the analysis of the position taken by the EU and the relevant positions of a number of countries, and therefore the political factor is prevalent.

2.4 Conclusion

This chapter has attempted to outline some of the main features of competition law and policy both on a national and an international level. It did so by first introducing the historical origins of competition law, from the development of the relevant case law in England in the 15th century on restrictive trade practices to the proliferation of competition law in most of the countries of the world, in the last 15 years.

The chapter noted that economic theories may have a significant effect on the particular application of national competition rules, and argued that various sectors of national economies are exempted from the application of competition laws, and these sectors may vary depending on the particular country under examination. The socio-cultural factors that have an effect on the particular application of competition rules in different countries have also been briefly reviewed. It has been shown that such factors are used as a basis for case-specific exemptions from the application of competition rules. In this regard, it has been argued that a number of issues that are not related to competition policies are taken into account in the context of the examination of a particular anticompetitive practice. Finally, on a national level, the chapter has exposed

198 Gross, L. (1948) 'The Peace of Westphalia, 1648-1948' 42:1 The American Journal of International Law, 20, at 28-29; In its extreme version, as Shaw notes, '[W]here survival is involved international law may take second place'. Shaw, M. (2004) supra n. 192, at 8.

199. See Slaughter, A-M. (1993) 'International Law and International Relations Theory: A Dual Agenda' 87 American Journal of International Law, 205.

some of the arguments that have been raised in the relevant literature for and against the adoption of competition rules by developing countries.

By exposing all of these particularities of competition law, the chapter has not questioned the validity of competition rules. In contrast, the statistics provided here reveal that a very large number of countries have adopted competition rules, and this, by itself, is a clear indication that competition law and policy is considered to be a key part of liberal political systems. The aim of the analysis of the variant and sometimes divergent aspects of national competition rules has been to highlight the fact that competition law is still a relatively new legal instrument and that there is a long way to go before consensus is reached as to its optimum application.

On the other hand, the chapter has also stressed that due to economic globalisation the number of multinational firms has been increased, and this in turn has increased the number of anticompetitive practices conducted by such firms that have an effect on multiple national markets. Three types of relevant practices have been briefly reviewed: hard core cartels; vertical restraints; and cross-border mergers and acquisitions. As also noted, a number of hybrid practices which include anticompetitive practices supported by governments or allowed by them through the exemptions from the application of competition rules may have an effect on international trade.

In view of the existence of such practices that should be dealt with by competition rules, it has been noted that there are two possible solutions. The first is unilateral, extraterritorial application of competition rules. Nonetheless, as argued, it is taken as an assumption in this thesis that international problems need international solutions and in this regard, international agreements, which provide for cooperation and/or harmonisation of competition rules, have been employed to address the anticompetitive practices by firms that have an international effect. These agreements will be the focal point of subsequent analysis in this study, and this analysis will be carried out from the perspective of the EU, in order to evaluate the role of the EU competition law and policy in the formation and application of these agreements.

Chapter 3: Bilateral Enforcement Cooperation Agreements[200]

Abstract

This chapter looks at self-standing bilateral (and tripartite) enforcement cooperation agreements in the field of competition law and policy. Section 1 follows the development of these agreements and attempts to identify some of their common characteristics. Section 2 explores the content and impact of the first generation of agreements, and is based primarily on the enforcement cooperation agreements signed by the EU and the US. Section 3 focuses on the limitations of the first generation of agreements. Section 4 discusses second generation agreements which allow the exchange of confidential information between the cooperating parties, as well as other forms of formal cooperation recently used in bilateral enforcement cooperation on competition, and in particular Mutual Legal Assistance (MLATs) and extradition Treaties. The chapter concludes by summarising the most important features of

200 An earlier version of this chapter has been published, under the title 'Enforcement cooperation agreements' in Marsden, P. (ed) (2007) Handbook of Research in Trans-Atlantic Antitrust (Edward Elgar Publishing).

enforcement cooperation agreements and by evaluating the role of the EU in the formation and development of this particular instrument.

3.1 Common characteristics of enforcement cooperation agreements

3.1.1 Enforcement cooperation as a substitute for harmonisation of competition laws

Bilateral (and tripartite) enforcement cooperation agreements are agreements that do not harmonize the competition laws of the contracting parties. These agreements provide for mechanisms of enforcement cooperation. In the field of competition law enforcement cooperation has been used as an alternative for the harmonisation of national competition laws. Since no agreement on a multilateral code on restrictive business practices could be achieved in the last century, a number of countries with active international trade (through multinational firms) and a developed competition law cooperated on enforcement of their competition laws in order to face up to the consequences of the increasing number of restrictive business practices with an international effect.

Thus, as early as the late 1950s when a conflict arose between the Governments of Canada and the United States on a case relating to a US investigation of a patent pool among Canadian radio and television makers designed to exclude US manufactured products from the Canadian market, the Governments of US and Canada entered into negotiations in order to coordinate their enforcement activities and avoid similar conflicts. The outcome of this conflict and the subsequent negotiations was the Fulton-Rodgers understanding of 1959,[201] with which the two governments agreed to construct a channel of communication regarding antitrust matters, through notification and consultation.[202]

Furthermore, by 1967 enforcement cooperation between competition agencies, had become an issue of interest at the OECD, which adopted its first recommendation[203] encouraging its member countries to co-operate in enforcement on antitrust issues. This first recommendation of 1967 has been modified several times, most recently, in

201 Named after the Canadian Minister of Justice and the US Attorney General at that time. See Finckenstein, K. von (2001), 'International Antitrust Cooperation: Bilateralism or Multilateralism?', Speech delivered in Vancouver, 31 May 2001, <http://www.apeccp.org.tw/doc/Canada/Policy/1a.htm> (last visited on 21 May 2007).

202 Stark, C. (2000) 'Improving Bilateral Antitrust Cooperation', Speech delivered in Washington D.C., 23 June 2000, at 2, <http://www.usdoj.gov/atr/public/speeches/5075.htm> (last visited on 21 May 2007).

203 OECD Recommendation of the Council Concerning Cooperation between Member Countries on Restrictive Business Practices Affecting International Trade of 5 October 1967 [C(567)53(Final)].

1995.[204] Taking as a model the most recent (recommendation of 1995), member countries are encouraged to:

(i) Notify other members when the latter's 'important interests' are affected by an investigation or enforcement action;[205]

(ii) Co-ordinate parallel investigations where appropriate and practicable;[206]

(iii) Disclose information concerning an investigation or proceeding which is being conducted in one member country but that may affect important interests of another member country, in order to permit the member country whose interests are affected to comment and consult with the proceeding member;[207]

(iv) Exchange information which is related to anticompetitive practices in international trade (with the reservation of the rules concerning confidentiality and unless such a disclosure of information would be contrary to significant national interests of a country);[208] and

(v) Request the competition authorities of another member country to take action if it considers that one or more undertakings situated in that country are or have been engaged in anticompetitive practices that are substantially and adversely affecting its interests.[209] Moreover, in the preamble,[210] the member countries are required to take into consideration the principle of international comity ('traditional' or 'negative' comity).

As can be seen, the provisions of the OECD recommendation are relatively vague, and the content of the agreements following the OECD recommendations has been expanded; however the basic structure of all these agreements follows to a greater or lesser extent the OECD recommendation. The recommendation is entirely voluntary; nevertheless it is still an important step since the OECD is the first institution that encouraged its Member States to be involved in mechanisms of cooperation on

204 OECD Recommendation of the Council of 27th and 28th July of 1995 [C (95) 130 (Final)].

205 Ibid. in Article I. A. 1.

206 Ibid. in Article I. A. 2.

207 Ibid. in Article I.B.4.a).

208 Ibid. in Article I.A.3.

209 Ibid. in Article I.B.5.a) in conjunction with Article I.B.5.c). The provision relating to positive comity was added to the recommendation by the amendment of 1973.

210 Ibid. in recital 7

competition enforcement and consequently to create a framework of cooperation,[211] and it has been to date particularly active in this field.[212]

3.1.2 Basic structure of the agreements

As is obvious from Table 3.1, enforcement cooperation agreements in the field of competition law follow the basic structure of the OECD recommendations. Nonetheless, the level of cooperation provided varies. For instance the Brazil-Russia agreement is modest, providing for a general undertaking by the parties to cooperate and consult each other on cases of mutual interest. On the other hand, the US-Australia agreement and the Denmark-Iceland-Norway tripartite agreement are the first to provide for exchange of confidential information and are the first legally binding enforcement cooperation agreements, called the *second generation agreements*, discussed in Section 4 of the chapter. All the other – *first generation* - agreements are soft law agreements and therefore include limitations on the ability of the competition agencies to share confidential information (the so-called confidentiality clause and the limitation by the existing laws - both discussed below). Almost all of these agreements provide for a basic procedure of cooperation, that is to say notification of cases of mutual interest, exchange of information, cooperation and coordination of enforcement activities, and negative comity. These mechanisms are also analysed below.

211 Monti, M. (2000) 'Cooperation Between Competition Authorities - A Vision for the Future' Speech delivered at the Japan Foundation Conference, Washington DC, 23 June 2000, <http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt =gt&doc=SPEECH/00/234|0|RAPID&lg=EN> (last visited on 21 May 2007).

212 See ICN (2007) 'Cooperation Between Competition Agencies in Cartel Investigations', Cartels Working Group Report, Presented at the ICN Annual Conference, Moscow, May 2007, <http://www.internationalcompetitionnetwork.org/media/library/conference_ 6th_moscow_2007/19ReportonCooperationbetweencompetitionagenciesincartelinvestigations.pdf> (last visited on 21 May 2007), at 5.

Table 3.1. Bilateral enforcement cooperation agreements

AGREEMENT	Notification	Exchange of information	Enforcement cooperation	Coordination	Consultations	Meetings between officials	Technical assistance	Comity	Positive comity	Predominance of Existing laws of the Parties	Right to share confidential information
US/Germany (1976)	√	√	√		√			√		√	
US-Australia(1982)	√	√	√		√			√		√	
EU-US (1991)	√	√	√	√	√	√		√	√	√	
US-Canada (1995)	√	√	√	√	√	√		√	√	√	
Australia-Taipei (1996)	√	√	√	√			√	√		√	
N. Zealand- Taipei (1996)	√	√	√	√			√			√	
EU-US on pos. com. (1998)			√						√	√	
US/Australia (1999)		√	√							√	√
EU-Canada (1999)	√	√	√	√	√	√		√	√	√	
US-Japan (1999)	√	√	√	√	√	√		√		√	
US-Brazil (1999)	√		√	√		√	√	√	√	√	
Australia- Papua New Guinea (1999)	√	√	√	√	√		√	√		√	
US - Israel (1999)	√	√	√	√	√	√		√	√	√	
US-Mexico (2000)	√	√	√	√	√	√	√	√	√	√	
Canada –Chile (2001)	√	√	√	√		√		√		√	
Russia-Brazil (2001)			√		√	√				√	
Canada -Mexico (2001)	√	√	√	√	√	√	√	√	√	√	
Australia-Fiji MOU (2002)		√	√	√		√	√	√		√	
Australia-Korea (Sept 2002)	√	√	√	√	√	√	√	√		√	
Canada-UK (2003)	√	√	√	√		√		√		√	
EU-Japan (2003)	√	√	√	√	√	√		√	√	√	
US-Canada pos. com. (2004)			√						√	√	

3.1.3 Bilateral agreements as a way to contextualise international cooperation in other fields of commercial law

Bilateral agreements have also been extensively used in other fields of commercial law, namely investment and taxation. In particular, since the 1950s and until 2000, more than 1300 bilateral investment treaties were signed.[213] The main goal of these agreements is to encourage and create favourable conditions for investors from the signing party, whereas some of them, for example the treaties signed by the US and Canada, also include a Most Favoured Nation (MFN) clause.[214] More than 1500 double taxation treaties have also been signed between various states, with the aim of mitigating the effects of double taxation by allocating taxation rights between source and residence countries and providing for cooperation, exchange of information and dispute settlement.[215]

3.1.4 Enforcement cooperation where there are trade flows

Another observation to be made regarding enforcement cooperation agreements is that all these agreements have been concluded between countries with significant trade flows. This justifies to an extent the fact that most of these agreements have been concluded among industrialised countries (such as the EU, the US, Canada, Japan, and Australia). In this regard, the EU has signed such agreements only with its three most important partners, namely the US, Canada, and Japan, while it currently considering the adoption of a relevant agreement with Korea.

Nonetheless, the fact that in the last five years or so a number of less developed countries have been involved in bilateral enforcement agreements should not be overlooked and considerable trade flows between the contracting parties is one of the main incentives for the conclusion of most of these agreements. For example, Papua-New Guinea has signed an agreement with Australia, and this is justified by the fact that Australia is the country with which Papua New Guinea has the most developed trade relations. Statistically, in the year 2000, Australia was the destination of 29.1% of Papua New Guinea exports and 21.2% of Papua New Guinea's imports came from Australia.

213 WTO Working Group on Trade and Investment (1998) 'Bilateral, Regional, Plurilateral, and Multilateral Agreements' WT/WGTI/W/22, at 4

214 Ibid, at 6.

215 Ibid at 10.

Moreover according to the Australian Competition and Consumer Commission (ACCC) the agreement is a way to achieve greater access to Papua New Guinea's market for Australian exporters through proper utilisation of competition law in this market.[216] It is logical to assume that 'proper utilisation of competition law' aims for the creation of an environment of safe investment for Australian firms.

3.1.5 Enforcement cooperation agreements (of first generation) in the form of soft law

A major characteristic of the first generation of agreements is that they are considered as soft law, which in turn has been used as an alternative to hard law in the '*legalisation*'[217] of international relations. Hard law refers to legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law. Each of these characteristics of law (obligations, precision and delegation) may be present in varying degrees along a continuum, and each can vary independently of the others.[218] Accordingly, soft law is chosen once legal arrangements are weakened along one or more of the dimensions of obligations, precision, and delegation. Put differently, soft law stands between hard law and purely political arrangements where legalisation is largely absent,[219] and includes elements from both these situations (that is, it includes legal provisions – an element of hard law - but these provisions are not legally enforceable - an element of purely political arrangements).

This indistinctness between law and policy has led some international lawyers to condemn soft law as vague and inadequate to regulate international economic relations. Weil for instance has argued that the increasing use of soft law can destabilise the whole international normative system into an instrument inadequate to serve its purpose.[220] In fact these arguments to an extent can be applied in the case of this first generation of bilateral and tripartite competition enforcement cooperation agreements. The lack of

216 See the ACCC website <http://www.accc.gov.au/international/international.htm>.

217 By 'legalisation' it is meant here the formalisation of international relations in the form of law (international agreements).

218 Abbott, K., R. Keohane, A. Moravcsik, A- M Slaughter, and D. Snidal (2000), 'The Concept of Legalisation', 54:3 International Organisation, 401 (hereinafter Abbott et al.)

219 Abbott, K. W, and D. Snidal (2000), 'Hard and Soft Law in International Governance' 54:3 International Organisation, 421, at 422. For a critique on this analysis, see Finnemore, M. and S. J. (2001) 'Alternatives to "Legalization": Risher Views of Law and Politics' 55:1 International Organization, 743, where the authors hold that the distinction made by Abbott and Snidal has certain limitations, as it does not take into account other important ingredients of law, such as the features and effects of legitimacy, including the need for a certain link between law and underlying social practice.

220 Weil, P. (1983), 'Towards Relative Normativity in International Law?' 77 American Journal of International Law, 413, at 423.

legally binding obligations, along with the confidentiality clause, give in reality absolute discretion to the contracting parties to overlook the agreements in cases where they consider that their important interests would be impeded if they had to follow the provisions of these agreements, and this is a significant drawback of the agreements, in view of discussion carried out in Chapter 2 with regard to the different understandings about the nature and proper enforcement of competition law.

So what exactly are the factors that have led to the choice of soft law instead of hard law in the process of legalisation of international economic relations? Soft law bilateral agreements have not only been used in the field of competition law but also in other areas of international law, such as taxation, investment and securities.[221] The reason for this choice, as a number of scholars have pointed out, is that soft law can overcome deadlocks in the relation of states that result from economic or political differences among them, when efforts at firmer solutions have been unsuccessful.[222] This general assumption can be applied in the process of internationalisation of competition law where the lack of success in concluding a multilateral agreement has obviously led countries to opt for alternative solutions, including bilateral (and in fact voluntary) enforcement cooperation agreements. This form of cooperation is definitely more flexible than traditional international agreements with binding provisions and as Chinkin puts it, '*thanks to soft law we still have people channeling efforts toward law and toward trying to achieve objectives through legal mechanism, rather than going ahead and doing it in other fashions*'.[223]

Furthermore a substantial amount of soft law can be attributed to differences in the economic structures and economic interests of different states.[224] This argument is also relevant in the case of competition law, which, as argued in Chapter 2, may include different aims depending on the interests of different countries, with variant objectives and cultures. Supportive of this hypothesis are provisions for deceptive marketing practices included in the Canada-Australia-New Zealand[225] and the US-Canada[226]

221 Slaughter, A-M (2000) 'Governing the Global Economy through Government Networks' in Byers, M. (ed.) The Role of Law in International Politics: Essays in International Relations and International Law (Oxford University Press),1077.

222 Reismann (1991), 'A Hard look at Soft Law: Panel Report' 82 American Society of International Law, 371, at 427.

223 Quoted in Reisman, ibid., at 377.

224 Ibid. at 375.

225 See Canada- Australia -New Zealand Agreement Art I 2.

226 See US - Canada Agreement Art. VII.

agreements, which thus incorporate consumer protection law.[227] What soft law contributes to this situation is that it creates channels of communication. As the next section argues, cooperation between competition officials supports the development of common understandings among them in relation to the nature and proper operation of competition law. To this end, when such a common understanding has been achieved, it could be argued that cooperation through soft law instruments may lead to stronger forms of cooperation.[228]

3.1.6 Bilateral enforcement cooperation as a strategy of strong states

It also becomes obvious from Table 3.1 that enforcement cooperation has taken the form of bilateral (and only lately tripartite) agreements. Why however bilateral and not for example multi- or pluri- lateral enforcement cooperation agreements? This question has to be answered especially in view of the fact that enforcement cooperation agreements have to a great extent been framed in accordance with the OECD recommendation, which itself does not speak about bilateral cooperation.

A number of scholars and politicians attribute bilateralism in the field of competition enforcement cooperation to the US policy on international competition law in the post-World War II period. The US historically resisted participation in international institutional arrangements; they were perceived as jeopardising its political autonomy,[229] a phenomenon also illustrated in the process of internationalisation of competition law, where the US has consistently been the most prominent opponent of the development of the idea of a multilateral agreement on competition. Instead, US officials have advocated that extraterritorial application of US competition law as the most appropriate way to address problems created by restrictive business practices with an international effect, even in cases where US laws have to be applied in an extraterritorial manner.[230]

Furthermore, US officials have used bilateral agreements as a complementary strategy to unilateralism. As Braithwaite and Drahos claim, in international trade

227 According to Canadian officials the main aim of these provisions is to solve problems relating to deceptive telemarketing, that is, person-to-person telephone calls used to make false or misleading representations in promoting the supply of a product or business interest. See: Murphy, G. (2001), 'Canada, Australia and New Zealand Competition Authorities Sign Cooperation Arrangement' 22:8 European Competition Law Review, 322, at 322.

228 See below, section 3.4.2 which discusses the cooperation between US and UK, and US and Canada, on criminal cases.

229 See Abbott et al, at 401.

230 See the discussion carried out in chapter 6 of the thesis, section 6.3.1.

generally, the most fundamental US strategy is to act tough on bilateral negotiations to set frameworks for subsequent multilateral negotiation.[231] This strategy has been observed in the area of intellectual property law, where it finally led to the adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),[232] and can also be observed in the field of competition law, where the US is the most frequent user of bilateral enforcement cooperation agreements, both in the form of soft law, through first generation agreements, and lately hard law, through the conclusion of a second generation agreement with Australia, and the use of Mutual Legal Assistance Treaties and Extradition Treaties with regard to the investigation of competition cases.[233]

Waller further argues that cooperation on enforcement agreements is currently in vogue because it increases national power.[234] It is definitely easier for politically and economically strong states to cope with negotiations and cooperation on a bilateral rather than on a multilateral basis. With the absence of a judicial body to decide on cases where a conflict arises it is very much the political and economic power of the contracting parties that will decide the outcome of the conflict. Officials and academics of smaller countries have often expressed this concern. For instance a Swiss official has stated that the possible conclusion of a multilateral competition agreement would be the best solution with respect to the problems stemming from restrictive business practices conducted by multinational enterprises, since, '*...parties with relatively little bargaining power will be able to join forces with similar countries to safeguard their interests, leading to a more balanced agreement*',[235] an argument tested and practically validated in the context of the discussion regarding the negotiations over a possible WTO agreement.[236]

231 Braithwaite, J. and P. Drahos (2000) Global Business Regulation (Cambridge University Press), at 198.

232 Ibid.

233 See section 3.4.2 below.

234 Waller, S.W. (1997), 'Internationalisation of Antitrust Enforcement' 77 Boston University Law Review, 343, at 378.

235 Zach, R. (1998), 'International Cooperation Between Antitrust Enforcement Agencies: A View from a Small Country' in Ulrich, H. (ed.) Comparative Competition Law: Approaching an International System of Antitrust Law (Nomos Verlagsgesellschaft Baden-Baden), at 261.

236 See chapter 6, section 6.3.2. where it is noted that developing countries, which would be normally in a disadvantaged position in bilateral talks, have combined their forces and have had a major impact at the multilateral level.

3.1.7. The policy of the EU towards the adoption of first generation bilateral enforcement cooperation agreements

All these arguments about bilateralism and the increase of national power are also reflected lately by the EU, but not in the field of agreements on enforcement cooperation. Having concluded enforcement cooperation agreements only with the US, Canada and Japan, the EU has not been as active as the US in the adoption of this particular legal tool, and two main arguments may be put forward with regard to this observation. First, the EU throughout the 1990s and until the collapse of the WTO talks on competition formally supported the adoption of a possible WTO multilateral agreement, and therefore considered to a certain extent soft law bilateral agreements to be of secondary importance.[237] Second, given the voluntary nature of the agreements, it was considered by the Commission that the use of such agreements is rather limited, since cooperation could be carried out anyway, irrespective of the existence of such agreements.[238] This second assumption is also supported by the fact that the EU has formally developed bilateral relations with Korea and China, both important business partners, yet in the case of China there is no official agreement adopted, while in the case of Korea, a Memorandum of Understanding was signed in 2003 in which the signing parties express their willingness to cooperate, and develop a dialogue through annual meeting of officials, without adopting a 'formal' agreement.[239]

On the other hand, the EU has been the most prominent user of bilateral trade agreements which include competition provisions and, as observed in Chapter 4, to a certain extent it obliges its co-signing states to adopt legislation similar to the EU. In addition, as argued in Section 4 it has lately been interested in concluding second generation bilateral agreements, but attempts have not been fruitful to date.

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237 See Chapter 6, section 6.2.

238 This position has been expressed by Stephen Ryan, of the European commission at a CEPR meeting in Paris, December 2005.

239 See Memorandum of Understanding on Cooperation Between the Fair Trade Commission of the Republic of Korea and the Competition Directorate、General of the European Commission (2004), <http://ec.europa.eu/comm/competition/international/bilateral/kr2_en.pdf> (last visited on 21 May 2007), where the parties note in para. 6 that they 'will do their best to establish a bilateral agreement as soon as the Member States of the European Union will agree to initiate negotiations leading to the adoption of a formal bilateral agreement on competition'.

3.2. The content of the first generation agreements

3.2.1 First agreements of this generation: reactive rather than proactive

The basic characteristic of the early agreements of the first generation is that their objective was to resolve conflicts that had already occurred and were relevant to the extraterritorial application of the US antitrust rules, rather than to avoid future conflicts. In this regard the agreements were reactive rather than pro-active. For example, the exchange of information is dealt with in much more detail in the US-Australia agreement and in the US-Canada Memorandum of Understanding[240] due to the fact that they were concluded after the confrontation in the *Uranium* case. During the 1970s in the *Uranium Cartel* case a US court held that it was justified in exercising jurisdiction against nine non-US uranium producers.[241] This decision created very serious friction and led a number of countries to adopt blocking statutes and/or claw back statutes. The former prevent or limit the ability of the United States to obtain information located in countries with such statutes. The latter allow citizens to seek compensatory damages paid to plaintiffs that have prevailed in US litigation.[242] This confrontation was the reason for the adoption of the bilateral enforcement cooperation agreements between the United States of America and Australia in 1982 and Canada in 1985 respectively.

3.2.2 The agreement between the US and the EU

The first pro-active agreement is the agreement concluded between the EU and the US in 1991.[243] In examining the content and impact of the first generation of bilateral enforcement cooperation agreements, the chapter concentrates mainly on the agreement between the EU and the US, and various reasons may be put forward in

240 Ham, A. D. (1993) 'International Cooperation in the Anti-trust Field and in Particular the Agreement between the United States of America and the Commission of the European Communities' 30 Common Market Law Review, 571, at 576.

241 Walker, W. K (1992) 'Extraterritorial Application of U.S. Antitrust Laws: The Effect of the European Community- United States Agreement' 33 Harvard International Law Journal, 583, at 586.

242 Pitofsky provides as an example the UK, which introduced such clauses with the Protection of Trading Interests Act, 1980, Chapter 11, as amended by the Civil Jurisdiction and Judgments Act, 1982, Chapter 27, and Statute Law (Repeals) Act, 1993, Chapter 50, Sch. 1, pt XIV. He also, notes that relevant laws have been adopted by Canada, France, Australia and South Africa. See Pitofski, R. (1999) 'Competition Policy in a Global Economy- Today and Tomorrow' 2:3 Journal of International Economic Law, 403, at 408.

243 The agreement finally entered into force in 1995 due to an action brought by the Government of France against the Commission successfully challenging the competence of the European Commission to conclude this kind of agreements. The problem was finally solved with the approval of the agreement by the European Council. See Riley, A. (1995) 'The Jellyfish Nailed? The Announcement of the EC/US Competition Co-operation Agreement' 16:3 European Competition Law Review, 185.

relation to this approach. This agreement is arguably the most important considering the impact of first generation agreements as it relates to two major 'players' in international trade with mature competition systems, and most importantly, it has been tested for more than ten years and to a great extent is the only agreement that can give us practical examples of situations where this kind of agreement has proven effective or ineffective. In addition, this agreement has also been the model for all the other similar agreements signed by the EU and the US. More relevantly to the research question that the thesis attempts to address, the analysis of the EU-US agreement may provide one with insights as to the way that the EU has reacted with regard to the use of this type of international agreement.

3.2.3 Negative comity (avoidance of conflicts)

First generation agreements primarily aim at the avoidance of conflicts between the cooperating parties, and this aim is incorporated into the text of the agreements in the form of the principle of comity. Comity, or more correctly negative comity - the term 'negative' has been given in order to distinguish it from positive comity - developed in the Netherlands in the last quarter of the seventeenth century[244] and was especially influenced by the work of Ulrich Huber, who based his analysis on three axioms: i) that each state had sovereignty in its territory (that is, the laws of its states bind all its subjects in the boundaries of this state but not beyond); ii) that every person who is found within the state is considered to be a subject of this state irrespective of whether he/she resides there permanently or temporarily; and iii) that states rulers should ensure (through the concept of comity) that the laws of other states be enforced within its boundaries in order to maintain validity and impartiality to other states' laws and citizens. According to Huber, comity was based on the existence of a *jus gentium*, i.e. a form of common law, which applying to conflicts of laws is law since the general utility of nations causes common practice giving effect to foreign laws and judgements to be held everywhere as laws. In contrast other theorists claimed that comity was a matter of discretion for each sovereign state.[245]

244 Yntema, H. (1966), 'The Comity Doctrine' 65:1 Michigan Law Review, 9.

245 Ibid. at 26.

This latter argument has prevailed in international law literature. Even though the notion of comity is not entirely clear in the public international law literature,[246] comity (as it is meant in general terms) is a situation where extraterritorial determinations are often grounded in considerations of politeness or respect; it is '*a willingness to grant a privilege, not as a matter of right, but out of deference and good will*'[247] in order to avoid conflicts relating to jurisdiction. Specifically with reference to competition law the principle of comity encourages the parties to take into account, during the enforcement of their competition laws, the important interests of the other party so as to avoid the creation of conflicts during their enforcement activity. In considering the other party's important interests the enforcing party applies the comity clause within the framework of its laws and to the extent compatible with its important interests.[248]

Negative comity has been included in the OECD recommendations (as described above) and has also formed part of almost every bilateral enforcement agreement. In the EU/US agreement the provision for comity is laid down in Article VI; it is based on three principles. First, there is recognition that the important interests of a Party would normally be reflected in laws, decisions or statements of policy by its competent authorities. A second principle is the recognition that that as a general mater the potential for adverse impact on one Party's important interests arising from enforcement activity by the other Party is less at the investigative stage and greater at the stage at which conduct is prohibited or penalised, or at which other forms of remedial orders are imposed. The third principle and actually the novelty introduced in this agreement is a list of six situations where the important interests of a Party may be affected. These include: (a) the relative significance to the anticompetitive activities involved of conduct within the enforcing Party's territory as compared to conduct within the other Party's territory; (b) the presence or absence of a purpose on the part of those engaged in the anticompetitive activities to affect consumers, suppliers, or competitors within the enforcing Party's territory; (c) the relative significance of the effects of the anticompetitive activities on the enforcing Party's interests as compared to the effects on

246 Joel Paul gives sixteen alternative meanings of the principle, found in various scientific articles that deal with comity: Paul, J. R. (1991) 'Comity in International Law' 32:1 Harvard International Law Journal , 2, at 3-4.

247 Himelfarb, A. J. (1996) 'The International Language of Convergence: Reviving the Antitrust Dialogue between The United States of America and the European Union with a Uniform Understanding of Extraterritoriality' 17:3 University of Pennsylvania Journal of International Economic Law, 909, at 914.

248 Ehlermann, C-D. (1994) 'The International Dimension of Competition' Policy' 17 Fordham International Law Journal, 833, at 836.

the other Party's interests; (d) the existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities; (e) the degree of conflict or consistency between the enforcement activities and the other Party's laws or articulated economic policies; and (f) the extent to which enforcement activities of the other Party with respect to the same persons, including judgments or undertakings resulting from such activities, may be affected.

As is obvious, the wording of the comity-related provision of the agreement is quite detailed. This reflects the intention of the contracting Parties to limit the possibilities of jurisdictional conflicts. Having said that, the following analysis shows that in both the US and the EU extraterritorial application of competition law is the guiding principle, and comity has been seen as a principle to be applied in exceptional circumstances.

3.2.4 Extraterritorial application of competition rules

In the last sixty years the US the courts have consistently applied US antitrust rules in an extraterritorial manner.[249] Nonetheless the extent to which comity considerations may be taken into account in competition cases varies, depending on the particular case under examination.

The 'effects doctrine' was first introduced in the 1945 *Alcoa* case.[250] According to this doctrine, the US courts have the competence to apply US antitrust law to conduct that has occurred wholly or partly in a foreign state that is intended to affect the United States and has in fact such an effect. In its 1976 *Timberlane* decision,[251] the Ninth Circuit mitigated the effects test by taking into account a consideration of comity for foreign defendants, creating thus a rule-of-reason comity analysis, which was codified in the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA).[252] Here it is provided that the challenged conduct must have a 'direct, substantial and reasonable foreseeable effect' on US commerce or on the trade of a US citizen/company engaged in export commerce. The aim of the FTAIA was to provide clear guidance with regard to

249 See generally Barnet, S. E. (2004), 'Conflicts of Jurisdiction and International Comity in Extraterritorial Antitrust', 18 Emory International Law Review, 555.

250 United States v. Aluminum Co. of America 148 F.2d 416 (2d Cir. 1945).

251 Timberlane Lumber Co. v Bank of America, 549F.2d 597 (9th Cir 1976).

252 15 U.S.C s 6a (1994).

the extraterritorial application of US competition rules; nonetheless it is widely acknowledged that it has failed to do so.[253]

In the 1993 *Hartford* decision[254] the Supreme Court held, in justifying the extraterritorial application of the Sherman Act, that in terms of comity, the exercise of US jurisdiction would be limited to exceptional occasions and only if there were a 'true conflict', and it was therefore to be applied only in exceptional cases. This statement was confirmed by the Supreme Court in the *Nippon Paper* case, where it held that comity is 'more an aspiration' than an established rule, confirming in the process that the growth of comity in competition matters was stunted by *Hartford Fire*.[255]

Lately, the Supreme Court once more examined the effects test in its *Empagran* decision,[256] where it held that foreign purchasers of vitamins based outside the US did not have the right to bring a claim for treble damages in a US court for conduct that had taken place solely outside the US market, even where it was part of a wider cartel which did affect US market. On remand from the Supreme Court,[257] the Court of Appeals held that, in order to obtain relief, plaintiffs must show that there is a 'direct casual relationship' between the effect that the anticompetitive practices have in the US market and the injuries they have suffered. The Court found that the appellants could not show such a 'proximate causation' and thus they did not have the right to bring an action against the appellees.[258] Hence, even though US approach to comity has changed over time, comity considerations apply rarely in the US jurisprudence, while extraterritorial application of US competition rules is the norm, and this assumption is also validated by the fact that, at least with regard to cartel enforcement, the US has been very active in recent years in seeking extradition of foreign nationals who participate in cartels.[259]

Similarly, as far as the European Union is concerned there has been in the last twenty years or so a continuous effort from the European Commission to establish the effects doctrine in Europe, with the aim of extending the scope of extraterritorial

253 Springman, C. (2005) 'Fix Prices Globally, Get Sued Locally? US Jurisdiction Over International Cartels' 72 University of Chicago Law Review, 265, at 271-273.

254 Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).

255 United States of America v. Nippon Paper Industries Co. LTD et Al., 109 F.3 d (1st Circ. 1997), p.9.

256 Hoffman La Roche vs. Empagran, SA 124 2359 (2004). See Reinker, K. S. (2004) 'Case Comment: Roche vs. Empagran' 28 Harvard Journal of Law and Public Policy, 297.

257 See Empagran S.A. v. Hoffman La Roche LTD. ET AL, Opinion of the Court of Appeals, No 01-7115c (2005).

258 Ibid.

259 As Watson – Doig notes, in the period between 2000 and 2005, of the 80 individuals serving jail sentences in the US for cartel activity, 18 were foreign nationals. See Watson-Doig, N. (2007) 'Crime and Competition', Competition Law Insight of 10.4.2007,8, at 9. See also the discussion on the Ian Norris case,ection 3.4.2.

application of EC competition law. In the *Wood Pulp* case[260] the Commission found that 36 out of 42 suppliers of wood pulp were violating European competition law (Art.81(1)). Forty out of these forty-two undertakings were not resident within the European Union. On appeal the ECJ ruled that an agreement concluded by undertakings that are not within the borders of the European Union would be an infringement of European competition law, if the agreement is 'implemented' within the EU.[261] In taking this decision, the ECJ refrained from relying on the effects doctrine despite the fact that the Commission argued for the effects test. Instead, it used the implementation doctrine, according to which EU competition law can be applied when a mere sale within the Community occurs. Thus the validity of the application of the effects doctrine in competition cases in Europe is still not clear, or at least not the same as the US.[262]

However, this is not the case in mergers. In the *Gencor* case, [263] Commission blocked a merger that was cleared by the South African competition authorities, despite the fact that both the companies involved in the merger were registered in South Africa, but which fell within the EU turnover thresholds which determine jurisdiction.[264] Judging on the case the Court of First Instance (CFI) declared that '*the application of the [Merger] Regulation is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community*'.[265] Furthermore, commentating on this case, former Commissioner Mario Monti expressed his opinion that:

'*I am confident, however, that this uncertainty is now behind us: the European Court of First Instance ... clearly states that the Community's exercise of jurisdiction over a merger taking place wholly outside of the Community is compatible with the*

260 Joined Cases C-89, 104, 114, 116, 117 and 125-129/85 Ahlstrom and Others v. E.C. Commission (Re Wood Pulp Cartel) [1998] E.C.R. 5193.

261 The decision reads: '[A]n infringement of Article 85 ... [is] made up of two elements, the formation of the agreement, decision or concerted practice, and the implementation thereof'. See, ibid, para. 16.

262 Banks, J.D. (1998) 'The Development of the Concept of Extraterritoriality under European Merger Law and its Effectiveness under the Merger Regulation following the Boeing/Mc Donnell Douglas Decision 1997' 19:5 European Competition Law Review, 306, at 308.

263 Case T-102/96, Gencor Ltd v Commission, [1999] ECR II-0753.

264 Ibid., paras 78-88.

265 Ibid. at para 90.

principles of public international law, where the merger produces direct substantial and foreseeable effects within the EU'.[266]

It follows that despite the inclusion of a comity provision in the agreement, the main aim of competition officials in the EU is to establish the effects test (and the unilateral application of EU competition law) rather than take into account comity considerations.[267] On the other hand, with the exception of the recent *Empagram* case, it has been observed that very little room for comity considerations has been left in the US and, up to the present moment, comity itself has not had any substantial impact on competition cases. Hence, we can observe that at least in the case of EU/US cooperation on competition the principle of comity has had a minimum effect.

Finally, it should be noted that the tendency to apply national competition rules on an extraterritorial basis has in recent years found more supporters. For instance, in 2004, Korea for the first time applied its competition rules in an extraterritorial manner by imposing fines of US $ 8.5 million on 6 graphite electrode manufacturers, including four Japanese firms, one German company, and one US company.[268]

3.2.5 Procedures of positive cooperation provided for by first generation agreements

Apart from the avoidance of conflicts, the first generation of enforcement cooperation agreements also provide for a mechanism of positive cooperation. This mechanism includes notification, exchange of information between officials, cooperation and coordination of enforcement activities, consultations, and finally, positive comity.

i. Notification, cooperation and coordination

There is a provision for notification (i.e. the exchange of basic information) in every competition enforcement cooperation agreement that has been concluded so far. Notification is in fact the mechanism which triggers the process of cooperation between competition agencies. The basic content of a notification provision is that the parties have to notify one another whenever their competition authorities become aware that their enforcement activities *may affect important interests of the other party.* This

266 Monti, M (2000), supra n. 211.

267 Nevertheless, it should be also pointed out that Woodpulp predates the conclusion of the agreement, and was probably among the factors that led to its adoption.

268 See OECD, (2005) supra n. 160, at 13.

provision has been included in cooperation agreements since the first agreement between the United States and Germany (1976). In the first agreements there are no indications of when the important interests of a contracting party may be affected. Hence, the test looks very general and it is actually left to the absolute discretion of the parties when to notify the other contracting party.

However this changed with the conclusion of the US-EU agreement of 1991 (as revised), which was the first agreement to specify particular situations where the important interests of 'the other party' may be affected.[269] These include cases: that are relevant to enforcement activities of the other party; that involve anticompetitive activities other than mergers and acquisitions which are carried out in significant part in the other party's territory; that involve mergers or acquisitions which one or more parties to the transaction, or a company controlling one or more of the parties of the transactions, is a company incorporated or organised under the laws of the other party or its states; where the anticompetitive practice involves conduct that is encouraged or approved by the other party; or that involve remedies that would require or prohibit conduct in the other party's territory.

This list includes almost any possible enforcement activity which could have an effect on the other party's important interests, and according to the European Commission the mechanism of notification is the clearest obligation stemming from the agreement.[270] The notification of the case to the other party should contain adequate information so that the other party's competition authority will be able to evaluate any effects on its interests. Moreover, the notification should be made to the other party far enough in advance in order to enable the other party's views to be taken into account before a final decision is adopted.[271] Hence, for example in a merger case where the European Commission decides to scrutinise the transaction, and according to the above mentioned provisions its involvement in the case may affect important interests of the

269 See EU/US Agreement, Art. II.

270 Commission (EC) (1998), 'EC Commission report to the Council and the European Parliament on the Application of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, 1 January to 31 December 1997'. Brussels, 11 May 1998, at 3.

271 See EU/US Agreement, Art. II.3 (a)(iii) and II.3 (b)(iii).

US, it must inform either the US Department of Justice or the US Fair Trade Commission (depending on the case) as soon as it initiates proceedings.[272]

Furthermore, with regard to coordination, the agreement stipulates in Article IV that where contracting parties have an interest in pursuing enforcement activities with regard to related situations, they agree that it is in their mutual interest to coordinate their enforcement activities. When considering if such coordination should be developed the parties shall take into account a number of factors. [273]

ii. Exchange of information - meetings between officials

Exchange of information is the cornerstone of international cooperation and the main aim of these agreements. It is in fact *the* factor on which the effectiveness of these agreements depends. The exchange of information - according to the way that these agreements have been framed - has a dual function. Firstly, it offers the chance for cooperating competition authorities to inform each other of, and on, cases of mutual interest. Notification, enforcement cooperation and coordination, consultation and positive comity are in one way or another based on exchange of information. However, the ability of competition authorities to exchange information is subject to the limitations imposed by the existing laws of the parties and the confidentiality clause, as discussed below.

Secondly, exchange of information can also be a process through which officials from different competition authorities can exchange their opinions on economic and political issues that are related to competition law enforcement. Perhaps the most important element of these agreements is that they provide for a mechanism through which officials of different national authorities are able to come into contact with one another and share their views on issues of mutual interest, thus developing a common understanding on the function of competition law and policy.[274] It has to be stressed here again that competition law is a relatively recent legal instrument, especially for countries which have only recently embarked on the process of creating an environment

272 Successive notifications may occur in the same case. For example, in a merger case the Commission may notify at the outset of the case; then, when appropriate, when the Commission decides to initiate proceedings; and, eventually, 'far enough in advance ...to enable the other Party's views to be taken into account', before a final decision is adopted: Commission (EC) (1998), supra n. 270., at 3.

273 For instance, in the EU/US agreement, these factors include the relative ability of the parties' competition authorities to obtain the information necessary to conduct enforcement activity, or the effect of such coordination on each party's ability to achieve its objectives.

274 It is interesting to note that lately (after the conclusion of the US/EU agreement) almost all of these agreements include a provision for meetings of officials, either on an annual, semi annual or periodic basis.

for competition in their internal markets; the existence of these agreements and the exchange of opinions and experience between officials regarding competition law and policy is a positive process towards the creation of a sound and effective framework for competition law.

International relations and politics literature give two alternative explanations for this phenomenon of internationalisation of competition law through the exchange of views between officials. First it is related to the literature that discusses *elite learning* and according to which decision makers incorporate new values and interests due to the regular contact with decision makers from other countries.[275] An alternative explanation for this process is that given by the supporters of institutional isomorphism, who claim that diffusion of interests, values and norms occurs through the *homogenisation* of institutional structures.[276]

The result of this process is the creation of what political scientists call a policy, or government network. According to legal and political scholars, transgovernmetalism, which is the outcome of the creation of these networks, is a new vision of global governance. The idea of transgovernmentalism starts from the assumption that the primary state actors in the international realm are no longer foreign ministers or head of states, but the same government institutions that dominate domestic policies, that is, administrative agencies, courts and legislators.[277] It then moves onto the conclusion that through different mechanisms of cooperation (among which are included bilateral enforcement cooperation agreements and memoranda of understandings) these groups of officials and domestic institutions are in fact the most important actors in the governance of global economy. Hence, according to this theory, global governance is horizontal rather than vertical, decentralised rather that centralised, and composed of national government officials rather than a supranational bureaucracy.[278]

Bilateral enforcement cooperation agreements create mechanisms for diffusion of information about technical aspects of competition law and different state interests. The outcome of the creation of this web is twofold. First, competition officials of one country will become familiar with the concerns of competition officials from another country regarding the function of competition policy and the enforcement of

275 See Kurzer, P (2001) Markets and Moral Regulation: Cultural Change in the European Union (Cambridge University Press).

276 See: Meyer, J. W., J. Boli, G. M. Thomas, and F. O. Ramirez (1997) 'World Society and the Nation State' 103:1 American Journal of Sociology, 144.

277 Slaughter (2000), supra.n. 221, at 1078-79.

278 Ibid. at 1093.

competition law. Second, and with reference to the policy network idea, this web reinforces the role of competition officials in international governance.

Regarding specifically the EU/US agreement, this exchange of information through meetings of competition officials happens through administrative 'Arrangements of Attendance', which include reciprocal attendance at a certain stage of individual cases involving the implementation of their respective competition rules.

iii. Positive Comity

Positive comity could be characterised as the most revolutionary form of cooperation that some of the first generation of agreements provide for, even though as a practice it is not a new one. This mechanism of cooperation has been included in the US-Germany Friendship, Commerce and Navigation Treaty of 1954[279] and subsequently in a number of bilateral Treaties between the US and Greece, Denmark, Japan, Italy and France.[280] It had been used between the US and Japan as a mechanism of cooperation in the past, even before its inclusion in bilateral enforcement cooperation agreements.[281] Despite the fact that it has been included in the OECD recommendations on cooperation since the amendment of 1973, positive comity has not yet been defined in a multilateral context.[282]

Nonetheless, since it was first included in the agreement between the US and the EU the provision for positive comity has been almost identical in every other agreement of this kind. According to the standard provision in bilateral agreements where positive comity is included, when a contracting party (Party A) believes that its important interests are affected by an anti-competitive practice that has been put into effect within the territories of the other contracting party (Party B) and for which Party A does not have the competence to initiate enforcement proceedings, then Party A is able to request Party B to take action relating to this anti-competitive practice on behalf of Party A. Thus rather than avoiding conflicts, positive comity requires the parties to conduct acts of positive co-operation.

279 Markert, K. E. (1968) 'Recent Developments in International Antitrust Co-operation' 13 Antitrust Bulletin, 355, at 359.

280 See: OECD (1999) 'CLP Report on Positive Comity', DAFFE/CLP (99).

281 Iyori, H. (1997) 'Japanese Cooperation in International Antitrust Law Enforcement' in Ulrich, H. (ed) Comparative Competition Law: Approaching an International System of Antitrust Law, (Nomos Verlagsgesellschaft Baden-Baden), at 261.

282 Grewlich, A. S. (2001) 'Globalisation and Conflict in Competition Law: Elements and Possible Solutions' 24:3 World Competition, 367, at 385.

The US/EU Agreement on Positive Comity of 1998

The agreement between the US and the EU on positive comity expands the notion of positive comity even further than the first agreement between EU and US.[283] It states that the competition authorities of a requesting party may petition the competition authorities of a requested party to investigate and, if warranted, to remedy anticompetitive activities in accordance with the requested party's competition laws. Such a request may be made even if the activities do not violate the requesting party's competition laws, and regardless of whether the competition authorities of the requesting party have commenced or contemplate taking enforcement activities under their own competition laws.

It also provides for suspension of enforcement activities by the requesting party aimed at anticompetitive activities in the other party's territory (that is, the extraterritorial application of its competition law) in favour of a positive comity referral to the other party in two kinds of cases: (i) where the foreign anticompetitive activities do not directly harm the requesting party's consumers (for example, a cartel on one side that limits exports from the other); and (ii) where the foreign anticompetitive activities occur principally in and are directed principally towards the other party's territory, but incidentally harm the requesting party's consumers.

Nevertheless, it excludes mergers[284] from its application (even though cross-border mergers are the most frequent object for cooperation) due to different deadlines that the EU and the US laws contain for the adoption of decisions.[285] It was also due to the fact that under the EC Merger Regulation the Commission has no discretionary power to examine mergers; in effect, it can only review mergers that have a 'community dimension'. Hence, in the case of a request by the US to the Commission to review a merger the European Commission would not have the competence to review the merger if it does not have a Community dimension.[286]

Positive comity: can it work?

There are a number of factors that determine whether positive comity can apply upon a request of a contracting party. Firstly, the anticompetitive conduct has to be

283 A similar agreement was signed between the US and Canada in 2004.

284 EU/US Agreement on Positive Comity, Article II (4).

285 Parisi, J. J. (1999) 'Enforcement Co-operation among Antitrust Authorities', 20:3 European Competition Law Review, 133, at 136.

286 Griffin, J. P. (1998) 'Antitrust Aspects of Cross- Border Mergers and Acquisitions' 19:I European Competition Law Review, 12, at 17.

prohibited not only by the competition law of the requesting party, but also by the competition law of the requested party. An example would be that an export activity permitted under the laws of the requested party is not covered by the positive comity mechanism even if it adversely affects an important interest of the other party. Another example would be different theoretical approaches regarding the same practice.[287]

Secondly and given the voluntary nature of these 'soft agreements' the application of positive comity as a tool for cooperation depends to a great extent upon the goodwill of the parties. It also requires great transparency during the enforcement procedures. It has been pointed out above, during the discussion on negative comity, that where important political and economic interests are involved, it would be an illusion to expect such goodwill in order to provide radical solutions based on the positive comity provisions. In 1992 Atwood[288] predicted that, '*We are dealing here not just with the laws of competition but also with the laws of human nature....We should not expect the principle of positive comity...to impact dramatically on the proposition that laws are written and enforced to protect national interests'.*

Atwood's assumption seems to have been proven correct. In fact in the context of the US/EU agreement this particular mechanism of cooperation has been used only a few times, and only once officially.[289] Informally, positive comity is – at least publicly - known to have been used on 3 occasions. The first involved a referral by the US Federal Trade Commission to the Italian competition authority regarding anticompetitive practices by Italian ham exporters, which were harming US consumers with supra-competitive prices.[290] The second case involved a complaint by Marathon Oil to the European Commission in relation to anticompetitive practices conducted by European firms and which had great negative effects on the US-based company.[291] Finally, the most publicised informal referral based on the procedure that positive comity calls for involved A.C. Nielsen, a company involved in the international market

287 See the discussion carried out in Chapter 2.

288 Atwood, J. R. (1993), 'Positive Comity: Is it a Positive Step?' in Barry Hawk (ed.) 1992 Annual Proceedings of the Fordham Corporate Law Institute International Antitrust Law and Policy Conference (New York: Fordham Corporate Law Institute), 79, at 86.

289 See Commission (EC) (1999) 'EC Commission Report to the Council and the European Parliament on the Application of the Agreement between the European Communities and the Government of the United States of America Regarding the Application of their Competition Laws, Brussels, 2 April 1999', <http://europa.eu.int/comm/competition/international/bilateral/usa/1998_comm_report_app_comp_law_en.pdf> (last visited on 21 May 2007).

290 Janow, M. E. (2000) 'Transatlantic Cooperation on Competition Policy' in Evennett, S. J., A. Lehman and B. Steil (eds) Antitrust Goes Global: What Future for Transatlantic Cooperation? (Brookings Institution Press), 29, at 38.

291 Ibid.

for retail tracking services (gathering of information regarding prices, sales, and relevant data sold by manufacturers and retailers in the form of market reports). Following complaints by IRI, a rival firm, both the European Commission and the US Department of Justice initiated investigations with respect to Nielsen's tying practices in countries where the company was in a dominant position, which were employed in order to achieve the conclusion of deals in countries where the company faced substantial competition. The US Department of Justice allowed the European Commission to lead the enforcement activities since most of the alleged conduct occurred in Europe. The outcome of this cooperation was an undertaking by A.C. Nielsen to change its practices, which satisfied both the European Commission and the US Department of Justice.[292]

Furthermore, the only formal positive comity referral was made in the *Sabre/Amadeus* case, where the US authorities asked the European Commission to investigate specific allegations of discrimination in relation to a computerised system (Amadeus) set up by the airlines Lufthansa, Air France and Iberia. The Commission investigated the case in co-operation with the US Department of Justice, and the outcome was the Commission's decision to open a procedure against Air France for possible abuse of its dominant position.[293] The investigation was finally closed following a private settlement agreement between Sabre and Air France.[294]

These are the only occasions where positive comity was used as a cooperative mechanism. Since then it has been included in every agreement in which the EU and the US have been contracting parties; however it has failed to justify the enthusiasm that it generated in (mainly) US competition officials when it was first introduced. Evidently, the International Competition Policy Advisory Committee (ICPAC)[295] admitted that *'after nine years and the experience derived from both formal and informal applications, the public officials appear to have tempered their enthusiasm'.*

292 Rill, J. F. and C. C. Wilson (2000) 'The A.C. Nielsen Case' in Evenett, Simon J, Alexander Lehman and Benn Steil (eds) Antitrust Goes Global,ibid., 192, at 193.

293 See Commission (EC) 'Commission Opens Procedure against Air France for Favouring Amadeus Reservation System', Press Release of 15 March 1999, IP/99/171.

294 See Commission (EC) 'Commission Acts to Prevent Discrimination between Airline Computer Reservation Systems', Press Release of 25 July 2000, IP/00/835.

295 ICPAC Report, at 325.

3.3 Limitations of first generation bilateral enforcement cooperation agreements

As mentioned above, all the previously discussed mechanisms for cooperation are weakened by the fact that most of these agreements are soft law instruments (that is, they do not create legally binding obligations for the contracting parties).[296] The agreements of this generation are not treaties. According to the European Commission they are 'administrative arrangements'; similarly, the US authorities regard the agreements as 'executive agreements'.[297] Therefore, the provisions of these agreements do not override the existing laws of the parties, and this has become a standard provision in every agreement of the first generation.

3.3.1 The confidentiality clause

The lack of legally binding obligations is reflected in the provision relating to the so-called 'confidentiality clause' contained in these agreements. Exchange of confidential information is one of the most sensitive issues relating to enforcement cooperation in the field of competition law. This is due to the fact that there are two groups of opposing interests underlying the exchange of confidential information. On the one hand, there is the interest of the competition authorities to receive as much information as possible regarding a practise under scrutiny. On the other side, there are important corporate interests that need to be taken into account. First, the information exchanged which relates to business goals and marketing strategy of the firms will not be made known to the competitors of the firm. Second, the information exchanged by the agencies in relation to a case will only be used for the particular reason that it is given to the other authority. This point is particularly sensitive in relation to cases where information could be used in cases related to the criminal liability of the firm's board.[298]

According to the 'confidentiality' provision, the parties can refuse disclosure of any information if the law of the party that possesses the information prohibits it or if

296 Furthermore they include a provision according to which contracting parties have the discretion to terminate the application of these agreements at any time (this provision for discretional termination of the agreements is included even in the two agreements that are not administrative arrangements but treaties).

297 The reasons for this situation are: (i) that under the American laws, in order to be a treaty, an international agreement has to get approval by the Senate; and (ii) for the EU, the lack of competence of the Commission to sign Treaties on behalf of the EU as a whole.

298 See: International Chamber Commerce (1999) 'ICC Recommendations to the International Competition Policy Advisory Committee (ICPAC) on Exchange of Confidential Information between Competition Authorities in the Merger Context', Commission on Law and Practices relating to Competition, 21 May 1999 Doc. Document 225/525.

this would be incompatible with the possessing party's important interests.[299] Put differently, and given the extent of discretion that the confidentiality clause leaves to the parties, in the case of these agreements it is more a matter of policy than a matter of law which finally determines the outcome of cooperation between competition authorities. Or, as Wood has pointed out, it is confirmation that nations believe that sovereignty privileges are much more important than any added benefits for competition law enforcement; in her own words, it also demonstrates that international companies '*are content to live in a world in which enforcement agencies must operate with one hand tied behind their back*'.[300]

With respect to the EU, a distinction is made between confidential agency information and confidential business information. The former relates to information gathered in the context of an investigation by the Commission, such as the identity of the undertakings being investigated and procedural aspects of the investigation. Such information may be given by Commission to the other authorities without the prior consent of the parties affected. The latter relates to business or trade secrets obtained as a result of the investigation. The Commission needs the consent of the affected parties in order to disclose such information to the US authorities.[301]

Respectively, provisions that are included in the Antitrust Civil Process Act (ACPA), the Federal Trade Commission Act (FTCA) and the Clayton Act restrict the US authorities from sharing confidential information. The ACPA states that no documentary material, answers to interrogatories or oral testimony shall be made available for examination without permission by the person who produced that material.[302] A similar provision can be found in the Clayton Act[303] and the FTCA,[304] which in addition extends the protection of confidentiality by stating that the FTC does not have the authority to make public any confidential financial information or trade secret, except that which the Commission may dispose to any law enforcement agencies, and can only be used for official law enforcement purposes.[305]

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299 See for instance EU-US agreement (Art. VIII); the EU/Canada agreement (Art X); US/Canada agreement (Art X); and the US/Japan agreement (Art IX(5)).

300 Wood, D. P. (1999) 'Is Cooperation Possible' 34:1 New England Law Review, 103, at 110.

301 Kiriazis, G. (2001) 'Jurisdiction and Cooperation Issues in the Investigation of International Cartels', <http://europa.eu.int/comm/competition/speeches/text/sp2001_010_en.pdf> (last visited on 21 May 2007), at 10-14.

302 15 U.S.C. s. 1313 (c)(3).

303 15 USC ss 7 A (h), 18 (a).

304 15 U.S.C. s. 57-2 (b).

305 15 USC s 46 (f).

When these restrictions due to confidentiality apply, the competition authorities of the contracting parties can share information only if they can receive a waiver of confidentiality from the party involved in the practice under examination. As is the case, these kind of waivers mostly occur in merger cases where the companies involved usually allow the sharing of confidential information in order to get a quick clearance for their proposed merger, especially if the competition agencies challenge the merger (due to lack of sufficient information) and, if the case goes to court, the companies are likely to abandon the transaction rather than to litigate the case. It should be remembered in this context that the decision of the courts usually takes up to two years or more.[306] Another incentive for parties to mergers to forego confidentiality is probably in order to have symmetrical remedies imposed by the antitrust authorities. Hence it is not a surprise that up to now in almost all instances where there has been successful cooperation between competition authorities it involves merger cases. According to US and EU officials, some notable examples regarding the EU/US cooperation include the merger cases *WorldCom/MCI,*[307] *Guinness/ Grand Metropolitan, Dresser/Halliburton,*[308] *Exxon/Mobil* and *Alcoa/Reynolds.*[309]

As opposed to mergers, parties involved in abuse of dominance or cartels cases are not eager to allow competition authorities of different countries to exchange information which without a waiver of confidentiality from the parties involved would be impossible to share. The experience of EU/US cooperation reveals that in only one case relating to abuse of a dominant position did a company offer a waiver of confidentiality, and this case was before the European Council approved the agreement. In the 1994 *Microsoft* case, the US Department of Justice and the European Commission co-operated closely in their investigations of Microsoft's activities after the consent of Microsoft to the exchange of confidential information, which otherwise

306 See Monti, M. (2001) 'The Future for Competition Policy in the European Union' Speech delivered at Merchant Taylor Hall, London, 9 July 2001, <http://www.europa.eu.int/rapid/start/cgi/guesten.ksh_p?action.gettxt=gt&doc=SPEECH/01/340|0|RAPID&lg=EN> (last visited on 21 May 2007).

307 US DoJ 'Department of Justice Clears WorldCom/MCI Merger after MCI Agrees to Sell its Internet Business' Press Release of 15 July 1998; due to the consent of the companies involved the competition agencies could exchange confidential information.

308 Commission (EC) 'Commission Clears the Merger of Halliburton and Dresser in the Area of Oilfield Services' Press Release of 8 July 1998, IP/98/643.

309 See: Monti, M (2000), supra n. 211.

would not be possible to share.[310] The case was finally settled with a trilateral negotiation between the two enforcement authorities together and Microsoft, and was undoubtedly an impetus for the final approval of the agreement.[311]

In the same period there is not even one (publicly known) waiver of confidentiality with respect to a cartel case. This is not to say that there is no informal cooperation on such cases;[312] nevertheless, it has been suggested by competition officials that the effectiveness of cooperation in cartel cases depends greatly upon the ability of the agencies involved to share confidential information.[313] More importantly, the lack of binding provisions seems to be leading to a situation where actual cooperation occurs between agencies which have built up a working relationship of trust over time,[314] irrespective of whether these agencies have signed a first generation agreement. As noted above, this assumption is probably the most important reason behind the relatively limited activity of the EU, at least in comparison to the US, in adopting such (first generation) agreements.

3.3.2 The inability of the first generation of agreements to address some important cases

Having discussed the mechanisms of cooperation and their impact, we can now return to the issue mentioned at the beginning of this section, that is, the inability of the agreements of this generation (i.e. soft law agreements) to deal with cases when important interests of both contracting parties are affected. The conflicts that arose between the US and the EU competition authorities, mainly on the *Boeing/MDD* and *GE/Honeywell* cases, reviewed in Chapter 2, made it clear that in cases like these where both regulators claim jurisdiction,[315] and very crucial policy issues are involved

310 Microsoft agreed to negotiate identical consent decrees with the Commission and the DoJ in order to resolve the allegations of anticompetitive practices made by Novell, Microsoft's main competitor in the software application market. See Himelfarb, A. J. (1996), supra n. 247, at 910-11.

311 See Commission (EC) 'Following an Undertaking by Microsoft to Change its Licensing Practices, the European Commission Suspends its Action for Breach of the Competition Rules' Press Release of 17 July 1994, IP/94/653

312 See See ICN (2007) 'Cooperation Between Competition Agencies in Cartel Investigations', Cartels Working Group Report, Presented at the ICN Annual Conference, Moscow, May 2007, <http://www.internationalcompetitionnetwork.org/media/library/conference_6th_moscow_2007/19ReportonCo-operationbetweencompetitionagenciesincartelinvestigations.pdf> (last visited on 21 May 2007)

313 Kiriazis, supra n. 301, at 1.

314 See ICN (2007), supra n. 312, at 24.

315 It should be noted that the decision of EU to take jurisdiction was actually disputed by some commentators. For instance see Bavasso, A. F. (1998) 'Boeing /McDonnell Douglas: Did the Commission Fly Too High?' 19:4 European Competition Law Review, 243. However see also Van Miert, K. (1998) 'International Cooperation in the Field of Competition: A View From the EC', in Barry Hawk (ed.) 1997 Fordham Corporate Law Institute International Antitrust Law and Policy Conference, (New York: Fordham Corporate

(namely, in both cases, economic and employment policy in the very sensitive field of the aviation sector), bilateral competition agreements, at least in the form that they are concluded at present, seem to be incapable of offering viable solutions. Given the fast moving globalisation of the markets on the one hand and the attempts of states to create national champions in order to participate with good 'players' in the world markets on the other, it is not difficult to predict that such conflicts may occur in the future.

In fact divergences have more recently arisen to a lesser extent with regard to the Commission's decision to impose a fine of about 497 million US Dollars on Microsoft and to oblige the company to disclose particular source code and supply a version of its Windows operating system without the company's Media Player obviously disappointed US officials, especially in view of the fact that in the USA Microsoft reached a settlement with the US Department of Justice more than two years before the EC Commission issued its decision.[316]

In sum, since contracting parties to these enforcement cooperation agreements are not bound by the provisions of these agreements, and furthermore these agreements do not provide for a mechanism for resolving conflicts, such as provisions for the specification of the competent court or the dispute settlement body in the case where a conflict arises, it is very much the case that the political power of the contracting parties will determine the outcome of such a conflict.

This would not cause any major impact in cases where a conflict arises between two states of equal political and economic strength. In fact the conflicts on the two merger cases between the US and the EU led to the negotiation and adoption of another soft law instrument, that is best practices on cooperation in merger cases,[317] where they express their commitment to effective cooperation, which is nevertheless limited by the impossibility of exchanging confidential information in cases where there is no waiver of confidentiality by the parties involved in the transaction under investigation.

The problems with regard to the controversies that may arise in the context of enforcement cooperation would definitely have a major impact in cases where one of

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Law Institute), 13, at 18, where the former Commissioner claimed that in Nippon Paper in terms of jurisdiction the US authorities went beyond what the Commission did in Boeing/MDD.

316 The Decision of the EC Commission was recently upheld by the CFI, (see Microsoft v. Commission Case T-201/04, Judgment of 17 September 2007). On the settelement between Microsoft and the US aurhorities, , see US DoJ 'Department of Justice and Microsoft Corporation Reach Effective Settlement on Antitrust Lawsuit' Press Release of 2 November 2001. See also, Burnside A., and H. Crossley (2005) 'Cooperation in Competition: A New Era' 30:2 European Law Review, 234, at 254-255.

317 US – EU (2002), Best Practices on Cooperation in Merger Investigations, <http://ec.europa.eu/comm/competition/mergers/others/eu_us.pdf> (Last visited on 21 May 2007).

the states involved in the conflict would be much stronger than the other. For instance, if we assume that such a conflict occurred between the US and Brazil, the Brazilian authorities would have been quite vulnerable to the threat of economic measures that the US could impose. Bilateralism, and as it has been shown here, soft law, increase national power. Or as an author from a developing country has put it, bilateral agreements, at least in the form of soft law, cannot overcome the test of hegemony and ethnocentricism.[318]

3.4 So what's next? Wider soft law cooperation and closer bilateral cooperation

Given the certain limitations of the agreements discussed in the previous section, alternative options of enforcement cooperation are discussed both at the bilateral and multilateral levels. As to the latter, discussions on enforcement cooperation have focused on cartels and have lately taken place at the ICN, where a sub-working group has been devoted to cooperation on cartels cases.[319] In parallel, the OECD, in the context of its Recommendation on Hard Core Cartels[320] that includes definitions of the terms hard-core cartels and provides that Member States and non- Member States should cooperate on cartel cases, also works in this particular field, and has already published three reports on the application of the Recommendation;[321] it has also issued best practices on the exchange of non confidential information on cartel cases, where provisions similar to the ones provided by the first generation of agreements are included.[322] It seems therefore that in the context of soft law, enforcement co-operation has seen a shift in the last five years towards multilateral channels of communication, discussed in Chapter 6 of the thesis.[323]

That said, there have also been developments in the field of enforcement cooperation at the bilateral level, and such developments have to do mainly with the debate over the necessity of second generation agreements, i.e. binding agreements

318 De Noronha Goyos, D. (1997) 'The Globalisation of Competition Law: A Latin American Perspective' 3(1) International Trade Law Review, 20, at 21.

319 See ICN (2007) supra n. 312, and the discussion in Chapter 6.

320 See OECD Recommendation of the Council concerning Effective Action Against Hard Core Cartels, 25 March 1998 – [C (98)35 (Final)].

321 See for instance OECD (2005), supra n. 160.

322 See OECD (2005) Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartel Investigations, DAF/COMP(2005)25/FINAL.

323 The issue has also been addressed by the WTO Working Group on the Relationship on Trade and Competition. See below, Chapter 6.

which would make possible the exchange of confidential information and provide for compulsory process on behalf of the other party. Even though no such agreement has been signed by the EU to date, it seems that the EC Commission is looking in this direction. Commissioner Kroes has recently stated that EU and US officials are currently exploring the possibility of signing a second generation agreement which would allow for the exchange of confidential information.[324]

Nevertheless, it is questionable whether the adoption of such an agreement would be feasible since on the basis of Article 12(3) of Regulation 1/2003 any exchange of information between the Commission and the Member States cannot be used by the receiving authority to impose custodial sanctions. The Regulation therefore prevents particular Member States which have penalised cartels (such as the UK and Ireland) from using information received by the Commission or other Member States in order to impose custodial sanctions. In this regard, if the Commission enters a second generation agreement which allows for exchange of confidential information with the US, where cartels are a criminal offence, it would practically discriminate against certain other Member States which can only use such relevant information to a limited extent.

Hence in order to achieve the conclusion of a second generation agreement, there are two options. The first is that the EU signs an agreement which explicitly contains a clause similar to Article 12(3) of Regulation 1, according to which the information exchanged may be not used with regard to custodial sanctions. While theoretically this would be possible, as far as the Commission gets a mandate to negotiate an agreement like this from the Council,[325] nevertheless it is practically unrealistic to expect the US, which has the imposition of custodial sanctions to members of cartels at the top of its enforcement agenda in recent years, to accept such a clause in a second generation bilateral enforcement cooperation agreement. The second option would entail an amendment of Regulation 1/2003, so as it would clearly allow for the exchange of information both between the Commission and Member States and between the Commission and third countries in cases which lead to custodial sanctions.

On the other hand, as in the case of first generation agreements, the US is the country which first moved towards the adoption of a second generation enforcement cooperation agreement on competition, while as the next subsection notes, it has

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324 Kroes, (2005), supra n. 85, at 5.

325 Something which itself may be difficult, as even such a partial ability to exchange confidential information would definitely raise concerns by a number of Member States and business associations.

recently also used other types of bilateral hard law agreements, such as Mutual Legal Assistance Treaties (MLATs) and Extradition Treaties, for the purposes of antitrust enforcement.

3.4.1 Second generation agreements: The US-Australia Agreement on Mutual Antitrust Enforcement Assistance, and the Denmark-Norway-Ireland Agreement

The US adopted in 1994 the International Antitrust Enforcement Assistance Act (IAEAA)[326] to overcome constraints on the exchange of confidential information, by allowing the DoJ and FTC to share such information with cooperating states; however constraints were not completely overcome. Due to business interests pressures[327] the materials obtained during the Hart-Scott-Rodino pre-merger notifications are protected by the IAEAA and cannot be shared with other competition authorities.[328] Following the adoption of the IAEAA the US entered in 1999 into a mutual antitrust enforcement agreement with Australia - which had legislation in place which was similar to the IAEAA[329] - paving the way for the second generation of agreements. The US/Australia agreement is not an executive agreement of a voluntary nature but a binding treaty. According to Article II.G this agreement complements the 1982 US/Australia Agreement on Enforcement Cooperation and thus the combination of these agreements makes the US/Australia cooperation on antitrust enforcement the most sophisticated of all, at least in terms of the capability to exchange official documents.

The parties have agreed to cooperate on a reciprocal basis in providing or obtaining evidence[330] related to enforcement of the other state's competition law. They also agree to disclose, provide, exchange or discuss antitrust evidence.[331] Moreover, the agreement provides that following a request - the type of which is described in great detail in Article III of the agreement - a party may obtain antitrust evidence from the other party. This evidence may include: taking the testimony or statements from persons; obtaining documents, or other forms of documentary evidence; locating or

326 International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. ss 6201-6212

327 These were related to the fact that such materials include highly sensitive information regarding business strategies of US firms. See Freeman, L. N. (1995) 'U.S. – Canadian Information Sharing and The International Antitrust Enforcement Assistant Act of 1994' 84 Georgetown Law Journal, 339, at 358-59.

328 U.S.C. 6204 (1)

329 Mutual Assistance in Business Regulation Act 1992 and the Mutual Assistance in Criminal Matters Act 1987.

330 See US/Australia Mutual Antitrust Enforcement Treaty, Art 1, A

331 Ibid. Art II 1.

identifying persons or things; executing searches and seizures; and disclosing, providing, exchanging, or discussing such evidence.

The information exchanged according to the provision of this agreement can be used solely for enforcing antitrust laws.[332] There is however a place in this agreement for refusal to share information. Article IV of the agreement provides that a Party may deny assistance in the case where such assistance would not be permitted by the law of the requested party (which shows that there are still laws that do not permit the sharing of information) or when information sharing that would be against the requested party's public interest. However, it is provided that the party which refuses to provide the requested information must offer an explanation for the basis of denial.

Following a similar pattern, Denmark, Norway, and Iceland, which have adopted legislation which allows the exchange of such information,[333] signed in 2001 an agreement which provides for the exchange of confidential information. In 2003 Sweden also entered the agreement.[334] The agreement follows the usual procedure of notification in cases where 'one Authority becomes aware of the fact that its enforcement measures could have a bearing on significant competitive interests that come under the competence of another Authority'.[335] The mechanism for cooperation in this process of sharing confidential information is not described in detail like it is in the US/Australia agreement. Article IV of this agreement just provides that the Parties agree that it is in their common interest to exchange confidential information, subject to a duty of confidentiality by the authorities which receive the information, and a commitment that they will use the confidential information only for the purposes stipulated in the agreement.

As a broad assumption, it may be argued that these agreements are a positive step for enforcement cooperation since they provide for clear legal obligations for the parties and they also provide competition agencies with the capability to exchange important information regarding enforcement against anticompetitive practices. Nonetheless, given the fact that reciprocal commitment from the contracting parties is

332 Art. VII. 1 - with the exception of information that has become publicly known: Art VII.D; and of the existence of a written consent by the party which provided the information: Art. VII. C.

333 See Consolidate Danish Competition Act No 687 of 12 July 2000, Section 18 a; see Norwegian Competition Act (Act No.65 of 11 June 1993) Section 1-8, as amended by Act No. 35 of 5 May 2000; see Icelandic Competition Act (Act No8 of 5 February 1993), Chapter XII, section 50a , as amended by the Act No 107 of 2000.

334 See Danish Competition Authority (2004) 'Wider Nordic antitrust cooperation', Press Release of 02.03.2004, <http://www.ks.dk/english/news/press-releases/2004/wider-nordic-antitrust-cooperation/> (last visited on 21 May 2007).

335 See Agreement between Denmark, Iceland and Norway on Co-operation in Competition Cases, Art. II, para 1.

needed in order for an agreement like this to be concluded, at the present time we cannot be over-optimistic about the conclusion of many more agreements like the one between the US and Australia, since there are very few countries with similar legislation to the IAEAA. Burnside and Botteman argue that in fact the US has been unsuccessful in its attempts to promote the adoption of agreements of this kind,[336] and particularly in cases where competition law has not been criminalised.

In addition, and even though these agreements contain provisions that oblige the parties to exchange confidential information, the US/Australia agreement contains exceptions to this obligation for reasons related to *public policy*. This may give a lot of room to the contracting parties to avoid exchange of confidential information in some cases, especially under the pressure that competition officials of the contracting parties may face from business organisations.

Finally, neither of the competition agencies involved in the implementation of these agreements (the US Department of Justice and the FTC and the ACCC in the case of the US/Australia agreement, and the Danish, Icelandic, Norwegian and Swedish competition authorities in the case of the Nordic agreement) has issued any documents on the implementation of the agreements of the second generation. Hence we cannot make safe conclusions yet on their impact on international enforcement cooperation.

3.4.2 The use of MLATs and extradition treaties in competition cases

What nevertheless has become obvious in the last five years is that there is a trend, at least with regard to industrialised countries, towards closer cooperation on competition matters, in the form of exchange of confidential information and procedural cooperation, which may even include extradition of natural persons who have participated in cartels. As to the former, such exchange of information is provided by Mutual Legal Antitrust Treaties in Criminal Matters (MLATs). The US is the most prominent user of such agreements, as it is a party to 50 of them. These agreements cover practices that constitute violations of criminal law in general and thus are useful

336 Burnside, A. and Y. Botteman (2004) 'Networking Amongst Competition Agencies' 10:1 International Trade Law & Regulation, 1, at 3. As expected, concerns with regard to the operation of such agreements have been expressed by business representatives, and despite the fact that the agreements include provisions which confirm that the information exchanged will be used only in relation to competition law, business organisations, such as the International Chamber of Commerce and the Union of Industrial and Employers' Confederation of Europe (UNICE – currently Business Europe), have already expressed their concern about the US/Australia agreement, especially about the fact that the shared information could be used for reasons other than competition, for example to impose criminal liability on the parties involved in the practise under scrutiny or to access the business strategy plans of the enterprises involved. See Parisi, J. J. (1999) supra n. 285, at 139.

in cases where both contracting parties have criminalized their competition rules. Such examples of MLATs that may be used on competition cases are the agreements between US-Canada and US-UK,[337] and as the OECD has noted, the US-Canada MLAT has been recently used in a number of cartel cases.[338]

As to the latter – extradition of individuals on the basis of a competition infringement (cartel) - major debate has developed lately among competition experts in relation to the recent decision of the UK Home Secretary to order extradition to the US of Ian Norris, a UK citizen, and former CEO of a company that was found to be part of a price fixing conspiracy for a period between 1999 and 2000 in the market for carbon products. In particular, Norris' extradition was ordered on the basis of his participation in a cartel and further attempts to obstruct justice in the context of the US grand jury investigation.[339] The decision was issued following a request of the US Government on the basis of the 2003 UK Extradition Act,[340] which ratified the relevant extradition treaty between the two states,[341] with which they have agreed to extradite natural persons in cases of criminal offences. While the initial aim of the Treaty was to support the effort of signing parties to fight terrorism, at least half of the extradition requests by US prosecutors relate to white collar crimes, including price fixing, as in the case of Norris.[342]

This case has been highly controversial, in view of the fact that the extradition treaty requires dual criminality, while Norris is to be extradited on the basis of a practice (price-fixing) which was criminalised in the UK in 2002, and therefore after the infringement came to an end.[343] The High Court rejected Norris' appeal and opined that

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337 See Holmes, P., A. Papadopoulos, O. Kayali, and A. Sydorak (2005) 'Trade and Competition in Regional Trade Agreements: A Lost Opportunity?' in Brusick, Alvarez and Cernat (eds) Competition Provisions in Regional Trade Agreements: How to Assure Development Gains (UNCTAD, Geneva and New York). That said, Zanettin argues that the US-Italy and the US-Spain MLATs may be used in competition cases, since they do not make dual criminality a prerequisite for assistance. Zanettin, B. (2002) Cooperation Between Antitrust Agencies at the International Level (Hart Publishing), at 149.

338 See OECD(2005) supra n. 160, at 38.

339 See Hammond, S. (2006) 'Charting New Waters in International Cartel Prosecution', Speech presented at the Twentieth Annual National Institute on White Collar Crime, March 2, 2006, < http://149.101.1.32/atr/public/speeches/214861.pdf> (last visited on 21 May 2007), at 12.

340 2003, c. 41.

341 Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America, <http://www.fco.gov.uk/Files/kfile/USExtradition_210503.pdf> (last visited on 21 May 2007).

342 See Byrne, B., S. Goodman, and E. Shapiro (2006) 'Extending the Long Arm of US Antitrust Law: the Ian Norris Extradition Battle' Global Competition Review, < http://www.cgsh.com/files/tbl_s47Details%5CFileUpload265%5C616%5CCGSH_ Extending_ the_long_arm.pdf> (last visited on 21 May 2007), at 2.

343 Ibid.

the price fixing conspiracy should be regarded as dishonest and prejudicial to others, and therefore it constitutes a conspiracy to defraud, irrespective of the fact that price-fixing had not been criminalised when the case under examination took place.[344] While Norris has appealed before the House of Lords, and therefore the case is not yet completed, it still is a very strong indication that in cases where countries have reached a common understanding as to the proper treatment of an anticompetitive practice, in conjunction with the existence of a legal framework of cooperation, enforcement cooperation may be maximised. That said, at least at the present point, it seems that only in particular occasions this may happen, and in fact only in cartel cases, and solely between countries that have criminalised this anticompetitive practice.[345]

3.5 Conclusion

The theme of this chapter is that first generation enforcement cooperation agreements have proven to be effective in relation to a number of problems concerning restrictive business practices with an international impact; however, they also have limitations.

Their most positive effect is that they create the mechanism through which officials of different national authorities are able to come into contact and have the opportunity to share their views on issues of mutual interest. The provisions for meetings between competition officials and the provisions for technical assistance are evidence of this. Given that competition law, having only been adopted by most countries recently, is a relatively new legal tool, the frequent communication among competition authorities is definitely beneficial in terms of the creation of a competition culture around the world, and at a more advanced level, such cooperation may contribute to harmonisation of national competition laws, through the achievement of common understandings about the proper function of competition.

In addition, facts revealed primarily from the operation of the EU/US agreement highlight that on the whole the agreement has offered useful mechanisms for cooperation in a number of cases, particularly relating to mergers, where the consent of the parties to give a waiver of confidentiality is something quite common. The increase

344 See Watson-Doig, supra n. 259, at 8.

345 These countries include among others the US, the UK, Ireland, Estonia, Germany, Canada, Australia, Japan, and Israel. See Hammond, supra n. 339, at 3.

in the number of notifications also shows that the everyday cooperation among competition officials is becoming stronger.

However, as mentioned above, it is indisputable that enforcement agreements have certain limitations. First, most of these agreements include a 'confidentiality clause' making them impractical in cartel cases and cases regarding abuse of dominant position. The two agreements between the US and Australia and the agreement between Denmark, Iceland, Norway (and Sweden) are undoubtedly very positive steps, since they provide the agencies of the contracting parties with the opportunity to exchange confidential information. Nevertheless at the moment we cannot evaluate the effect of these agreements given that there is no available data as to their application. On the other hand, recent developments have shown that bilateral cooperation may be far-reaching in cartel cases, through the use of MLATs and Extradition Treaties; however, such agreements may only be used by states which have criminalised cartels, and therefore, for instance, competition systems such as the EU cannot be benefited from such cooperation.

Second, even in merger cases - where the cooperation has been proven to be effective - the US/EU agreement failed to provide the authorities with adequate legal tools in cases like *Boeing/MDD* and *GE/Honeywell* where very sensitive interests of the contracting parties were affected. This is a reflection of the voluntary nature of the agreements of the first generation, and to a certain extent on the problems that may arise from the relationship between, and co-existence of, competition law and policy with other national policies.

Third, bilateral and tripartite enforcement cooperation agreements are by definition insufficient to face situations where interests of more than two or three nations are affected. A very illustrative example is that of the multiple notifications in the case of multijurisdictional mergers. For instance, the *Exxon/Mobil* transaction was notified in 20 jurisdictions.[346] Obviously bilateral or tripartite agreements could not provide for any adequate mechanisms of cooperation in such cases. The only possibility for resolving problems like this, based on provisions of bilateral or tripartite agreements, would be in the case where all the nations with a competition regime have concluded this kind of agreement. Apparently, that would be extremely complicated given that if we take into account only the OECD countries we would need 435 bilateral

346 Griffin, J. P. (1999) 'What Business People Want From A World Antitrust Code' 34:1 New England Law Review, 39 , at 39.

agreements in order to face the problems of international competition enforcement effectively.

All these considerations stress the fact that even though they are useful, enforcement cooperation agreements in the field of competition law are by no means adequate in themselves to provide for radical solutions with respect to the problems caused by restrictive business practices with an international effect. It is also noteworthy that two of the most recent enforcement agreements discussed in the chapter are tripartite and this illustrates the need for expansion of the number of contracting parties. The substantial work that has been carried out by the ICN, and the OECD further highlights the fact that even in the field of voluntary enforcement cooperation, international problems need international solutions. Even US officials who, as has been illustrated above, have been traditionally opposed to a possible international harmonisation of competition law and have supported the proposition that bilateral cooperation will be adequate to solve problems relating to restrictive business practices with an international effect seem to have changed their opinion. Characteristically, Charles James[347] admitted that, '...there have been days when we thought (or hoped) that such (bilateral) cooperation itself would eventually minimize or resolve even the most serious areas of antitrust divergence. More recently, however, we have come to understand that cooperation alone will not resolve some significant areas of divergence among antitrust regimes that must be addressed if we are to maintain the integrity of antitrust on a global stage'.

A reflection of this argument may be traced in the development of the policy of the EU with regard to the formation and application of soft-law enforcement cooperation agreements. As the chapter has shown, the policy of the EU in the field of bilateral enforcement cooperation agreements has been rather neutral, in the sense that the EU has signed agreements only with its most important trade partners (members of the QUAD: the US, Canada, and Japan), and has set up a more informal channel of cooperation with the agencies of another two important trade partners, Korea and China. The agreement with the US has been probably the most influential and important of the various agreements of this kind; however, as opposed to the US, which has been the more extensive user of such agreements, the EU has not seemed interested in offering such semi-formal cooperation to more commercial partners. It could be therefore argued

347 James, C. (2001) 'International Antitrust in the Bush Administration', Canadian Bar Association on Competition Law, Ottawa, Canada, 21 September 2001, <www.usdoj.gov/atr/public/speeches/9100.pdf> (last visited on 21/3/2007).

that, to a certain extent, the formation of such agreements has not been on the top of the priorities list in Brussels. On the other hand, while the EU has been interested in the last couple of years in the possibility of adopting second generation agreements, these attempts have not been successful yet, and therefore, no safe conclusions may be drawn at this point.

As the following chapters show, the efforts of the EU have been rather devoted to other forms of cooperation such as bilateral trade agreements, which include a chapter on competition, and the negotiations on a multilateral agreement on competition law and policy. Besides, the main aim of the EU has been further development of its own competition policy, which as shown in Chapter five is the most successful regime of a plurilateral regional agreement, and has been used as a model for the creation of various other relevant regional regimes around the world.

Chapter 4: Bilateral Trade Agreements Which Include Competition Provisions[348]

Abstract

It is estimated that by 2005 more than 250 bilateral trade agreements were in force and 115 of them included competition related rules.[349] The EU has been a prominent player in this field. It has used bilateral agreements (not in force any more) as a vehicle for the accession of the 12 new Member States, and has also signed bilateral trade agreements with a number of neighbouring countries and selected trade partners. Currently, there are 23 such EU agreements in force which include competition provisions.

In view of these figures, two main hypotheses may be developed; first, that bilateral trade agreements have an influence on the development of international norms on competition; second, and more relevant for this study which examines the role of the EU on the formation of international norms on competition, these agreements have been used and are still being used by the EU as a tool for the exportation of its competition policy. This chapter primarily examines the latter hypothesis, and finds that the EU has to a certain extent successfully exported its competition rules through such agreements, and that furthermore, it has played a significant role in the formation of international competition rules primarily in the form of provisions found in bilateral trade agreements.

Section 1 includes a historical development of trade agreements in general, and an introduction to the EU agreements reviewed here. Section 2 discusses the substantive competition provisions included in the EU bilateral trade agreements. It is observed that these agreements include provisions both relating to anticompetitive practices, and following the EU competition model, on state aid and public undertakings. Section 3 of the chapter examines the provisions on cooperation in competition included in these agreements, and Section 4 discusses the extent to which these agreements can be described as hard or soft law.

348 An earlier version of this chapter, has been a part of the paper written with P. Holmes, H. Muller and A. Sydorak, under the title 'A Taxonomy of International Competition Cooperation Provisions', that will be published in, Evenett, S. (ed.) (2008 forthcoming) Handbook on Competition, Trade and Development (Edward Elgar)

349 Ibid.

4.1 Historical review of trade agreements

The formation of the first trade agreements goes back to the beginning of the 18th century, when the first trade agreements appeared in Europe. In 1707, England and Scotland signed the Act of Union, thus creating a bilateral customs union, that is an agreement which provides for internal elimination of tariffs and a unified external tariff. Similarly, in France the various internal tolls and tariffs in force since 1600 were abolished in 1790 after the French Revolution. Prussia also started considering an economic union in 1808, and this led to the establishment of the Zollverein in 1834 - historically considered to be the first plurilateral regional trade agreement - when most German states adopted the Prussian external tariff, thus operating as a fully fledged customs union.[350]

In the mid- 19th century England was the first nation to unilaterally open its national barriers to foreign trade, with the repeal of Corn Laws in 1846, which was followed by a number of unilateral reductions or even removal of tariffs.[351] At the same time and until the end of the 19th century, a number of bilateral free trade agreements (FTAs) were signed between European countries, the most important agreement of which was the Commercial Treaty signed between England and France in 1860.[352] According to this Treaty, France reduced its tariffs initially to 30% and after 1865 to 20%, and England decreased dutiable goods from 419 to 48 and also reduced wine tariffs.

Following the adoption of this agreement a number of bilateral treaties were signed between European countries. These treaties were based on the MFN principle, according to which countries agreed that when a party to these agreements decided to negotiate and offer favourable trade concessions to a third country, it would have to offer the same concessions to the other party to the agreement.[353] By the 1860s the MFN clause was applied to all British, German, Belgian, and Dutch colonies, while the

350 Irwin, D. (1993) 'Multilateral and Bilateral Trade Policies in the World Trading System: An Historical Perspective' in De Melo, J. and A. Panagariya (eds.) New Dimensions in Regional Integration, (New York: Cambridge University Press), 90, at 92.

351 Clough S.B. and C.W. Cole (1941) Economic History of Europe (Boston MA, D.C. Heath), at 469-475.

352 Accominotti, O., and M. Flandreau (2005) 'Does Bilateralism Promote Trade? Nineteenth Century Liberalisation Revisited' CEPR Discussion Papers 5423, where the authors provide an examination of the actual increase in trade following the conclusion of the Anglo-Franco agreement.

353 Kenwood, A.G. and A.L. Lougheed, (1971) The Growth of International Economy (London, Allen & Unwin), at 75-78.

French colonies adopted the same tariff code as France, thus creating a customs union.[354]

A second period of proliferation of such agreements is the period between the two World Wars, when these agreements became the main strategy of the US, which signed 32 of them with selected trade partners. In the aftermath of the 2nd World War, bilateral free trade agreements lost favour once more, as at the international level the creation of a multilateral trading system under the auspices of GATT and subsequently the WTO became the main target.

Nonetheless, in the last twenty years or so, the conclusion of such agreements has been very much in vogue, and many of them include competition provisions. In particular, by the year 2005, 317 trade agreements were notified to the WTO, and more than 80% of these agreements were concluded since the 1990s.[355] As Cernat has shown, recent trade agreements tend to encompass partners that are economically and geographically diverse.[356] He notes in particular, that a quarter of trade agreements are inter-continental (i.e. they are concluded by countries situated in different continents) and 65% of those agreements are signed by countries which are at different stages of development.[357]

The EU has been a major user of this type of agreement. The US has also concluded a number of bilateral free trade agreements with Australia, Bahrain, Chile, Israel, Jordan, Morocco, and Singapore. Nonetheless, it is notable that most of the US's bilateral FTAs do not include competition provisions, though three recent US bilaterals do so, namely US-Singapore (2004) US-Australia (2005) US-Morocco (2005). Furthermore, Canada has also used this instrument by signing agreements with Chile, Costa Rica, and Israel. Australia has similar agreements with Singapore, Thailand, the US, and New Zealand.[358] In total, as noted above, 115 bilateral trade agreements include provisions relevant to competition law. The subsequent analysis in this chapter is based on the agreements signed by the EU.

354 Irwin, supra n. 350, at 98.

355 Estimation based on Cernat, supra n. 3, at 7.

356 Ibid, at 2.

357 Ibid.

358 See Holmes at al. (2005), supra n. 337.at 68-69.

4.1.1 Bilateral agreements of the EU

Bilateral trade agreements have been in the last 15 years at the heart of the EU external policy. As has been documented, the EU is the prominent example of a polity that has used bilateral trade agreements as a tool to export its trade policy, including competition policy, as it has used its negotiating power to export or in certain cases impose its *acquis communautaire,* which is the legal framework that regulates the relations of its Member States.[359] This policy has been criticised by commentators, who have argued that the EU is not eager to cooperate, but only interested in imposing its competition laws on other states. In particular, it has been argued that in the context of their accession, candidate countries had to '*swallow all 80,000 pages of European laws and adapt their own legislation to accommodate them*', and this whole process has been closely reviewed by EU officials.[360]

From this perspective, the assumption examined in Chapter 3 that bilateralism is a strategy used by economically strong states in order to increase their power over their weaker co-signing parties becomes of relevance here. In this regard, Trebilcock and Howse, argue '*...deep economic integration among nation states is typically predicated either on the existence of a hegemonic power with the ability to impress its will on other smaller and weaker states [. . .] or on the willingness of member states to cede substantial aspects of their domestic political sovereignty...* '.[361]

The nexus of bilateral agreements of the EU substantiates this presumption, since, as the chapter shows, the EU has been involved in agreements with a large number of countries which surround it geographically. In particular, three broad categories of EU trade agreements, all of which include competition provisions, may be distinguished. First, the agreements with candidate countries, which have been the main EU strategic and legal tool with regard to the process of its enlargement. Second, the agreements with Southern Mediterranean and the agreements with former Soviet Union states, that have been adopted in the attempts of the EU to strengthen its overall cooperation with its neighbour countries. Most of these countries have been included in the European Neighbourhood Policy (ENP). Finally, the EU has extended its network

359 See Maur, J-M. (2005) 'Exporting Europe's Trade Policy' 28:11 World Economy, 1565.

360 Leonard, M. (2005) Why Europe Will Run the 21st Century? (Fourth Estate), at 45. On the way that the EU monitors the adoption and implementation of the Acquis, see the EC Commission website at http://ec.europa.eu/enlargement/enlargement_process/accession_process/how_does_a_country_join_the_eu/negotiations_croatia_turkey/index_en.htm#acquis (last visited on 21 May 2007).

361 See Trebilcock M. and R. Howse (1999) The Regulation of International Trade (Routledge, 2nd edition), at 129-134.

of bilateral agreements that include competition provisions to certain selected trade partners around the world. Table 4.1 includes all the relevant EU bilateral agreements.

Table 4.1: Bilateral Trade Agreements discussed in chapter 4

EU	Title of agreement	Signed	Into force	Status of Eu's co signing country
Bulgaria	Europe Agreement (EA)	1993	1993 (no longer in force)	EU Member
Croatia	Stabilisation and Association agreement (SAA)	2001	2004	Candidate for accession
FYROM	SAA	2001	2004	Candidate for accession
Romania	EA	1993	1993(no longer in force)	EU Member
Turkey	Customs Union	1995	1996	Candidate for accession
Algeria	Euro-Mediterranean Association Agreement (EMAA)	2002	1/9/2005	ENP
Egypt	EMAA	2001	1/6/2004	ENP
Israel	EMAA	1995	1/6/2000	ENP
Jordan	EMAA	1997	1/5/2002	ENP
Lebanon	EMAA	2002	In ratification process	ENP
Morocco	EMAA	1996	1/3/2000	ENP
PA	Interim EMAA	1997	1997	ENP
Tunisia	EMAA	1995	1/3/1998	ENP
Armenia	Partnership and Cooperation Agreement (PCA)	1996	1/7/1999	ENP
Azerbaijan	PCA	1996	1/7/1999	ENP
Georgia	PCA	1996	1/7/1999	ENP
Kazakhstan	PCA	1995	1/7/1999	-
Kyrgyzstan	PCA	1995	1/7/1999	-
Moldova	PCA	1994	1/7/1998	ENP
Russia	PCA	1994	1/12/1997	-
Ukraine	PCA	1994	1/3/1998	ENP
Uzbekistan	PCA	1996	1/7/1999	-
Chile	AA	2002	1/3/2005	-
Mexico	Global Agreement	1997	1/10/2000	-
S.Africa	Trade, Development and Cooperation Agreement (TDCA)	1999	26/4/2004	-

i. Agreements with candidate countries

Agreements with candidate countries is a group of agreements that the EU has concluded with countries pursuing EU accession. Following the accession of ten Member States in May 2004,[362] and another two (Bulgaria and Romania) in 2007, the current official candidates to join the EU are Croatia, Turkey, and Former Yugoslav Republic of Macedonia (FYROM).[363] The EU-Croatia Stabilisation and Association Agreement (SAA) was signed in 2001 and came into effect on 1 February 2005, but the trade provisions together with competition policy provisions were implemented in 2002. The SAA with FYROM was signed in 2001 and entered into force in 2004. As with the Europe Agreements, the SAAs with Croatia and FYROM provide for political dialogue, cooperation in all areas of EU policies, approximation of the candidate countries' regulation to that of the EU, and the four freedoms of the internal market. The aim is entry of Croatia and FYROM into the EU. The relationship between EU and Turkey is ruled by the Customs Union, signed in 1995 and in operation since January 1996.[364] In the context of this study, these three agreements are reviewed in this chapter. In addition, where relevant, the chapter also discusses the agreements that governed the relationship between the EU and its two newest Member States – i.e. Bulgaria and Romania.[365]

ii. The European Neighbourhood Policy

Following the accession of 10 members states in 2004, the EU launched the so-called European Neighbourhood Policy which aims to establish closer cooperation with its neighbouring countries and to strengthen the prosperity, stability and security in the

362 Cyprus, Czech Republic, Slovakia, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, and Slovenia. For an evaluation of the effect of the Europe agreements on competition law and policy of the countries that entered the EU in 2004, see Holscher, J. and J. Stephan (2004) 'Competition Policy in Central Eastern Europe in the Light of EU Accession' 42:2 Journal of Common Market Studies, 321.

363 While accession negotiations were launched with Croatia and Turkey in October 2005, accession negotiations have not yet started with FYROM. See the website of the Commission, < http://ec.europa.eu/enlargement/ countries/index_en.htm> (last visited on 21 May 2007).

364 See the EC Commission website, at http://ec.europa.eu/trade/issues/bilateral/countries/turkey/ index_en.htm (last visited on 21 May 2007).

365 As with most of the countries which entered the EU in 2004, the relationship of Bulgaria and Romania with the EU was governed by the so-called 'Europe Agreements', signed in the 1990s. These agreements included provisions on all fields related to the EU internal market (trade liberalisation, free movement of services, payments and capital in respect of trade and investments, and the free movement of workers), according to which candidate countries committed themselves to approximating their legislation to the EU acquis communautaire.

neighbourhood.[366] The ENP is based on a number of bilateral partnership or association agreements signed with two groups of countries: Southern Mediterranean countries, with which the EU has signed the so-called Euro-Mediterranean agreements, and East European and Central Asian Countries, with which the EU has concluded partnership and cooperation agreements.

ii.1. *Euro-Mediterranean agreements* is the group of agreements concluded between the EU and nine Mediterranean countries[367] in the context of the Barcelona declaration,[368] which provided for political dialogue, respect for human rights and democracy, establishment by 2010 of a (WTO compatible) free trade area, and economic, financial, social and cultural cooperation. The agreements also include provisions relating to intellectual property, services, public procurement, competition rules, state aids and monopolies, cooperation relating to social affairs and migration (including re-admission of illegal immigrants) and cultural cooperation between the EU and the countries of the Mediterranean.[369] All the Euro-Mediterranean countries are included in the European Neighbourhood policy.

ii.2. *Partnership and cooperation agreements* were signed with a number of Eastern European and Central Asian countries.[370] These ten-year bilateral treaties provide the legal framework upon which the cooperation of the EU with these countries is built. They express the contracting parties' respect for democratic principles and human rights, and they further provide for political dialogue on issues relating to security and stability. The agreements also include provisions relating to economic and

366 ENP was first outlined in a 2003 Commission Communication. Commission (EC) (2003) 'Wider Europe— Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours', Brussels 11 March 2003, COM (2003) 104 final, which was followed by a more detailed Communication in 2004: Commission EC (2004) 'Communication from the Commission, European Neighbourhood Policy; Strategy Paper' Brussels, 12 May 2004, COM (2004) 373 final.

367 See Table 4.1.

368 See the 'Barcelona Declaration' adopted at the Euro-Mediterranean Conference, 27 and 28 November 1995, <http://europa.eu.int/comm/external_relations/euromed/bd.htm> (last visited on 21 May 2007).

369 See EC Commission website at <http://europa.eu.int/comm/external_ relations/euromed/med_ass_agreemnts.htm.> (last visited on 21 May 2007). On the basis of these agreements and in the context of the European Neighbourhood Policy, the European Union has issued specific action plans for particular countries (namely Israel, Jordan, Morocco, Tunisia and the EU-Palestinian Authority Joint Committee). These action plans set out specific measures for the fulfilment of the obligations set out by the Euro-Med Agreements. See Council (EC) '2640th Council Meeting, General Affairs and External Relations' Press Release of 21 February 2005, 6419/0521.

370 See Table 4.1. These Partnership and Cooperation agreements replaced the Trade and Co-operation Agreement (TCA) concluded between the European Community and the Soviet Union in 1989.

trade relationship between the contracting parties; nonetheless, contrary to contractual relations with all the EU's other neighbouring countries, the partnership and cooperation agreements grant neither preferential treatment for trade, nor a timetable for regulatory approximation.[371] On the other hand, with the exception of Russia (with which the EU cooperates independently of the ENP),[372] Kazakhstan, Kyrgyzstan and Uzbekistan, all of the other countries of the region that have concluded partnership agreements with the EU are included in the ENP.

iii. Agreements with selected trade partners

Finally, three other agreements signed by the EU with selected trade partners are reviewed in this chapter. The first is the *Global Agreement with Mexico*,[373] which provides for political dialogue on a number of issues, such as democracy, human rights, poverty, terrorism, migration and regional development. The agreement further provides for the creation of a WTO compatible free trade area in goods and services, the liberalisation of capital movements and payments, mutual openings of the procurement markets and adoption of disciplines in the fields of competition and intellectual property rights. Based on this agreement, the EU-Mexico Joint Council adopted in 2000 a decision which (among other issues) creates a legal framework for cooperation between the parties on competition related issues.[374] The second is the *Association Agreement between the EU and Chile*, signed in November 2002. The competition provisions of this agreement have been provisionally applied since 1 February of 2003. The agreement replaced the earlier Framework Cooperation Agreement (signed in 1996) which provided for political and economic association between Chile and the EU. This later agreement is very detailed[375] and provides for thorough cooperation on political and trade matters. Finally, the EU has signed a *Trade, Development and Cooperation Agreement* (TDCA) with South Africa. The agreement includes provisions on trade

371 See EC Commission website at <http://europa.eu.int/comm/external_relations/ceeca/pca/index.htm> (last visited on 21 May 2007). See EC Communication on Wider Europe, supra n 366, at 5.

372 In fact it has been documented that Russia excluded itself from the ENP, preferring to cooperate with the EU on an equal basis. See Smith, K.E. (2005) 'The Outsiders: The European Neighbourhood Policy' 81:4 International Affairs, 757, at 759.

373 Signed in 1997 and entered into force on 1st October 2000.

374 See Annex XV of DECISION No 2/2000 OF THE EC-MEXICO JOINT COUNCIL of 23 March 2000 (OJ L 157, 30/6/2000, p.10).

375 Probably, the Association agreement with Chile is the most detailed of all the bilateral free trade agreements signed by the EU. Former Commissioner for Trade, Pascal Lamy, has characterised the agreement as '...a XXI century model of trade relations.' See Commission (EC) "EU-Chile Association Agreement to be signed today in Brussels" Press Release of 18 November 2002, IP/02/1696.

related issues, economic cooperation, social and cultural cooperation and political dialogue, financial assistance and development cooperation.[376]

4.1.2 The role of competition in trade agreements and the way that the EU has used such provisions

Competition provisions are included in bilateral trade agreements in the context of a much broader and diverse legal framework, which contains rules relating to political dialogue, trade liberalisation, and commitment of the signing parties to respect human rights and democratic principles, and (most of them) approximation of the contracting parties' laws.[377] Hence, commercial, political and cultural issues are all addressed by these agreements.

Nonetheless, the common denominator and starting point for further cooperation are rules relating to trade liberalisation. Tariff reduction and the gradual creation of a free trade area is the obvious goal of most of these agreements.[378] Accordingly, the main role for competition law is to reduce, and if possible, to eliminate practices conducted by private undertakings that may have an affect on trade between the contracting parties. This function of competition law as a tool to secure and strengthen market integration has been successfully tested in the context of the EU's own integration project, and the need for adoption and effective application of competition rules is most evident in the case of the agreements with candidate countries which aim at EU accession.

On the other hand, with its recently launched Neighbourhood Policy, the EU opted for the creation of closer political and economic relationship with its neighbouring countries. In this regard, the Commission has stated that, *'[T]he European Neighbourhood Policy's vision involves a ring of countries, sharing the EU's fundamental values and objectives, drawn into an increasingly close relationship, going beyond co-operation to involve a significant measure of economic and political*

376 The agreement was signed in 1999 and has not yet been ratified. Nevertheless, it has been provisionally and partially applied since 1 January 2000. See EC Commission website at <http://europa.eu.int/comm/development/body/country/country_home_en.cfm?cid =za&lng=en&status=new> (last visited on 21 May 2007).

377 On the diversity of the reasons that have led to the conclusion of these agreements, see Pelkmans, J. and P. Brenton (1999) 'Free Trade with the EU: Driving Forces and the Effects' in O. Memedovic, A Kuyvenhoven and W. Molle (eds.) Multilateralism and Regionalism in the Post-Uruguay Round Era: What Role for the EU? (Kluwer, Boston).

378 In particular this goal is explicitly expressed in agreements with candidate and accession countries, in the Euro-Med agreements, and in the agreements signed with Chile, South Africa and Mexico.

integration...',[379] and expresses the opinion that in the context of the proposed regulatory and legislative approximation, *'[C]onvergence towards comparable approaches and definitions, legislative approximation on anti-trust as well as State aid regulations, will eventually be needed for partners to advance towards convergence with the Internal Market.*'[380]

Convergence on competition rules is therefore, at least from the perspective of the EU, a way to achieve market integration with its co-signing parties, and in this regard its attempts, at least with regard to candidate countries and countries that have been included in the ENP, are dedicated to the approximation of competition rules of these countries to the competition model of the EU. As a recent OECD study which compares the competition provisions found in 47 trade agreements indicates, in terms of competition law and policy, one may distinguish two "families" of trade agreements. The first, the EU-style agreements mainly contain substantive competition provisions, i.e. provisions that aim to address anticompetitive behaviour. The second group of agreements, agreements where either the US[381] or Canada[382] is a signing party, do not contain substantive competition law provisions, but provisions dedicated to cooperation and coordination of enforcement activities.[383]

As the chapter shows, this distinction cannot be an absolute one, since there are agreements signed by the EU which apart from the substantive competition law provisions also include provisions on cooperation with the other contracting parties.[384] Nonetheless, the distinction used by the OECD offers some indications as to the way that the EU policy in this field can be differentiated when compared with the policies followed by the US and Canada. Whereas the US and Canada, use both enforcement cooperation agreements on competition and bilateral trade agreements to put into context issues of cooperation on competition law, the EU through bilateral trade agreements imposes the application of EU compatible competition rules regarding practices that affect common trade and in certain cases it obliges contracting parties to

379 EC Commission ENP Strategy Paper (2004), supra n. 366, at 5.

380 Ibid at 16.

381 The US has concluded a number of bilateral free trade agreements with Australia, Bahrain, Chile, Israel, Jordan, Morocco and Singapore. Nonetheless, it is notable that most of the US's bilateral trade agreements do not include competition provisions, though three recent US bilateral agreements do so, namely US-Singapore (2004), US-Australia (2005), and US-Morocco (2005).

382 Canada has signed agreements with Chile, Costa Rica, and Israel. Furthermore, Australia has similar agreements with Singapore, Thailand, the US, and New Zealand. See Holmes at al. (2005), supra n. 337, at 68-69.

383 OECD. (2005), 'Competition Provisions in Regional Trade Agreements',supra n. 3.

384 See section 4.3. below.

adopt legislation identical to its competition law. The next two sections of the chapter test this hypothesis as they analytically review the substantive competition provisions, as well as the rules providing for cooperation that are found in the EU bilateral agreements.

4.2 Substantive competition provisions in the EU bilateral agreements

In an attempt to observe the substantive competition provisions found in these agreements, the first distinction to be made is the one between antitrust rules, i.e. rules that aim to regulate anticompetitive practices conducted by private firms, on the one hand, and state aid rules and rules regulating state monopolies of a commercial character and public undertakings granted exclusive rights on the other, which refer to the regulation of state actions, and fall within the realm of EC competition law.

It may be observed that, depending on the particular category of the agreements, the wording of the competition-related provisions is very similar, or even identical, and this may attributed to two main reasons. First, by using identical provisions as a standard starting point of negotiations, such negotiations may be faster. One cannot overlook the fact that the resources of the EC Commission which negotiates bilateral trade agreements are limited, while the number of the agreements is increasing in a very rapid way. In addition, with regard to competition law, it is interesting to note that the chapters on competition of most of these agreements have been negotiated by officials who work for the Directorate General for Trade (DG Trade) and not the Directorate General for Competition (DG Competition). This is partly because DG Trade is responsible for the negotiation of these agreements and partly because DG Competition lacks adequate resources in order to get actively involved in the negotiations.[385]

4.2.1 Provisions relating to private undertakings

A further distinction should be made with regard to the antitrust provisions included in these agreements, as two groups of relevant provisions may be identified. The first includes provisions which require the EU's co-signing parties to approximate their competition laws to that of the EU. The second group of provisions includes provisions that prohibit particular anticompetitive practices conducted by private firms

385 Less than 10 officials work for the International Affairs Unit of DG Competition, which is the Unit responsible for all bilateral agreements, and the work carried out in international organisations. This point was raised by an interviewee from the European Commission, Brussels, 15/11/2007.

and have an effect on the common trade. This section reviews both groups of provisions relating to the regulation of anticompetitive practices of private firms.

Table 4.2 Provisions relating to anticompetitive business practices

EU	Obligation to harmonize national antitrust rules	Best effort to approximate laws	General statement that approximation of competition law would strengthen economic the parties economic links	Prohibition of anticomp. agreements that affect common trade	Prohibition of abuse of dominance that affect common trade
Bulgaria	√			√	√
Croatia	√			√	√
FYROM	√			√	√
Romania	√			√	√
Turkey	√			√	√
Algeria		√		√	√
Egypt		√		√	√
Israel		√		√	√
Jordan		√		√	√
Lebanon				√	√
Morocco		√		√	√
PA		√		√	√
Tunisia		√		√	√
Armenia			√		
Azerbaijan			√		
Georgia			√		
Kazakhstan			√		
Kyrgyzstan			√		
Moldova			√		
Russia			√		
Ukraine			√		
Uzbekistan					
Chile				√	√
Mexico				√	√
S.Africa				√	√

i. Agreements with acceding and candidate countries

A standard provision included in all the agreements concluded between the EU and candidate countries declares incompatible with their proper functioning, *'(...) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the*

prevention, restriction or distortion of competition',[386] as is a provision stating that the abuse by one or more undertakings of a dominant position in the territories of the European Community or of the contracting Party as a whole or in a substantial part thereof.[387] The agreements also state that the assessment of relevant cases will be on the basis of EC law.

It may be observed that the aforementioned provisions are copied from the EC Treaty (articles 81 and 82) and apply to cases where the intraregional trade is affected. On the other hand, being in the process of accession, candidate countries clearly have the obligation to approximate their existing and future competition legislation to that of the EU.[388] It follows that while EU compatible law is to be applied when an anticompetitive practice affects common trade, from the date of the adoption of the agreements, the EU co-signing countries also have to go a step further and align their legislation to that of the EU.

In practice, the process of the approximation of laws is closely scrutinised by the EC Commission, and in terms of competition, DG Competition monitors this process. Once the accession negotiations are launched, the Commission works together with representatives of candidate countries and issues screening reports, with which it expresses its opinion as to the development of the adopted competition legislation and the enforcement of such legislation. In the case, for instance, of Bulgaria, such reports were annual until the accession of the country to the EU. Screening reports have been also recently published regarding the two candidate countries with which accession negotiations have been launched, i.e. Croatia and Turkey.[389]

On the other hand, this obligation of candidate countries to have and enforce EU compatible competition rules also includes an obligation to have in place institutions

386 EU-Bulgaria art 64.1.i, EU – Croatia art 70.1.i, EU – FYROM 69.1.i EU- Romania art 64.1.i EU-Turkey art 32. The EU-Turkey Customs Union is the most comprehensive of all the agreements discussed in this section as it includes specific examples of agreements that fall within the scope of the relevant article.

387 EU-Bulgaria Art 64.1.ii, EU – Croatia Art 70.1.ii, EU – FYROM 69.1.ii, EU- Romania Art 64.1.ii, and EU-Turkey Art 33.

388 EU-Bulgaria Art 69, EU Romania Art 69, EU-Croatia Art 69. The EU-Turkey Customs Union provides that in areas of direct relevance to the operation of the customs union, Turkey will harmonise its legislation with that of the EU. Furthermore, approximation of laws is provided in the area of competition law and policy (Art 32, and Art 39). With regard to FYROM, the SAA provides in Art. 68 that approximation will take place in two stages and also states that approximation on competition law should be carried out in stage 1. In addition, all these agreements provide that anticompetitive practices will be assessed in the context of the EU's competition rules.

389 On Bulgaria for instance, the Commission published nine such annual reports from 1997 to 2005, when the Commission expressed its estimation that Bulgaria was ready to access the EU and apply the acquis upon accession. See the website of the EU, < http://europa.eu/scadplus/leg/en/lvb/e12101.htm> (last visited on 21 May 2007). On Croatia and Turkey, see below, foornote 426.

with the competence to apply the rules. This obligation is documented in the text of the EU bilateral trade agreements either directly, in the form of a clear obligation of the EU's co-signing parties to set up a competition authority, or indirectly, in two ways: by leaving this issue to be addressed with later decisions by the Association or Stabilisation Councils, which are established by the agreements and consist of government representatives of the parties, or by including a general statement by the signing countries that they will have and enforce competition laws.

In particular, the Customs Union with Turkey,[390] and Stabilisation and Association agreement with Croatia[391] clearly provide that the Parties should ensure that an operationally independent public body is entrusted with the powers necessary for the full application of the competition related rules.[392] Europe Agreements with Romania and Bulgaria state that the Association Council will adopt within three years the necessary rules for the implementation of the competition rules.[393] Even though the provision does not directly require the creation of an authority to apply the competition rules, both in the case of Bulgaria and Romania, these authorities were created before the adoption of the implementing rules.[394]

ii.1 Euro-Mediterranean agreements

Two provisions similar to Articles 81 and 82 EC provisions are also included in the agreements with Mediterranean countries, and are to be applied in cases where the common trade is affected.[395]

390 Article 39.a.

391 Article 70.3.

392 The agreement with FYROM does not include a similar provision, nevertheless as it is noted below, the obligation to have in place a competition authority is implied.

393 On the basis of this article, the EU-Bulgaria Association Council has adopted decisions No 2/97 on the implementation of competition rules, and Decision No 2/2001 of the EU-Bulgaria Association Council of 23 May 2001 adopting the implementing rules for the application of the provisions on State aid. Similarly, the EU-Romania Joint Council has adopted decision no 2/1999 on the implementation of competition rules, and Decision No 4/2000 of the EU-Romania Association Council of 10 April 2001 adopting the implementing rules for the application of the provisions on State aid referred to in Articles 64(1)(iii) and (2) pursuant to Article 64(3) of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and Romania, of the other part, and in Article 9(1)(iii) and (2) of Protocol 2 on European Coal and Steel Community (ECSC) products to that Agreement (2001/390/EC)

394 Hence, the implementing rules refer to these authorities. On Romania, see Art 1(2) of the implementing rules, and on Bulgaria, Art. 1(2) of the implementing rules.

395 Regarding the prohibition of anticompetitive agreements that have an effect on common trade, see EU-Algeria Art 41.1.a, EU-Egypt Art 34.1.i, EU-Israel Art 36.1.i, EU-Jordan art 53.1.a, EU-Lebanon interim agreement art 27.1.a, EU-Morocco art 36.1.a, EU-Palestinian Authority interim agreement art 30.1, and EU- Tunisia Art 36.1.a. With regard to the prohibition of abuse of dominance,

Some of the agreements[396] also provide that the cooperation shall be aimed to assist the Mediterranean countries to approximate their legislation to that of the EU, on fields covered by the agreement (including competition). In agreements concluded with Egypt, Israel and Jordan, the wording is slightly different, as it is provided that the Parties agree to make best efforts to approximate their laws in order to facilitate the application of the agreement.[397]

It is therefore clear, that as opposed to the agreements signed with acceding and candidate countries, which have the obligation to adopt EU-style competition rules, in the case of the Mediterranean Partners, such commitment is looser. Priority is given to the application of EC-compatible rules on practices that affect intra-regional trade, and accordingly in most of these agreements the Parties agree that practices that have an intra-regional effect contrary to the competition related provisions will be assessed in accordance with Articles 81, 82 and 87 of the Treaty establishing the European Communities, including secondary legislation.[398]

On the other hand, this clause highlights the fact that despite the fact that there is no clear obligation regarding the adoption of competition rules from the co-signing countries, it is important for the EU, as far as the intraregional trade is concerned, to impose the application of its own rules. The extent to which this goal has been achieved to date is a debatable issue however. Geradin and Petit for instance note that the Euro-Mediterranean agreements are of limited value and this is mostly because, in contrast to the provisions found in most of the agreements stating that the Association Council will adopt the necessary rules implementing the competition provisions of the agreements, such rules have only been adopted in the case of the agreements with Algeria and Morocco.[399]

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see EU-Algeria Art 41.1.b, EU-Egypt Art 34.1.ii, EU-Israel Art 36.1.ii, EU-Jordan Art 53.1.b, EU-Lebanon interim agreement Art 27.1.b, EU-Morocco Art 36.1.b, EU-Palestinian Authority interim agreement Art 30.1.b, and EU-Tunisia Art 36.1.b.

396 EU-Algeria Art 56, and similarly EU-Morocco Art 52, EU-Palestinian Authority interim agreement Art 41, and EU-Tunisia Art 52.

397 EU- Egypt Art 48, EU-Israel Art 55, EU-Jordan Art 69.

398 EU- Jordan Art 53.2, EU- Morocco Art 36.2, EU-Palestinian Authority interim agreement Art 30.2, EU-Tunisia Art 36.2. Furthermore, in the case of the EU – Egypt agreement, there is not a similar joint-statement by the contracting Parties. The EU rather declares this position. (EU-Egypt Art 34 and Declaration of the EC on Art 34). Finally, the agreements with Algeria, Israel, and the interim agreement with Lebanon, do not contain a similar provision.

399 See Geradin, D. and N. Petit (2004) 'Competition Policy in South Mediterranean Countries' 3:1 Review of Network Economics, 65, at 73 and 78. Most of the Euro-Mediterranean agreements also provide that in a period from three to five years (depending on each particular agreement) the Association Council will adopt the necessary rules for the application of the competition related provisions. Nevertheless, as noted above, such rules have only been adopted in the case of Algeria and Morocco.

This claim is to a certain extent confirmed by the Commission in its recent reports on the Mediterranean countries, published in the context of the ENP. The Commission notes that while Egypt,[400] and Lebanon[401] are in the process of drafting competition rules, Jordan[402] and Tunisia have recently adopted such rules (in 2004 and 2005 respectively). Of these countries the Commission expresses that actual development has been achieved only in the case of Tunisia.[403] Algeria has also adopted competition rules based on the EU model.[404]

ii.2 Agreements with Eastern European and Central Asian Countries

The agreements signed with Eastern European and Central Asian Countries only include a general statement that the parties recognise that an important condition for strengthening the economic links between EU and the co-signing party, is the approximation of the co-signing party's existing and future legislation to that of the Community, and includes competition in the extensive list of the relevant fields that have to be approximated.[405]

The agreements between the EU and Moldova, Russia, and Ukraine further include a general commitment for the contracting parties to have and to enforce laws addressing restrictions of competition by enterprises within their jurisdiction. The terms 'restrictions of competition' are not further defined by these agreements.[406] The remaining agreements between the EU, and Eastern European and Central Asian Countries include a general commitment that the Parties will examine ways to apply their respective competition laws on a concerted basis in the case where trade between

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In the case of Algeria, the rules have entered into force as part of the agreement's Annex 5 (a relevant annex - Annex 8 - is also included in the agreement with Syria, which nevertheless has not been ratified yet). With regard to Morocco, these rules were adopted in the form of a Council decision. See Council Decision No 1/2004 of the EU Morocco Association Council of 19 April 2004 adopting the necessary rules for the implementation of the competition rules'. OJ L 165/10, of 25/6/2005. The implementing rules include provisions relating to the cooperation of the competition authorities of the countries. This provisions are further discussed in section 4.3 below.

400 Commission (EC) (2005) 'Country Report: Egypt' Brussels, 2 March 2005 SEC(2005) 287/3, at 18.

401 Commission (EC) (2005) 'Country Report: Lebanon' Brussels, 2 March 2005 SEC(2005) 289/3, at 19.

402 Commission (EC) (2006) 'ENP Progress Report: Jordan' Brussels, 4 December 2006, SEC(2006) 1508/2, at 8

403 Commission (EC) (2006) 'ENP Progress Report: Tunisia' Brussels, 4 December 2006, SEC(2006) 1510 at 6.

404 See OECD Global Forum on Competition (2004) 'Challenges/obstacles Faced by Competition Authorities in Achieving Greater Economic Development Through the Promotion of Competition: Contribution from Algeria' CCNM/GF/COMP/WD(2004)21, at 4.

405 EU- Azerbaijan Art 43.2, EU-Armenia Art 43.2, EU- Georgia Art 43.2, EU-Kazakhstan Art 43, EU-Kyrgyzstan Art 44.2, EU Moldova Art 50.2, EU Russia Art 55.2, EU- Ukraine Art 51.2, and EU-Uzbekistan Art 42.2.

406 EU – Moldova Art 48.2.1, EU – Russia Art 53.2.1, and EU – Ukraine Art 49.2.1.

them is affected by particular practices conducted by firms,[407] without any further specification of practice that are prohibited.

Hence the commitments undertaken by Eastern European and Central Asian Countries are looser both in relation to those undertaken by candidate countries and in relation to those undertaken by the Mediterranean ones. That said, as in the case of the Mediterranean countries, the development of competition-related legislation of the former Soviet Union states that have been included in the ENP is being followed by the Commission. In recent Commission reports, it is noted that competition law was adopted in Armenia in 2000, and an EU-financed project currently provides support to the authority on developing implementing regulations, to supplement the competition Act adopted in 2000.[408] Azerbaijan and Georgia both have competition laws in place that cover anticompetitive agreements, abuse of dominance and mergers.[409]

In addition, much of the EU attention naturally falls to Russia, which is the most important strategic partner of the EU in the region. Informally, the Commission has been very interested in the development of competition rules in Russia,[410] which has adopted a competition law that includes prohibitions of anticompetitive agreements and abuse of dominance, as well as merger control. Nonetheless, as a recent OECD study notes, though relatively complete in terms of its areas of coverage, the competition law does not contain effective sanctions and fails to provide the Russian competition authority with sufficient investigative powers. [411]

iii. Agreements with selected trade partners

Finally, the agreement concluded between the EU and Chile, and EU and Mexico require no substantive changes in partners' laws. The Parties agree to apply their – already in place - competition regimes, in a manner consistent with the agreement. In contrast, even though South Africa had a competition law in place when

407 EU-Azerbaijan Art 43.4, EU-Armenia Art 43.4, EU–Georgia Art 44.2, EU- Kazakhstan Art 43.4, and EU-Uzbekistan Art 42.4. Only the EU-Georgia agreement further defines the terms 'competition laws' and provides that the EU will provide Georgia with technical assistance on the formulation and implementation of competition law, and in particular: agreements and associations between undertakings and concerted practices which may have the effect of preventing, restricting or distorting competition, abuse by undertakings of a dominant position in the market, state aids which have the effect of distorting competition, state monopolies of a commercial character, and public undertakings with special or exclusive rights.

408 Commission (EC) (2005) 'Country Report: Armenia' Brussels, 2 March 2005 SEC(2005) 285/3, at 17.

409 See EC Commission (2005) 'Country Report: Azerbaijan' Brussels, 2 March 2005 SEC(2005) 286/3, at 19; EC Commission (2005) 'Country Report: Georgia' Brussels, 2 March 2005 SEC(2005) 288/3, at 19.

410 Interview with EU official, Brussels, 15/11/2007.

411 OECD (2004) 'Competition Law and Policy in Russia: An OECD Peer Review' (OECD, Paris).

the EU-South Africa agreement was signed, the agreement provides in Article 36 that if at the entry into force of the agreement the contracting parties do not have the necessary laws and regulations for the implementation of the competition-related provisions of the agreement, they would have to do so within a period of three years.[412] In addition EU compatible provisions on anticompetitive agreements[413] and abuse of dominance are included in the agreement with South Africa, and are to be applied in cases where common trade is affected.

On the other hand, among the agreements explored here, only the agreement with Chile includes specific provisions relating to mergers. The parties declare that their merger regulations are included in the scope of competition law, as this is defined by the agreement.[414] That said, in view of the fact that the agreements with candidate countries and most of the Euro-Med agreements provide that anticompetitive practices will be assessed in accordance with Articles 81, 82 and 87 of the EC Treaty including secondary legislation, it could be argued that mergers are also covered by these agreements.

4.2.2 Rules relating to state actions and public undertakings

While the inclusion of competition provisions relating to private undertakings in the bilateral trade agreements of the EU reveals to an extent the attempt of the polity to export its competition law model, of equal or even greater importance are the rules relating to state aids and public undertakings. As noted in the context of the analysis carried out in Chapter 5,[415] state aid rules and rules on public undertakings, even though traditionally not considered to fall within the realm of competition law, have been treated as competition issues in the EU, as the relevant rules are enforced by the EU's central competition authority – the EC Commission. Hence, the inclusion of such provisions is an indication of the actual influence of the EU model on the development of international competition rules.

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412 It has to be noted that Annex VIII of the agreement clearly states that anticompetitive practices will be assessed in the case of the EU on the basis of articles 81 and 82 of the EC Treaty, while with regard to South Africa will be assessed on the basis of South African competition law. Thus there is no obligation created for South Africa to approximate its competition laws to those of the EU. See Szepesi supra n. 9. This differentiation in the case of the EU/South Africa agreement, may be attributed to the fact that South Africa has special competition rules to deal with the apartheid legacy, by supporting traditionally discriminated individuals.

413 EU-South Africa Art 35.a. Nonetheless it has to be stressed that the agreement declares incompatible with its proper functioning such practices, '(...) unless the firms can demonstrate that the anti-competitive effects are outweighed by pro-competitive ones'.

414 EU- Chile art 172.2. With regard to the EU the (later amended) Regulation 4064/89 of the EEC is mentioned.

415 See below, chapter 5, section 5.2.

On the other hand, the inclusion of state aid rules and rules on public undertakings is of major importance, as most of the EU's associated states are countries which for decades were governed by communist regimes and until the collapse of the Soviet Union, there was no market-based economy, and market activity was functioning in the context of a large administrative hierarchy.[416]

Table 4.3 State Aid Provisions

EU	Obligation to harmonise national state aid rules	Prohibition of. state/public aid	Abolition of countervailing duties in so far as signing countries have state aid rules in place	Obligation to apply state aid rules in a transparent way	Obligation to provide the other party with information on state aid	Obligation to harmonise national law on st. monopolies and p. undertakings with exclusive rights	Non discrimination in the actions of state monopolies
Bulgaria	√	√	√	√	√	√	√
Croatia	√	√	√	√	√	√	√
FYROM	√	√	√	√	√	√	√
Romania	√	√	√	√	√	√	√
Turkey	√	√	√	√	√	√	√
Algeria		√					√
Egypt		√	√	√	√		√
Israel		√	√	√	√		√
Jordan		√	√	√	√		√
Lebanon		√					√
Morocco		√	√	√	√		√
PA		√	√	√	√		√
Tunisia		√	√	√	√		√
Armenia							
Azerbaijan							
Georgia							
Kazakhstan							
Kyrgyzstan							
Moldova		√					√
Russia		√					√
Ukraine		√					√
Uzbekistan							
Chile				√	√		
Mexico							
S.Africa		√		√	√		

416 Litwack, J.M. (1992) 'Legality and Market Reform in Soviet-Type Economies' 5:4 The Journal of Economic Perspectives, 77, at 79-83.

i. Agreements with candidate countries

As in the case of rules relating to private undertakings, the provisions relating to state aids and public undertakings may be divided into two broad categories. First, in the context of their general obligation to align their legislation with the EU legislative framework, candidate countries are obliged to adopt state aid rules and rules on public undertakings, compatible with those of the EU. Second, the agreements also include particular provisions on the application of state aid and public undertakings on cases that affect intraregional trade.

State Aid. There is a common provision included in the agreements of the EU with candidate countries declaring incompatible with their proper functioning, '*(...) any public aid which distorts, or threatens to distort, competition by favouring certain undertakings or the production of certain goods.*'[417] Similarly with the other competition provisions, it is provided that the assessment of relevant cases will be on the basis of the EU law. The parties also ensure transparency in the application of their state aid rules, and express their commitment to provide information on state aid schemes and individual state aids, upon request of the other party.[418]

A consequence of the inclusion of state aid rules in the context of competition legislation, and the subsequent obligation of the countries to have and enforce state aid rules, is that the agreements signed with candidate countries provide that subsidies are regulated by the provisions relating to state aids. In this respect, countervailing measures[419] are abolished in so far as candidate countries have state aid laws in place.[420]

In addition, all the agreements provide that these countries will be considered for a (renewable with a later agreement) period of five years, as areas identical to those

417 EU-Bulgaria Art 64.1.iii, EU-Croatia Art 70.1.iii; EU-Romania Art 64.1.iii. Similarly EU-Turkey, Art 34. With regard to Euro-Med agreements see EU- Egypt Art 34.2, EU-Israel Art 36.2, EU-Morocco Art 36.3, EU-Palestinian Authority interim agreement Art 30.3, and EU-Tunisia Art 36.3.

418 EU-Bulgaria Art 64.4.b; EU-Croatia Art 70.5; and EU-Romania Art 64.4.b. There is no such provision in the CU with Turkey, and this is due to the fact that there is as of yet no authority in Turkey to review state aids.

419 Countervailing measures are extra duties ('countervailing duties') that may be charged by countries on subsidised imports that are found to be hurting domestic producers. See the WTO website <http://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm> (last visited on 21 May 2007).

420 In the case of the EU Turkey customs union it is provided in Article 44.1 that the Association Council is the competent body to suspend the application of trade defence measures; this has not yet been implemented however. Furthermore Article 70.9 of the SAA with Croatia agreement provides that 'Nothing in this Article shall prejudice or affect in any way the taking, by either Party, of antidumping or countervailing measures in accordance with the relevant Articles of GATT 1994 and WTO Agreement on Subsidies and Countervailing Measures or related internal legislation.', while in the case of the agreement with FYROM (Art. 69(5)) it is stated that any measures regarding lack of application of the state aid rules have to be taken in accordance with the procedures and under the conditions laid down thereby or the relevant Community internal legislation.

areas of the EU where the standard of living is abnormally low or any state monopolies there is serious underemployment, as described in Article 92(3)(a) (currently 87(3)(a)) of the Treaty establishing the European Community,[421] offering practically those countries the opportunity to be exempted from the application of the state aid rules for the given period.

Hence the agreements with candidate countries include a provision that prohibits state aid which affects common trade; they do not however include further clarifications as to the way that these provisions have to be applied. Cremona has identified a number of problems raised in view of this generality of the state aid provisions. She notes that in the case of the Europe Agreements with the current new Member States, more specific provisions were laid down in the rules implementing the state aid provisions of the agreements, and these rules provided that surveillance of state aid rules would be enforced by a national candidate country authority in cooperation with the EC Commission.[422]

In contrast to the Europe Agreements, the agreements with Croatia and with FYROM do not provide for the adoption of implementing rules, but have incorporated some of the implementing rules in the agreements themselves. In the case of Croatia for instance, it is provided that Croatia has to set up an independent authority with the competence to review state aids in the country.[423] In the case of FYROM, no such obligation is explicitly stated in the agreement, nonetheless the fact that FYROM undertakes the commitment to apply state aid rules within five years from the entry into force of the agreement, implies that the country has to establish a body to enforce the law.[424]

As with the provisions relating to private undertakings, in practice, as soon as accession negotiations are launched, the state aid schemes of the candidate countries are put under the microscope by the Commission, which reviews the type and amount of the

421 EU-Bulgaria Art 64.4.a; EU-Croatia Art 70.7.a; and EU-Romania Art 64.4.a. In the case of Bulgaria and Romania, this period was extended by the Association Council for another five years. For Bulgaria, see Decision No 1/2000 of the EU-Bulgaria Association Council. For Romania, see Decision No 2/2000 of the EU-Romania Association Council of 17 July 2000 (OJ L 230, 12/9/2000, p. 13).

422 See Cremona, M. (2003) 'State Aid Control: Substance and Procedure in the Europe Agreements and the Stabilisation Association Agreements', 9:3 European Law Journal 265, at 267-269.

423 EU-Croatia SAA Art. 70(4).

424 See Cremona, supra n. 422, at 269.

aid granted by the governments of candidate countries.[425] For instance, in its recent screening reports on Croatia and Turkey, the Commission notes that neither the legislative framework nor the enforcement level are satisfactory in these countries.[426]

State monopolies of a commercial character and public undertakings granted exclusive rights: the Europe agreements with Romania and Bulgaria, as well as the SAAs with Croatia and FYROM, and customs union with Turkey provide that the Member States and the candidate country undertake the commitment to progressively adjust any state monopolies of a commercial character so as to ensure that, by the end of the fifth year following the entry into force of the respective agreements, no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of the Member States and of the candidate country.[427] It is therefore made clear in the agreements that upon entry into force, any state monopolies in the candidate countries have to compete on equal terms with firms registered in the EU.

In relation to public undertakings, or undertakings granted exclusive rights, the Europe Agreements with Romania and Bulgaria[428] state that with regard to such undertakings, the Association Council shall ensure that, as from the third year from the date of entry into force of the Agreement, the Parties have to align their legislation to that of the EU, i.e. Article 90 of the EC Treaty,[429] and the principles adopted by the concluding document of the April 1990 Bonn meeting of the Conference on Security and Cooperation in Europe (notably entrepreneurs' freedom of decision). While a similar provision is included in the agreement with Turkey and FYROM,[430] in the case

425 This is secured in practice with the creation of inventories of state aid where the candidate and acceding countries notify any aid granted in their territory. See Cremona (2003) supra n. 422, at 280.

426 See Commission (EC) (2006) 'Screening Report: Turkey – Chapter 8, Competition Policy',<http://ec.europa.eu/enlargement/pdf/turkey/screening_reports/screening_report_08_tr_internet>en.pdf> (last visited, 21 May 2007), where the Commission, in pp. 10-13 expresses the opinion that the Turkish regime on state aids is not satisfactory, both with regard to the legal framework and the institutional set up of Turkey in these fields. Similar problems have been identified by the Commission with regard to Croatia; see Commission (EC) (2006) 'Screening Report: Croatia – Chapter 8, Competition Policy', <http://ec.europa.eu/enlargement/pdf/croatia/screening_reports/screening_ report_08_hr_internet_en.pdf> (last visited on 21 May 2007).

427 EU-Bulgaria Art. 30; EU-Romania Art. 30; EU- Croatia Art. 40; EU-Turkey Art. 42. The EU- Croatia SAA agreement further provides that the Stabilisation and Association Council will be informed of the measures adopted to implement this objective.

428 Article 66 in both agreements.

429 Now Article 86 of the EC Treaty.

430 EU-Turkey Art 41. The difference in the EU-Turkey agreement is that Turkey will ensure alignment of its legislation to that of the EU by the end of the first year following the entry into force of the agreement, EU-FYROM, Art. 70.

of the EU-Croatia SAA, the only reference in relation to public undertakings is made in Article 70.3, in the context of the creation of an independent body to apply competition provisions. On the basis of this provision, in conjunction with the country's obligation to align its competition rules to those of the EU, it may safely be assumed that the relevant rules applied by the Croatian institution have to be aligned with the EU law. In any case the development in the fields of state monopolies and public undertakings are also reviewed by the Commission in the context of the accession negotiations of candidate countries, and accession is only completed as long as these countries have reached satisfactory levels of approximation of their relevant regimes to EU law.

ii. Euro –Mediterranean agreements and agreements with former Soviet Union states

State aid: 2a) With the exceptions of the EU-Algeria agreement and the interim agreement between EU and Lebanon, all the Euro-Mediterranean agreements are identical to the agreements with candidate and acceding countries as they include a provision on state aids providing that public aids that distort or threaten to distort competition are incompatible with the proper functioning of the agreements.[431] The agreements also include a dual commitment by the signing parties to apply state aid rules in a transparent way and to submit any information required by the other party on state aid schemes and individual aid.[432] Some of them also state that the Mediterranean countries will be considered for a period of five years as areas where the standard of living is abnormally low as described in Article 92(3)(a) of the Treaty establishing the European Community.[433] As in the case of the agreements with candidate countries, the Euro-Mediterranean agreements contain provisions according to which the WTO rules on subsidies and countervailing measures will apply only for a period of 3-5 years (depending on each particular agreement) until the adoption of the relevant state (or public) aid rules.[434]

431 EU- Egypt Art 34.2, EU-Israel Art 36.2, EU-Morocco Art 36.3, EU-Palestinian Authority interim agreement Art 30.3, and EU-Tunisia Art 36.3.

432 EU-Egypt Art 34.2, EU-Israel Art 36.3, EU-Jordan Art 53.4.b, EU-Morocco Art 36.4.b, EU-Palestinian Authority interim agreement Art 30.5, and EU-Tunisia Art 36.4.b.

433 EU- Jordan Art 53.4.a, EU-Morocco Art 36.4.a, EU-Tunisia Art 36.4.a, and EU-Palestinian Authority interim agreement Art 30.4. The wording of the interim agreement between EU and the Palestinian Authority is different. The parties agree that for a period of 5 years public aid to the Palestinian Authority is allowed to grant public aid 'to undertakings as an instrument to tackle its specific development problems'.

434 EU-Egypt Art 34.2, EU-Israel Art 36.2, EU-Jordan Art 53.3, EU-Palestinian Authority interim agreement Art 30.3, and EU – Tunisia Art 36.3.

Hence, in terms of the legal text, the state aid related provisions found in the Euro-med agreements are very similar – or even identical to the provisions included in the agreements with candidate countries. That said, the major difference between these two groups of agreements is that while candidate countries have undertaken the commitment to align their rules to those of the EU, and their regimes are scrutinised by the Commission in the context of the accession process, the Southern Mediterranean countries only express that they will do their best to align their legislation with the EU legislation. In view of this fact, in combination with the absence of rules implementing the state aid provisions, and the fact that such provisions are more directly intervening in the public policies of Mediterranean countries, it comes as no surprise that to date none of the these countries have adopted EU compatible state aid rules.[435]

2b) As opposed to the agreements with Mediterranean countries, the agreements with former Soviet Union States do not include detailed state aid rules. In fact only three of them, namely the agreements that the EU has concluded with Moldova, Ukraine and Russia, state that the parties agree to refrain from granting state aid favouring certain undertakings or the production of products other than primary goods as defined in the GATT. They also agree to provide, upon request by the contracting Party, information on their state aid schemes or individual state aid.[436]

On the other hand, all the agreements with former Soviet Union states include a 'best effort clause' according to which the Parties will cooperate in subsidies investigations and will do 'their outmost' to find a constructive solution to the problem. Furthermore all these agreements clearly state that the provisions on competition law will not affect a Party's right to apply countervailing measures.[437] Hence, the wording of the agreements with former Soviet Union States is largely based on the relevant WTO instruments, and not on the EU state aid model, an indication that at least in terms

435 Interview with EU official (Brussels 15/11/2007). This argument is also seconded by the Commission in its recent ENP reports, where it is noted that there has been no progress with regard to the surveillance of state aid rules in Egypt, Jordan, Lebanon, Morocco, and Tunisia.

436 EU-Ukraine Art 49.2.2 and 49.2.3, EU-Moldova Art 38.2.2 and 48.2.3. In the case of EU-Russia agreement the wording of the provision is a little different than the other relevant provisions. Article 53.2.2 makes reference to "export aid" (as opposed to state or public aid in the other agreements). EU and Russia agree that for a transitional period of 5 years, Russia is able to adopt measures inconsistent with this provision (Annex 9).

437 EU-Armenia Art 14.6, EU-Azerbaijan Art 14.6, EU-Georgia Art 14.6, EU-Kazakhstan Art 13.6, EU-Kyrgyzstan Art 13.6, EU-Moldova Art 18 in conjunction with Art 48.5, EU-Russia Art 18 in conjunction with Art 53.5, EU- Ukraine Art 19 in conjunction with Art 49.5, and EU-Uzbekistan Art 13.6.

of the text of the agreements, state aid rules are not included in the competition framework set out by the signing countries.

That said, at least in two cases there have been developments in this field in this group of countries which might indicate that certain former Soviet Union states tend to be moving towards the adoption of EU compatible state aid rules. In particular, in 2004 the Ukrainian Antimonopoly Committee submitted a draft state aid law which was closely modelled on the *acquis*; the law was rejected however by the Ukrainian Parliament. According to the Commission, the Ukrainian agency intends to shortly submit an amended version of the Ukrainian competition Act, in order to introduce state aid elements.[438] Similarly, in the case of Armenia, even though there is no particular provision on state aid in its agreement with the EU, it has recently amended its competition rules, in which it has inserted state aid rules.[439] In both countries, these developments have occurred in the context of projects of technical assistance provided by the EU,[440] something that highlights two issues. First, that these agreements are the starting point for cooperation and in practice the cooperation may go further than it is provided in their articles. Second, technical assistance offered by the EU may facilitate such closer cooperation. The various technical assistance tools used by the EU are discussed in some more detail below.

State Monopolies of a commercial character: With regard to state monopolies of a commercial character, the Euro-Mediterranean agreements, as well as the agreements with Moldova, Russia, and Ukraine, include a standard provision, similar to the one included in the agreements with candidate countries, according to which the parties undertake a commitment to progressively adjust any state monopolies of a commercial character so as to ensure that, by the end of the fifth year following the entry into force of the respective agreements, no discrimination regarding the conditions under which

438 See Commission (EC) (2006) 'ENP Progress Report: Ukraine' Brussels, 4 December 2006, SEC(2006) 1505/2, at 10-11.

439 See AEPLAC (2007)'Assessment of Institutional Standing in the Fields of Competition and State Aid', report presented in the context of the EU funded TACIS programme, <http://www.aeplac.am/pdf/2007/Compet/Compet.pdf> (last visited on 3 August 2007), at 25-28. These provisions have not yet been applied.

440 On Armenia, see AEPLAC, ibid. The relevant project in Ukraine took place from 2001 to 2006, and the EU offered 2.5 million euros to assist the Ukrainian authority to 'to facilitate improvement of business climate in Ukraine through adjustment of competition rules and competition law enforcement in Ukraine, making it compatible with the international standards, and in particular, with the provisions of Partnership and Cooperation Agreement and requirements of the WTO'. See the website of the EU delegation in Ukraine, < http://www.delukr.ec.europa.eu/page38038.html> (last visited on 21 May 2007).

goods are procured and marketed exists between nationals of the Member States and of the candidate country.[441]

This provision could be of major importance in view of the fact that most of the EU's co-signing countries are economies in transition and the role of state monopolies are consequently considerable. Nevertheless, in the case of agreements where the obligations of the parties are limited to the expression of goodwill by the signing parties that they will do their best to approximate their legislations; the expected effects of this provision may not be overestimated.

Public undertakings granted exclusive rights: With regard to public undertakings, and undertakings granted exclusive rights, in the Euro-Mediterranean agreements, and the agreements with Moldova, Russia and Ukraine, the Parties agree that within 5 years from the adoption of the agreement, the Association Council will ensure that there is neither enacted nor maintained any measure distorting the Parties' common trade to an extent contrary to their respective interests. The Parties further declare that *'(...) This provision shall not obstruct the performance, in law or fact, of the particular tasks assigned to such undertakings'.*[442]

The wording therefore of these agreements on public undertakings granted exclusive rights differs from the wording of the agreements with candidate countries. On the one hand, the Mediterranean and former Soviet Union states do not have to align their legislation with the relevant EU rules, and on the other hand they withhold the discretion in practice to take measures which are probably incompatible with the EU competition rules, as they state that only measures that are contrary to their respective interests are not allowed, without further indication as to how these interests may be determined.

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441 With regard to the Euro-Med agreements see EU-Algeria Art 42, EU- Egypt Art 35, EU- Israel Art 37, EU-Jordan Art 54, EU Lebanon interim agreement Art 28, EU- Morocco Art 37,EU- Palestinian Authority interim agreement Art 31, EU- Tunisia Art 37. There is a transitional period of 5 years for the Parties to adjust their legislation to this provision; this is however without prejudice to their commitments to GATT. See also EU-Moldova Art 48.2.4, EU-Russia Art 53.2.4, EU-Ukraine Art 49.2.4. It has to be noted that depending on each particular agreement the parties have to adjust their relevant legislation in a period between 3 and 5 years, which may be further extended by a new agreement between the parties (EU-Moldova Art 48.2.6, EU-Russia Art 53.2.5, and EU-Ukraine Art 49.2.6).

442 EU-Algeria Art 43, EU-Egypt Art 36 EU-Israel Art 38, EU-Jordan Art 55, EU-Lebanon interim agreement Art 29, EU-Morocco Art 38, EU-Palestinian Authority interim agreement Art 32, EU-Tunisia Art 38. See also EU-Moldova Art 48.2.5, EU-Russia Art 53.2.4, and EU-Ukraine Art 49.2.5 It has to be noted that the transitional period provided for by these agreements varies from 3 to 4 years from the adoption of the agreements. The parties have also agreed that they may extend this period with a new agreement.

iii. Agreements with selected trade partners

State aid: Of the three agreements with selected partners (Mexico, Chile and South Africa), only the former does not make reference to public or state aids. The EU-Chile agreement does not define the terms public or state aid, nonetheless in Article 177.3 the parties agree to provide the other party with information on state aid on an annual basis, including the overall amount of aid and, if possible, by sector. Each party may request information on individual cases affecting trade between the parties. The requested party will use its best efforts to provide non-confidential information. Despite the fact that the wording of the agreement on state aids resembles to a certain extent the wording of the agreements with candidate and Mediterranean states, as opposed to the agreements with these countries the Chile agreement makes clear that the parties may take countervailing measures, in accordance with the WTO rules.[443]

The EU-SA agreement is the most comprehensive of the three on this particular issue. Section E of the EU-SA agreement is devoted to the regulation of public aid.[444] Article 41.1 of the agreement provides that public aid which favours certain firms or the production of certain goods, and which does not support a specific public policy objective or objectives of either party, is incompatible with the proper functioning of the agreement,.[445] The parties also agree to ensure that public aid is granted in a fair, equitable and transparent manner,[446] and they express their commitment to transparency in the field of public aid.[447] In addition, the parties agree to provide upon request of the other party, information regarding their aid schemes, or individual cases of public aid. The parties also agree that exchange of information shall take into account the limitations imposed by laws relating to business or professional secrecy.[448] Similarly to the agreements with candidate and Mediterranean countries, the agreement with South Africa also provides in Annex IX that the WTO rules on subsidies and countervailing measures will be applied as long as rules on public aid are not adopted.

443 EU- Chile Art 78.

444 It has to be noted that the provisions on public aid are included in a separate section of the agreement (Section E) and not in the competition related section (Section D)

445 ANNEX IX of the agreement specifies a number of relevant public policy objectives: regional development, industrial restructuring and development, promotion of the micro enterprises and SMEs, advancement of previously disadvantaged persons, affirmative action programmes, employment, environmental protection, rescue and restructure of firms in difficulty, R&D, support to firms in deprived urban areas, training.

446 EU-SA agreement Art 41.2.

447 Ibid. in Art 43.

448 Ibid.

State monopolies of a commercial character: With regard to public monopolies of a commercial character, of the three agreements only the EU-Chile agreement includes relevant provisions.[449] Specifically, it is provided that nothing in the competition related title prevents a party from designating or maintaining public or private monopolies according to their respective laws.

Undertakings granted exclusive rights: With regard to public undertakings or undertakings granted exclusive rights, the agreement between the EU and South Africa explicitly excludes public undertakings from the application of the rules relating to public aid[450] (ANNEX IX). There is no other particular reference made on this matter. In contrast, the EU and Chile in their agreement (Art 179.1) have included a similar provision to that in the Euro-Mediterranean agreements.[451]

4.3 Provisions on cooperation in competition

As mentioned earlier in the chapter, bilateral EU agreements primarily contain substantive competition law provisions. As this section observes, a number of these agreements also include provisions on cooperation on competition; the level of cooperation provided however varies considerably. For instance, supplementary agreements (rules implementing the competition provisions) have been signed with some candidate countries with the aim of strengthening and formalising cooperation on competition issues. Of the Euro-Mediterranean agreements, similar implementing rules have been adopted in the case of Algeria and Morocco, and include provisions on a number of cooperative instruments. In contrast to these agreements, the agreements signed with the former Soviet Union states include looser provisions on enforcement cooperation. On the other hand, the EU-Chile agreement and the EU-Mexico Joint Council decision 2/2000, which supplements the agreement between EU and Mexico, are the most detailed on cooperation issues, as they include (non-binding) provisions which are very similar to those included in competition enforcement cooperation agreements, discussed in Chapter 3 of the thesis.

More generally, it may be pointed out that in certain cases the actual level of cooperation depends on the political and economic closeness of the EU's co-signing

449 Article 179.1.

450 See Annex IX of the agreement.

451 The difference in the case of this agreement is that no transitional period is provided. The provision will be applied as soon as the agreement enters into force.

party with the EU. In this regard, and irrespective of the content of the agreements, the level of cooperation with candidate countries is usually very high, in view of the scrutiny that these countries have to go through in the context of their aim to enter the EU. This section discusses in some more detail the relevant cooperative tools provided by the EU bilateral agreements.

Table 4.4: Provisions on cooperation

EU	Notification of cases	Consultation in the context of dispute settlement	Consultation as a cooperative instrument	Exchange of non confidential information	Positive Comity	Provision on technical assistance on competition	General TA provision in the context of approximation of laws
Bulgaria	√	√		√			√
Croatia	√	√		√			√
FYROM	√	√		√			√
Romania	√	√		√			√
Turkey	√	√		√			√
Algeria	√	√	√	√		√	
Egypt		√		√		√	
Israel		√		√			
Jordan		√		√			
Lebanon		√					
Morocco	√	√	√	√		√	
PA		√		√			
Tunisia		√		√			
Armenia							√
Azerbaijan							√
Georgia							√
Kazakhstan							√
Kyrgyzstan							√
Moldova						√	
Russia							
Ukraine						√	
Uzbekistan							√
Chile	√		√	√		√	
Mexico	√		√	√			
S.Africa	√	√	√	√	√	√	

4.3.1 Notification of cases

As noted in the context of the analysis carried out in Chapter 3, notification is the starting point for cooperation in cases where two countries have an interest in the

same competition case. A number of the agreements reviewed in this chapter provide for notification of cases.

i. Agreements with candidate countries

Such notification is obligatory in the case of the agreements with candidate countries, in view of the scrutiny the regimes of these countries have to go through in the pre-accession process. Based on this information, the EC Commission is able to review and express its opinion on the development of competition law and policy in these countries and on the extent to which they have aligned their rules to those of the EU. In the case of the EU agreements, the notification provision was included in the rules implementing the competition-related provisions of these agreements.

Hence, the relevant rules regarding Bulgaria and Romania make clear that the competition authorities of the contracting parties have to notify the authorities of the other contracting party of an enforcement activity, in case such activity may have an effect to the other party's interests or relates to an anticompetitive practice that has been principally carried out in the territory of the other party.[452] Thus, these provisions lie between negative and positive comity, as they describe cases which are not exactly negative comity (obligation to take into consideration the interest of the other party when enforcing competition law), nor positive comity (request of enforcement action by the other party on practices that are conducted in the territory of the other party and have effects on the requesting party). While both negative and positive comity require some sort of action, or avoidance of action, the provisions discussed here only require notification of cases of mutual interest, and therefore may be rather a starting point for further cooperation on such cases.

A similar provision is included in the agreement between the EU and Turkey.[453] With regard to Croatia, and to FYROM, while no particular provision on case notification is included in the relevant agreements, the screening of the Commission of

452 Decision No 2/1999 of the Association Council between the European Communities and their Member States, of the one part, and Romania, of the other part of 16 March 1999 adopting the necessary rules for the implementation of Article 64(1)(i) and (ii) and Article 64(2) of the Agreement establishing an association between the European Communities and their Member States, of the one part, and Romania, of the other part, article 2.1. (OJ L 096/22, 10/04/1999), and Decision No 2/1999 of the Association Council between the European Communities and their Member States, of the one part, and Bulgaria, of the other part of 7 October 1997 adopting the necessary rules for the implementation of Article 64(1)(i) and (ii) and Article 64(2) of the Agreement establishing an association between the European Communities and their Member States, of the one part, and Bulgaria, of the other part, Article 2.1.

453 EU-Turkey, art. 43.

the development of the competition regimes of these countries indicates that these parties are in practice obliged to notify the Commission of any case of mutual interest.

ii. Euro – Mediterranean agreements and agreements with former Soviet Union states

As for the Euro-Mediterranean agreements, provisions on notification are included only in the rules implementing the competition-related articles of the agreements with Algeria and Morocco. The rules provide that the parties have the obligation to notify the other party, in initial stages of an investigation of a practice that: (a) the notifying party considers them relevant to enforcement activities of the other party; (b) they may significantly affect important interests of the other party; (c) they relate to restrictions on competition which may directly and substantially affect the territory of the other party; (d) they involve anti-competitive activities carried out mainly in the territory of the other Party; (e) they condition or prohibit action in the territory of the other party. The provisions are similar to the provisions included in the bilateral enforcement cooperation agreements of the EU, and describe a broad group of activities. Nevertheless their effect cannot be evaluated, since there have been no reports as to their implementation.

On the other hand, there are no particular notification provisions included in the agreements with former Soviet Union states.

iii. Agreements with selected trade partners

In contrast to these agreements, a detailed provision on notification of cases is included in the agreements concluded with Chile and Mexico. The provision states that each party will notify the authorities of the other party of an enforcement activity, in cases similar to those described in the implementing decisions of the agreements with Bulgaria and Romania.[454] As with Algeria and Morocco, there are no publicly available documents regarding the implementation of these provisions.

454 EU-Chile Art 174 , EU Mexico, Art. 3 of Annex XV.

4.3.2. Exchange of Information

With the exception of the agreements with former Soviet Union states,[455] all the other agreements provide for some sort of information exchange on competition matters, which is subject to confidentiality clauses similar to those discussed in Chapter 3. For example, the agreements with candidate countries provide that the contracting Parties will ensure administrative cooperation in the implementation of their respective competition legislations and exchange information taking into account the limitations imposed by the requirements of professional and business secrecy.[456] A similar provision is also included in the Euro-Mediterranean agreements,[457] and the agreement with South Africa.[458] Finally, the agreements with Chile and Mexico[459] contain a detailed provision on exchange of non-confidential information.

4.3.3. Consultations

Two distinct forms of consultations can be observed in the text of the agreements discussed in this section. The first is the consultation mechanism in the context of a party's decision to take action against a particular anticompetitive practice. The second is a part of the general cooperative framework provided by the agreements.

As to the former, the agreements with candidate and Euro-Mediterranean countries provide for consultations within the Association Committee, in case one of the

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455 Even though there are no formal documents explaining this non-inclusion of an information exchange provision, it may be suggested that this omission reflects to a certain extent the lack of confidence, at least on the part of the EU, regarding the prospect of the adoption and more importantly the application of competition rules by these countries. It may also be linked to the fact that only the agreements with Moldova, Russia and Ukraine include a clear commitment that the parties will have and enforce competition law, and even those agreements include no further clarifications as to the description of particular anticompetitive practices.

456 EU-Bulgaria Art 64.7, and EU-Romania Art 64.7. It has to be stated that the parties further declare in the joint declaration concerning Article 64 that they "(...) shall not make an improper use of provisions on professional secrecy to prevent the disclosure of information in the field of competition." The agreement with Croatia makes no specific reference to exchange of information on competition matters, nonetheless extensive exchange of information is provided with regard to economic and political cooperation. Finally the EU-Turkey Customs Union (Article 36) provides for exchange of information subject to the limitations imposed by laws relating to professional and business secrecy.

457 EU-Algeria Art 41.2, similarly EU-Egypt Art 34.6, EU-Israel Art 36.6, EU-Jordan Art 53.7, EU-Lebanon interim agreement Art 27.2457, EU-Morocco Art 36.7, EU-Palestinian Authority interim agreement Art 30.8, EU-Tunisia Art 36.7. Subject to the same limitations regarding professional and business secrecy, the EU-Algeria agreement further provides that the Parties shall ensure administrative cooperation in the implementation of their respective competition legislations.

458 EU-South Africa Art 40.

459 EU-Chile Art 177, EU Mexico Annex XV of the Joint Decision, Art. 4.

parties considers that a particular practice of a private firm is incompatible with the relevant provisions on competition. The parties may take action against this particular practice after consulting with the other party, or in any case after 30 working days following referral for such consultation.[460] A similar consultation process is provided by the EU- South Africa agreement in Article 37. Hence, this form of consultation may be launched when the parties intend to take action against a practice which affects common trade, and is applied in the context of the Association Committee, i.e. at the intergovernmental level.

The second type of consultation refers to consultation as a cooperative instrument, in the sense that it is applied by the competition authorities of the parties. For instance, the EU-South Africa agreement also provides in Article 38.4 that in case a competition authority decides to conduct an investigation or intends to take any action which may have an effect on the interests of the other contracting Party, the parties should consult at the request of either party and try to find a mutually acceptable solution in the light (among others) of comity considerations. A similar provision is included in Article 176 of the EU-Chile agreement, as well as the rules implementing the agreements with Algeria and Morocco.[461]

4.3.4 Positive comity

Of the EU bilateral agreements, only the one with South Africa contains a provisions regarding positive comity. In particular, Article 38.4 of the agreement provides that: *"The Parties agree that, whenever the Commission or the South African Competition Authority has reason to believe that anti-competitive practices, defined under Article 35, are taking place within the territory of the other authority and are substantially affecting important interests of the Parties, it may request the other Party's competition authority to take appropriate remedial action in terms of that authority's rules governing competition."*[462]

460 EU-Bulgaria Art 64.6, EU-Croatia Art 70.9; EU-Romania Art 64.6. Similarly EU-Turkey Art. 38. With regard to Euro-Med agreements see EU-Algeria Art 41.3, EU- Egypt Art 34.5, EU-Israel Art 36.5, EU-Jordan Art 53.3 EU-Lebanon interim agreement Art 27.3, EU-Morocco Art 36.6, EU-Palestinian Authority interim agreement Art 30.7, and EU-Tunisia Art 36.6.

461 See EU-Algeria, Annex 5, Art. 6.1 and Council decision implementing the competition provisions of the EU-Morocco agreement, supra n.399, Article 6.1.

462 Similar provisions are included in the EU-Bulgaria and EU-Romania Association Council Decisions supra n. 393.

4.3.5 Technical assistance

Almost all the agreements analysed in this section are concluded between the EU and developing or in-transition countries, and in this regard the offer of technical assistance is a very important condition for the adoption and application of competition rules in these countries.[463] A general (not specific to competition matters) provision on technical assistance is included in most of the EU bilateral agreements. On the other hand, some of the agreements also include provisions which require the grant of technical assistance specifically in the context of the cooperation of the signing countries on competition.

i. Agreements with candidate countries

In particular, in the framework of the obligation of Bulgaria and Romania to approximate their laws to those of the EU, the EU clearly takes responsibility to provide these countries with technical assistance, which may include among other things, the exchange of experts, the organisation of seminars, training activities, and aid for the translation of Community legislation in the relevant sectors.[464] Similarly, the SAAs with Croatia and FYROM state that in the context of their regional cooperation, the EU will support projects having a regional or cross-border dimension through its technical assistance programmes.[465]

ii. Euro – Mediterranean agreements and agreements with former Soviet Union states

Technical assistance provisions are also included in the rules implementing the competition provisions of the agreements with Algeria and Morocco. In particular, it is provided that technical cooperation shall include training of officials, seminars for civil servants and studies of competition laws and policies.[466] Furthermore, in the case of the EU-Egypt agreement there is a clear commitment (in Article 72) undertaken by the EU side to make a financial cooperation package available to Egypt, with the aim (among others) of establishing and implementing competition legislation.

463 The importance of technical assistance with regard to the development of competition law in developing countries is in some detail discussed in chapter six of the thesis, which observes the development of the competition debate at the WTO. See particularly section 6.3.2.

464 EU-Bulgaria Art 71, EU-Romania Art 71.

465 EU–Croatia Art 11, EU FYROM, Art 11. Such a provision is absent from the EU-Turkey Customs Union, nonetheless substantial technical assistance has been and is being provided to these countries too.

466 See EU-Algeria, Annex 5, Art. 7, and EU-Morocco implementing rules, Art. 7.

Furthermore, in the context of their legislative cooperation, the EU undertakes a commitment to provide a number of the former Soviet Union States with technical assistance.[467] Some of these agreements specifically provide for technical assistance on competition matters. In particular, the agreements with Moldova and Ukraine provide that The Parties agree that they will provide upon request of the other party and within available resources, technical assistance for the development and operation of competition rules.[468]

iii. Agreements with selected trade partners

Finally, the agreement with SA provides that the EU will provide South Africa with technical assistance in the context of the restructuring of its competition law and policy. The assistance will include the exchange of experts, training activities and the organisation of seminars. Article 178 of the EU-Chile agreement provides that *'the Parties may provide each other technical assistance in order to take advantage of their respective experience and to strengthen the implementation of their competition laws and policies'.*

iv. Application of technical assistance provisions

With regard to the application of the technical assistance provisions, the EU has established different projects to provide its partners with such assistance in the various fields that are covered by the agreements.[469] It is not quite clear what part of these available funds is dedicated to competition law and policy, as there is no single database published by the Commission which details the competition-related assistance.

467 EU-Azerbaijan Art 43.3, EU-Armenia Art 43.3, EU-Georgia Art 43.3, EU-Kazakhstan Art 43.3, EU-Kyrgyzstan Art 44.3, EU-Uzbekistan Art 42.3.

468 EU-Moldova Art 48.4, EU-Ukraine Art 49.4.

469 For instance, the EU has offered and still offers extensive financial assistance to candidate and accession countries through the PHARE (mainly), SAPARD, and ISPA programmes. The EU has also funded the Western Balkan States (Albania, Bosnia-Herzegovina, Croatia, the former Yugoslav Republic of Macedonia and Serbia and Montenegro) through the CARDS programme. As of 01/01/2007, the main instrument for technical assistance to candidate and potential candidate countries is the Instrument for Pre-Accession Assistance (IPA). See the EU Commission's website at <.http://ec.europa.eu/enlargement/financial_assistance/ipa/index_en.htm> (last visited on 21 May 2007). Cooperation with Mediterranean Countries has been funded through the EU MEDA programme, and with Eastern European and Central Asian Countries, through the TACIS programme. See, Commission (EC) (2004), 'European Neighbourhood Policy: STRATEGY PAPER', COM (2004) 373 final, at 30; See the EC Commission's website, <http://ec.europa.eu/enlargement/financial_assistance/cards/index_en.htm>. (last visited on 21 May 2007).

It could be argued that the screening of competition policy in candidate and acceding countries during the process of accession definitely includes elements of sharing of expertise, in the sense that the Commission uses its expertise to supervise the process of alignment of these countries' competition law and policy to that of the EU. It could be equally argued however that given that candidate countries are obliged to approximate their competition laws and policies to the EU regime, this sort of supervision is mostly embedded assistance and less a voluntary form of cooperation.

That said there are also projects which the EU's co-signing parties voluntarily accept. This is the case for instance with the so-called twining programmes, in which, by using EU funding, EU member states' competition authorities assist governments of EU's co-signing countries in their attempt to adopt EU compatible competition laws and establish the authorities that would apply the laws. For instance, the Romanian competition authority has been assisted by the Italian competition authority on issues of enforcement of competition law, in the context of the so-called twinning projects that have been financed by the EU.[470] A similar project is carried out in Croatia, where the competition authority is assisted by the relevant authorities of Germany and Croatia in the field of state aid.[471] At the moment, such twinning projects are underway in Morocco (with the German competition authority),[472] Tunisia, and Ukraine (both with the French competition authority).[473]

Another type of technical assistance provided by the EU involves the organisation of training programmes for officials of the EU's co-signing countries. Such training programmes are mainly financed by the Technical Assistance and Information Exchange programme (TAIEX), and take the form of short-term workshops. As has been recently documented, such workshops have been organised on a number of issues,

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470 UNCTAD (2007) 'Criteria for Evaluating the Effectiveness of Competition Authorities' Submission by Romania to the Inter-governmental Group of experts < http://www.unctad.org/sections/wcmu/docs/c2clp_ige8p15Romania_en.pdf> (last visited on 21 July 2007), at 4-5, where it is also noted that Romania also received technical assistance by the US in the drafting of its competition legislation.

471 Croatian Competition Agency (2006) 'Annual Report of the Croatian Competition Agency for 2005) < http://www.aztn.hr/eng/pdf/izvjesca/ANNUAL%20REPORT%20aztn%202005%20eng.pdf> (last visited on 21 May 2007), at 36.

472 See Commission (EC) (2006) 'Commission Staff Working Paper Accompanying the Communication from the Commission to the Council and the European Parliament on Strengthening the European Neighbourhood Policy; ENP Progress Report, Morocco', COM (2006) final, at 13, where it is also noted nevertheless that a competition directorate is not yet established in Morocco, and the Commission prepares an action plan with the aim of strengthening the role and capacity of the existing Competition Council and the other authorities which apply competition law in Morocco. It is also stated that Morocco's state aid regime lacks transparency.

473 With regard to Tunisia, see UNCTAD (2006) .'Voluntary Peer Review of Competition Policy: Tunisia' (UNCTAD/DITC/CLP/2006/2), at 26.

both relating to antitrust and state aid.[474] Finally, technical assistance may take the form of internships of competition officials of one country, at the EC Commission. Turkey has been a beneficiary of this form of technical assistance.[475]

4.4 Dispute settlement and the extent to which EU bilateral agreements are considered hard law

Having reviewed the substantive and cooperation provisions included in the EU bilateral agreements, a final issue to be examined is whether these agreements provide for the establishment of a decision body to review cases where a conflict has arisen relating to competition. The answer to this question is affirmative, as with the exception of Chile,[476] all the EU agreements include a provision relating to the creation of a dispute settlement mechanism that would decide on conflicts that may arise from their application.

Specifically, the agreements provide that the parties may refer to the Association Council,[477] which consists of government representatives, any dispute arising from the application of the agreement. The Council will settle such disputes by means of decision, according to most of the agreements.[478] In the case of the agreements with Eastern European and Central Asian Countries, with which as noted above the cooperation of the EU has been looser, the relevant Council is entitled to settle disputes by issuing a recommendation. In addition, with the exception of the agreements with candidate countries and the one with the Palestinian Authority, the EU bilateral agreements provide for an arbitration procedure, if the Council cannot reach a decision on the dispute.[479]

As noted in Chapter 3, the delegation of powers to interpret and implement the provisions is one of the elements that determine whether a norm may be considered as hard law. Thus, the inclusion of a dispute settlement procedure, not found in bilateral

474 UNCTAD (2005) 'Communication Submitted by Turkey to the Fifth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices' <http://www.unctad.org/sections/wcmu/docs/ tdrbpconf6p043_en.pdf> (last visited on 21 May 2007), at 6.

475 Ibid.

476 Which explicitly excludes disputes relating to the competition provisions from the dispute settlement provision. EU-Chile Art 180.

477 Or the Stabilisation and Cooperation Council in the case of the EU-Croatia Agreement, and the Cooperation Council in the case of the agreement signed with Central Asian and Eastern European countries.

478 All the agreements with Candidate Countries, the Euro-Mediterranean Agreements and also the agreement with South Africa.

479 Such an arbitration procedure is not applied in the agreement concluded between the EU and its candidate countries, and the EU-Palestinian Authority interim agreement.

enforcement cooperation agreements, raises the issue regarding whether such agreements may be classified as hard law or soft law. In the case of candidate countries, where the operation of the conflict resolution procedure is definitely influenced by the commitment of these countries to approximate their laws to those of the EU, and consequently the fact that the EU has a substantially extended bargaining power over candidate countries, it could be expected that the decisions of the Association Council would be binding.

On the other hand, as Szepesi notes, even though the agreements with Euro-Mediterranean countries and those with Mexico and South Africa include similar dispute settlement provisions, the expected effect of such provisions varies.[480] The author notes that the agreements with Mexico and South Africa include much more detailed rules on Dispute Settlement than the agreements with Mediterranean countries, and in particular, as opposed to the latter, they include specific time limits within which a decision must be reached. In addition, both the Euro-Mediterranean agreements and the agreement with South Africa include no provisions as to the actions that a complaining party may take in case the other party does not comply with the Councils' decision, elements that make their likely effects of limited value. On the other hand, the agreement with Mexico is much more elaborate in terms of procedures, time limits and actions that the complaining party may take in case of non-compliance.

Apart from delegation of powers, two further components have to be taken into consideration in the attempt to evaluate whether the EU bilateral agreements can be considered as hard law. These elements are precision of the rules, and obligations created by them.

With regard to the former, and at least in terms of substantive competition provisions, it may be argued that the extent of activities covered by these agreements also varies. For instance, the Europe agreements with Romania and Bulgaria, the SAA with Croatia, the Customs Union with Turkey, as well as the Euro-Med agreements and the EU-Chile and EU-South Africa agreements include specific provisions prohibiting anticompetitive practices, i.e. agreement between undertakings, and abuse of dominance, that have an effect on the trade between the signing countries. The agreements with candidate and Mediterranean countries also include provisions on state aids. It has been observed that Articles 81, 82, and 87 of the EU Treaty are copied into

480 See Szepesi, (2004), supra n. 9.

the text of these agreements, and from this perspective, the rules included in these agreements are quite precise. On the other hand, the obligation of the candidate countries to adopt EU compatible competition rules, an obligation not included in the other EU agreements, make the agreements signed with candidate countries far more precise than the rest.

In contrast to these agreements, the agreements with the former Soviet Union states include no particular substantive competition provisions other than general statements that the parties will make their best efforts to resolve problems that arise from anticompetitive practices that effect common trade, and therefore the element of precision is entirely absent.

With regard to the obligations created by the agreements, it has to be noted that every single agreement discussed in this section includes a *"catch all"* exemption clause, similar to Article 30 EC, that reads: '*Nothing in this Agreement shall preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of intellectual, industrial and commercial property or regulations concerning, gold and silver. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Parties.* [481]

Furthermore all the agreements include a national security clause which exempts the application of competition rules on issues relating to national security of the Parties. Another sector exempted from the application of competition law in most of the agreements discussed in this section is agriculture. Finally, the Parties may terminate these agreements any time subject to six months prior notification.

Despite the wide list of exceptions and the ability to terminate the agreements at any time, as suggested in various parts of the chapter, the extent to which EU's co-signing countries are obliged to apply the provisions of the agreements depends upon its economic and political closeness with the other state. In this respect it has been noted that only candidate countries are in practice obliged to apply the rules contained in the

481 EU-Croatia Art 42, EU Bulgaria Art 36, EU–Romania Art 36, EU-Turkey Art7, EU-Algeria Art 27, EU-Egypt Art 26, EU-Israel Art 27, EU-Jordan Art 27, EU Lebanon interim agreement Art 23, EU-Morocco Art 28, EU-Palestinian Authority interim agreement Art 24, EU-Tunisia Art 28, U-Armenia Art 16, EU-Azerbaijan Art 16, EU-Georgia Art 16, EU-Kazakhstan Art 15, EU-Kyrgyzstan Art 15, EU-Moldova Art 19, EU-Russia Art 19, EU-Ukraine Art 20, and EU-Uzbekistan Art 15.

agreements, since their application is a non-negotiable requirement for their access in the EU. Neither the agreements with Mediterranean countries nor the agreements with former Soviet Union states and selected trade partners entail such a commitment and therefore the extent to which such agreements could be classified as hard law or soft law is a matter mostly determined by the extent to which the signing states aim to cooperate. As observed, in the case of the EU agreements, the level of cooperation and commitment in the case of Europe agreements, is much higher than the agreements signed with Mediterranean and former Soviet Union states, as well as the agreements signed with South Africa, Chile and Mexico. This assumption also substantiates the argument that in the field of international law in general, and more particularly in that of trade agreements, one may observe a lack of clear hierarchy between general international law and treaties, and more generally, between any two rules of international law, as the rights and obligations that arise from international agreements derive from the will or consent of states.[482]

4.5 Conclusion

This chapter has suggested that being the strongest economic player in the region, the EU has used bilateral trade agreements to put into context its political and trade relations with a number of countries. The 23 agreements reviewed here in addition to the - no longer in force - 10 agreements signed with the countries that joined the EU in 2004 make the EU the most extensive user of this particular instrument in the field of international relations.[483] Three broad categories of such agreements have been identified. The first includes candidates wishing to join the EU countries. The second encompasses countries that have been included in the European Neighbourhood policy,

482 Pauwelyn, J. (2001) 'The Role of Public International Law in the WTO: How Far Can We Go?' 95:3 The American Journal of International Law, 534, at 536.

483 In fact this nexus of bilateral agreements will be further expanded soon with the conclusion of a number of Economic Partnership agreements between the EU and African, Caribbean and Pacific countries, in the context of the Cotonou Agreement. See Hurt, S.R. (2003) 'Co-operation and Coercion? The Cotonou Agreement between the European Union and ACP States and the End of the Lome' Convention' 24:1 Third World Quarterly, 161. It is noteworthy that this argument has been recently confirmed by a senior EC Commission official who noted that "...we are just starting negotiations on a new generation of market access driven Free Trade Agreements (FTA), which should have a strong competition dimension, ensuring that the positive changes induced by globalisation are not jeopardised by private anticompetitive practices or State induced distortions. Given that competition matters are off the agenda of the multilateral negotiations for now, we would try to move on competition issues bilaterally in the context of the new generation of market-access driven Free Trade Agreements (FTA).' See Galindo – Rodriguez B. (2007) 'European Competition Policy. development, and protectionism' Speech delivered at the Sixth Annual ICN Conference, Moscow, <http://www.internationalcompetitionnetwork.org/media/library/conference_6th_moscow_2007/34SpeechofBlancaRodriguezGalindoEuropeanCommissiononCompetitionandDevelopment.pdf>. (last visited 21 May 2007).

a project launched by the EU after the completion of the 2004 enlargement, and is based on two groups of agreements: agreements with Southern Mediterranean countries and agreements with former Soviet Union states. Finally, the EU has also been involved in agreements with selected trade partners, which is a third category of EU agreements reviewed in this chapter.

All these agreements include competition law provisions. While it has been suggested that, depending on the particular category of the agreement, the wording of the agreements are similar or at times identical, the chapter has shown that there are variations not just across but within categories. This has made the attempt to review such a large number of agreements difficult; nevertheless, it is also a departure from the relevant literature on this issue, which tends to view EU bilateral agreements as homogenous in terms of provisions on competition.

On the other hand, a common element of these agreements is that they include competition law provisions, in the attempt of the signing parties to secure that liberalisation of intraregional trade will not be distorted by anticompetitive practices. Hence competition law, at least conceptually, is to be used in the way that the EU itself has used competition law and policy, i.e. both as a way to secure competitive conditions in the market, and as an additional tool for the achievement of market integration with its trade partners. This argument leads to a number of consequences, identified in the chapter.

First the agreements include competition provisions to be applied to practices which have an effect on the intraregional market. In this respect, the agreements with candidate and Euro-Mediterranean countries, as well as those with Chile, Mexico and South Africa, provide that anticompetitive practices and abuse of dominance which have an effect on the common market are prohibited. Following the EU model, most of the agreements also provide for rules relating to state aids, state monopolies of a commercial character and public undertakings, and this is a clear indication that through these agreements the EU has, at least in terms of the text of the agreements, successfully exported its competition model to its trade partners.

Second, the agreements require that the signing countries have in place domestic competition rules and authorities to apply the rules, an assumption that is in certain cases explicitly referred to in the agreements, while in other agreements the parties leave this issue to be addressed with later decisions by the Association or Stabilisation

Councils, or they undertake a general commitment to have and enforce competition laws.

On the other hand, it has been argued that the actual application of the agreements to a major extent depends on the political and economic closeness of the EU with its co-signing countries. For example, the competition provisions found in the agreements with candidate countries have been most rigorously applied in the context of those countries' aim to access the EU, on the basis of which these countries undertook enormous non-negotiable, uniformly applied and closely enforced commitments.[484] Upon accession, candidate countries have to fully apply the competition rules of the EU, and therefore the Commission closely reviews the development of their competition regimes. At the opposite side and concerning the provisions included in the agreements with former Soviet Union states, the competition provisions are looser and include only general statements from the parties that they will have competition rules in place.

A further observation made in the chapter is that while the EU bilateral agreements mostly include substantive competition provisions, some of them also provide for cooperation on competition law and policy, which includes notification of cases, exchange of information and consultations on cases of mutual interest. Given that most of the EU co-signing states are in-transition economies, and therefore have no experience on the operation of competition law and policy, probably the most important cooperation provision is the one relating to technical assistance. The chapter has argued that while the EU has established separate funding instruments for the different groups of countries with which it has adopted bilateral agreements, it is not really clear what part of these funds have been used to finance technical assistance projects on competition. That said it has been also identified that technical assistance has been granted to a number of countries, and takes various forms such as twinning projects, the organisation of seminars, and internships at the EC Commission.

On the other hand, it has been argued that the provisions on cooperation represent only a starting point for real cooperation, as the extent to which actual cooperation is carried out in the field of competition law and policy is mostly a matter of the parties' broader economic and political relations. This argument is not much

484 Vachudova, M.A. (2002) 'The Leverage of the European Union on the Reform in Post Communist Europe', paper presented at the workshop 'Enlargement and European Governance' ECPR Joint Session Workshops, Turin, 22-27 March 2002, <http://www.essex.ac.uk/ecpr/events/jointsessions/paperarchive/turin/ws4/Vachudova.pdf> (last visited on 21 May 2007), at 10; Glenn, J.K. (2004) 'From Nation-States to Member States: Accession Negotiations as an Instrument of Europeanization' 2 Comparative European Politics, 3.

different than the one made in the case of bilateral enforcement cooperation agreements, and despite the fact that the bilateral EU trade agreements are much closer to hard law than enforcement cooperation agreements, as they are more precise than the latter and also provide for a dispute settlement procedure with the aim of resolving conflicts that would arise from their application. That said, even though bilateral trade agreements provide for a higher degree of obligations for the signing parties, the level of such obligations varies in accordance with the group of countries under examination. In this respect, cooperation with candidate countries, which undertake the obligation to approximate their rules to those of the EU and aim to enter the EU is fierce, while cooperation with the EU's other partners varies.

Returning to the main question that the thesis attempts to address, i.e. the role of EC competition law and policy in the formation of international agreements on competition, and based on the analysis carried out in this chapter, it could be argued that the EU has played a significant role in the development of international rules in the field of bilateral trade agreements. The EU has in practice used these agreements to export its competition model to a large number of neighbouring countries, some of which are already candidates for accession countries and selected trade partners.

Irrespective of whether the EU model is appropriate for these countries, a difficult issue that the thesis does not touch upon, the inclusion of competition elements in such a large number of international agreements makes by itself the role of the EU on the formation of international competition rules significant. On the other hand, the extent to which these agreements have been implemented in practice varies. The closer the political and economic relations of the co-signing party with the EU, the more rigorous the implementation of the agreement. In addition, in view of the fact that most of these agreements have been adopted in the last five to ten years, and that, as noted in Chapter 2, it takes time for countries with little or no competition culture to develop competition regimes, it would be unrealistic to expect that such a large number of agreements could be equally applied in a short period. That said, the provisions found in these agreements are definitely a starting point for the adoption and, more importantly, the application of effective competition rules, which is an assumption that may only be tested in the future.

Chapter 5: Plurilateral Regional Agreements Which Include Competition Provisions

Abstract

This chapter discusses plurilateral regional agreements, i.e. agreements signed by three or more neighbouring countries. Hence, the chapter looks at agreements similar to the EU. The aim of the chapter is twofold. The first is to review the competition regimes of such agreements and the second is to identify features of these regimes that may be attributed to the EU, which itself is the prominent example of a plurilateral regional agreement which has developed sophisticated competition law and policy.

Section 1 of the chapter includes a historical review of the formation of plurilateral regional agreements in various parts of the world, and introduces the agreements whose competition regimes are further reviewed in this study. It also briefly reviews the reasons which lead to the adoption of such agreements and discusses the role of competition law and policy in the context of plurilateral regional agreements. Section 2 is devoted to the presentation of the EU competition regime, and section three discusses the relevant regimes found in other plurilateral regional agreements around the world. Section 4 reads comparatively the provisions discussed in Sections 2 and 3, and attempts to explain the different models of the various competition regimes of plurilateral regional agreements, both in terms of substance and institutional set up. Finally Section 5 attempts to evaluate the role of the EU in the formation of competition rules in the context of plurilateral regional agreements.

5.1. History of plurilateral regional agreements, reasons that led to their adoption and the role of competition law and policy

5.1.1 Historical development of plurilateral regional agreements, and agreements reviewed in this chapter

i. Europe

While there is an overarching tendency of states in the last 20 years to get involved in plurilateral regional trade agreements, the origins of the creation of such agreements in various parts of the world go back to earlier centuries. For instance in Europe, which is the continent where regionalism has been more developed than anywhere else in the world, the ideas about unification of European countries originate

back in medieval times.[485] As seen in the previous chapter, a number of bilateral trade agreements were concluded between these countries in the 19th century, and the Prussian Zollverein established in 1834 was considered the first regional-plurilateral agreement is the world. These agreements lost favour in the first half of the 20th century, as nationalistic policies dominated the region and led to two destructive World Wars.[486] Nevertheless, following the WWII, a wide network of agreements was created in Europe,[487] including the European Economic Community - which later became the European Union and which has been to date the most comprehensive and successful relevant initiative in the history - [488] as well as the European Free Trade Association and The European Economic Area.[489]

ii. Latin America

This tendency for the creation of plurilateral regional agreements also appeared as early as the 18th and 19th centuries in certain other parts of the world, such as South America and Africa. In particular, in Latin America in the 19th century, Simon de Bolivar succeeded in uniting the territories of what are now Ecuador, Colombia, Venezuela and Panama into what he termed 'Nueva Granada'.[490] Following WWII, ideas concerning regionalisation were once more widespread in Latin America. With the EEC being the model, two major agreements were concluded in the 1960s, namely the

485 See Kalijarvi, T.V. (1963) 'Obstacles to European Unification' 348 Annals of the American Academy of Political and Social Science, The New Europe: Implications for the United States, 46.

486 That said, in the interwar period there were voices in many Western European Countries that supported the creation of a Federal State in the region. See Dinan, D. (2004) Europe Recast: A History of the European Union (Lynne Rienner), at pp. 2-6.

487 Sapir, A. (2000) 'Trade Regionalism in Europe: Towards an Integrated Approach' 38 Journal of Common Market Studies, 151.

488 For a brief overview of the historical development of the EU, see Appendix II.

489 Both EFTA and the EEA have adopted substantive competition rules identical to those of the EU, while in terms of institutional set up, both agreements include detailed rules. The chapter focuses on the examination of the EU competition law and policy system, which has been the model on which EFTA and the EEA have been both based. The EEA competition provisions are applicable whenever an anticompetitive practice has an influence on the territory of one or more EU Member States and one or more EFTA Member States, and where a practice has an effect on the trade between EFTA Member States. As to the former, concurrent jurisdiction is granted to the EC Commission and the EFTA Surveillance Authority to apply competition law. As to the later, the EFTA Surveillance Authority has the competence to review the case, and its decision is subject to an appeal before the EFTA Court of Justice. In relation to mergers that fall within the realm of the EC Merger Regulation, the EC Commission has the exclusive competence in the EEA to review mergers with a Community dimension. See the website of the EU at <http://ec.europa.eu/comm/competition/ international/multilateral/eea.html> (last visited on 21 May 2007).

490 Vervaele, J. AE (2005) 'MERCOSUR and Regional Integration in Latin America' 54 International and Comparative Law Quarterly, 387, at 389.

Latin America Free Trade Association (LAFTA)[491] and the Central America Common Market (CACM),[492] with the aim of promoting economic cooperation between the signing states, and a certain extent, of countering balance the hegemony of the US in the north part of the continent.[493] In subsequent years, two other major plurilateral regional blocs were set up in the region, namely the Andean Community in 1969 and MERCOSUR in 1989, both presently in operation and whose competition systems are further discussed in this chapter.[494]

iii. Africa

In Africa, the debate over regional integration and cooperation goes back to colonial times and became much more active following the WWII and especially following the independence of the majority of African countries in the late 1950s.[495] In 1963, the Organisation of African Union was established with the Treaty of Addis Ababa, which stressed the importance of the participating states' sovereignty, in the sense of non-interference with these states' internal affairs.[496] Hence the organisation was in fact a plurilateral conference of heads of governments, and the organising

491 LAFTA included all South America countries plus Mexico. High barriers to external trade were maintained, and in general Member States sought to regulate economic activity by legal agreements rather than by opening up the markets. Thus in general it has been observed that the agreement served mostly political rather than economic purposes, and it was finally replaced in 1980 by the Latin American Integration Association, which consists of 12 countries, (Argentina, Bolivia, Brazil, Chile, Colombia, Cuba, Ecuador, Mexico, Paraguay, Peru, Uruguay, and Venezuela), and is mainly structured around bilateral trade preferences. For a brief review of this regional arrangement see the IMF Directory of Economic, Commodity and Development Organizations, <http://www.imf.org/ external/np/sec/decdo/laia.htm> (last visited on 21 May 2007).

492 CACM was established in 1960 by four countries: Guatemala, El Salvador, Honduras, Nicaragua, while in 1963 Costa Rica joined the agreement. The agreement included provisions related not only to commercial policy, but also to financial, fiscal, monetary, and industrial policies. In the first years of its operation the agreement was a major success, nonetheless, it collapsed in 1969, due to the war between Honduras and El Salvador. CACM was revived in 1991 when the five central American Countries plus Panama signed the Protocol of Tegucigalpa with the aim of facilitating economic and political integration in the region. Despite the ambitious goals, such as the gradual creation of a customs union, a central customs authority and eventually the achievement of free movement of labour, capital, and the establishment of a monetary Union, the agreement has not been a success, as Panama has not ratified the Treaty and Costa Rica has opposed the creation of a monetary Union and more generally it has abstained from the attempts for political integration. See Wionczek, M.S. (1970) 'The Rise and Decline of Latin American Economic Integration' 9:1 Journal of Common Market Studies, 49, at 56-58.

493 Hufbauer, G.C. and B. Kotschwar (1998) 'The Future of Regional Trading Arrangements in the Western Hemisphere', Paper prepared for the Michigan State University 10th Anniversary Conference. Institute of International Economics Paper, <http://www.iie.com/publications/papers/paper.cfm? ResearchID=318>, (last visited on 21 May 2007), at 1.

494 On the main aims and institutional set up of these two agreements, see Appendix II.

495 See Adedeji, A. (2002) 'History and Prospects for Regional Integration in Africa' Speech presented at the Third Meeting of the African Development Forum, Addis Abeba, 5 March 2002, <http://www.uneca.org/eca_resources/Speeches/2002_speeches/ 030502adebayo.htm.> (last visited on 21 May 2007).

496 See Gottschalk, K. and S. Schmidt (2004) 'The African Union and the New Partnership for Africa's Development: Strong Institutions for Weak States?' 4 Internationale Politik und Gesellschaft, 138.

principles were intergovernmental, as consensus was required to adopt decisions, while the role and powers of its supranational secretariat were limited.[497] Despite some attempts to strengthen the political and economic cooperation and integration in the region,[498] a number of problems mainly relating to the political instability in the Member States, and most importantly the absence of sufficient institutions to carry out these demanding tasks, made the operation of the organisation problematic, and led to the adoption of the Treaty of Lome in 2000, which created the new African Union.[499]

The African Union is the most inclusive regional organisation on the African continent, as 53 different African States participate in it. Under the umbrella of the Union,[500] there are currently 14 plurilateral regional agreements in force in Africa, with overlapping membership,[501] and varying structures, levels of integration, and objectives.[502] According to a recent IMF study, these agreements usually have ambitious goals, for example the five major agreements in the region[503] aim to establish a customs union, and therefore require strong political commitment by the contracting parties. Nonetheless such a commitment has not proved strong in the past, as there have been long delays in the application of the agreements, and policy reversals by the Member States governments.[504] Second, these agreements are primarily focused on intraregional tariff reduction, and include variant and detailed rules of origin. Third, despite the attempts to reduce intraregional tariffs, external trade barriers remain

497 According to Article III of the Treaty, 'The Member States, in pursuit of the purposes stated in Article II solemnly affirm and declare their adherence to the following principles: 1. The sovereign equality of all Member States. 2. Non-interference in the internal affairs of States...'

498 Mainly through the establishment of an economic community in 34 years (in accordance with Article 6(1) of the Abuja Treaty of 1991, which established the African Economic Community, <http://www.africa-union.org/root/au/Documents/Treaties/Text/AEC_Treaty_1991.pdf>.

499See African Union (2007) 'African Union in a Nutshell', <http://www.africa-union.org/ root/au/AboutAu/au_in_a_nutshell _en.htm> (last visited in 21 May 2007).

500 One of whose aims is to harmonise the rules provided by the various regional agreements in the continent. See ibid.

501 This overlapping membership sometimes causes major problems with regard to the operation of particular agreements. For instance, Kenya and Uganda are members of both the East African Community and the Common Market for Eastern and Southern Africa. The EAC already operates as a Customs Union, applying an external tariff of of 0, 10, and 25% (with the exemption of particular sensitive products). On the other hand, COMESA was prepared to launch a common external tariff of 0, 5, 15, and 30 percent. Given that Kenya and Uganda are bound by the EAC common external tariff, the initiation of the COMESA tariff, scheduled for November 2004, were postponed, and this problem has not yet been solved. See Khandelwal, P. (2004) 'COMESA and SADC: Prospects and Challenges for Regional Trade Integration' IMF Working Paper, WP/04/227, at 10.

502 See Nyirabu, M. (2004) 'Appraising Regional Integration in Southern Africa' 13:1 African Security Review, 21.

503 (ECOWAS, WAEMU, COMESA CEMAC and SADC).

504 See Yang, Y. and S. Gupta (2005) 'Regional Trade Arrangements in Africa: Past Performance and the Way Foreword', IMF Working Paper, WP/05/36, at 12-15.

high.[505] Of these agreements, six are reviewed in this chapter: the West African Economic and Monetary Union (WAEMU); the Southern African Customs Union (SACU); the East African Cooperation (EAC); the Common Market for Eastern and Southern Africa (COMESA); the Economic Community of West African States (ECOWAS); and the Southern African Development Community (SADC).[506]

iv. North America and Carribean

In contrast to Europe, Latin America, and Africa, in North America regionalism has occurred only in the last 15 years, and this shift towards regionalisation is mostly a consequence of the decision by the US Government in the mid 1980s to adopt a two-track approach regarding international trade liberalisation by adding the adoption of preferential trading agreements to its traditional encouragement of multilateral trade liberalisation.[507] The outcome of this policy was the adoption of the North American Free Trade Agreement (NAFTA) and the negotiations over a possible wide ranging Free Trade Agreements of the Americas (FTAA). The competition provisions of these agreements, along with the relevant regimes of the Central America Free Trade Agreement plus Dominican Republic (CAFTA- DR), and the Caribbean Community (CARICOM), a plurilateral agreement formed by Caribbean countries, are briefly discussed in this chapter.

v. Asia

Finally, among the regions discussed in this thesis, Asia has been the last one to embark on the establishment of plurilateral regional trade agreements. Even to date, the major powers of the region, such as Japan, South Korea and China, prefer to get involved in bilateral free trade agreements with selected trade partners and not plurilateral trading schemes.[508] The main exception to this general observation is the Association of South East Asian Nations (ASEAN), which along with the Asia-Pacific Community (APEC), a cross-regional organisation that includes members from four continents, is further reviewed in this chapter.

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505 Ibid.

506 These agreements, along with the Economic Community for Central African states (ECCAS), are the agreements with the most significant economic impact in the region. See Yang, andGupta ibid, at 10.

507 Krueger, A.O. (2000) 'NAFTA's Effects: A Preliminary Assessment' 23:6 The World Economy, 761, at 761-763.

508 See Hufbauer, G.C., and Y. Wong (2005) 'Prospects for Regional Free Trade in Asia', IIE Working Paper, WP 05-12.

Table 5.1. Plurilateral agreements reviewed in Chapter 5 (For an overview of the structure and aims of the agreements see Appendix II)

AGREEMENT	Formed (Year)	Type of Agreement	Current Status of the Bloc	Continent	Number of Member /Negoti-ating States
EU	1957	CU-Common Market- Monetary Union	CU-Common Market-Monetary Union	Europe	27
ANDEAN COMMUNITY	1969	Free Trade Area	Free Trade Area	Latin America	4
MERCOSUR	1989	CU	Partial CU (on 90% of products)	Latin America	4
NAFTA	1994	Free Trade Area	Free Trade Area by 2008	North America	3
FTAA	-	Under negotiations (stagnant)	-	North and Latin America	34
CAFTA-DR	2005	Free Trade Agreement	Immediate Free Trade Area on 80% of products and eventual full FTA in 10 years from adoption	North-Central America	7
CARICOM	1973	Single Market	Partial single Market	Caribbean	15
WAEMU	1994	CU-Common Market- Monetary Union	Monetary Union – partial CU and Common Market	Africa	7
EAC	1967 - collapsed in 1977- Revived in 1999	CU (aim: Common Market and Monetary Union)	CU	Africa	3
COMESA	1993	CU	FTA for 11 Member States, PTA for 9 and aim: CU by 2008	Africa	20
SACU	1910 (Amended 1969 and 2002)	CU	CU	Africa	5
SADC	1992	FTA	FTA for all Member States except Angola and D.R. Congo – aim: CU by 2010, Common Market by 2015 and a monetary union by 2018	Africa	15
ECOWAS	1975- amended 1993	Aim: Economic and Monetary Union	Aim non accomplished, economic integration very slow	Africa	15
ASEAN	1977 – amended 1995	FTA	Aim: Full FTA for 5 members in 2010, for all Members in 2015. Economic Union by 2020	Asia	9
APEC	1989	Informal forum promoting economic liberalisation	-	cross-regional	21

5.1.2. Factors that lead to the creation of plurilateral-regional agreements

In an attempt to review briefly the factors that lead to the establishment of plurilateral regional agreements, an initial observation is that, with the exception of APEC, all the agreements discussed in this chapter share a significant common characteristic: they are regional blocs, *i.e.* they are formed by neighbouring countries. The assumption that people living in geographically close countries develop a certain community of political and economic interests, and this leads to the creation of formal international norms, was first tested in 1943, when a paper published in the American Political Science Review attempted to identify the characteristics of regionalism and universalism.[509] Geographic proximity remains probably the most important factor that leads to the conclusion of such agreements, since it is believed that neighbouring countries are 'natural' trading partners,[510] and on the basis of this assumption a number of scholars have suggested that FTAs among regional groupings would usually have positive effects.[511]

Other factors that have been identified as significant in the decision of countries to establish regional agreements include the belief that the creation of larger (regional) markets would enable participating states to exploit economies of scale, increase domestic competition, and thus raise returns on investment and attract more foreign direct investment.[512] In addition, it has been argued that the formation of plurilateral regional blocs is linked to the attempt of certain neighbouring states to achieve peace and security in the region, as well as the attempt of particular groups of neighbouring countries to counterbalance the negotiating powers of other (existing) regional blocs. As to the former, it has been argued that the formation of the European Union was a way to ensure that France and Germany would not repeat the wars they fought during the preceding hundred years. The same arguments regarding democracy, peace and economic stability were raised in the negotiations with three more recent Member States, that is Greece, Spain and Portugal, which suffered from dictatorships a few years

509 Potter, P.B. (1943) 'Universalism Versus Regionalism in International Organisation' 37:5 The American Political Science Review, 850, at 852. See also pp 853 onwards for a critique on the arguments developed pro and against regional integration.

510 Despite the fact that in the last 10 years or so both the EU and the US have concluded agreements with countries that are not geographically close to them. For instance EU has signed trade agreements with Mexico, Chile and South Africa, and the US with Singapore and Jordan.

511 Krugman, P. (1991) 'The Move to Free Trade Zones' in Policy Implications of Trade and Currency Zones (Federal Reserve Bank of Kansas City, Kansas City), pp. 7-42.

512 Yang, Y. and S. Gupta (2005), supra n. 504, at 9.

before their accession to the Community.[513] As to the latter (counter-balancing of negotiating powers of other regional blocs)[514] it has been argued that both MERCOSUR and the ANDEAN Community have been considered as a response to the establishment of NAFTA and the launch of negotiations for an FTAA.[515] Similarly, as Young and Gupta argue, the creation of plurilateral trade agreements in Africa is, inter alia, an expression of the assumption that regional trade agreements increase the bargaining power of the participating states in international trade negotiations, especially in Africa, which consists of a large number of poor states.[516] This debate directly refers to political realism, as it indicates that the main motive behind the conclusion of plurilateral trade agreements is the will of particular groups of countries to increase their power over other groupings.[517]

5.1.3 EU strategy regarding the formation and operation of plurilateral regional agreements

A final (relevant) point concerning the broader issue under discussion is the overall strategy of the EU in the formation of other plurilateral agreements. As Bilal notes, the EU supports other regional initiatives in various forms.[518] First, the support is expressed by a general political support to these initiatives, which includes sharing of the EU's experience in the development of its own regional system. Such support for the operation of other regional agreements is evident for instance in the position taken by the EC Commission with relation to the negotiation of Economic Partnership

513 See Eichengreen, B. and J. A. Frankel (1995) 'Economic Regionalism: Evidence from Two 20th Century Episode' 6:2 The North American Journal of Economics and Finance, 89, at p. 103, where the authors argue that the motives behind the negotiations with former Members of the Soviet Union was also the promotion of peace, democracy and eventual stability in the region. Similarly, as noted in Appendix II, among the main reasons that led to the creation of MERCOSUR, was to avoid possible hostilities between the two stronger states in the region, i.e. Brazil and Argentina. The authors argue that the motives behind the negotiations with former Members of the Soviet Union was also the promotion of peace, democracy and eventual stability in the region.

514 See Mansfield, E.D. and E. Reinhardt (2003) 'Multilateral Determinants of Regionalism: The Effects of GATT/WTO on the Formation of Preferential Trading Agreements' 57 International Organization, 829.

515 Brown, O., F. Haq Shaheen, S. Rafi Khan, and M. Yusuf (2005) 'Regional Trade Agreements: Promoting Conflict or Building Peace?' International Institute for Sustainable Development Working Paper, at 6.

516 Yang and Gupta, supra n.504, at 25. The authors note that while Africa has 12% of the world's population, it produces only 2 percent of the world's output, because of low productivity.

517 Chapter 6 examines the process of negotiations for a multilateral competition agreement and argues that various developing countries have coordinated their actions, and through their regional blocks have consistently expressed their disagreement to the possible adoption of a multilateral agreement on competition under the auspices of the WTO.

518 Bilal, S. (2004) 'Can the EU Be a Model and a Driving Force for Regional Integration in Developing Countries?' Paper presented at the Second Annual Conference of the Euro-Latin Study Network on Integration and Trade, Florence, Italy, October 29-30, 2004, <http://www.ecdpm.org/Web_ECDPM/Web/Content/Download.nsf/0/22194B4795A077D5C1256F9E0053FC38/$FILE/Bilal%20-%20EU%20model%20of%20RI%20Draft%20rev.pdf> (last visited on 21 May 2007), at p. 9.

Agreements (EPAs) with African, Caribbean and Pacific (ACPs) countries. The Commission notes that regional integration in these regions is among the focal aims of the negotiations, along with partnership, development, and compliance with the WTO provisions. As the Commission states, *'Regional integration is a powerful means of fostering integration into the world economy. The EU itself has built its strength on regional integration. The recent progress made in regional integration within the ACP reflects the political decision of the ACP States to base their own integration into the world economy on regional economic integration. EPAs will therefore be based on regional integration initiatives existing in the ACP. They will keep step with the integration process within the ACP, as provided for in the Constitutive Act of the African Union or as agreed among the ACP States as a whole.'*[519]

Besides providing political support and experience sharing, the EU has also committed a substantial share of its development aid and technical assistance to the support of regional initiatives, which is one of the six priority areas of its development assistance. In the framework of its partnership with the African, Caribbean and Pacific states (Cotonou Partnership Agreement), and as noted in chapter 4 the Mediterranean countries (MEDA), the EU has jointly carried out regional indicative programmes in parallel with aid granted to particular states.[520]

On the other hand, the EU is in the process of formalising its relationship with other plurilateral regional agreements through the negotiation of association agreements with regional blocs such as the ANDEAN Community, MERCOSUR, and ASEAN, as well as in the context of the Cotonou Agreement with African, Caribbean and Pacific countries.[521] As Meunier and Nicolaidis argue, the EU sees itself as a role model for other regional agreements, and through the negotiation of such inter-regional

519 See the website of the Commission, at <http://ec.europa.eu/trade/issues/bilateral/regions/acp/ nepa_en.htm> (last visited on 21 May 2007). In a similar vein, the Commission has also stated on another occasion that the opinion that regional integration can 'enhance efficiency, increase competition between peers in development, enable economies of scale, increase attractiveness to Foreign Direct Investment (FDI) and secure greater bargaining power.... [and that] regional integration can contribute to the consolidation of peace and security'. In addition, the Commission notes that '...regional integration is enhanced when co-operation goes beyond border measures and is extended to deeper integration, including the convergence of domestic policies such as investment and competition policies...'. See Commission (EC) (2002) Communication to the Council and the European Parliament 'Trade and Development: Assisting Developing Countries to Benefit from Trade', 18 September 2002, COM(2002) 513 final, at p. 13.

520 See Bilal , supra n. 518, at 9.

521 See in detail the website of the Commission, at <http://ec.europa.eu/external_relations/search /regions.htm> (last visited on 21 May 2007).

agreements it aims to exploit economies of scale through market access.[522] The authors also argue that by these agreements, as in the case of bilateral agreements discussed in chapter 4, the EU attempts to export its single market rules, and therefore includes in the agreements areas which include the environment, competition or intellectual property standards.[523] While it would be difficult to evaluate these argument - given that none of the inter-regional agreements have been concluded - these assumptions will be revisited in section 5 of the chapter, in the context of the evaluation of the role of the EU and its laws in the formation of competition regimes in various other plurilateral regional agreements.[524]

5.1.4 The role of competition law and policy in plurilateral regional agreements, and the role of plurilateral regional agreements in the development of international competition norms

A s in the case of bilateral trade agreements, Appendix II shows that competition law is only one of the legal tools adopted in the context of these agreements, and at least in theory, its role is to ensure that trade liberalisation on the borders of these blocs' Member States is not hampered by anticompetitive practices conducted by private firms. In this regard, it could be argued that the more advanced the level of economic integration, the more vigorous the intraregional activity of private companies and, in consequence, the more demanding the need for effective competition regimes. This argument is substantiated by the fact that the EU has been the plurilateral regional agreement with both the deepest level of economic integration and the most developed competition regime in the world. At the opposite side, of equal significance is the role that competition law may play in the achievement of market integration, and this is a hypothesis also verified in the development of the EU, where, as was noted, competition law and policy has been used to facilitate market integration.

From a different perspective, it may be also argued that the inclusion of competition law and policy in such agreements is an important factor influencing the development of international competition norms. It could be argued, in particular, that the competition regimes provided by these agreements, some of which include a wide

522 Meunier, S. and K. Nicolaidis (2006) 'The European Union as a Conflicted Trade Power' 13:6 Journal of European Public Policy, 906, at 911and 915. See also Elgstrom, O. (2007) 'Outsiders' Perceptions of the European Union in International Trade Negotiations', 45 Journal of Common Market Studies, 949, at 955 – 956.

523 Ibid at 914.

524 See section 5.5. below.

number of Member States, may be considered as a miniature of a possible future multilateral agreement on competition, and this hypothesis is based on the fact that as opposed to bilateral agreements, where in practice the stronger state on many occasions imposes the adoption of regulatory measures on weaker ones, plurilateral agreements are characterised by a more balanced distribution of national influence, and therefore they simulate to a certain extent the possible operation of competition law and policy at the multilateral level.

In addition, if all of these agreements have the success of the EU, the proliferation of such agreements may in the future lead to a situation where a handful of representatives from these regional blocs negotiate at the international level on behalf of the Member States. Such a hypothesis, which could be of major significance with regard to competition law and policy, is to a certain extent validated in the next chapter, where it is observed that on particular trade issues under negotiations at the WTO not only does the EU negotiate on behalf its Member States, but in practice the members of more regional blocs such as the African Union and CARICOM express a common unified approach at this level.[525]

On the other hand, it also has to be noted that with the exception of the EU, whose competition regime has been widely researched, only very recently have the competition systems of plurilateral regional agreements been discussed in the relevant literature;[526] the motives behind the inclusion of competition rules in plurilateral regional agreements in general are equally under-researched. Besides, as shown in Section 3, which reviews the competition regimes of various plurilateral regional agreements, with the exception of WAEMU, regional competition rules have not been applied to date for a number of reasons. In this regard, it is not possible to assess the actual effect of competition rules in these agreements, unless detailed analysis of the

525 See below, chapter 6, section 6.3.2.

526 Exceptions to this general observation are papers written by Bellis and Hoekman in the late 1990s, and by Jenny and Horna, as well as Desya and Barnes more recently. See Bellis, J.F. (1997) 'The Treatment of Dumping, Subsidies and Anticompetitive Practices in Regional Trade Agreements' in Demaret, P., J.-F. Bellis and G. García Jiménez (eds), Regionalism and Multilateralism after the Uruguay Round: Convergence, Divergence and Interaction. (European Interuniversity Press, Brussels); Hoekman, B. (1998) 'Free Trade and Deep Integration. Anti-Dumping and Antitrust in Regional Agreements' World Bank Policy Research Working Paper, No. 1950; Jenny, F. and P. Horna (2005) 'Modernization of the European System of the Competition Law Enforcement: Lessons for Other Regional Groupings', in Brusick, Alvarez and Cernat (eds) Competition Provisions in Regional Trade Agreements: How to Assure Development Gains (UNCTAD, Geneva and New York); Desta, M.G., and N. J. Barnes (2006) 'Competition Law and Regional Trade Agreements' in Lorand Bartels and Federico Ortino (eds.) Regional Trade Agreements and the WTO Legal System (Oxford University Press), p. 239.

geopolitical factors that occur in the particular regions where these agreements operate is carried out, a task that cannot be undertaken in the context of this study.

To this end, and in view of the working question of the thesis, i.e. what is the role of the EU competition rules in the formation of international agreements on competition, the remainder of this chapter provides a brief review of the EU competition regime, and then moves onto the presentation of the competition regimes of a number of other regional blocs. Finally, the chapter attempts to identify common characteristics of these regimes, and some of their features which may be attributed to the influence of the EU.

5.2 Competition law and policy in the EU

Competition law and policy has been of primary importance in the development of the European Union. As early commentators on the political developments in the Union suggested: *'...[C]ompetition has been chosen as the motive force of the economic revolution that is to promote the interpretation of several national economies, prisoners for centuries of their different structures, different traditions and habits, and merge them in a new economic entity, the European Common Market'.*[527] Against this background, competition provisions were inserted into the Treaty of Rome in order to ensure, according to Article 3(g) of the EC Treaty, that competition remains undistorted in the internal market.[528]

The Treaty further includes both substantive competition rules and general rules regarding the institutional structure of the regime. These provisions are found in Chapter 1 (Articles 81-89) of Title VI of the Treaty relating to *'common rules on competition, taxation, and approximation of laws'*. Given that it would be impossible – in the context of this thesis - to describe in detail the development of competition law in

527 Spaak, F. and J.N. Jaeger (1961) 'The Rules of Competition Within the European Common Market' 26:3 Law and Contemporary Problems, 485, at 487.

528 While competition and free competition are included in various other articles of the EU Treaty. For instance, Article 10 notes that Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks, abstain from any measure which could jeopardise the attainment of the objectives of the Treaty, including competition law. This article, in conjunction with Articles 81 and 82 have been applied by the ECJ on various occasions. See Whish, R. (2003) Competition Law, (Butterworths, 4th edition), at 184-189. Furthermore, Article 27(c) mentions that the Commission should take the measures appropriate to ensure undistorted competition with regard to finished goods, and Article 98 of the Treaty repeats that '...The Member States and the Community shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources...'.

the EU, an issue that has been extensively researched,[529] this section only attempts to highlight the main substantive provisions of the Treaty. In addition, the section also makes reference to the institutional set up of the Union relating to competition, and while probably too brief, this discussion is of significance for two reasons: first because the EU is the only regional agreement – if not the only international agreement of any kind – where competition law has been practically applied, and where competition policy has been developed. Second, because this discussion may provide us with insights when come to evaluate the provisions on the institutional set up of other plurilateral regional agreements.

5.2.1 Substantive provisions

i. Articles 81 and 82

The main antitrust provisions of the EU are found in Articles 81 and 82 of the Treaty. In particular Article 81 declares as void any horizontal and vertical agreements and concerted practices by undertakings which have as an object or effect the prevention, restriction or distortion of competition in the common market, subject to certain exemptions that may be granted on the basis of the third paragraph of the article.[530] On the other hand, Article 82 of the Treaty prohibits the abuse of dominant position by one or more undertakings, where such practices have an effect on trade between Member States.[531]

As it has been noted in Chapter 2, on the basis of the market integration aim, and the influence of ordoliberalism, the particular application of Articles 81 and 82 has been to a certain extent different from the way that the comparable Sections 1 and 2 of the Sherman Act, have been applied in the US, although the extent of this divergence has been substantially reduced in recent years.

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529 For an introduction to the competition law and policy of the EU, see Whish, ibid; Jones and Sufrin, supra n. 83; Goyder, E.C. (2003) EC Competition Law (Oxford University Press, 4th Edition); Rodger, B. and A. McCulloch (2004), Competition Law and Policy in the EC and UK: An Introduction to Practice and Policy (Cavendish Publishing, 3rd edition); Monti, G. (2007) EC Competition Law (Cambridge University Press);

530 The wording of the article has been extensively analysed both by academic commentators and the Courts. On the development of Article 81, see Odudu, O (2006) The Boundaries of EC Competition Law: The Scope of Article 81 (Oxford University Press); Nazzini, R. (2006) 'Article 81 EC: Between Time Present and Time Past: A Normative Critique on "Restriction of Competition" in EU Law' 43:2 Common Market Law Review, 497.

531 See Ehlermann, C-D and J. Rattlif (2005) 'Mario Monti's Legacy for Competition Policy in Article 82' Wilmer Cutler Pickering Hale and Dorr Antitrust Series, Paper No 50; Kallaugher and Sher (2004) supra n. 90.

ii. State aid and public undertakings

Apart from the provisions on anticompetitive agreements and abuse of dominance, of central importance in the development of the EU as a whole have been the rules relating to state aids and state monopolies or public undertakings offered exclusive rights. In fact, issues relating to subsidies and public undertakings have been traditionally considered to lie outside the realm of competition or antitrust rules, since these rules regulate the acts of states and not private undertakings. Nonetheless, in the EU, the existence of state dominated national markets prior to the creation of the EEC, and the fact the governments of these nation states were supporting particular public firms, made the inclusion of provisions to regulate particular aid schemes and public undertakings a very important tool for the achievement of undistorted competition, in accordance to article 3(g) of the EU Treaty.[532]

In a more general context, the inclusion of state measures in the competition context was a clear statement of the states that formed the EEC in 1957 that their economies would be driven by free market principles, as opposed to the communist bloc, which was very powerful at the time, and where the economy was driven by governmental interventions in a system based on state monopolies. In its 50 years of existence, the EU experiment has shown that the inclusion of these provisions in the competition chapter, and most importantly the enforcement of these provisions by the institution in charge of the enforcement of competition law and policy, is a very successful initiative, and a very important factor for the establishment of the single market and the liberalisation process within the Union.

In particular, with regard to state aids,[533] Article 87 paragraph of the EU Treaty states that, *"...any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market"*, while in the second and third paragraphs of the article a number of occasions are identified, where aid

532 See Cacciato, C. (1996) 'Subsidies, Competition Laws, and Politics: A Comparison of the EU and USA', Centre for West European Studies, University of Pittsburgh, Policy Paper No. 2, at 2.

533 See in general Biondi, A, P. Eeckhout, and J. Flynn (eds.) (2004) The Law of State Aids in the European Union (Oxford University Press).

granted to specific undertakings, or relating to the production of particular goods, are[534] or may be[535] compatible with the Treaty. According to Article 88 paragraph 3, any plans of the Member States to grant or alter state aid must be notified to the Commission, which decides as to whether such aid is compatible with EU law. Furthermore, Article 89 of the EU Treaty entitles the Council to adopt regulations on state aid, following a proposal by the Commission. On the basis of this article the Council has adopted Regulations relating to the procedure of review of state aid by Member States.[536]

With regard to state monopolies, Article 86(1) of the Treaty provides that in the case of public undertakings or undertakings to which the Member States have granted special or exclusive rights, the Member States shall not adopt or maintain measures which are in conflict with the Treaty provisions, and in particular with the competition-related provisions. Article 86(2) provides that undertakings entrusted with the operation of services of economic interest or having the character of revenue-producing monopoly are also governed by competition rules, '*insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them*'. According to the third paragraph of the article, the Commission is the competent body to ensure that the provisions of Article 86 are respected by Member States and address appropriate directives and decisions to them. The importance of this provision is highlighted by the fact that Article 86(3) has been the main legal basis for the

534 These include aid given to recover the damage caused by natural disasters or exceptional occurrences, and aid having a social character.

535 These include, inter alia, aid that promotes economic development in poor regions and promotes culture and heritage conservation. In a recent paper, EU Competition officials have pointed out that, with regard to Article 87(3), more economic analysis should be used by the Commission. See Friederiszick H.W, L-H. Roller and V. Verouden (2006) 'European State Aid Control: An Economic Framework', <http://ec.europa.eu/dgs/competition/esac.pdf>, (last visited on 21 May 2007); see also Commission (EC) (2005) 'State Aid Action Plan: Less and Better Targeted State Aid: A Roadmap for State Aid Reform 2005-2009', Brussels, 7.6.2005, COM(2005) 107 final.

536 Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 (now Art.88) of the EC Treaty Official Journal L 83/1, 27.03.1999, p. 1; Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC)No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 140, 30.4.2004, p. 1. The Council has also adopted a Regulation (Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 (now 87 and 88 respectively) of the Treaty establishing the European Community to certain categories of horizontal State aid, Official Journal L 142, 14.05.1998, p.1), which offers the competence to the Commission to adopt block exemption Regulations. On the basis of this Regulation, the Commission has adopted a Regulation in 1998 and has also adopted Regulations regarding de minimis aid, training aid, employment aid, and aid offered to small and medium size enterprises. If the criteria of these Regulations are met, then the Member States are not obliged to notify the aid in advance. See Commission EC (2007) 'Vademecum Community Rules on State Aid' <http://ec.europa.eu/comm/competition/state_aid/studies_reports/vademecum_on_rules_2007_en.pdf > (last visited on 21 May 2007).

liberalisation project which has transformed public undertakings across the EU in fields such as telecommunications and energy.[537]

iii. The control of mergers

As opposed to anticompetitive agreements and unilateral conduct, the Treaty of Rome includes no provisions with regard to mergers, and despite the fact that provisions on mergers had been included in the Treaty establishing the ECSC (in Article 66). In fact, it took 32 years before the EC first introduced merger-related legislation with the adoption of its Merger Regulation.[538] A number of factors played a role in this delay,[539] the most important of which was the hesitation of Member States to expand the competence of the Commission to the examination of mergers, which by definition encompass important economic and political interests of the Member States.[540] Until the adoption of the Regulation in 1989, the problem of anticompetitive effect that mergers could create to the common market was being resolved mainly by the application of Article 82 (then 86) of the Treaty.[541]

In 2004, a new merger regulation was adopted[542] in order to address a number of problems that appeared in the application of the merger control system. The most significant amendments were the change of the substantive test,[543] the extension of the

537 See the website of the European Commission, <http://ec.europa.eu/comm/competition/liberalisation/legislation/legislation.html> (last visited on 21 May 2007). See also Sierra J.L. B. (2000) Exclusive Rights and State Monopolies Under EC Law: Article 86 (former Article 90) of the EC Treaty (Oxford University Press).

538 Council Regulation (EEC) No 4064/89 of 21 December 1989, OJ L 395, p. 1.

539 McGowan, L. and M. Cini (1999) 'Discretion and Politization in EU Competition Policy: The Case of Merger Control' 12:2 Governance, 175, at 178-180

540 See Van Kraay, F.G.A. (1977) 'Proposed EEC Regulation on the Control of Mergers' 26:2 International and Comparative Law Quarterly, 468.

541 The first major case examined under Article 82 was the Continental Can case, Case 6/72, Europempballage Corporation & Continental Can Co. Inc. v. Commission [1973] ECR – 215. In its 1986 judgment in the Phillip Morris case, the ECJ ruled that Article 81 (then 85) could also be used for the control of concentrations. See Joined Cases 142 and 156/84, British American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v Commission [1986] ECR – 1899.

542 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, p. 1.

543 Whereas according to the 4064/1989 regulation (Article 2(3)) a concentration should be prohibited where it 'creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or a substantial part of it', according to the new regulation (139/2004), a concentration should be prohibited where it 'would significantly impede effective competition, in the common market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position'.

one–stop–shop review mechanism,[544] and the right of the merging parties to notify the merger before a binding agreement between them is reached. [545]

5.3.2 Institutional set up: the role of European Courts and the Commission

What differentiates the EU competition regime in relation to any national relevant regime is the fact that competition policy in the EU has been applied in a transnational rather than a national environment, since to a great extent EU Member States retain their sovereignty. That said, in terms of competition the fact that the EU is considered as one single polity is by itself an indication of the success this agreement has had in the 50 years of its application. Such uniform development is attributed to the institutional set up of the Union with regard to competition law. In particular, it may be argued that two supranational bodies have played the most significant role in the development of competition law in the EU: the European Court of Justice (ECJ) and the Commission.

i. The role of the Court

The ECJ has played a significant role in the development of the competition system of the EU in three main ways.[546] First, by developing in the 1960s three legal doctrines which put into context the relationship between the European Institutions on the one hand, most notably the Commission, and the Member States on the other, the Court facilitated the operation of the Union. These principles include the doctrine of direct effect of EC law, the doctrine of supremacy of EC law and the doctrine of implied powers.[547] According to the doctrine of direct effect, EC law creates legally enforceable rights for individuals, who can rely on those rights before the courts of the Member States.[548] The doctrine of the supremacy of EU law is based on the presumption that EC

544 The new regulation offers (in Article 4(5)) the merging parties the right to provide the Commission with a 'reasoned submission' requesting it to assert jurisdiction over a case where the turnover thresholds are not satisfied but which would otherwise require to be notified in three or more Member States.

545 See Article 4(1)(b) of Regulation 139/2004. For an analysis of the main novelties of the new Merger Regulations, see Levy (2005) supra n.89; Berg, W. (2004) 'The New EC Merger Regulation: A First Assessment of it Practical Impact' 24 Northwestern Journal of International Law and Business, 683.

546 Alter, K.J. (1998) 'Who Are the 'Masters of the Treaty'? European Governments and the European Court of Justice' 52:1 International Organisation, 121, at 128.

547 Weiler J.H.H. (1991) 'The Transformation of Europe' 100:8 Yale Law Journal, 2403, at 2412-2417. The author identifies a fourth equally important doctrine, that is the doctrine of Human Rights.

548 See ECJ decision, Case 26/62, Van Gend en Loos v. Nederlandse Administratie Belastingen, [1963] ECR - 1. On the development of the doctrine, see Craig, P. and Gr. De Burca, (2003) EU Law: Text, Cases, and Materials (Oxford University Press), Chapter 5, at 179-229.

norms are superior to national norms of the Member States, irrespective of whether these national norms have been adopted before or after the adoption of the EC norms.[549] Finally according to the principle of implied powers, in areas where the EC Commission had internal competence, it was implied by the Treaty that the EC Commission also had the competence to negotiate and conclude international agreements.[550]

The *'intellectual leadership'*[551] of the Court in the early years of competition law in the EU was further highlighted by two decisions. With the first decision the ECJ supported the argument of the Commission that an agreement which segments markets of the Member States have as their object the restriction of competition and that therefore no further analysis is needed as to their effects, thus highlighting the importance of market integration in the development of competition law in the EU.[552] The second related to the expansion of the scope of Article 81, which is applicable to agreements that '*...may affect trade between Member States...*'. The Court in its *Société Technique Minière* decision, which was issued on the basis of the preliminary ruling system,[553] opined that Article 81 could be applicable not only to agreements between undertakings in different Member States, but also to agreements operating in a single Member State that could have a wider effect on the regional trade, such as elimination of imports in or exports from a Member State.[554]

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549 See Schutze, R. (2006) 'Supremacy Without Pre-emption? The Very Slowly Emergent Doctrine of Community Pre-Emption' 43 Common Market Law Review, 1023. In relation to competition law, the doctrine of supremacy of EU law over national laws of the Member States was confirmed by the ECJ in the Walt Wilhelm case, Case 14-6, Walt Wilhelm and others v Bundeskartellamt, [1969] ECR-1.

550 See Case 22/70, Commission v. Council, (ERTA)[1971], ECR-263, Cases 3,4, and 6/76, Kramer, [1976], ECR-1279, and Opinion 1/76 on the Draft Agreement Establishing a Laying-up Fund for Inland Waterway Vessels, [1977] ECR-741. Nonetheless, it has to be noted here that the principle is not applicable in the field of commercial policy, where the EU has been given by Article 133 (ex113) EC external competence. The same applies with regard to association agreements with third parties that the Community has the power to negotiate and conclude, on the basis of Article 310 (ex Article 238) of the Treaty.

551 See Gerber, supra n. 22, at 352-353.

552 See Etablissements Consten SA & Grundig-Verkaufs-GmbH v. Commission, supra n. 82.

553 According to Article 234 of the Treaty, the Court has jurisdiction to give preliminary rulings on issues addressed to it by courts or tribunals of the Member States relating to the interpretation of the EC Treaty, the validity and interpretation of acts of the institutions of the Community and the European Central Bank, or the interpretation of the statutes of bodies established by an act of the Council where those statutes so provide. Given the lack of direct competence of the Court to decide upon the extent to which a measure of a Member State is compatible with EU law, it encourages national courts to use the preliminary rulings mechanism, with which the Court reviews such issues of compliance. The Treaty of Nice (Article 225(3)) gives also to the CFI the competence to give such rulings in specific areas, according to the Statute of the Court of Justice. The CFI may refer the case to the ECJ in case it considers that the issue under consideration could affect the consistency of EU law.

554 See Case 56/65, Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.) [1966] ECR-235.

In the following years, as also seen in the next sub-section, the Commission took the lead in the development of competition law and policy in the Union, the Courts (the ECJ and as from 1989 the Court of First Instance - CFI) developed extensive jurisprudence in the field of competition law,[555] and in this way they contributed greatly to the development of the competition-related rules, but also to the convergence of competition laws of the Member States.[556] In addition, the Courts on specific occasions have questioned the policy followed by the Commission, and have thus caused modifications not only in the way that the Commission applies the rules, but also in the internal structure of the Commission itself.[557]

ii. The role of the Commission, and the modernisation of enforcement

While the role of the Court has been of major significance in the development of competition law and policy in the EU, the most distinctive feature of EC competition law and policy has been the wide competence granted to the Commission, a supranational regional body, to apply competition rules. The Treaty itself does not contain detailed rules as to the competences of the Commission in the field of competition. Article 85 EC only contains a general statement that the Commission is the competent body to ensure the application of Articles 81 and 82 of the Treaty. Furthermore Article 83 provides that the Council is empowered to adopt, on the proposal of the Commission with a qualified majority and having consulted the European Parliament, the appropriate regulations and directives for the implementation of Articles 81 and 82. These two provisions set the general rules on the enforcement of competition law in the bloc; nevertheless, the particular institutional set up of the competition system was to be detailed in Regulation 17,[558] which was adopted by the Council in 1962, following lively debate between the Member States.[559]

Regulation 17/62 offered the Commission the competence to remove the authority from the jurisdiction of the Member States, by initiating its own proceedings,

555 See generally the material cited in footnote 529.

556 See Van Waarden, F. and M. Drahos (2002) 'Courts and (Epistemic) Communities in the Convergence of Competition Policies', 9:6 Journal of European Public Policy, 913.

557 A recent example to be given is the effect of the CFI's decisions to annul three Commission merger decisions in 2002. See supra n. 87. Following these developments, new legislation was put in place (the new Merger Regulation), a Chief Economist was appointed by the Commission and the Merger Task Force was abolished.

558 Council Regulation (EEC) Implementing Articles 85 and 86 of the Treaty, OJ 13, 21.02.1962, p. 204. (hereinafter 'Regulation 17/62').

559 See Goyder, supra n. 529, at 30-34.

since according to Article 9(3), the Member States could apply articles 85(1) and 86 (currently 81(1) and 82), only if the Commission had not initiated any procedure in the case under consideration. The competence of the Commission was further strengthened by Article 9(1) of Regulation 17/62, according to which the Commission, subject to judicial review by the Court, had the sole right to apply Article 81(3) of the Treaty and thus declare inapplicable the provision of Article 81(1) for agreements that met certain requirements. Furthermore, according to Articles 2, 3, and 6 of the Regulation, the examination of such cases could be carried out by the Commission, either following a notification by the Member States, or by the parties involved in the agreement. Thus, the system of examination of business agreements that could have an anticompetitive effect on the common market was centralised, and until the entrance into force of Regulation 1/2003, which replaced Regulation 17/62, the Commission had been offered in practice a jurisdictional monopoly to enforce the competition rules of the Treaty.[560]

These extensive jurisdictional powers of the Commission were further strengthened in two ways. First, according to Regulation 17, the Commission could issue decisions and impose fines which were binding upon the firms that were found to be infringing the competition rules of the Treaty. These decisions were subject to judicial review by the ECJ and after 1989, by the CFI. Second, with the issuance of Regulation 19/65, the Commission was granted the competence to issue block exemptions, on the basis of Article 81(3) of the Treaty, without approval by the Council.[561]

While a number of experts, including Members of the European Parliament and high profile judges of the European Courts, have extensively criticised the broad powers

560 This model of enforcement, is called 'the authorisation system', and was borrowed from German law. The model was based on the assumption that all agreements were considered unlawful, until they get negative clearance by the Commission (according to Article 2 of the Regulation 17/62). Despite the fact that notification was not obligatory, the companies involved in such agreements had to notify them to the Commission for purposes of legal certainty. It also has to be noted that when the Regulation was discussed, an alternative option, backed by the French government, was the directly applicable exemption system, according to which each firm had to considered itself the legality of its agreements, and thus no prior notification to the Commission was needed. As noted, finally the authorisation system prevailed in Regulation 17/62. See Goyder, ibid, at 41. It should be also mentioned, nevertheless, that the competition authorities of the Member States could be given the competence to apply Articles 81 and 82 in cases where their national legislation allowed them to do so, while at the same time, Articles 81(1) and 82 had direct effect, and therefore national courts could apply these provisions.

561 Council Regulation (EEC) No 19/65, on application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices, OJ. 36, 06.03.1965, p. 53.

granted to the Commission,[562] it has been also argued that such centralisation of enforcement has been the secret behind the success of the EC competition system, as the broad competence granted to the Commission has ensured the uniform development of competition law in the EU, and the appropriate use of competition related rules for the facilitation of the most important goal of the Treaty, i.e. market integration.[563] This same argument applies to the authorisation model applied to Article 81(3), especially in view of the fact that at the time when Regulation 17/62 came into force and for a long period after its adoption, there were Member States without a competition law in place,[564] or with a competition law that was practically inactive.[565]

Nevertheless, this centralised system gradually created a number of problems, the most serious of which was the fact that the Commission had to review an enormous amount of applications for exemption in the context of Article 81(3), despite the fact that since the 1960s the Commission: (i) adopted a number of block-exemptions, which applied in various fields;[566] (ii) developed procedures to review notifications informally through the so-called 'comfort letters'; and (iii) attempted (in the 1990s) to involve the Competition Authorities of the Member States in the examination of notifications.[567]

Apart from these practical problems, and according to commentators of EU law, by the late 1990s it was obvious that this centralised system had become obsolete; this

562 Forrester, I.S. QC, and A.P. Komninos (2006) 'EU Administrative Law: Competition Law Adjudication' Sectoral Report on Adjudication in the Competition Field, American Bar Association, European Union Administrative Law Project, <http://www.abanet.org/adminlaw/eu/SectRptAdj-Competition--Komninos_spring2006. pdf > (last visited on 21 May 2007), at 6.

563 See Ehlermann, C-D (1992) 'The Contribution of EC Competition Rules to the Single Market' 29 Common Market law Review, 257.

564 Jenny and Horna, supra n. 526, at 327, fn.2.

565 For instance, the competition law in Greece, Law 703/1977 for the Protection of Free Competition, was first adopted in 1977 but at least for twenty years it was rarely applied by the competent national enforcing institutions.

566 According to these Regulations, the agreements which met their requirements were automatically exempted from the application of Article 81(1), and therefore did not have to be notified. See for instance, Commission Regulation (EEC) No 1983/83 of 22 June 1983 on the application of Article 85(3) to categories of exclusive distribution agreements, OJ L 173, 30.6.1983, as amended by Commission Regulation (EC) No 1582/97 of 30 July 1997, OJ L 214, 6.8.1997, p. 2. Relevant Regulations were also adopted by the Council in the 1980s relation to exclusive purchasing agreements and franchising agreements. All these Regulations were replaced in 1999 by Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ L 336, 29.12.1999, p. 21 Currently there are also Block exemptions on the agreements on the motor vehicle sector (Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ L 203, 01.08.2002, p. 30, the insurance sector (Commission Regulation (EC) No 358/2003 of 27 February 2003 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector, OJ L 053 , 28.02.2003. p.8), and on the transfer of technology (Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, OJ L 123, 27.04.2004, p.11).

567 See Monti, G. (2007), supra n. 529, at 398, 399.

was so for three mains reasons. First, it was inadequate to meet the requirements of vigorous pro-active enforcement, given that a large amount of resources were dedicated to the examination of agreements that were not really significant from a competition viewpoint. Second, the system failed to provide companies with legal certainty, in view of the fact that it provided no clarification as to the type of agreements that should be notified to the Commission.[568] Third, as Giorgio Monti notes, in the mid 1990s particular Member States expressed their concern about the lack of transparency in Commission's decisions concerning mergers. In this regard, German commentators started demanding institutional restructure and the establishment of an independent central competition agency.[569]

It should be taken into account that Regulation 17/62 was adopted to regulate competition enforcement in a Community of 6 Member States. By the end of the 1990s these Member States had become 15 and were to be further increased to 25 by 2004. This led the Commission in 1999 to publish a White Paper on the modernisation of the competition enforcement system.[570] It is also notable however that when the Treaty of Rome was adopted only Germany had a competition law in place, but that by 1999, all of the Member States except Germany had competition law rules which were compatible with the EC rules,[571] and that by 2004 the ten new Member States had adopted EC-compatible competition law rules on the basis of the Europe Agreements referred to in Chapter 4.

As noted in the previous sub-section, convergence of national laws has been attributed to the regional courts that have developed detailed jurisprudence. That said, such convergence has also been attributed to the development of a community of legal experts or 'epistemic community' which developed a common understanding as to the proper function of competition law; such common understanding was built on the basis of EC competition law, which was transposed into national legal systems.[572] In this regard, it may be argued that the centralised application of competition law has had as a

568 Venit, J. (2003) 'Brave New World: The Modernisation and Decentralisation of Enforcement under Articles 81 and 82 of the EC Treaty' 40 Common Market Law Review, 545, at 550.

569 A proposal which nonetheless found no further support. See Monti G. supra n. 529, at 400.

570 See Commission (EC) (1999) 'White Paper on The Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty', Brussels, 28.04.99, Commission Programme 99/027. See Ehlermann, C-D (2000) 'The Modernisation of EC Antitrust Policy: A Legal and Cultural Revolutions' 37 Common Market Law Review, 537.

571 See Monti, supra n. 529 at 401.

572 See Van Waarde and Drahos, supra n. 556, in particular at 931-932.

side effect the development of harmonised rules, even in those Member States which were not obliged to adopt relevant rules in order to enter the Union.

The public debate triggered by the White Paper finally led to the adoption of Regulation 1/2003, which entered into force on the 1st of May 2004 (which, incidentally, is also the date of accession of the 10 new Member States).[573] The new regulation introduced two major changes. First, it replaced the authorisation system with a directly applicable exemption system. Unlike under Regulation 17/62, if the agreements meet the criteria of Article 81(3) no negative clearance is required.[574] The second major change is that the competent institutions (national competition authorities and national courts) of the Member States have to apply Articles 81 and 82 when they review cases that may have an effect on trade between Member States.[575]

These provisions do not preclude the Member States from having and applying stricter national rules on unilateral conduct, nor from applying provisions of national law that predominantly pursue an objective different from the objectives pursued by Articles 81 and 82 of the Treaty,[576] thus leaving the space open for governmental intervention and industrial policy in national markets, as long as trade within the EU is not affected. Nevertheless, in cases where intra-state trade may be affected then the competent national bodies are bound by Articles 81 and 82, and by the jurisprudence of the ECJ and the CFI and the decisional practice of the Commission.[577]

Furthermore, the European Competition Network (ECN) was launched in 2002. The ECN is not an administrative body, but a mechanism for cooperation and coordination as regards the competition agencies of the Member States.[578] The aim of the network is twofold: it attempts to ensure, first, the efficient allocation of cases,[579] and, second, the uniform application of the competition law rules.[580] These important issues are also further addressed by the Regulation 1/2003 itself.

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573 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003, p. 1. (hereinafter Regulation 1/2003).

574 Regulation 1/2003, Article 1(2).

575 Regulation 1/2003, Articles 3, 5, and 6.

576 Regulation 1/2003, Article 3(2) and (3).

577 Regulation 1/2003, Art. 16.

578 Council and Commission (EC) (2002) 'Joint Statement of the Council and the Commission on the Function of the Network of Competition Authorities', <http://ec.europa.eu/comm/competition/ecn/joint_statement_en.pdf> (last visited on 21 May 2007).

579 Ibid, at paras. 11-19.

580 Ibid., at paras 20 – 26.

As to the former objective, i.e. overcoming overlaps in the application of Articles 81 and 82, Regulation 1/2003 also includes provisions on the cooperation of the Commission with national competition authorities. Specifically, the Commission still has the competence to remove a case that is being reviewed by a national authority where it believes that the case may have an effect on the common market, subject to the obligation to consult with the Member State.[581] It is also competent to refer to the national authorities a complaint submitted to it on the basis of Articles 81 and 82 where it considers that the case under examination is not of major interest and it has previously made its policy clear through other relevant cases.[582]

As to the latter objective, i.e. the uniform application of law, the Regulation in Articles 11(3) and (4) provides that whenever the national authorities decide to initiate proceedings relating to a case on which Articles 81 and 82 are to be applied, they have to notify the Commission. They are also obliged to notify the Commission at least 30 days before the adoption of the decision. In practice, when the Commission receives the draft decision of the national authority it examines the way that the law is interpreted and applied; in those cases where it disagrees with their application of the Treaty articles it returns to the authorities with comments. A database has been created in order to ensure the efficient supervision of the network. This provides a mechanism - to which all the Member States have access - for the Commission and the national authorities to notify relevant cases.

The relationship between the Commission and national authorities and courts, and important features relating to the application of Community rules, are further clarified by a number of Notices, which are soft law instruments[583] that the Commission published on the date of publication of Regulation 1/2003. In particular, the Commission has published notices on the cooperation within the ECN,[584] cooperation

581 Regulation 1/2003, Art. 11(6).

582 There is no particular provision on this procedure, apart from the general statement of Article 11(1) of the Regulation, which states that, 'The Commission and the competition authorities of the Member States shall apply the Community competition rules in close cooperation.' Nonetheless, based on this general provision and the non-binding Commission (EC) (2004) Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.04.2004, p. 43, which provides us with jurisdictional criteria, in practice the Commission refers cases to the national authorities.

583 On the use of soft law instruments, such as notices, recommendations and guidelines in the field of the EU competition policy, see Cosma, H. A. and R. Whish, (2003) 'Soft Law in the Field of EU Competition Policy' 14:1 European Business Law review, 25.

584 Commission Notice on cooperation within the Network of Competition Authorities, supra n. 582.

with the Courts,[585] the handling of the complaints,[586] the effect on trade,[587] the application of Article 81(3),[588] and on access to the file.[589]

5.3.3. Some points on the EU competition regime

While it would be premature to evaluate the effect of Regulation 1/2003, given the short period of time that has passed since its adoption, from this brief analysis of the EC competition law regime, it would be useful to keep some elements in mind, particularly in view of the subsequent presentation of competition regimes of a number plurilateral agreements. The first such element is that it takes time until a competition regime may be developed at a regional level, and this is an argument that is not much different from the one made in Chapter 2 with regard to developing countries. That said, the extra factor that has to be taken into account when discussing a regional regime is that the diverse political preferences of the various Member States of a bloc may delay the adoption of certain regional substantive rules. This is a problem evident in the fact that merger rules were adopted in the EU 32 years after the adoption of the Rome Treaty.

On the other hand, at the enforcement level, and irrespective of the fact that the EC competition system is far from perfect,[590] the European project has demonstrated that a centralised enforcement system - where a supranational body and a well established regional Court have the competence to apply the regional rules - may be adequate for the development of an efficient competition regime, even in cases where competition law is scarce or non-existent in the Member States. The EC experience has also shown that it was only when (i) the supranational body (i.e. the Commission) has gained enough experience in the application of the regional rules, (ii) the Member States have adopted EC-compatible competition laws and established competition authorities, and (iii) even more importantly, a certain level of common understanding has been developed among their competition agencies that the Commission was ready to

585 Commission (EC) (2004) Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ C 101, 27.04.2004, p. 54.

586 Commission (EC) (2004) Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ C 101, 27.04.2004, p. 65.

587 Commission (EC) (2004) Notice - Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ C 101, 27.04.2004, p. 81.

588 Commission (EC) (2004) Notice - Guidelines on the application of Article 81(3) of the Treaty , OJ C 101, 27.04.2004, p. 97.

589 Commission (EC) (2004) Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, OJ C 325, 22.12.2005, p. 7.

590 Something that is proved by the fact that it has been recently amended.

decentralise the enforcement of the regional rules. These arguments will be revisited in Section 4 of the chapter, which provides us with a comparative reading of competition provisions found in the various regional agreements, including the EU.

5.3. Competition provisions in other plurilateral regional agreements

Having briefly reviewed the competition regime of the EU - which is characterised by the existence of detailed substantive competition provisions which are to be applied at the regional level and by the fact that such regional rules are enforced by supranational and national institutions - in the attempt to evaluate the role of the EU on the formation of other plurilateral regional agreements, this section provides us with a presentation of the competition regimes established by these agreements. In contrast to the analysis of bilateral enforcement cooperation agreements and bilateral trade agreements, the comparative reading of the competition regimes of the various plurilateral regional agreements is a more complex task, due to the fact that the competition-related provisions of these regimes are far less homogenous than the relevant provisions found in bilateral enforcement cooperation agreements and the bilateral trade agreements of the EU. To this end, the chapter first presents separately the competition provisions found in the various plurilateral regional agreements reviewed, and then attempts to provide generalisations as to the competition-related content of those agreements, as well as comparisons with the EC regime.

5.3.1. Andean Community

Article 93 of the Cartagena Agreement, which is the Treaty establishing the Andean Community,[591] contains a mandate that '*[B]efore December 31, 1971, the Commission, shall adopt, at the General Secretariat's proposal, the rules which are needed to guard against or correct practices which may distort competition within the Subregion*'. It took more than 20 years however before the first regional legislation was enacted with aim of establishing a competition law and policy system largely based on the EC model: Decision 285 of 1991.[592] Thus, rules prohibiting anticompetitive practices and abuse of dominance which could have a regional effect were

591 Andean Subregional Integration Agreement "CARTAGENA AGREEMENT" <http://www.comunidadandina.org/INGLES/normativa/ande_trie1.htm> (last visited on 21 May 2007).

592 Andean Community, Decision 285, Rules and regulations for preventing or correcting distortions in competition caused by practices that restrict free competition. <http://www.comunidadandina.org/INGLES/ normativa/d285e.htm> (last visited on 21 May 2007).

introduced.[593] These rules would be enforced by a centralised - transnational body, the Board of the Commission, which had investigatory and decision-making powers as well as the competence to launch investigations following a petition submitted either by a Member State or an undertaking.[594]

The competition system of the Andean Community has not been a successful one for a number of reasons relating both to the internal political dynamics of the Member States and to the institutional set up of the regional enforcing body, i.e. the Board of the Commission. As for the former, a lack of political will to apply competition laws by some participating countries, such as Bolivia and Ecuador, has been observed. [595] As for the latter, the fact that the Board did not have punitive powers that would force firms to implement its decisions; furthermore, the fact that it did not have the power to initiate investigations *ex officio* substantially decreased the effectiveness of the Institution's work.[596]

It was against this background, in 2005, that Decision 608 was introduced, amending the competition rules with the aim of improving the operation of the competition regime in the bloc. A number of reforms were introduced, which to a certain extent show the influence of the EU competition model, while it also has to be noted that the EU provided the ANDEAN Community with funding in order to harmonise competition rules in the ANDEAN region.[597] First, further competences were granted to the Board: it may now initiate its own investigations and can also impose fines, and, in cases where it finds it appropriate, order interim measures. The Board has also been granted the competence to request the cooperation of National Competition Authorities. Furthermore, the Decision provides for the creation of an advisory committee (the Andean Committee for the Protection of Competition) which consists of

593 See Articles 3-5 of the Decision 285.

594 See in detail, Ibid, Art. 6-15.

595 In addition, it should be pointed out that with regard to the other three participating countries, even though they have adopted competition law have applied the law on an inconsistent basis. See Jenny and Horna, supra n. 526, at 306.

596 See Jatar, A.J. and L. Tineo (1998) 'Competition Policy in the Andean Countries: Ups and Downs of A Policy in Search of its Place', in Rodriguez Mendoza, M., P. Correa and B. Kotschwar (eds.) The Andean Community and the United States: Trade and Investment Relations in the 1990s, (Organization of American States) 169, at 183-184, and Decision 285, Art 16-17.

597 See Andean Community Press Release of June 8, 2001, 'European Cooperation for Harmonizing Rules on Free Competition in the Andean region' < http://www.comunidadandina.org/INGLES/ press/press/np8-6-01.htm> (last visited on 21 May 2007), according to which, 'The project aim will be pursued through two lines of measures: 1. Definition and implementation of a harmonized regional legislative, administrative, and judicial framework; and 2. Support for national and regional institutions responsible for overseeing enforcement of the rules of free competition. These objectives are expected to be accomplished through technical assistance, training and information activities, including visits by Andean technicians to European institutions. These measures will make it possible for Europe's experience and know-how in this area to be made available to the CAN'.

members of the national authorities. In addition, national competition authorities, consumer organisations, and legal entities and individuals may lodge complaints to the Board.[598]

According to Article 49 of Decision 608, National Competition Authorities may apply regional competition rules to cases which have an effect on the regional trade. In this way countries with no national competition law, such as Bolivia and Ecuador, can apply the regional rules in such cases.[599] Finally, Article 5 of the Decision includes an extended notion of 'community effect' as it provides that such an effect may be produced by a practice conducted in the territory of one or more Member States and have an effect on the territory of another Member State, or practices that take place in the territory of a non-Member State and whose real effects are felt in one or more Member States. Room is therefore left for the application of the regional rules in an extraterritorial manner. In view of these developments and despite the lack of efficient enforcement of a competition regime in the Andean region, the amendments provided by Decision 680 may be a starting point for improvements in the application of competition law and policy in this particular region.[600]

5.3.2. MERCOSUR

Competition-related issues are addressed in MERCOSUR by the Fortaleza Protocol for the Defence of Competition, which was signed in December 1996, seven years after the establishment of the bloc.[601] The similarity to the EU model can be seen in the substantive provisions of the Protocol, although less so in relation to enforcement.[602] In particular, Article 4 of the Protocol prohibits agreements and concerted practices whose purpose or final effect is to restrict, limit, falsify or distort

598 Galindo Sanchez, R. (2005) 'New Antitrust ANDEAN Regulation', < http://www.brigardurrutia.com.co/figuras/funciones/documento.asp?ruta=/publicaciones/87/NewAntitrustAndean2005_rgs.pdf>, (last visited on 21 may 2007), at 4.

599 See UNCTAD (2006) 'COMPAL Global Annual Report 2005' UNCTAD/DITC/CLP/2006/1, at 10.

600 See Marcos, P. (2007) 'Downloading Competition law from a Regional Trade Agreement: A New Strategy to Introduce Competition Law to Bolivia and Ecuador' Berkeley Program in Law & Economics Latin American and Caribbean Law and Economics Association (ALACDE) Annual Papers (University of California, Berkeley), Paper 050107'8, where the author also discusses the problems that Bolivia and Ecuador face in the process of adopting regional- compatible competition rules and agencies.

601 Common Market of the Southern Cone (MERCOSUR), Protocol of the Defense of Competition (hereinafter 'the Fortaleza Protocol') < http://www.ftaa-alca.org/Wgroups/WGCP/English/cpa/cpa3_e.asp> (last visited on 21 May 2007).

602 As noted in Appendix II, this is also the case in general regarding MERCOSUR, whose initial aim was to create a customs union and a common market based on four freedoms (free movement of goods, persons, services and capital). Despite the obvious similarities with the EU, the institutional set up of the bloc differs from that of the EU. For more detail, see Appendix II.

competition or access to the market, as well as abuse of dominance that affects intra-regional trade.[603] State monopolies fall within the realm of the competition provisions, insofar as the rules of this Protocol do not prevent the regular exercise of their legal attributions,[604] while Article 32 requires Member States, within two years from the adoption of the Protocol, to have in place the legislation and mechanisms for the control of state aids which may have an effect on common trade. The relevant legislation should be in accordance with the WTO rules on subsidies.[605]

As for the institutional set up, the Protocol is to be enforced by two intergovernmental bodies, the MERCOSUR Trade Commission (TC), which performs adjudicative functions, and the Committee for the Defence of Competition (CDC), which consists of representatives of signing countries' national competition authorities, and is responsible for the investigation of cases in cooperation with the national authorities of the state in which the defendant is domiciled.[606] According to the Fortaleza Protocol, proceedings are initiated by the competition authorities of the Member States either *ex officio* or following a complaint by an interested party.[607] The national authorities, after a preliminary determination of whether the practice has MERCOSUR implications, may submit the case to the CDC for a second determination, and both evaluations must be based on a rule-of-reason analysis in which a definition of the relevant market and evidence of the conduct and the economic effects of the practice must be provided.[608]

When the investigation is completed, the national agency provides the CDC with a conclusive ruling, and the CDC, taking into account the view of the national competition agency, and subject to approval by the TC, decides upon the possible infringement found, the sanctions to be applied to the infringing parties, and any other appropriate measure.[609] On the basis of the Protocol, the MERCOSUR Member States

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603 Article 6 of the Protocol further specifies the types of practices (agreements and abuses of dominance) that are incompatible with the Protocol, on the basis of Article 4.

604Fortaleza Protocol, Art 2(2).

605 Fortaleza Protocol, Article 32(2)

606 Ibid, Articles 8, 9, and 15. See Tavares de Araujo Jr, J. (2000) 'Competition Policy and the EU-MERCOSUR Trade Negotiations', paper presented at the Working Group on EU- MERCOSUR Trade Negotiations. Paris, May 12-13, 2000, <http://www.sice.oas.org/compol/Articles/cpeumercdoc>, (last visited on 21 May 2007), at 12.

607 Fortaleza Protocol, Art. 10.

608 Fortaleza Protocol, Art. 14, and Tavares de Araujo Jr., supra n. 606, at 12

609 Fortaleza Protocol, Articles 18, 19, and 20(1). According to Article 20(2), the measures taken have to be applied by the national authority of the state which conducted the investigation, while Article 20(3) states that in case of disagreement between the

have also signed a Complementary to the Protocol Regulation (not yet ratified) in 2002, and a cooperation agreement which focuses on cooperation issues and technical assistance programmes in 2003.[610]

In sum, more than 10 years after its adoption, and despite the relatively detailed substantive and institutional rules that it contains, the Protocol has not been successful. This is for a number of reasons. First, as noted in Appendix II with regard to the general operation of MERCOSUR, unlike under the EC system, there is no strong supranational administrative body in place to enforce the Protocol's provisions. Second, even though Article 7 of the Protocol provides that the signing countries have to adopt (Protocol-compatible) competition legislation and ratify the Protocol within two years of its adoption, Paraguay does not have competition legislation in place, and the Protocol has been ratified by only Brazil and Paraguay.[611] Third, there has been strong resistance by the Member States, especially with regard to provisions on the regulation of state-aids.[612] Hence, at the moment, there are ongoing negotiations over the possible amendment that would enhance the effectiveness of the regional competition system.

5.3.3. NAFTA

Competition policy issues are addressed in Chapter 15 of the NAFTA. In particular, Article 1501 of the agreement provides - w ithout providing any further specifications as to the required content of such rules - that the signing parties should have and enforce competition rules. The agreement also includes provisions on state enterprises and monopolies. Articles 1502 and 1503 stipulate that the signing parties are allowed to establish public enterprises and monopolies, as long as they have notified them to the other parties and have a minimum set of rules in place to ensure that the other provisions of the agreement are not infringed by their operation. In addition, Article 1501(2) of the agreement includes a general statement according to which the signing parties recognise the importance of cooperation and coordination in the enforcement of competition cases and further states that such cooperation should be

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competent bodies as to the final decision, the TC has to refer the case to the Common Market Group, which is the main Executive body of Mecosur (see below, Appendix II).

610 See UNCTAD (2004) 'Cooperation and Dispute Mediation Mechanism in MERCOSUR Related to Competition law and Policy', Communication submitted by Brazil Ministry of Justice, <http://r0.unctad.org/en/subsites/cpolicy/docs/IGE1104/Brazil_cooperation.pdf> (last visited on 21 May 2007).

611 See Schmidt C.A.J. (2002) 'The Defence of Competition in the Mercosur', <http://www.seae.fazenda.gov.br/document_center/papers-and-articles/2002-1/3-pdfwin32>, (last visited on 21 May 2007).

612 See Jenny and Horna, supra. n. 526, at 312.

based on mutual legal assistance, notification, consultation and exchange of information relating to the enforcement of laws in the free trade area. On this basis, detailed bilateral enforcement cooperation agreements, already reviewed in Chapter 3, have been signed between the signing parties.

In general, with regard to competition law and policy, NAFTA includes modest substantive rules and excludes the application of competition related provisions from the dispute settlement mechanism.[613] The agreement further operates as a basis for cooperation of the signing countries in the enforcement of competition rules. Hence the operation of competition in the context of NAFTA resembles the US model of bilateral trade agreements referred to in Chapter 4, and differs substantially from the EU model.

5.3.4. CAFTA-DR

CAFTA – DR, which was adopted in 2004,[614] includes no provisions on competition.

5.3.5. FTAA

As noted in more detail in Appendix II, the FTAA has been the most ambitious of all the regional initiatives carried out in North and South America.[615] In terms of competition law and policy, the draft Chapter 19 of the proposed FTAA, includes very detailed provisions. The provisions of the draft chapter, like the FTAA in general, include a combination of rules of other plurilateral trade agreements which operate in the region. Hence, like NAFTA, the draft chapter includes a provision according to which the signing parties should have and enforce competition provisions. The draft chapter also includes provisions which similar to NAFTA on public enterprises and state monopolies,[616] and provides for enforcement cooperation on competition issues between the signing parties.[617]

On the other hand, unlike NAFTA, the draft chapter also includes substantive provisions. In particular, it includes a prohibition of anti-competitive agreements and abuse of dominance by business firms; it also includes provisions on state aids, and

613 NAFTA, Art. 1501(3).

614 For a brief review of CAFTA –DR, see Appendix II.

615 Negotiations for a possible FTAA started in 1994. However, due to a number of reasons identified in Appendix II, negotiations have been stagnant in the last 4 years. See in more detail Appendix II.

616 See FTAA draft., Chapter 15, Article 9.

617 In particular, Articles 8 of the draft chapter provides for exchange of information, which is subject to a confidentiality clause (according to Article 4 of the chapter). Article 14 provides for consultations and article 16 for technical assistance in the field of competition law and policy.

therefore follows the precedent set by the EU.[618] The Committee on Competition, an intergovernmental body which would consist of representatives of the Member States, would be the enforcing institution of the agreement.[619]

5.3.6. CARICOM

A Chapter of the revised Treaty establishing CARICOM[620] is devoted to the regulation of anticompetitive practices. Article 169 sets out the objectives of the CARICOM Competition Regime: (i) to ensure that the benefits expected from the establishment of the CARICOM Single Market Economy (CSME) are not frustrated by anti-competitive business conduct; (ii) to promote competition and the enhancement of efficiency; and (iii) to promote consumer welfare and consumer interests. With regard to substantive provisions, Article 177 paragraph two contains an extensive list of agreements that would constitute an infringement of competition law while paragraph four of Article 177 exempts the above-mentioned agreements from the application of competition rules provided certain conditions are met. Finally, Articles 178 and 179 of the Revised Treaty refer to the abuse of dominant position.

Furthermore, Article 170(1)(b) (i) requires Member States to adopt competition legislation consistent with the Treaty. Articles 170(1) (b) (iii) and (iv) require Member States to establish and maintain institutional arrangements and administrative procedures to enforce competition laws and to take effective measures to ensure access by nationals of other Member States to competent competition authorities including the courts on a transparent and non-discriminatory basis. Nonetheless, only Jamaica and Barbados of the CARICOM Member States have adopted competition rules to date.

Competition law is to be applied mainly by a CARICOM Competition Commission[621] and by the Court of Justice. In addition, based on Article 182 of the Revised Treaty, the Council for Trade and Economic Development (COTED) published a comprehensive CARICOM model law in 2003, which includes not only substantive competition law provisions but also addresses procedural issues regarding the application of competition at the regional level.

618 See FTAA draft., Chapter 15, Articles 6(2) and 10.

619 Ibid, in Article 12.

620 Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy, <http://www.caricomlaw.org/docs/revisedtreaty.pdf> (last visited on 21 May 2007).

621 See Articles 171 to 176 of the Revised Treaty.

In sum, CARICOM has developed a comprehensive competition framework similar to the one developed by the EU. The EC authorities have informally shown interest in the development of the bloc's competition regime, by considering possible ways of financial assistance, a project that has not been fruitful to date.[622] In addition, there are still a number of problems regarding the application of competition law in the region. As already noted, only two of CARICOM's members currently have a competition law in place and the Competition Commission has not yet been set up.[623] Moreover, further research should be undertaken in order to evaluate whether competition laws are needed in the micro-economies of the CARICOM's member states. In any case technical assistance is needed so as to educate competition officials who would be asked to apply the competition rules and also for businesses operating in the region.[624] On the other hand, it should be noted that the fact that such a comprehensive framework has been developed, not to mention the fact that the Court of Justice - which has the competence to apply CARICOM's competition rules - has started operating, may indicate that competition law and policy could rapidly evolve in this particular region.

5.3.7. WAEMU

WAEMU is probably the regional agreement in Africa with the most comprehensive set of competition rules. Also, the region's competition regime is very much influenced by the EU competition framework.[625] In particular, Article 88 of the Treaty establishing WAEMU declares as void anticompetitive agreements and abuse of dominance that may affect intra-regional trade. Article 88(c) also declares void state aid which would limit competition by favouring particular companies. According to Article 90, the Institution responsible for the application of the Community Competition rules is the Commission, while the Council of Ministers, with a 2/3 majority, has the competence to adopt further competition rules (Article 89 of the Treaty).

622 Interview with EC Commission official, Brussels, 15/11/2007.

623 The Commission nevertheless should start operating in the near future, as on February 13 2007 an agreement between CARICOM and the Government of Suriname was signed, and provides for the establishment of the Commission in this country. See 'Agreement between the Government of the Republic of Suriname and the Caribbean Community (CARICOM) Establishing the Seat and the Office of the Competition Commission', < http://www.caricomlaw.org/doc.php?id=2373> (last visited on 21 May 2007).

624 See Stewart, T. (2001), 'Challenges of Developing a Competition Regime in CARICOM', <http://www.iadb.org/sds/doc/IFM-Taimoon_Stewart-E.pdf.> (last visited on 21 May 2007).

625 As noted in Appendix II, WAEMU follows the EU model in general. See Appendix II.

On the basis of this provision, the Council of Ministers, following a study that was financed by the EC Commission,[626] adopted in 2002 three Regulations and two Directives which comprise the competition law of WAEMU.[627] This secondary legislation regulates anticompetitive agreements, abuse of dominance, state aids, transparency of the financial relationship between Members States and public enterprises and between public enterprises and international organisations, and cooperation between WAEMU's Commission and national competition authorities.

The institutional set up of the regional competition system also resembles the EU model. The WAEMU Commission (in which 2 officials from every Member State participate) has the sole responsibility to apply regional competition law,[628] and there is cooperation between national competition authorities on cases investigated by the Commission. In addition WAEMU is in the process of setting up a network to link national authorities with the Commission.[629]

Of the agreements discussed in this chapter which contain substantive regional competition rules, WAEMU is the only bloc (with of course the exception of the EU) that has applied these rules in practice. In particular the Commission has issued three decisions based on the regional competition rules. In two cases of 2004 and 2005 the Commission granted a comfort letter to firms in the framework of the West African Gas Pipe-line Project between Benin and Togo, and also issued a comfort letter to Benin and Tongo regarding harmonized tax law provisions adopted in the framework of this particular Project. Also in 2005 the Commission issued a decision imposing an injunction which ordered Senegal to stop the state aid it provided to a firm.[630]

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626 The study was carried out by a Belgian law firm, which was responsible for the legal aspects, and an American consultancy firm, which dealt with the economic aspects. According to officials of WAEMU, '...It should be stressed at the outset that, among the several dozen technical assistance projects financed by the European Union since 1996, the study on the development of community competition law is regarded as one of the most satisfactory to the WAEMU Commission...'. See OECD Global Forum on Competition (2002) 'Contribution by UEMOA', CCNM/GF/COMP/WD(2002)30, at pp. 3-4.

627 Reglement 02/2002/CM/UEMOA relatif aux pratiques anticoncurrentielles a l'inturieur de l'UEMOA, Reglement 03/2002/CM/UEMOA relatif aux procidures applicables aux ententes et abus de positions dominantes a l'inturieur de l'UEMOA, Reglement 04/2002/CM/UEMOA relatif aux aides d'Itat a l'Inturieur de l'UEMOA et aux modalitis d'applications de l'article 88(c) du traiti, Directive 01/2002/CM/UEMOA relative 0 la transparence des relations financieres d'une part entre les etats membres et les entreprises publiques, et d'autre part entre les Etats membres et les organisations internationales ou trangeres, and Directive 02/2002/CM/UEMOA relative a la coopuration entre la commission et les structures nationals de concurrence des Etats membres pour l'application des articles 88, 89 et 90 du trait2 de l'UEMOA.

628 Something decided by the Regional Court of Justice with its opinion 003/2000/CJ/UEMOA.

629 See Jenny and Horna, supra. n. 526, at 315.

630 Bakhoum, M. (2006) 'Delimitation and Exercise of Competence between the West African Economic and Monetary Union (WAEMU) and its Member States in Competition Policy' 29:4 World Competition, 653, at 665.

While a number of issues with regard to the operation of the competition regime in this bloc remain unaddressed,[631] the fact that the regional body has already applied the regional competition rules is a significant development in the context of the discussion about the development of competition regimes in plurilateral regional agreements, as it demonstrates that competition law can be applied in the context of a relevant agreement. This assumption has not yet been tested in practice, since the EU has been the only relevant bloc which has effectively developed and applied regional competition legislation over a sustained period of time.

5.3.8. ECOWAS

In contrast to WAEMU, and as noted in Appendix I, competition law is not a priority in ECOWAS.[632] This is reflected in the text of the agreement establishing the bloc: it does not contain provisions on competition.

5.3.9. EAC

The Treaty establishing EAC provides[633] that competition law provisions should be included in the protocol establishing the EAC Customs Union. In parallel, in the Development Strategy of EAC, a common competition policy is envisaged to promote free competition; it should be enforced by a central autonomous institution.[634] The Customs Union protocol, signed in 2004, includes a provision similar to Article 81 EC, according to which the Partner States shall prohibit any practices that adversely affect free trade including any agreement, understanding or concerted practices which has as its objective or effect the prevention, restriction or distortion of competition within the Community.[635]

2004 also saw the drafting of the EAC Competition Bill which is currently under discussion at the Assembly.[636] The Bill is a comprehensive piece of legislation, since it

631 For instance the fact that the Commission is understaffed as it employs two competition experts at the moment (interview with EC Competition official, Brussels, 15/11/2007).

632 See Appendix II. See also the discussion carried out in the next chapter on the alternative and sometimes opposing views with regard to the need of the operation of competition rules in developing countries.

633 See EAC Treaty, <http://www.eac.int/documents/EAC%20Treaty.pdf>, (last visited on 21 may 2007), Article 75.

634 See EAC (2001) 'The Second East African Community Strategy Paper', <http://www.eac.int/documents/Development%20Strategy.pdf>, (last visited on 21 May 2007)

635 See EAC, 'Protocol on the Establishment of the East African Customs Union', <http://www.eac.int/EAC_CuctomsUnionProtocol.pdf> (last visited on 21 May 2007), Article 21. The article also includes a paragraph similar to Article 81(3) of the EU, which exempts a number of agreements that have other positive effects.

636 See EAC Secretariat. (2006) 'Role of EAC in Promoting Competition in the Region', by Dr Flora Mndeme Musonda, Director of Trade, EAC, <http://www.cuts-international.org/7up3/Role_EAC.pdf>, (last visited on 21 May 2007), at 12-15.

includes provisions on anticompetitive agreements, abuse of dominance, mergers as well as subsidies. It follows in other words the EU model.[637] The Bill also provides for the establishment of the EAC Competition Committee, an intergovernmental institution composed of the representatives of the Member States,[638] which is proposed to be the institution with the competence to enforce the competition provisions of the Competition Act.

5.3.10. COMESA

The COMESA Treaty[639] includes a number of provisions that regulate anti-competitive practices. In particular, Article 55 prohibits anticompetitive agreements that may have an effect on the common market, and further states that: *'The Council shall make regulations to regulate competition within the Member States.'* A Regulation on competition was published,[640] and was approved by the Council in 2005.[641] It contains extensive provisions on anti-competitive business practices. The Regulation *'...applies to all economic activity whether conducted by private or public entities within, or having effect with the common market...'*.[642] It also contains provisions on restrictive business practices,[643] abuse of dominance by firms,[644] mergers,[645] and consumer protection.[646] Based on this Regulation, the draft COMESA Competition Rules have

637 The influence of the EU model in the drafting of competition rules in EAC is also documented by a recent submission of EAC to UNCTAD, where it is stated that '...[T]he European Union is arguably the most successful regional integration organization in terms of effectiveness in the enforcement of Competition Law and Policy. A priori, if one were to consider best international practices, the EU cannot be ignored.' See Contribution by Kenya to the UNCTAD Group of Experts, on behalf of the EAC (2006) 'Regional Cooperation on Competition Policy and Law – The Experience of the East African Community', <http://www.unctad.org/sections/wcmu/docs/ c2clp_ige7p25_en.pdf> (last visited on 21 May 2007).

638 WTO (2006) 'Trade Policy Review, Report by the Secretariat: East African Community' WT/TPR/S/171, at 25. This has been one of the reasons which have delayed its final approval by the Assembly, in view of the fact that a number of countries have argued that the Committee should be a supranational body with a separate budget and capable of undertaking competition advocacy through the promotion of public awareness and understanding of competition in EAC. See the website of the East African Business Council, <http://www.eabc-online.com/news/EABC_Newsflash_March05.php #COMPETITION> (last visited on 21 May 2007).

639COMESA Treaty, <http://www.comesa.int/comesa%20treaty/comesa%20treaty/Multi-language_ content.2005-07-01.3414/en> (last visited on 21 May 2007).

640 Draft COMESA Competition Regulations, <http://www.tralac.org/pdf/COMESA_Competition_ Regulations_-_21.10.2002.doc> (last visited on 21 May 2007).

641 Muhara, L. (2007) 'Brief on Progress and Challenges of the Competition and Fair Trading Commission in Malawi' Paper delivered at the 8th Session of the Intergovernmental Group of Experts, UNCTAD, Geneva, 17-19 July 2007, at 9.

642 Article 3, subject to the exemptions set forth in Article 4.

643 Articles 16 and 20 of the Draft Regulation.

644 Articles 17 and 18 of the Draft Regulation.

645 Articles 23-26 of the Draft Regulation.

646 Articles 27-39 of the Draft Regulation.

been published.[647] The draft Rules contain more specific provisions on the function of the Competition Commission, a supranational body which, when established, will have the competence to apply the regional rules. According to the Treaty, conflicts that may arise between COMESA's Member States regarding the application of regional competition rules should be resolved by the Court of Justice.[648]

The draft Regulations were approved by Ministers of Justice and Attorneys-General in their Seventh Meeting in April 2004. Hence COMESA is another example of a plurilateral regional bloc with a comprehensive competition regime on paper. In this regard it is similar to the competition regime of the EU. Indeed, the EC has financially supported the establishment of the competition rules in COMESA.[649] Nevertheless the regional competition regime has not been applied to date. Of the 20 Member States of COMESA, only 6 have adopted competition rules, and the regional enforcement institution, the Competition Commission, is not yet established. As Lipimile and Gacguiri observe, this absence of a regional competition system has already had major consequences in the region, since a number of global mergers that have been individually notified to and reviewed by the competition authorities of the Member States.[650]

5.3.11. SACU

With regard to competition law and policy, even though the promotion of conditions of fair competition in the Common Customs Area is a stated objective of SACU,[651] the agreement only includes a general provision according to which the member countries shall cooperate on competition issues while developing their own national competition policies.[652] To this end, the agreement follows the US (NAFTA) model of agreements, which provides for cooperation on and not harmonisation of the

647 Draft COMESA Competition rules, < http://www.tralac.org/pdf/COMESA_Competition_Rules_-_21.10.2002.rtf> (last visited on 21 May 2007)

648 See Khandelwal, supra n. 501, at 10.

649 See Commission (EC) (2003) 'Technical Assistance Programmes and Projects Provided by the European Community and its Member States in the Field of Trade and Competition Policy' WT/WGTCP/W/223.

650 Lipimile, G.K. and E. Gachuiri (2005) 'Allocation of Cases Between National and Regional Competition Authorities: The Case of COMESA', in Brusick, Alvarez and Cernat (eds), supra n.3 , at 377-385.

651 Southern African Customs Union (SACU) Agreement, <http://www.sacu.int/ResourceCentre/Legislation/2002SACU Agreement/tabid/370/Default.aspx> (last visited on 21 May 2007), Article 2(c).

652 Article 40 of the SACU agreement; for an analysis of possible options with regard to the development of competition policy in the region, see Mathis, J. (2005) The Southern African Customs Union (SACU) Regional Cooperation Framework on Competition Policy and Unfair Trade Practices (UNCTAD, Geneva and New York)

competition rules of the parties. On the other hand, it should be pointed out that of the five SACU Member States, currently only South Africa and Namibia have adopted competition laws and therefore no particular conclusions may be made drawn with regard to the actual application of the competition-related provision of the SACU agreement.[653]

5.3.12. SADC

Like SACU, Article 25 of the SADC protocol on trade[654] includes a general statement, according to which, *"Member States shall implement measures within the Community that prohibit unfair business practices and promote competition"*. On this basis a group of experts has been convened and has re-expressed the commitment of SADC Members to strengthen cooperation on competition matters in the region. The SADC Secretariat should play an important role in this regard, by both facilitating such cooperation and by providing the Member States with assistance in their attempt to establish national competition regimes.[655]

5.3.13. ASEAN

No competition provisions have been adopted in the context of ASEAN, and the discussion over the usefulness of competition law for the strengthening of regional integration is ongoing. In particular, the Hanoi Action Plan of 1999 referred to the need for cooperation in order to '*explore the merits of a common competition policy*'.[656] Furthermore, in 2003, Indonesia recommended the setting up of the ASEAN Consultative Forum for Competition (ACFC) with the aim of serving as a forum for exchange of opinions among officials of the participating countries – members of ASEAN - on competition related issues of common interest, as well as to exchange such ideas with other international organisation.[657] The ACFC was finally established in 2004.

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653 See Horna, P.M., and BO Kayali (2007) 'National Implementation of Competition – Related Provisions in Bilateral and Regional Trade Agreements', in Alvarez, A-M and L. Wilse Samson (eds) Implementing Competition –Related Provisions in Regional Trade Agreements: is it possible to obtain development gains? (UNCTAD, Geneva and New York), 21, at 46.

654 Adopted on the basis of Article 22 of the amended Treaty.

655 SADC Secretariat (2007) 'SADC Expert Group Meeting on Competition Law and Policy' <http://www.sadc.int/attachments/calendar/251/1892_Expert%20Group%20Meeting%20on%20Competition%20Law%20&%20Policy%20Record%20(Draft).pdf> (last visited on 21 May 2007), Appendix II.

656 Lloyd, P.J. (2002) 'Competition Policy in the Asia-Pacific Region' 14:2 Asian-Pacific Economic Literature, 1, at 8.

657 There is no secretariat established in the context of the ACFC, and in this regard the network resembles the ICN. From 2005, the members of the ACFC meet once a year. See Yong, O.K. (2006) 'Opening Remarks at the 2nd ASEAN Conference on

5.3.14. APEC

In the context of APEC, a Competition Policy and Deregulation Group (CPDG) was established and has been in operation since 1996. It has the task of discussing competition issues in the Member States and possible influence that competition policy has on the investment in the region.[658] The Group convenes on an annual basis and has been particularly active after 1999, when the APEC Principles to Enhance Competition and Regulatory Reform were endorsed by the Ministers of the Member States. These Principles expressed a number of competition related aims, including the promotion of advocacy of competition policy and regulatory reform, the building of expertise in competition and regulatory authorities, the courts and the private sector, and the attainment of adequate resources for regulatory institutions, including competition institutions.[659] On this basis, the CPDG has set up a series of training courses and has framed a four year action plan (2005-2009) with the aim of, among others, gathering information on the development of competition law and policy in the Member States, encouraging cooperation among national authorities, and undertaking capacity building programs to assist economies in implementing the 'APEC Principles to Enhance Competition and Regulatory Reform'. [660]

5.4 Competition provisions in plurilateral agreements: A comparative reading

The brief presentation of the competition regimes of the various agreements to a certain extent validates what has been argued in an earlier part of the chapter, *viz.* that there is wide acceptance by regional blocs that some sort of competition rules are needed, since most of the regional blocs discussed here have adopted relevant provisions. Only four of these agreements, namely CAFTA-DR, ECOWAS, ASEAN and APEC, contain no competition provisions at all, and of those four agreements only in two (CAFTA-DR and ECOWAS) have there been no attempts to date to adopt

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Competition Policy and Law, Bali, Indonesia, 14-16 June 2006', < http://www.aseansec.org/18507.htm> (Last visited on 21 May 2007), where the author also notes that as of to date Indonesia, Singapore, Thailand and Viet Nam have enacted specific competition law, while currently, Malaysia and the Philippines are considering the enactment of a competition law.

658 See the website of the Committee, at <http://www.apec.org/apec/apec_groups/committees/committee_on_trade/competition_policy.html> (last visited on 21 May 2007).

659 See APEC (1999) 'APEC Principles to Enhance Competition and Regulatory Reform', <http://www.oecd.org/dataoecd/48/52/2371601.doc> (last visited on 21 May 2007), Implementation, paragraph 6.

660 See APEC Committee on Trade and Development (2006) 'Annual Report to the Ministers' APEC#206-CT-01.6, at 110 (Appendix 7).

competition rules.[661] As opposed to these two, both ASEAN and APEC have established mechanisms for the exchange of ideas and experiences of the Member States on competition matters, and this is a process referred to in various parts of the thesis as a mechanism for the development of common understandings and the final formation of rules.

On the other hand the presentation of these blocs' competition regimes show that while the content of these regimes varies there are also certain common characteristics among the agreements. This section attempts to expose such common characteristics in two broad areas: substantive competition provisions provided by the agreements, and the institutional set up of these agreements.

5.4.1. Substantive competition provisions in plurilateral regional agreements

Table 5.2. Substantive provisions

AGREEMENT	Prohibition of anticompetitive practices	Prohibition of abuse of dominance	Mergers	State aid rules included in the competition context	Rules on public /state monopolies
EU	√	√	√	√	√
ANDEAN COMMUNITY	√	√			
MERCOSUR	√	√		√	√
NAFTA					√
FTAA	√	√		√	√
CAFTA-DR					
CARICOM	√	√			
WAEMU	√	√		√	√
EAC	√	√	√	√	
COMESA	√	√	√		√
SACU					
SADC					
ECOWAS					
ASEAN					
APEC					

In terms of substantive competition law provisions, as in the case of bilateral free trade agreements, there are two main competition related models followed by plurilateral agreements. The first model is the one first adopted by NAFTA, according to which countries undertake a general obligation to have an operational domestic competition regime and a commitment to cooperate on competition matters of common interest. This model is also followed by SACU and SADC. SADC has only adopted a

661 It should be pointed out nevertheless that CAFTA –DR is an agreement that has only been very recently adopted and in this regard it is probably too early to judge whether regional competition has been totally overlooked by the participating countries.

single provision that requires the Member States to have and promote domestic competition rules; SACU also includes a provision according to which the Member States have to cooperate with each other on competition matters. Hence, no particular substantive regional competition rules are provided by these agreements.[662]

The second model includes a number of substantive competition provisions and is the one followed by the EU. This model has been followed by most of the regional blocs discussed here. A common characteristic of these agreements is that they prohibit specific anticompetitive business practices, and, in particular, they include provisions that aim to address anticompetitive agreements and the abuse of a dominant position which have an effect on the regional market. Nonetheless, the extent to which the EU model is further followed varies considerably among the different regional blocs, as only some of the blocs include substantive rules on mergers, public undertakings, and state aids.

This variety may be attributed to the fact that the more extended the scope of competition rules the more direct the intervention to the sovereign national systems of the Member States. An indicative example may be found in the field of mergers. As noted in the context of the analysis of the EU competition regime, merger rules were introduced in the EU 32 years after the adoption of the founding Treaty, and this has been primarily attributed to the hesitance of the Member States to grant authority to a regional body to apply rules that relate to the performance of the most important companies of the Member States (and therefore rules that indirectly impact upon some of the most important economic and political interests of these states). Hence, it comes as no surprise that only two of the agreements discussed in this chapter, namely EAC and COMESA, have adopted rules for the control of mergers, and such rules have yet to be applied.

Similarly, only EAC, WAEMU, have included the examination of aid granted to undertakings by the state within the realm of competition law, while three of the agreements discussed in this chapter, namely MERCOSUR, WAEMU and COMESA, have also included competition law provisions that regulate practices conducted by public enterprises and/or state monopolies, thus following the EU model.[663] Nevertheless, the relevant provisions also vary. While COMESA's competition

662 A similar set of provisions are found in the proposed FTAA, which also contains substantive competition provisions that are to be applied to cases where the regional market is affected.

663 See Table 5.2.

provisions clearly apply (or are to be applied) equally to private and public firms, WAEMU's competition regime includes provisions which aim at securing transparency of the financial relationship between Members States and public enterprises. MERCOSUR's competition law includes state monopolies within the realm of the regional competition rules only in those cases where these rules do not prevent the regular exercise of their legal rights; it is similar therefore to the EU relevant provision of Article 86(2) EC.

At least in terms of drafted rules, the inclusion of state aid rules and rules relating to public undertakings are indications of the tendency to include the public sector within the scope of the competition rules contained in particular regional agreements. As mentioned in the context of the presentation of the EC competition regime, such rules have been viewed as being essential in view of the fact that prior to their existence, national markets of the Member States of the Union were state dominated, and these rules to a certain extent ensured that the regional markets would be framed on principles of free markets. In this regard these rules can help protect private initiative against the actions of the state. However it should be also pointed out that, with the exemption of WAEMU - where two cases on state aid have been decided by the Commission - and the EU, in which the competent institutions (the Commission and the Court of Justice) have developed detailed jurisprudence, in none of the other agreements discussed in this chapter these rules have been operational.

5.4.2. Institutional set up and implementation of the rules

Table 5.3. Institutional set up

AGREEMENT	Obligation of M. states to harmonise their rules to those of the Regional agreement	General obligation of Member States to have a national competition law	Number of Member States with national Competition laws in place (as of 2005)	Type of regional institution competent to apply competition rules: A. Supranational B. Intergovernmental	Court competent to review the decisions of the regional authority	Provisions on cooperation between the M. states' national authorities
EU	√		27/27	A	√	√
ANDEAN COMMUNITY			2/4	A	√	
MERCOSUR	√		3/4	B		
NAFTA		√	3/3			√
FTAA		√	---	B		√
CAFTA-DR			2/6			
CARICOM	√		2/15	A	√	
WAEMU	√		5/7	A	√	√
EAC			2/3	B	√	
COMESA			6/20	A	√	
SACU		√	2/5			
SADC		√	7/14			
ECOWAS			5/15			
ASEAN			4/10			
APEC			16/21			

As noted in the context of the presentation of the EC competition regime, of equal or even major importance to the substantive rules included in the plurilateral-regional agreements are the provisions which organise the institutional structure of these blocs. As a general observation it could be noted that there are also two broad types of institutional structures provided by the agreements which include competition rules. The first is the one adopted by NAFTA, and followed by SACU and SADC, in which no regional institution is provided and all the competition-related issues are to be resolved by the national competition authorities of the participating countries. In this regard, both NAFTA and SACU specifically provide that the participating states should cooperate in competition matters, and as has been seen in Chapter 3, in the case of NAFTA the signing parties have also concluded non-binding bilateral enforcement cooperation agreements.

The second type of institutional structure follows the EU approach and provides for the creation of a centralised body that has the competence to enforce competition law in the region. With this model, however, the type of the regional body established to apply the rules varies. In particular, the Andean Community, CARICOM, WAEMU,

and COMESA are blocs that have opted for the creation of a supranational body equivalent of the EC Commission. On the other hand, it should be noted that, to date, of these institutions only the Andean Community Board of Commissioners and the WAEMU Competition Commission have been established in practice, and only the latter has recently started operating by issuing its first three decisions.

In contrast to the EU precedent, two of the regional blocs, EAC and MERCOSUR, have opted for the establishment of an intergovernmental institution competent to apply the regional rules. In EAC, competition law is to be applied by an intergovernmental body; and in MERCOSUR, the competence to apply regional competition rules has been granted to two relevant bodies. In these cases it is obvious that the contracting parties were not ready to offer the competence to a non national institution to review cases that may have an effect on their national markets.

In a broader context, what also becomes obvious from this data is that even with regard to the agreements which have opted for the adoption of substantive regional competition laws, i.e. those that by-and-large follow the EU model, there is no agreement as to what type of centralised enforcement body is appropriate to enforce the competition rules, and more particularly, whether such a body should be supranational or intergovernmental. This debate over the positive and negative features of supranationalism *vis-à-vis* intergovernmentalism is a vivid one, in the context of the EU's institutional set up itself,[664] and the extent to which either of these institutional designs is appropriate for a regional competition regime can only be examined by conducting research on every particular agreement, a task that cannot possibly be undertaken in the context of this study; indeed, with the exception of the EU and lately WAEMU,[665] it is an issue that is under-researched in the relevant literature. On the other hand, as noted above, the EU experiment has shown that in terms of competition law and policy, where to date the EU regime has been the only successful and operative regional regime in the world, the delegation of powers to a supranational institution (the Commission) is of major importance if a credible regional regime is to be achieved.[666]

664 See Tsebelis, G and G Garett (2001) 'The Institutional Foundations of Intergovernmentalism and Supranationalism in the European Union' 55:2 International Organization, 357; Tallberg, J. (2002) 'Delegation to Supranational Institutions: Why, How, and with What Consequences?' 25:1 West European Politics, 23.

665 See Bakhoum, M. (2006) supra n. 630, at 125.

666 See McGowan, L. (2007) 'Theorising European Integration: Revisiting Neofunctionalism and Testing its Suitability for Explaining the Development of EC Competition Policy?' 11:3 European Integration online papers, 1, at 4-5.

As also argued in this chapter, in the case of the EU, the regional courts have been of equal significance in the development of competition; they have extensively interpreted and applied the regional competition rules, and have also developed principles which delineate the relationship between the supranational body and the national authorities. To this end, the fact that some of the agreements (namely the Andean Community, CARICOM, WAEMU, EAC, COMESA, and SADC) also provide for the establishment of regional Courts which have the competence to review cases relating to the regional competition rules may be considered as a choice that should normally lead to the more efficient application of competition rules. Nevertheless this hypothesis cannot yet be tested as, with the exception of the WAEMU Court of Justice, none of these courts have to date applied the competition rules: in practice the competition regimes have not been operational in these other blocs.

On the other hand, the brief presentation of the EC competition system has also shown that the system is a dynamic one, in the sense that it changes over time. For instance, with regard to the institutional set up of the EU, it has been noted that while until recently the European Commission had sole competence to apply the competition-related provisions, Regulation 1/2003 has provided for decentralisation of enforcement, requiring Member States to apply regional rules in cases that have an effect on intraregional trade. In this regard, and while the adoption of competition rules is not a clear legal prerequisite for the EU Member States,[667] this development in the competition system practically requires Member States to have national competition institutions in place, and apply the regional rules in particular instances.

Furthermore, in a broader context, the EU experience has shown that in the long term the development of an effective regional competition regime may lead to the adoption and development of the national competition regimes which are equivalent to the regional one.[668] If the EU hypothesis is to be applicable to these other agreements, then it should be expected that the development of the regional regime should precede the relevant development of national competition regimes, particularly with regard to

667 This argument does not apply to the Member States that joined the EU from 2004 onwards, where the adoption of a competition law compatible to the EU was among the obligations that these Member States had to fulfil in order to secure EU accession. See chapter 4.

668 This argument has been already made with regard to competition law and policy in Greece. It should not however be overlooked that certain Member States have only relatively recently adopted national competition rules. For instance, The Netherlands in 1994.

regional agreements which include developing countries, where the adoption and more importantly the development of effective competition regimes is a very difficult task.[669]

To this end, and in view of the fact that to date almost none of the reviewed competition regimes have been operational, it comes as no surprise that despite the fact that certain agreements require their Member States to have competition law in place,[670] while others go a step further and require adoption of national competition rules compatible with the substantive regional rules,[671] in most of these blocs a number of Member States have not even adopted a competition law.[672]

5.5. The role of the EU in the formation of competition rules in plurilateral regional agreements.

The previous section has attempted to highlight some of the common characteristics of the competition regimes that have been set up, or that are in the process of being set up, by various competition agreements. While this comparative reading of the agreements has probably raised more questions than it has answered, and while further research needs to be undertaken to examine the particular features of the regional markets where competition law is to be applied, to suggest the appropriate substantive and procedural rules that should be adopted by these regional blocs, and to evaluate in more general the development of competition regimes of these blocs,[673] some interesting observations may still be put forward as to the role of the EU in the formation of competition regimes in other plurilateral – regional agreements.

The main such observation, and the starting point for the discussion carried out in this section, is that the competition regime of the EU has been the model followed by a number of other regional blocs, both in terms of substance and in terms of institutional set up. Indeed, the EU model has been followed by much more agreements of this kind than the NAFTA model. While it has also been suggested in the previous section that the extent to which the EU model of competition has been followed varies considerably among the various blocs which have opted this model, this observation is still of some

669 On the problems faced by developing countries in the process of adoption and application of competition rules, see Chapter 6.

670 These agreements include NAFTA, FTAA, SADC and SACU.

671 Including MERCOSUR, CARICOM and WAEMU.

672 See Table 5.3.

673 A task, that at this stage has to be limited to the negotiations for the adoption of competition regimes in these blocs as well as to the analysis of the adopted rules, and cannot be extended on issues of enforcement of the rules, since with the exceptions of the EU and WAEMU, such rules have not been operational to date.

significance, as it suggests that a model of sorts for a regional competition regime may be arising in the field of international competition. This model encompasses substantive competition provisions, at least regarding the prohibition of anticompetitive agreements and abuses of dominance which have an effect on the common – regional market, and is also based on the creation of regional institutions, either supranational or intergovernmental, that will apply these rules.

In an attempt to evaluate this phenomenon, and on the basis of the analysis carried out in this chapter, two main reasons may be put forward as to why the EC competition model was chosen by a number of other blocs. First, it might be argued that the EU itself has encouraged other regional blocs to adopt competition rules similar to those of the EU. As noted in sub-section 5.1.3., the EU in a broader context has supported the creation and operation of regional blocs, and has expressed its position in this regard through policy statements, aid granted to regional agreements and the negotiation of trade agreements with other regional organisations.

In the absence of inter-regional agreements, it is clear that no proof has been offered by the chapter regarding possible attempts by the EU to impose its own competition rules to other regional blocs through the adoption of inter-regional agreements, a practice that, as exposed in chapter 4, has been the main strategic tool of the EU in the field of bilateral trade agreements. On the other hand, this chapter has shown that on several occasions, support for regional initiatives, and in particular for the establishment of regional competition regimes, has been expressed by the EU through the funding of competition-related projects in regional blocs, such as the Andean Community, COMESA, and WAEMU. While the exact conditions upon which such assistance has been granted have not been made publicly available, it is noted in the context of the discussion that the general aim of the financial aid was to assist these regional blocs in their attempts to adopt competition law, and therefore it would be rather safe to argue that such assistance has been based on the experience gained through the application of the EC competition regime. Thus in view of the fact that it has been offered to other regional blocs which are comparable with the EU, it might be argued that such projects have been a vehicle through which the EU has attempted to export its own competition model.

That said, it has also became clear from the chapter's analysis that the EU in encouraging the adoption of competition rules by other plurilateral-regional agreements has not been as active as in the case of bilateral free trade agreements with neighbouring

countries and selected trade partners. In addition, it should be noted that at least up to 4 years ago, as demonstrated in the next chapter, in the field of international competition, much of the resources of the Commission have been devoted to the talks on competition at the WTO, while, as noted in chapter 4, the Commission has also focused on the application of competition provisions included in bilateral agreements, and particularly in agreements with candidate and acceding countries.[674]

So to what main reason may the influence of the EU observed in the context of the discussion above be attributed? By induction, it could be argued that the EU model of competition has to a certain extent been copied due to the fact that it has been considered by other regional blocs as a benchmark and a tool for the achievement of regional integration. This phenomenon – countries or group of countries copying the legal regime of another country or group of countries – has been explained by economic theory, which suggests that competitors imitate successful strategies over a given period of time.[675] This assumption may be applied by analogy to the field of plurilateral regional agreements, where the successful application of the EU regime in general and its competition regime in particular has been to a certain extent imitated - at least on paper - by a number of other plurilateral agreements.

Similarly, in the international relations literature, the concepts of mimetic and normative isomorphism have been advanced in order to explain the reasons that lead to the adoption of similar competition regimes by different regional agreements.[676] According to mimetic isomorphism, certain organisations mimic other organisations due to uncertainty. The more frequent the practice, the more likely it is that other organisations imitate such a practice. On the other hand, according to normative isomorphism, an organisation imitates another organisation in cases where the approaches and procedures of the latter on a given issue is considered to be superior and

674 It is interesting to note, that none of the last two Commissioners for Competition (former Commissioner Monti and Commissioner Kroes), has publicly expressed the position that the EU actively supports the formation of competition rules in other regional blocs. This should not lead us to the opposite end and argue that the EC Commission has not been eager to support such initiatives, nevertheless, is indicative of the fact that such support has not been of primary importance at least as far as DG for Competition is concerned.

675 Sokol, D. D. (2007) 'Why is this Chapter Different From all the Others? An Examination of Why Countries Enter Into Non-Enforceable Competition Policy Chapters in Free Trade Agreements', Legal Studies Research Paper Series, Research Paper No. 2007-13, at 50.

676 Ibid, where the author refers to the work of DiMaggio and Powell who first developed the context of institutional isomorphism, a concept already mentioned in the thesis in the context of the analysis of bilateral enforcement cooperation agreements (Chapter 3). See DiMaggio P. J. and W.W. Powell (1983) 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields' 48 American Society Review, 147.

based on prevailing thought. While mimetic and normative isomorphism are based on different causal grounds (mimetic on uncertainty and lack of information and normative on the assumption of superiority), the outcome of both is the imitation of the most successful approaches. To this end, the adoption by a number of agreements of the EC competition model is a consequence of the fact that the EC model is a tested one and whatsmore is considered to be as a very successful one. Therefore it comes as no surprise that the model has been used as a template to be followed by other competition regimes (WAEMU, CARICOM, and COMESA being the prime examples) which, having accepted the argument that the operation of an effective competition law could have a positive effect in the bloc, have followed the EC competition regime.

5.6. Conclusion

This chapter has reviewed the competition regimes of a number of plurilateral regional agreements around the world. It first presented the historical development of regional agreements, and identified the factors that lead to the establishment of the various regional blocs. Geographic proximity, the aim of the signing states to achieve peace and increased welfare in the region, and their aim of counter-balancing the bargaining powers of other formed regional blocs and strong states at the international level are all important factors.

In terms of competition, the chapter argued that the role of competition law and policy in these arrangements is to ensure that regional trade liberalisation, a goal pursued by all the agreements discussed, is not hampered by anticompetitive business practices with an effect on the regional markets. From a different viewpoint, it has also been noted that the examination of the competition law provisions of these agreements is significant in view of the fact that these agreements, with their wide membership, may be considered as a miniature of a possible multilateral agreement. However this is an assumption that one cannot yet test, since to date, with the exception of the EU and lately WAEMU, none of the other regional competition regimes have been operational.

This lack of application of the competition rules may be attributed to various factors, including the fact that, as the EU experiment has shown, it takes time for the regional competition regime to develop. The hesitation of particular Member States to accept a regional body to apply rules that may have an effect on companies supported by the governments of these states is another factor, as is the lack of sufficient resources regarding the enforcement of competition rules. On the other hand, what can be safely

supported is that there is wide recognition that some sort of regional competition law is important for the effective operation of the regional trade agreements. This assumption is based on the fact that most of these blocs have adopted or are in the process of adopting competition rules.

In the context of the brief examination of the competition regime of the EU, which is the focal point of study in this thesis, it has been argued that EU competition law and policy has been built around two main elements: detailed substantive competition rules, and effective enforcement of these rules, which in the case of the EU has been carried out by two regional - supranational institutions, i.e. the Commission and the Courts. Hence, the EU model - as opposed to the NAFTA model which is limited to a commitment undertaken by the Member States to have national rules in place and provides with mechanisms for voluntary cooperation - requires the adoption of detailed substantive regional rules and centralised enforcement of such rules.

On the other hand, as noted above, while all the agreements that follow the EU model include provisions on the prohibition of anticompetitive practices and abuse of dominance, there is great variation as to both the remaining substantive provisions included in the other agreements and the institutional set up they provide for. In particular, it has been noted that only some of them include provisions relating to mergers, state aids, and abuse of dominance. In terms of institutional set up, of the agreements that have granted the competence to enforce the competition rules to regional bodies, two of them, namely EAC and MERCOSUR, have granted it to intergovernmental bodies, thus departing from the EU model of institutional set up, which is greatly based to a supranational body, i.e. the Commission.

This variation in the provisions found in regional agreements reveals that there is a long way to go before reaching some sort of agreement as to the optimum operation of competition in these blocs. In view of this argument, further research has to be undertaken to analyse the competition framework of individual regional plurilateral agreements. Such research should (i) focus on the examination of the particular regional markets created by these agreements, (ii) evaluate the particular needs of these markets, and (iii) propose substantive rules appropriate for their effective operation, as well as the rules that would better support the effective enforcement of these rules. To this end, major international organisations such as UNCTAD, OECD and the IMF have recently started looking at this issue.

Finally with regard to the influence of the EU in the formation of regional competition rules in other blocs, the chapter has indicated that while there have been instances where the EU has financed projects relating to the adoption of competition rules by regional blocs, the EU administration has not been as active in this field as in the case of bilateral trade agreements, and at least until 4 years ago, as in the negotiations over a possible competition agreement at the WTO. In this regard, the chapter has argued that the fact that a number of plurilateral regional agreements have even partially followed the competition regime of the EU may be mainly attributed to the fact that to a certain extent, the EU model is considered as a benchmark, and is therefore followed by a number of other agreements which have adopted substantive competition rules and have granted the competence for the application of the rules to centralised enforcement bodies. As argued in the chapter, the theoretical basis of this phenomenon relates to the fact that there is a tendency among organisations to imitate tested and successful strategies and practices of other organisations. Given that the EU in general and the EC competition regime in particular have been major successes, it comes as no surprise that a number of other regional blocs have to a certain extent imitated the EU precedent.

Chapter 6: The Role of the Competition Law and Policy of the EU in Multilateral Negotiations on Competition

Abstract

This chapter examines the development of the negotiations on competition at the multilateral level so as to understand the policy followed by the EU in the context of these negotiations. A large part of the chapter is devoted to the WTO talks on the issue, which has been the most recent attempt to conclude a binding multilateral agreement on competition; it also observes the developments that have taken place in the last four years at the ICN. As is argued in subsequent discussion - itself informed by elements identified in previous chapters of the thesis - and in contrast to the formation of competition rules in the context of bilateral and plurilateral trade agreements where the influence of the EU has been important, at the multilateral level the role of the EU has been less influential. In reaching this conclusion nonetheless, the chapter also attempts to highlight the various parameters which play a role on multilateral negotiations on competition law and policy.

The chapter is divided into three sections. Section 1 briefly reviews the discussions concerning a possible multilateral agreement that have taken place from the beginning of the 20th century until relatively recently. Section 2 focuses on the process of negotiations at the WTO. This section reviews the position taken by the EU on the issue and further examines the relevant positions taken by the US and a number of developing countries. Finally, Section 3 discusses the work carried out by the International Competition Network.

6.1 Historical development of the negotiations on the adoption of a multilateral agreement on competition

6.1.1. Attempts under the aegis of the League of Nations, and the proposed International Trade Organization (ITO)

The history of the attempts to adopt a multilateral agreement on competition law goes back to 1925 when the first international competition code was proposed in a study conducted under the aegis of the League of Nations.[677] The proposal was finally rejected by the League on the basis of arguments not much different than those developed to

677 Furnish, A (1970) 'A Transnational Approach to Restrictive Business Practices', 4 International Lawyer, 317, at 317-319.

explain the lack of success of subsequent attempts for the adoption of a multilateral competition agreement: that divergent national attitudes towards restrictive business practises precluded the creation of an international code; and that an international regime would heavily infringe upon state sovereignty.[678]

Almost 20 years later, a second significant attempt to include competition law in the international trading system was made. In particular, Chapter V[679] of the proposed Havana Charter was dedicated to the regulation of restrictive business practices. According to the provisions of this charter, the Member States of the proposed International Trade Organisation (ITO) would have been obliged to adopt appropriate legislation and to co-operate with the ITO in order to prevent private and public commercial enterprises from getting engaged in practices that would restrain competition, limit access to markets, or foster monopolistic control whenever such practices would have harmful effects on the expansion of production or trade and would interfere with the achievement of any of the other objectives listed in Article 1 of the Charter.[680] An extensive list of such practices was included in the proposed code.[681]

Member States would have been entitled to complain about prohibited restraints of competition to the ITO,[682] which according to the proposed Charter would have been empowered to investigate and demand information during its investigation.[683] If the ITO were to find that the alleged practice would have a restrictive effect on competition, it would have been empowered to request each member involved to 'take every possible remedial action'.[684] Moreover Article 48 (8) would have entitled the ITO to request from the offending Member Nation full reports in relation to the progress of its remedial measures.

Although most of the countries that participated in the discussions favoured the adoption of the Havana Charter, the proposed Charter failed to get favour in the US Congress which, as documented, was essentially motivated by the traditional concerns over international incursions into US domestic political sovereignty and by the feeling

678 Ibid.

679 See Havana Charter, Chapter V, Articles 46 to 54.

680 Ibid, in Art. 46 (1).

681 Ibid in Art. 46 (3): The list included price fixing, sales or purchase quotas, excluding enterprises from business activities, dividing territorial markets or fields of business, and limiting production or fixing production quotas.

682Ibid in Art 48 (1).

683 Ibid in Art 46(2) and 48 (3).

684 Ibid in Art 48 (7).

that the competition rules of Chapter V were not adequate for the US.[685] Thus the Congress withdrew its support for the Charter and the negotiations failed to produce an agreement.

6.1.2. UNCTAD: The Restrictive Business Practices Code

No significant initiative for a multilateral competition agreement was to be taken until the 1970s.[686] At that time, the desire for discussions concerning a multinational agreement came from less developed countries. These countries were concerned about the increasing expansion of multinational enterprises, which from their point of view were powerful and abusive.[687] Under the developing countries' pressure the issue of negotiating a multilateral competition agreement was once again raised. The discussions were held under the aegis of the United Nations Conference on Trade and Development (UNCTAD), and the result of these negotiations was the adoption of a Restrictive Business Practices Code (RBP Code)[688] which, contrary to the initial proposal of the developing countries, is a recommendation and thus not legally binding.[689]

In terms of substance, the Code includes provisions addressing horizontal restraints of competition (price-fixing, boycotts, and market and consumer allocation).[690] In relation to vertical restraints, the Code declares that such restraints should be condemned only when they are conducted by a dominant firm and they are abusive in character.[691] Concerning abuse of a dominant position by a firm, the Code states that each practice should be examined on its own merits (purpose and effect).[692]

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685 See Timberg, S. (1973) 'An International Antitrust Convention: A Proposal to Harmonise Conflicting National Policies Towards the Multinational Corporation' 8 Journal of International Law and Economics, 157.

686 In the period between 1950 and 1970, two initiatives are noteworthy: First, the UNESCO's committee endorsement of a second draft of the Havana Charter's Competition Principles, which failed due to the withdrawal of the US support (See Furnish, supra n. 677, at 323). Second, the work of a group of experts that was appointed in 1958 to discuss the possible inclusion of competition provisions in GATT. The decision was again negative, notwithstanding that the contracting parties recognised the problems that restrictive business practices create in international trade. See Malaguti, M-C. (1998) 'Restrictive Business Practices in International Trade and the Role of the World Trade Organisation' 32:3 Journal of World Trade, 117, at 120.

687 Fox, E.M. (1995) 'Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade' 4 Pacific Rim & Law Policy, 1, at 4.

688 The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, U.N. Doc. TD/RBP/CONF 10/Rev. 1 (1980), endorsed by G.A. Res. 63, U.N. Doc. A/RES/35/63 (1980), reprinted in 19 I.L.M. 813 (1980).

689 The Code is not a Treaty but a Resolution of the General Assembly. Article 10 of the U.N. Charter defines such Resolutions as 'Recommendation to States'.

690 RBP Code, supra n. 688, sec. D-3.

691 ibid in sec. D-4.

692 Ibid in sec D-4 & note accompanying the word "abuse".

Generally it could be said that the RBP Code has been noteworthy since it is the only multinational competition agreement that has been adopted and it represents the only time that the US has supported the adoption of such an agreement. Probably it comes as no surprise that, in the relatively long story of multilateral negotiations concerning a competition agreement, the only time when consensus was reached on substantive competition provisions it was for a non-binding agreement. On the basis of the analysis about soft-law that has been carried out in earlier chapters, this may be considered as a first step towards further and formal (in the form of a binding agreement) multilateral cooperation on competition. Such a position is also revisited in the context of the discussion on the work of the ICN,[693] itself a body that has also issued a number of soft law instruments. In view of the fact that no binding agreement has been reached to date on this issue, it may also be an indication that with regard to an issue such as competition law, where there is no common approach as to its optimum operation, semi-formal arrangements in the form of soft law are the second best, but yet the only, solution regarding the treatment of anticompetitive business practices with an international effect.

On the other hand, it has been argued that as the code is a soft law instrument many of its provisions are vague, and that many of the rules that developing countries wished to be included into the Code did not survive the negotiation process (due to the opposition of the developed countries that participated in the negotiations).[694] Both of these points render the Code a legislative text of relatively limited value. That said, as examined in the following section of the chapter, the work of UNCTAD in this field has been very important, as it is the organisation that most actively supports the interests of developing countries.

6.1.3. The re-opening of the debate on a multilateral agreement on competition in the 1990s

The debate over the adoption of a multilateral agreement on competition law and policy was revived in the mid 1990s within the Auspices of the WTO, which was

693 See below, Section 6.3.

694 Miller, D.L. and J. Davidow (1982) 'Antitrust in the United Nations: A Tale of Two Codes' 18:2 Stanford Journal of International Law, 347, at 354-355.

established in Marrakech in 1994.[695] The WTO is the product of the 8th Round of Multilateral Trade Negotiations (the Uruguay Round) which was held between 1986 and 1994 under the General Agreement on Tariffs and Trade, and integrates approximately 30 Uruguay Round Agreements and 200 previous GATT Agreements into one single legal framework.[696]

As already noted, by the time that the WTO was established no binding multilateral agreement on competition had been adopted. Non etheless, at the time, especially in Europe, there were voices that enthusiastically supported the adoption of such a multilateral agreement. With the European Union being at the forefront of a group of WTO Members that promoted the issue before the Singapore Ministerial Conference in 1996, the possible inclusion of competition within the WTO was finally discussed in the Conference. The Ministerial Declaration provided no consensus among the state representatives on possible substantive actions that should be taken,[697] nonetheless Member States agreed on the creation of a working group to study the interaction between trade and competition policy, including anti-competitive practices, and to identify the areas that may merit further consideration in the WTO framework.[698] Thus competition was included in the WTO agenda, along with another three topics: investment, transparency in government procurement, and trade facilitation. These four new topics are referred to in WTO jargon as the 'Singapore Issues'.

The establishment of the working group on trade and competition at the WTO triggered a lively debate over the usefulness of competition law and policy in the international trade system. Hundreds of papers from Member States were submitted to the working group, expressing these states' positions on the issue.[699] In this regard, the

695 Agreement Establishing the World Trade Organisation, Final Act Embodying the Results of the Uruguay Round of Negotiations, Marrakech, 15 April 1994 (hereinafter WTO Agreement), <http://www.wto.org/english/docs_e/legal_e/final_e.htm#TRIPs> (last visited on 21 May 2007).

696 Petersmann, E-U. (1994) 'Proposals For Negotiating International Competition Rules In The GATT-WTO World Trade And Legal System' 49 Swiss Review of International Economic Relations, 231, at 264.

697 Cocuzza, C. and M. Montini (1998) 'International Antitrust Co-operation in a Global Economy' 19 European Competition Law Review, 156, at 161.

698 WTO (1996) 1996 Singapore Ministerial Conference of the Parties to the WTO, Singapore Ministerial Declaration WT/MIN(96)/DEC.

699 Specifically, 246 communications (papers) were submitted to the Working Group by WTO Members, as well as by international organisations, such as the OECD. 20 of these communications were submitted by the EC. In relation to the other Singapore Issues, the number of communications is high. For instance, 146 relevant communications were submitted in the context of the discussions at the working group on trade and investment, 41 to the Working Group on the transparency in government procurement practices. See the WTO website <www.wto.org>.

consultations at the WTO level have proved to be a reality-check regarding the status of competition law and policy from an international trade perspective.

Most of the issues raised in the context of this study were discussed at the WTO. These include the optimum operation of competition law at the national level; the optimum operation of competition law at the international level, and more particularly the types of anticompetitive practices that should be dealt with by international competition rules; the relationship between competition law and WTO law including the application of general principles of the WTO law, such as transparency, non-discrimination and the principle of the most favoured nation on competition; the examination of restrictive business practices that have an effect on the markets of multiple states; and the analysis of methods of cooperation between Member States on competition issues, including issues of technical assistance and capacity building.

On the basis of these consultations, in Doha in November 2001, the WTO Members decided to include competition law and policy in the next round of the WTO negotiations. According to paragraph 25 of the Ministerial Declaration,

"In the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hard-core 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". [700]

Nonetheless, once more, as in Havana in 1947, the Ministerial Conference in Cancun in 2003 provided no results, and the negotiations on competition were wound up.[701] The Singapore issues were finally withdrawn from the agenda in the so-called 'July package', i.e. the decision adopted by the WTO General Council a few months after the Cancun conference that aimed to reactivate the negotiations, with the exception of trade facilitation. The Council noted that it:

'agrees that these issues, mentioned in the Doha Ministerial Declaration ..., will not form part of the Work Programme set out in that Declaration and therefore no work

700 WTO (2001) 2001 Doha Ministerial Declaration, WT/MIN(01)/DEC/1 at paras 23-25.

701 WTO Ministerial Statement, WT/(min)03/20, where it is stated that further work should be carried out in the context of the Doha Declaration without any reference to particular tasks and deadlines.

towards negotiations on any of these issues will take place within the WTO during the Doha Round.'[702]

The next sections of the chapter attempt to understand the debate about the possible inclusion of competition law within the WTO framework as has been developed during the negotiations in the context of the Working Group on Trade and Competition. In view of the central question that the thesis tries to address, the focus of subsequent analysis is the policy followed by the EU in this particular field. Thus, the next section discusses the reasons that led the EU to the initial proposal for adoption of a WTO competition agreement, observes the way that the US and developing countries have received and reacted to this proposal, and attempts to identify the factors that led to the final collapse of negotiations at Cancun.

6.2 Factors that led to the EU proposal for inclusion of competition within the WTO framework

As noted above, the EU was the most enthusiastic supporter of the inclusion of competition law in the WTO framework. The section attempts to identify the reasons that initially led to the EC support for the idea to conclude a binding agreement on competition and the reasons that led to the withdrawal of the EU proposal in 2004.

6.2.1 The leadership of Lord Brittan and the creation of a network of academics and politicians who supported the adoption of a multilateral agreement on the WTO

One of the most significant factors that played a role in the re-launch of discussions over a possible WTO agreement on competition was the development in Europe in the early 1990s of a network of academics and officials who supported the adoption of such an agreement. As most of the experts interviewed in the context of this study have stressed, Lord Brittan was the leader of this group and the most influential individual in the development of the EU position.[703] In fact he was the first to launch the issue within the European Commission, and the first to express the belief that competition law and policy should find a place in the WTO nexus of agreements.

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702 WTO (2004) 'Decision Adopted by the General Council on 1 August 2004', WT/L/579, at 3.

703 These interviewees include four officials from the EC Commission, as well as an EU and a US competition practitioners (Interviews conducted in Brussels, 20and 21/7/2003. The importance of the role of particular individuals in the development of new policies in the international arena has been extensively discussed in the political science literature. See for instance Young, O.R. (1991) 'Political Leadership and Regime Formation: On the Development of Institutions in International Society' 45 International Organisation, 281.

Brittan was the Commissioner for Competition from 1989 until 1993, when he undertook the position of Commissioner for the Union's external affairs and became the EU's chief negotiator at the Uruguay Round. He was a major supporter of free trade in general and a strong opponent of the use of anti-dumping measures. According to one of the interviewees, he once stated that *'anti-dumping is chemotherapy which kills the patient'*.[704]

He first publicly expressed his belief that competition rules should be included in the GATT/WTO framework in 1992, when he was still the Commissioner for Competition.[705] When he became the EU chief negotiator at the WTO, he found in Karel Van Miert, the new Commissioner for Competition, a strong ally in his attempt to incorporate competition within the WTO framework. For both Commissioners, the issue became a priority and being in leading positions at the Commission they had a major impact in the process of the negotiations.

In parallel, a network of academics was being developed in Europe, and supported the idea of a binding multilateral agreement on competition. In particular, in 1993 a group of competition and trade experts, the so-called 'Munich Group', which consisted of nine German, one Japanese and two US academics, all lawyers,[706] proposed a Draft International Antitrust Code (DIAC).[707] According to its drafters, the Munich Code would be introduced in the GATT-MTO (Agreement establishing the Multilateral Trade Organisation - as the Munich Group named the WTO) as a Plurilateral Competition Agreement.[708]

These experts proposed the adoption of a detailed competition code[709] which would include provisions for horizontal restraints,[710] vertical restraints,[711] concentrations,[712] abuses of a dominant position,[713] and a regime for public

704 Interview with EU Competition Practitioner, Brussels 21/7/2003.

705 See Brittan, L. (1992) Competition Policy and International Relations (Brussels: Centre For European Policy Studies).

706 The private International Antitrust Code Working Group was composed by W. Fikentscher, E. Fox, J. Drexl, A. Fuchs, A. Heinemann, U. Immenga, H.P. Kunz-Hallstein, E-U Petersmann, W.R. Schluep, A.Shoda, L.A. Sullivan and S. Soltysinski.

707 Draft International Antitrust Code, as a GATT- MTO – Plurilateral Trade Agreement: Antitrust and Trade Regulation Report (BNA) at 126 (Special Supplement No 1628, 19 August, 1993), (hereinafter DIAC).

708 See DIAC, ibi, in Art.1.

709 For an analysis of the Munich Code see Fikentscher, W. (1994) 'Competition Rules for Private Agents in the GATT/WTO System' 49 Swiss Review of International Economic Relations, 281.

710 DIAC in Art.4.

711 Ibid in Art 5.

712 Ibid in Art.8-13.

713 Ibid in Art 14.

undertakings and state authorisation[714] similar to Article 86 of the EU Treaty for public undertakings. Moreover, DIAC provided for the establishment of an international competition agency which would operate within the institutional framework of the MTO (WTO)[715] and which would have the right to bring individual cases to the national courts, or to the International Antitrust Panel which would be established.[716]

As is obvious, DIAC had many similarities with Chapter V of the Havana Charter, and, since it included proposed provisions on almost every aspect of competition law, was a very ambitious plan for the creation of a multilateral code. Nonetheless it was almost immediately felt that such a proposal was too optimistic, and to a certain extent not realistic, since it was a very detailed piece of legislation that was proposed at a time when not more than 30 states had competition law in place.[717]

Two years after the publication of the proposal, another group of academics and EU officials,[718] which was convened by Karel Van Miert, came up with a report,[719] in which it argued that a pluriliteral agreement under Annex IV of the WTO would be the most realistic option with regard to the possible adoption of a multilateral agreement on competition.[720] According to the report the agreement would be adopted at a first stage by countries with a mature competition system.[721] It would include elements that were included in bilateral enforcement cooperation agreements such as procedural notification, cooperation, negative and positive comity obligations, and some minimum substantive principles for cross-border cases, such as the prohibition of horizontal agreements (cartels, including export cartels), vertical restraints (for which a rule-of-reason test was provided), abuse of a dominant position, and national monopolies with exclusive or special privileges.[722] These principles would be incorporated into the national laws of the Member countries in much the same way as EC Directives: each

714 Ibid in Art 16.

715 Ibid in Art. 19.

716 Ibid, in Art. 20.

717 It is characteristic that even some members of the Munich Group had expressed their concerns in relation to a full-competition code and supported a more limited approach and for a code embodying only 15 principles. See E. Fox, supra n. 687, at 10.

718 The group of experts was composed by the Commission officials Claus Dieter Ehlermman, Roderick Abbott, Jean-Francois Marchipont, Francois Lamoureux, Alexis Jacquemin and Francois Pons; and as external experts, Frederic Jenny, Ulrich Immenga and Ernst- Ulrich Petersmann.

719 See Commission (EC) (1995) 'Report of the Group of Experts, "Competition Policy in The New Trade Order: Strengthening International Competition and Rules', COM(95) 359 final (Hereinafter, Report of EU Experts).

720 This approach has been named 'the building block approach' or the 'instalments approach'.

721 Report of EU Experts, at 16-17. For a first stage, the report suggest that the signatories should be all the Member Countries of the OECD, the Central and Eastern European Countries, and Hong Kong, Korea, Singapore, Taiwan.

722 See Report of the EU Experts, at 17.

country would have to incorporate the principles in its national legislation, but would not be obliged to amend its legislation in cases where the legislation already contained the principles or was open to similar interpretation.[723]

In terms of enforcement, the report proposed that the WTO Dispute Settlement should review competition cases envisaging four distinct types of possible disputes: disputes over international procedural obligations, disputes over per-se prohibitions, disputes over rule-of-reason violations and disputes over impediment to market access.[724] Such a plurilateral agreement would develop and expand its coverage progressively through a '*domino effect*', both in terms of its geographic scope, substantive coverage and surveillance.[725]

It is clear that by advocating an '*instalment approach*', the proposal of this group of experts was far more realistic than the one proposed by the Munich Group. Irrespective of the substance of the proposal, what is of importance is the fact that in the mid-1990s a network of academics and EU officials had emerged and clearly expressed the belief that competition law should be included in an international, binding agreement. It should be noted that Professors Petersmann and Immenga, both participated in the Munich Group and the Group of Experts appointed by the Commissioner Van Miert, an indication of the intellectual links between the two groups.[726] It is also important to note that no business representatives participated in the preparation of these reports. On the contrary, major business confederations, such as UNICE (currently Business Europe), repeatedly expressed their concerns over a possible binding agreement within the WTO framework. For instance, in 1999, UNICE clearly stated its concern '*...about a binding multilateral agreement on specific competition rules concluded in the WTO as opposed to clear objectives or guidance for a voluntary set of rules. WTO is not intended or equipped to operate at the private-to-private level. UNICE fears that a binding agreement cannot but result in binding review*

723 Ibid, at 17; see also Petersmann, E-U. (1996) 'International Competition Rules For Governments and for Private Business: The Case for Linking Future WTO Negotiations on Investment, Competition and Environmental Rules to Reforms of Anti-Dumping Laws' 30:3 Journal of World Trade, 5, at 26.

724 See Report of EU experts at 18-19.

725 Ibid at 20.

726 It should be pointed out that in the second half of the 1990s a number of alternative proposals emerged with regard to the insertion of competition policy in the WTO. Such proposals included the insertion of minimum substantive standards of competition law, the expansion of the scope of current WTO agreements in order to bring non-violation complains, the introduction of competition criteria in anti-dumping, the prohibition of export cartels and the adoption of procedural and due process norms. For a review of these proposals from a developing country perspective, see Hoekman, B and P Holmes (1999) 'Competition Policy, Developing countries and the WTO' 22:6 The World Economy, 875.

of specific essentially private cases by bodies that are inappropriate and ill-equipped for that task. This will greatly slow down commerce and escalate private disputes to international problems.'[727]

Given the hesitance of EU business to support a competition agreement in the WTO, it follows that the network that re-activated the debate over an international binding agreement on competition encompassed academics and, most importantly, EU officials - primarily from the Directorate General for Competition. The issue was a creature of the EU bureaucracy, and it was initially put forward for two main reasons.: (i) due to the belief that the EU model regarding the regulation of competition should be expanded and applied on a global basis; and (ii) so as to open up international markets for EU companies (market access goal). Another two possible driving forces behind the persistence of the EU as regards the adoption of a WTO competition agreement may be put forward: the attempt of the EU at the time to limit the expansion of competition rules by the US in an extraterritorial manner; and the desire of the EU bureaucracy to slow down agricultural reform at the WTO, an issue of major importance for developing countries. All these arguments are further discussed in the remaining part of this section.

6.2.2 Expansion of the EU model on a global scale

The most profound reason behind EU support for the adoption of an international binding agreement on competition is the fact that the EU itself had successfully met the challenge of creating an effective competition framework that was applied in all its Member States. In the context of the EU, competition law and policy has been used to facilitate the development of EU intra-regional trade. Thus, given this experience it is no surprise that the EU was the leading proponent of the idea to adopt a multilateral competition agreement.[728]

The aim of expanding the EU approach to multilateral agreements on competition is also reflected in the Communication that the former Commissioners Brittan and Van Miert addressed to the Council in 1996, in the context of the negotiations on the issue at the WTO. The Commissioners noted that, *'...[E]nhanced commitment to competition policy enforcement would strengthen the trading system*

727 See UNICE (1999) 'Preliminary UNICE Comments on the Commission Discussion Paper: Trade and Competition: WTO Framework on Competition Rules', UNICE Paper No 1/30/1.

728 See Fox, E.M. (1997) 'Towards World Antitrust and Market Access' 91:1 The American Journal of International Law, 1, at 4-10, where the author discusses the analogy between the EU experience in the use of competition rules in a wider trade context and the possible operation of competition rules in an international context.

along the lines of our legal systems and market economies, of which competition law is a basic feature.'[729] Along the same lines, it has been argued in the political science literature that, in view of its own experience with the successful development of a common market composed of a number of sovereign states, the EU has been far more pro-multilateralist than other countries, and especially the US. According to Higgot, *'Europe, in theory if not always in practice, exhibits a stronger normative, some would say 'post-modern' attitude towards multilateral governance structures developing constitutional and regulatory frameworks that increasingly transcend the nation state'.*[730]

6.2.3 EU pursued inclusion of competition agreement within the WTO in order to secure market access for its firms to other national markets

Apart from the ideal of a single universal market where competition would be used as a way of avoiding distortions in the market caused by private firms, another clear motive behind the EU's persistence in the mid 1990s to include competition provisions in a multilateral agreement was its desire to secure market access for European business in third countries. Market access was a priority for the Commission at the time and this is clearly expressed in a Memo issued by the Commission in 1996:

'Much of the prosperity and job creation in Europe depends on foreign trade and investment. The European Commission is therefore determined to pursue a more active market opening strategy for the benefit of the European exporters, who face a huge number of trade barriers on foreign markets. We are entitled to demand that our trading partners respect their international commitments: a deal is a deal. Our market is open and we expect others to open theirs also'.[731]

Lack of competition law in general, or lack of effective enforcement of competition law in national markets where European firms wanted to do business, was considered to be one of the trade barriers that could obstruct EU firms. Hence, the attempts to adopt a multilateral agreement on competition was part of the Community's

729 See Commission (EC) (1996) Communication to the Council 'An International Framework of Competition Rules', COM (96) 284.

730 Higgott, R. (2005) 'The Theory and Practice of Global and Regional Governance: Accommodating American Exceptionalism and European Pluralism' GARNET Working Paper No 01/05, at 10.

731 See Commission (EC) (1996) 'How a Unified Stategy Can Help European Business. Background Note on the Market Access Strategy', MEMO/96/108. In order to implement this goal, the Commission created a database which includes the trade barriers in different regions and states of the world, available at <http://mkaccdb.eu.int/mkaccdb2/indexPubli.htm> (last visited on 21 May 2007).

strategy on market access: *'...anticompetitive practices are keeping our firms out of third country markets but they cannot, in the absence of proper enforcement measures in those third markets, be tackled effectively without international rules'.*[732]

It follows that, behind the apparent 'romantic' motivation of the EU to expand its successful EU model on a global level, lies a major strategic goal of the EU bureaucracy, namely offering EU business the opportunity to expand their operation to new markets.[733]

6.2.4 A multilateral agreement in order to avoid conflicts in the enforcement of competition law and weaken the effect of extraterritorial application of US laws

Another reason put forward by the Commission in support of the inclusion of competition within the WTO framework was the avoidance of conflicts in the enforcement of competition rules by multiple states. According to the Commission, *'...[C]onvergence and conflict avoidance would also increase the legal security of firms operating in different jurisdictions, as well as reduce their costs of compliance with competition laws'.*[734]

This is obviously a rational argument, particularly when one considers the discussion developed in earlier chapters of the thesis concerning multijurisdictional review of mergers and, most importantly, the extraterritorial application of competition rules (by the US). It should be pointed out that since the beginning of Clinton's presidency the US was much more aggressive in the pursuit of antitrust violations in comparison to the Reagan and Bush administrations.[735] This was an issue of major concern among EU officials, who felt that it could lead to extensive extraterritorial application by the US antitrust authorities.

In fact the intentions of US officials to expand the scope of extraterritorial application of antitrust rules became apparent with the *Pilkington* case of 1994, where the basis of US intervention was harm to US exporters rather than to US consumers.[736]

732 See Commission Communication, (96) 284, supra n. 729.

733 This argument has been mentioned by two interviewees, an EC Commission Official and an EU practitioner, Brussels, 20 and 21/7/2003 respectively.

734 See COM (96) 284, supra n. 729.

735 See Litan, R.E. and C. Shapiro (2001) 'Antitrust Policy During the Clinton Administration' Competition Policy Centre, University of California, Berkeley, Working Paper No CPC01-22, at 19.

736 The case related to allegations that Pilkington PLC established a network of restrictive distribution agreements impeding market access of US companies to the UK and other national glassware markets. See United States v. Pilkington plc, 1994-2 Trade Cas. (CCH) 70842.

According to an EU official who participated in the WTO competition negotiations on competition, by proposing a WTO agreement on competition, the EU attempted to limit the extraterritorial enforcement of the competition rules by the US.[737] Officially, this concern was also expressed in the Communication of the Commission to the Council, where the Commission stated that *'...[E]nhanced international cooperation would limit competition authorities' need to resort to extraterritorial action. There are compelling advantages to solving problems through cooperation, especially if such cooperation improves the likelihood that the anticompetitive behaviour can be eliminated'*.[738]
It follows that the EU at the time preferred cooperation over extraterritoriality. One should remember however that, in contrast to the US where extraterritorial application of competition rules was already established in the 1940s, and despite the attempts of the EC Commission to apply the effects doctrine since the 1980s, the EU's ability to apply competition rules extraterritorially was relatively limited by the ECJ.[739]

6.2.5 The proposal for an agreement on competition as a way of avoiding reforms on agriculture

A final correlated scenario worth mentioning is that the EU sought to add the Singapore Issues, and consequently competition in the WTO agenda, in order to slow down agricultural reform at the WTO.[740] This argument is based on the assumption that the EU, being aware that developing countries would not agree to the inclusion of these issues in the WTO framework, would have an extra bargaining chip in order to satisfy the very strong lobby of agricultural producers in several EU states on the one hand,[741]

737 In his words, 'at the time, Joel Klein would enforce Section 1 of Sherman Act all over the world'. Interview with EC Commission officiall, Brussels, 21/7/2003.

738 See COM (96)284, supra, n 729, at 5.

739 See the discussion on extraterritoriality in Chapter 3.

740 See Woolcock, S. (2004) 'The Singapore Issues in Cancun: A Failed Negotiation Ploy or a Litmus Test for Global Governance?' LSE working paper, <http://www.lse.ac.uk/collections/international TradePolicyUnit/pdf/theSingaporeIssuesInCancunRev1.pdf> (last visited on 21 May 2007). This point was also raised by an EU practitioner interviewee (Brussels, 21/7/2003). A similar point has been raised by De Bievre, who claims that through its demands on regulatory issues, including competition, the EU attempted to balance future market access concessions on agriculture. De Bievre, D. (2006) 'The EU Regulatory Trade Agenda and the Quest for WTO Enforcement' 13:6 Journal of European Public Policy, 851, at 852.

741 See for instance Daugbjerg, C. (1999) 'Reforming the CAP: Policy Networks and Broader Institutional Structures' 37:3 Journal of Common Market Studies, 407.

and resist the pressure of developing countries for extensive liberalisation of the agricultural sector on the other.[742]

6.2.6 Development of the EU proposal in the context of the work of the Working Group on Trade and Competition

Initially, the position of the EU reflected the ideas contained in the report of the Group of Experts and the subsequent communication of the Commission to the Council. Thus, in its first submission, the EU proposed that the Working Group should focus on the following issues:

- The examination of anticompetitive practices that may have an effect on international trade;
- The examination of the feasibility of a commitment by all WTO Members to adopt competition rules;
- The examination of the way that the WTO could contribute to the strengthening of cooperation among its Member States;
- The examination of possible core principles that could be adopted at the international level; and
- The examination, in a second stage, of the extent to which the WTO dispute settlement rules could be applied in order to ensure compliance with the contemplated agreement on competition.[743]

In subsequent submissions, the EU elaborated on these proposals. In particular, with regard to substantive provisions, the EU noted that priority should be given to the examination of business practices which have a foreclosure effect - and which would therefore negatively affect consumer welfare in the country where the practice is being implemented - and which, at the same time, affect the legitimate interests of the country whose producers are being denied equality of competitive opportunities. According to the EU these practices include horizontal agreements, certain abuses of dominant position, vertical restrains, and mergers. [744]

742 See Laird, S., R. Peters and D. Vanzetti (2004) 'Southern Discomfort: Agricultural Policies, Trade and Poverty' Centre for Research in Economic Development and International Trade, University of Nottingham, Working Paper No. 04/02.

743 See Communication from the European Community and its Member States, WT/WTGTCP/W/1, of 11 June 2007, at 4-6.

744 See Communication from the European Community and its Member States, WT/WTGTCP/W/62, of 5 March 1998.

By 1999, and in view of the resistance both by the US and developing countries to the possible adoption of a comprehensive competition agreement,[745] the EU representatives narrowed the scope of their proposal. This is reflected in the statement that the use of the dispute settlement mechanism in competition cases would not be appropriate, at least for the examination of individual cases.[746] At this point, it seems that the EU representatives started departing from the views of Sir Leon Brittan, who at an OECD conference in the same year stated that *'A WTO Agreement on competition would have no added value unless it was binding on governments. Even if there was consensus on a list of substantive rules, these would have no teeth or credibility if they remained purely 'paper' obligations. I am therefore convinced that the commitments to be included in a multilateral competition agreement should be subject to WTO dispute settlement'*.[747]

In 1999 the EU further proposed that a possible WTO agreement on competition should include three main elements: [748]

(a) Core principles and rules on competition law and its enforcement which would be incorporated in the domestic legislation of WTO Members. With regard to the core principles, the EU proposed that the WTO principles of non discrimination and transparency should be applied to competition law.[749]

(b) A specific focus on anti-competitive practices with a significant impact on international trade and investment.[750] According to the EU, priority should be given to hard-core cartels. It was also accepted that in cases concerning vertical restraints and abuses of a dominant position there is need for a case-specific evaluation, and thus the

745 See below, sections 6.3.1, and 6.3.2.

746According to the EU's submission, 'Dispute settlement modalities will need to be further considered once there is greater clarity about the scope of the commitments to be assumed under a WTO agreement so that they are well adapted to the specifics of competition law. In any event, there should be no dispute settlement review of individual decisions.' See Communication from the European Community and its Member States, WT/WTGTCP/W/130, of 12 July 1999 (hereinafter WT/130), p. 6, which was submitted one month after the speech of Brittan. See also Communication from the European Community and its Member States, WT/WTGTCP/W/115, of 29 May 1999, (hereinafter WT/115), where the EU, at 11, notes that 'A WTO agreement could therefore establish a basic framework of rules, relating to the adoption and enforcement of domestic competition law, and provisions on cooperation among WTO Members. It would not at all be envisaged that the WTO should develop any powers of investigation or enforcement on anticompetitive practices. The commitments assumed under the multilateral framework will be incorporated in the domestic competition law of WTO Members'.

747 See Brittan, L (1999) 'The Need for a Multilateral Framework of Competition Rules' OECD Conference on Trade and Competition, Paris, France, 29-30 June, in OECD (1999) Trade and Competition Policies - Exploring the Ways Forward (Paris, OECD), 32, at 36.

748 See WT/130, ibid.

749 See WT/115, supra n. 746, at 11.

750 WT/130, supra n. 746, at 4.

adoption of general rules on competition in the context of the WTO would be too rigid. The EU took the view that with such practices further cooperation and exchange of experience between the WTO Members would be needed. Such cooperation was also considered important for the review of multijurisdictional mergers and export cartels.[751] Even though the EU never pursued officially at the WTO the inclusion of vertical restraints, abuse of dominance and mergers in a possible WTO competition agreement, the inclusion of such practices had been proposed by the Group of Experts back in 1995, and by 1999 it was clear that inclusion of such practices[752] could not survive the WTO negotiations.

(c) Modalities of international cooperation. Such cooperation should have, according to the EU, a dual aim. The first is to provide technical assistance to countries that have enacted competition laws recently or were in the process of enacting such laws. This position reflects to a certain extent the concerns expressed by a number of developing countries about the viability of competition law on the national as well as international level when no technical assistance is provided by rich industrialised countries. In this context the EU took the view that this could include a framework to facilitate the exchange of experiences and information on competition law and its enforcement, voluntary peer reviews, and the possibility of periodic reports on global trends in competition law and policy.

Second, the EU proposed that cooperation modalities utilised under enforcement cooperation agreements should also be included in a WTO competition agreement. These modalities, examined in some detail in Chapter 3 of the thesis, include the notification of cases, consultations and exchanges of non-confidential information. The EU also proposed that positive comity could be included in a possible agreement, but noted that on such an occasion the provision on positive comity would be applied in a discretionary manner by the Member countries and thus would not be binding.[753]

Hence, by 1999, the EU had submitted a minimal proposal for a competition agreement within the WTO framework. Nevertheless the reception of this proposal was never tested, as the talks at the Seattle Ministerial Conference were suspended amidst

751 Ibid.

752 See COM(96) 284, supra, n. 729,ANNEX, and WT/62 supra, n. 744, where the EU proposes the examination of the impact of such agreements.

753 Ibid.

very serious protests.[754] Following this development the EU continued to work on the competition agenda; however it also acknowledged the difficulties concerning the adoption of an agreement that were due to the widespread hesitation expressed by a number of industrialised and developing countries. With its submission to the Working Group in 2000, the EU clearly expressed these concerns:

'...the decision on whether to launch negotiations on competition is essentially political in nature, and as such, does not correspond to this Working Group, whose mandate is exploratory and analytical; ...the elements of a possible future WTO agreement on competition could only be determined as a result of multilateral negotiations and, on the basis of input from all WTO Members. The elements mentioned in this paper are, therefore, no more than our current ideas about the possible architecture of a WTO competition agreement. We wish moreover to acknowledge that our thinking on many of these issues is influenced by the contributions made by many countries - both developed and developing - to substantive discussions in this Working Group.'[755]

In this submission, the EU repeats its support for the adoption of an agreement on competition and its position that such an agreement should include the three main elements discussed before Seattle: core principles on domestic competition law and policy, modalities for international cooperation, and support for the progressive reinforcement of competition law and institutions in developing countries.[756]

In another submission in 2000, the EU attempted to highlight the development benefits of competition law and policy.[757] It was clear by now that developing countries had to be persuaded that competition law and policy in general and competition provisions in the WTO context in particular would benefit or at least would not harm these countries. Thus, the concepts of flexibility and progressivity were further discussed.[758] It seems that by these concepts the EU returned to the building-block

754 See Economist, December 2nd 1999, 'The New Trade War'.

755 See Communication from the European Community and its Member States, WT/WTGTCP/W/152, of 25 September 2000, (hereinafter EU, WT/152), where the EU, at 10-12, expresses its support for the establishment of enforcement institutions in developing countries and relevant technical assistance for capacity building.

756 Ibid. For a synopsis of the EU proposals, see also Bercero, I.G. and S. Amarasinha (2001) 'Moving the Trade and Competition Debate Forward' 4:3 Joumal of International Economic Law, 481.

757 See Communication from the European Community and its Member States, WT/WTGTCP/W/140, of 8 June 2000, particularly at 2-4.

758 The EU first referred to these concepts in 1997. See Communication from the European Community and its Member States, WT/WTGTCP/W/45, of 24 November 1997.

approach that was first recommended by the group of experts in 1995: it noted in this submission that it had not proposed that a prospective agreement should be applied equally and instantly to all WTO Members. Instead, the EU suggested that, in particular with regard to developing and least developed countries, the adoption and enforcement of competition rules and the subsequent participation in a future agreement '*should be of a progressive and flexible nature*'.[759]

6.2.7. From Doha to Cancun

The Doha Declaration, issued at the conclusion of the Doha Ministerial Conference in 2001, put the discussions into context. According to the Declaration, Member States *'agree that negotiations will take place ...on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations'*.[760] Hence, despite the contrary opinion of the EU representatives, it was agreed that the issue was not mature enough to be negotiated immediately. On the other hand, it left the issue open to be discussed after the next Ministerial Conference in Cancun, if all the members would agree on that, and set the particular issues that the working group should further discuss.

According to paragraph 23 of the Declaration, the working group should focus its work on four main issues: (i) the examination of core principles, with an emphasis on non-discrimination, transparency, and procedural fairness; (ii) further examination of the types of discretionary cooperation between the Member States, (which is linked to the practice of the enforcement cooperation agreements); (iii) further work should be carried out in the field of hard core cartels, which was the only anticompetitive practice discussed by the working group that was advanced to be part of a possible agreement; and (iv), and most importantly, special consideration should be given to developing countries. The notion of flexibility was included in the text to make it clear that developing countries would be given the time to develop their own competition policies, something that was in compliance with the Doha Round, which was the Development Round.

759 See WT/140 supra n. 757, at 7. On this matter, see also OECD Joint Group on Trade and Competition (2001) The Role of 'Special and Differential Treatment' at the Trade, Competition and Development Interface, OECD COM/TD/DAFFE/CLP(2001)21/FINAL.

760 See Doha Declaration, supra n. 700, para 23.

The Declaration[761] also stressed the need for technical assistance that should be offered to developing countries in order to evaluate the implications of closer cooperation at the multilateral level for their own development policies and objectives, and to establish institutions that could effectively enforce competition law. It is also noted that, on the basis of this commitment, the working group should cooperate with other international institutions, with particular reference to UNCTAD, which is the international organisation most closely associated with developing countries. Finally the Declaration recognised the importance of regional and bilateral agreements, through which technical assistance to developing and least developed states would be provided.

Thus the Declaration stated in a more formal manner that some sort of a minimal agreement on competition could be negotiated. It also came as a surprise, that the US, which had traditionally opposed the adoption of any binding agreement at the multilateral level, gave its consent to the possible inclusion of competition in the agenda of the next round of negotiations. On the other hand, the Declaration also reflected the serious concerns that had been expressed by developing countries over the possible adoption of an agreement on competition.[762]

These concerns were confirmed during the negotiations that took place on the way to and during the Cancun Ministerial Conference. Through its submissions to the working group, the EU continued to support the inclusion of competition in the WTO agreement and elaborated on the topics provided by the Doha Declaration.[763] A major disagreement arose in Cancun however, and the inclusion of the Singapore Issues along with the elimination of export agricultural subsidies were the main concerns of developing countries. As reported at the time: *'...the European Union, ..., denied it had ever promised to get rid of export subsidies. Led by India, many poor countries denied that they ever signed up for talks on new rules[on the Singapore Issues]'.*[764] Thus no agreement was reached and finally, as already noted, discussions on competition were withdrawn from the agenda in July of 2004. Since then competition law and policy is not an issue (formally) discussed at the WTO.

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761 Ibid, para. 24.

762 See below, section 6.3.2.

763 See Communications from the European Community and its Member States, WT/WTGTCP/W/184, on international cooperation;WT/WTGTCP/W/193, of 1 July 2002 on hard core cartels; WT/WTGTCP/W/222, of 19 November 2002, on core principles, and WT/WTGTCP/W/234, of 26 June 2003, on progressivity and flexibility.

764 'New rules' relates to the Singapore Issues, including competition. See Economist, September 18th 2003, 'The WTO under Fire'.

6.3 Reasons that led to the failure of the EU proposal

The main reason behind the failure of the EU proposal for the adoption of a competition agreement within the WTO context was the opposition of the US and a number of developing countries on this issue.

6.3.1. Resistance by the US

The first major reason for to the failure of the EU proposal for a WTO agreement on competition is the traditional opposition of the US to the adoption of a multilateral competition agreement. As already noted above, both the talks in 1925 at the League of Nations and in 1947 on the Havana Charter were, in the final analysis, a failure due to US opposition, and to a certain extent, this was repeated in the context of the WTO talks in the mid 1990s and early 2000s. As noted in the first submission of the US to the WTO working group, *'...[A]lthough the United States has stated on other occasions, and continues to believe, that there is not the degree of consensus today that would support negotiation in the WTO of constructive competition policy disciplines, the proposed work programme is intended to foster among Member countries a common understanding of the relationship of competition matters to the WTO framework and to be neutral regarding any conclusions that may be reached'.*[765]

The reasons behind this position were restated a couple of years later by Joel Klein. During a speech at the OECD, Klein made it clear that a WTO agreement on competition could not be concluded, since there was still a lack of experience on the part of developing countries concerning competition law and policy. He also re-emphasised the US concern that the possibility of using the WTO dispute settlement mechanism to review competition cases would entail the danger of politicising the application of competition rules, as it *'...would necessarily involve the WTO in second-guessing prosecutorial decision making in complex evidentiary contexts – a task in which the WTO has no experience and for which it is not suited'.*[766] Instead, the US would support the adoption of bilateral enforcement cooperation agreements, a strategy

765 See Communication of the US, WT/WGTCP/W/6, of 19 June 1997, at 4.

766 See Klein, J.L.(1999) 'A Reality Check on Antitrust Rules in the World Trade Organization, and a Practical Way Forward on International Antitrust', speech at OECD Conference on Trade and Competition, Paris, 29–30 June 1999, in Trade and Competition Rules: Exploring the Ways Forward. (OECD, Paris), 37, at 41-42.

discussed in Chapter 3, while attempting to provide developing countries with technical assistance in this field.[767]

The US approach was to a large extent realistic, at least in view of the fact that a competition culture has not been reached at the international level. In fact, as noted in earlier chapters of the thesis, there are still a number of elements that may have an influence on the particular application of competition law at the domestic level and such elements may vary considerably from state to state. It has also been pointed out that in most countries a competition law has only been adopted in the last 10 years or so, and this obviously means that there is little experience in the application of the rules in these countries.

That said, it should also been pointed out that the main reason behind the US opposition to the possibility of adopting a binding multilateral agreement on competition is the so-called hegemonic stance that has characterised the country's external policy in various fields of international law, competition law included.[768] Indeed, as it has been seen in earlier chapters, the US has been the most regular user of extraterritoriality in the enforcement of its antitrust laws. Such extraterritorial application of US law is complemented by the application of Section 301 of the 1994 Trade Act, according to which the US has the right to retaliate in cases where foreign countries follow policies which, among others, lead to *'toleration of systematic anticompetitive practices'* by a firm in the market of this foreign country, and which have as an effect the inability of US firms to enter this particular market.[769] Put differently and with regard to the current debate, this position reflects the traditional perception in the US that US antitrust law is superior to other national laws and thus, until other countries reach the US level of competition enforcement, national US competition law should be applied to resolve situations where US firms are harmed due to inefficient enforcement of national competition laws by other countries. This hypothesis is also examined in the next sub-section.

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767 Ibid. See also the Communication from the US, WT/WGTCP/W/116, of 25 May 1999, where cooperation through regional settings like NAFTA and non-biding multilateral cooperation through the OECD are also mentioned.

768 See Byers, M. and G. Nolte (2003) United States Hegemony and the Foundations of International Law (Cambridge University Press).

769 For an analysis of Section 301, see Dabbah, M. (2003) 'The Internationalisation of Antitrust Policy' (Cambridge University Press) at 225-227. The author notes nonetheless that the US has never used Section 301 in competition cases and points out that the US uses this legal instrument as a medium to negotiate the removal of unfair trade practice with the authorities of other countries. See ibid at 226

i. The establishment of ICPAC and the introduction of a 'new global initiative'

It was against this background that the International Competition Policy Advisory Committee (ICPAC) was set up in November 1997 by the (then) Attorney General Janet Reno and Joel Klein. The Committee consisted of politicians, academics and business representatives with legal and economic backgrounds.[770] In comparison to the composition of the relevant group of experts that emerged in Europe in the 1990s which introduced the idea of a multilateral regime, the Committee was more inclusive as it included business representatives and economists. The aim of the Committee was threefold: to review the effect of multijurisdictional mergers; to examine the relationship between trade law and competition law; and to evaluate the prospects of further international cooperation on competition.[771]

ICPAC came up with a very comprehensive report in 2000 that contributed significantly to the current debate on multilateralism in the field of competition; indeed, it was an important factor leading to the establishment of the International Competition Network.[772] With regard to the possible inclusion of competition within the WTO context the report simply repeated the traditional US concerns on the necessity of such an agreement. It expressed the opinion that the WTO should not develop competition rules under its umbrella, and concluded that *'...[W]hile recognizing that in some instances it may not be a fully satisfactory result, the Advisory Committee believes that national authorities are best suited to address anticompetitive practices of private firms that are occurring on their territory. If anticompetitive and market blocking practices are occurring in a jurisdiction that does not have a competition authority or that authority is unable or unwilling to remedy the problem, then the harmed nation may be able to apply its own laws in an extraterritorial fashion'*.[773]

The report also summarised the reasons which lead to the US rejection of the proposal for a competition agreement at the WTO. According to its drafters, such an agreement would lead to the potential intrusion of WTO dispute settlement panels into domestic regulatory practices, a concern regularly asserted by US officials. It

770 International Competition Policy Advisory Committee (2000), ICPAC Final Report to the Attorney General and the Assistant Attorney General for Antitrust (hereinafter ICPAC Report) <http://www.usdoj.gov/atr/icpac/finalreport.htm> (last visited on 21May 2007), Annex 1-B.

771 See Janow, M.E. and C. R. Lewis (2001) 'International Antitrust and the Global Economy: Perspectives on The Final Report and Recommendations of the International Competition Policy Advisory Committee to the Attorney General and the Assistant Attorney General for Antitrust' 24:1 World Competition, 3, at 3

772 See below, section 6.4.

773 See ICPAC Report, at 278-9.

nonetheless went on to note that a WTO competition agreement would be inappropriate for another two reasons: first, because of the inappropriateness of obliging countries to adopt competition laws, and second, because such an agreement could also lead to the distortion of competition standards due to the *quid pro quo* nature of the WTO negotiations.[774]

As to the former, it could be argued that such an argument is, at first sight, rather puzzling since the US has been the leader in the development of international economic laws at the GATT and WTO system and the subsequent obligations created for the participating countries. In addition, it has been noted in the context of the discussion on bilateral trade agreements that some of the US agreements include a commitment undertaken by the signing countries that they will have a competition law in place. On the other hand, it has to be noted that this position of the US also reflects the position of a number of developing countries which by the end of the 1990s questioned not only the value of such an agreement, but also the necessity of domestic competition rules.[775] Thus for different reasons both the US and developing countries seemed to be pursuing the same aim.[776]

As to the latter, it could be argued that along with concerns over the operation of the Dispute Settlement Mechanism, the assertion that a possible WTO agreement could lead to the distortion of antitrust standards lies at the heart of the debate on competition in the WTO context. As seen in Chapter 2, an operational US competition regime has been in place for more than 110 years. This regime is probably the most comprehensive in the world. US competition analysis is predominantly based on efficiency concerns and still differs to a certain degree from competition enforcement within the EU.[777] In relation to developing countries which have just embarked on the adoption and application of competition law and policy, such differences are chaotic.

In this connection, Calvani notes that the reluctance of the US to accept the inclusion of competition law in a binding multilateral agreement, also expressed in the

774 The exact text is : 'Various concerns animate the Advisory Committee's scepticism toward competition rules at the WTO, including the possible distortion of competition standards through the quid pro quo nature of WTO negotiations; the potential intrusion of WTO dispute settlement panels into domestic regulatory practices; and the inappropriateness of obliging countries to adopt competition laws.' See ICPAC Report, at 278.

775 See below section 6.3.1.

776 It is noteworthy that one of the EC Commission officials – interviewees, (Brussels 15/11/2007) argued that in fact in the process of the negotiations the US 'was hiding behind the position of developing countries'.

777 For a recent review of the current debate on the remaining differences between the US and EU competition laws see also Kolasky, W. (2004) 'What is Competition? A Comparison of US and Europe Perspectives' 49:1/2 Antitrust Bulletin, 29.

ICPAC Report, reflects the concern of politicians and certain academics in the US that conciliations at the WTO could lead to *'populist antitrust divorced from economic underpinnings'*,[778] in the sense that the *quid pro quo* nature of the negotiations at the WTO entailed the risk of accepting principles not directly related to the 'proper function' of competition law, in the way that the US considers the notion of 'proper function'.

To this end, the ICPAC proposed the creation of a 'a new global initiative' to act as a forum where developed and developing countries as well as non-governmental organisations and business representatives could exchange their views and experiences on anti-cartel enforcement, merger review, analytical tools, enforcement cooperation, technical assistance, and any other relevant issue.[779] This proposal was instrumental in the establishment of the ICN discussed in section three of the chapter.

ii. The paradox in Doha

US policy has been consistent in its opposition to the inclusion of competition law within the WTO framework. It has also been observed that towards the end of the 1990s this position remained unchanged among competition officials in the US. That said, in Doha, the US trade representatives signed the Conference Declaration, which provided for negotiations on particular competition issues, and this decision has been one of the most fascinating and at the same time unexpected incidents in the development of the negotiations on competition at the WTO.

In fact, the first signs of a shift of the US trade administration on this issue became apparent in July of 2001 when Robert Zoellick, the US chief negotiator, suggested that the US would be ready to support the application of core principles of transparency, non-discrimination, and procedural fairness to competition; he also emphasised that the US supports further technical assistance and capacity building projects in developing countries.[780] Nonetheless he also noted that the US was working to understand more clearly the EU proposal and was in discussions with the EU about

778 See Calvani, T. (2005) 'Conflict, Cooperation, and Convergence in International Competition' 72 Antitrust Law Journal, 1127, at 1133.

779 See ICPAC Report, at 224.

780 See Statement of U.S Trade Representative Robert B. Zoellick on U.S.-E.U. Efforts to Launch a Global Round of Trade Negotiations, 07/17/2001, <http://www.ustr.gov/Document_Library/Press_Releases/2001/July/Statement_of_US_Trade_Representative_Robert_B_Zoellick_on_US-EU_Efforts_to_Launch_a_Global_Round_of_Trade_Negotiations.html.> (last visited on 21 May 2007).

possible ways in which the EU could accommodate concerns of the US and other WTO Members.[781] Zoellick went on to express his concerns about the way that obligations stemming from the application of core principles on competition law would be addressed, and noted that it was not clear whether the EU was also proposing the use of the dispute settlement mechanism in antitrust cases.[782]

Four months later in Doha, the US gave its consent not only to the inclusion of the core principles in the final Declaration, but also to the inclusion of hard core cartels. The US community of experts was considerably surprised with this development, as reflected in the comments that the Antitrust Division of the American Bar Association (ABA) submitted to the US Trade Representative, where on the basis of the reasons already expressed by Klein and the ICPAC report, the ABA urged the US Trade Representative to express strong reservations regarding the proposals for a WTO competition framework.[783]

It is difficult to interpret the reasons that led the US to accept competition policy as a possible issue for negotiations in Doha. Following the Doha Declaration, Zoellick made clear in a letter to the Congress that the aim of the US strategy in this field was just to develop, through the Working Group on Trade and Competition, a common culture on competition among the Members of the WTO, for instance through a peer review mechanism. He further noted that the US aimed to ensure that the work at the WTO would not undermine US antitrust laws and enforcement, and that the decisions of the US authorities would not be subject to the WTO Dispute Settlement.[784] This however does not explain why and how paragraphs 23-25 of the Doha Declaration were accepted by the US representatives.

Various suggestions may be put forward in relation to this development. It may be argued for instance that the US accepted the competition-related part of the Declaration in the context of the broader negotiations at the WTO, in view of the fact that by the time it had become obvious that developing countries would not support the inclusion of competition in the list of WTO agreements. In particular, it could be

781 Ibid.

782 Ibid.

783 See ABA, Antitrust Division (2003) 'Comments and Recommendations on the Competition Elements of the Doha Declaration', <http://www.abanet.org/antitrust/at-comments/2003/05-03/doha.pdf> (last visited on 21 May 2007), at 16.

784 See 'Zoellick Notifies Congress of Progress on Global Trade Talks', 11/05/2002, <http://www.ustr.gov/Document_Library/Letters_to_Congress/2002/Zoellick_Notifies_Congress_of_Progress_on_Global_Trade_Talks.html> (last visited on 21 May 2007).

suggested that the US supported the prospect of a minimal agreement on competition in order to withdraw such support later on in the context of the negotiations on a more important to the US issue. This channel of argument would practically prove right the concern of competition experts in the US that the WTO is not the right forum for competition policy as competition is only one of the many '*bargaining chips*' on the table of discussions.[785]

On the other hand, it should be kept in mind that the Doha Round took place only two months after September 11 and as has been documented Robert Zoellick used this occasion in order to propose further liberalisation at the WTO, with the inclusion of the new issues in the agenda of negotiations, and thus went on to even accept the prospect of a possible minimal agreement on competition.[786]

In any event the fact that competition was included in the Doha Declaration is an indication that in the US the trade administration is more sympathetic to the possibility of adopting competition rules in the WTO than the antitrust administration (which has opposed it consistently). Nonetheless, there has been no tension as of yet from this apparent divergence, since competition policy was finally withdrawn from the negotiations after the collapse of the talks in Cancun.

6.3.2. Coordinated resistance by developing countries

When Lord Brittan introduced his proposal for inclusion of competition law and policy in the global trading system, the position of developing countries was not much of a concern. In fact, as it has been reported by Peter Carl Mogens, former Director General of the Commission's DG Trade, during the Punta Del Este Conference of 1986, which launched the Uruguay Round, it was the (participating) developing countries that suggested multilateral negotiations on competition; nevertheless this proposal was rejected by industrialised countries.[787]

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785 This was also expressed during an interview with a US Practitioner (Brussels21/7/2003).

786 Zedillo, E. (2006) 'The WTO's Biggest Problem at 10: Surviving the Doha Round', Speech delivered at conference "WTO at 10: Governance, Dispute Settlement and Developing Countries', Columbia University, April 7, 2006, <http://www.ycsg.yale.edu/center/forms/doha.pdf> (last visited on 21/3/2007), at 3, where the author notes that following the 9/11 events, Zoellick kept repeating that 'The international market economy – of which trade and the WTO are vital parts - offers an antidote to this violent rejectionism. Trade is about more than economic efficiency; it reflects a system of values: openness, peaceful exchange, opportunity, inclusiveness and integration, mutual gains through interchange, freedom of choice, appreciation of differences, governance through agreed rules, and a hope for betterment for all peoples and lands'.

787 See Mogens, P.C. (2001) 'Towards Basic Rules on Trade Related Competition Policy', Speech delivered in Brussels, 2 March 2001, <http://trade.ec.europa.eu/doclib/docs/2004/november/tradoc_120130.pdf> (last visited on 21/3/2007).

This position was reversed ten years later at the Singapore Ministerial Conference when the first signs of opposition from developing countries to the possible adoption of a competition agreement became apparent. Since then, developing countries have successfully held a common line against a number of the issues of the trade agenda, including competition policy, and resisted negotiating on these issues not only in Seattle but also during the Ministerial Conferences in Doha and Cancun.[788]

In fact, until the late 1990s only a handful of developing countries had actively participated at the GATT and WTO talks, while, as has been documented, the more delicate negotiations were largely dominated by the QUAD.[789] This situation started changing at the Singapore Ministerial Conference in 1996, and became apparent in a dramatic way in the 1999 WTO Ministerial in Seattle where developing countries demonstrated co-ordinated and concerted negotiating leverage through the formation of a number of groups of countries that dealt with particular policy issues.

One such example is the so-called Like Minded Group, initially consisting of eight countries, that aimed to block the inclusion of the Singapore issues in the WTO agenda.[790] Other examples include a number of coalition groups that appeared in Doha and Cancun, such as the African Group, the African Carribean Pacific (Carrebean) Group, the Group of Least Developed Countries (LDCs), and the group of Small and Vulnerable Economies.[791] These groups pursued a variety of aims at the negotiations, on issues such as agriculture, special and differential treatment, development, and opposition to the inclusion of the Singapore issues in the table of negotiations.[792] Another such example is a coalition called the Core Group, which consisted of Latin

788 Young, A.R. and J. Peterson (2006) 'The EU and the New Trade Politics' 13:6 Journal of European Public Policy, 795, at 803.

789 See Metzer, J-M. (2000) 'Seattle: Failure or New Departure?' OECD Observer, July 2000, where the author notes that 'Countries such as India, Brazil, Egypt and Morocco, as well as Bangladesh, El Salvador, Tanzania and Jamaica, to name a few, have always participated actively in the work of the GATT and its successor, the WTO'.

790 The initial members of the coalition were Cuba, Egypt, India, Indonesia, Malaysia, Pakistan, Tanzania, and Uganda. These countries were later joined by Dominican Republic, Honduras, Sri Lanka and Zimbabwe, while Jamaica and Kenya also attended the meetings of the Group. For an analysis of the way that the Group operated in the context of the WTO negotiations from 1998 until the Doha Ministerial Conference, see Narlikar, A. and J. Odell (2003) 'The Strict Distributive Strategy for a Bargaining Coalition: The Like Minded Group in the World Trade Organization', Paper Presented at a Conference on Developing Countries and the Trade Negotiation Process, UNCTAD, Gneva, 6-7 November 2003.

791 See Narlikar, A. and D. Tussie, (2004) 'The G 20 at the Cancun Ministerial: Developing Countries and Their Evolving Coalitions in the WTO' 27:7 The World Economy, 947, at 948-951.

792 Ibid.

American and African countries which emerged during the period between Doha and Cancún[793] with the aim of blocking negotiations on the Singapore issues.

With regard to competition in particular, the groups of developing countries which opposed the adoption of a competition law agreement at the WTO was led by India, which expressed its disagreement regarding the adoption of a multilateral competition agreement on various occasions.[794] For instance, in Doha, where competition was included in the final Declaration which provided that negotiations on these issues would start in the next Round of negotiations only if all the WTO Members would give consent, Yussuf Hussain Kamal, the Conference chair, issued at the request of India a statement where he clarified that, *'...[In] my view, this would give each Member the right to take a position on modalities that would prevent negotiations from proceeding after the fifth Session of the Ministerial Conference until that Member is prepared to join in an explicit consensus'.*[795]

In Cancun, once more developing countries opposed the possible inclusion of competition in the negotiations, and to a certain extent this was the main reason that led to the collapse of the talks. The Core Group gained support from a number of countries, and, on the last day of the meeting, a group of 29 developing countries including India and China, and with Bangladesh signing on behalf of the Least Developed Countries, sent a letter to Pierre Pettigrew, the Facilitator for the Singapore Issues at the Cancun Ministerial Conference, where they claimed that the Singapore Issues should not proceed forward for negotiation.[796] As Nurlikar and Tussie informs us, on the final day of the Cancun conference, Botswana, speaking on behalf of the African Union, stated that the Union would not agree to any deal regarding the Singapore Issues. Following this statement, South Korea retaliated and stated that it would not accept any deal without an agreement on all the four Singapore Issues, which therefore became the main reason behind the failure of the talks.[797]

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793 The countries which joined this group were Bangladesh, Cuba, Egypt, India, Indonesia, Kenya, Malaysia, Nigeria, Pakistan, Venezuela, Zambia and Zimbabwe.

794 For an extensive review of the position of India on this matter in relation to the relevant EU position, See Holmes, P., J. Mathis, T.C.A. Anant, and S. J. Evenett (2003) 'EU – India Study Report on Competition Policy', <http://www.evenett.com/chapters/compfinaljune.pdf> (last visited on 21/3/2007).

795 Cited in Singh, A. (2003) 'Competition and Competition Policy Development in Emerging Markets: International and Developmental Dimensions' ESRC Working Paper No246, at 2.

796 <http://www.ictsd.org/ministerial/cancun/docs/developing_country_%20letter_SI.pdf> (last visited on 21 May 2007).

797 See Narlikar and Tussie, supra n. 791, at 950.

It is thus obvious that developing countries used their bargaining power[798] and managed to block the adoption of even a minimal agreement on competition at the WTO; they did this against the will of (primarily) the EU. In this regard, it has been suggested in the political science literature that agreements which are adopted on the basis of the principle of sovereign equality of states enjoy the highest degree of legitimacy.[799] The logic of the GATT/WTO is that in the negotiations each member is sovereign to determine for itself whether a proposed agreement is to its advantage, to decide the criteria by which to identify the relevant advantages and disadvantages, and to apply those criteria by the formula that the member considers appropriate.[800]

The more balanced allocation of power in international organisations has been already asserted in earlier chapters of the thesis, in the context of the discussion about the characteristic of bilateral agreements to increase the power of strong industrialised states. As seen in this section, it has been this balance of powers at the WTO which has led to a certain extent to the failure of talks on competition, in view of the opposition of a number of developing countries on the issue. What is more important at this stage however is to identify the reasons that led to the opposition by most of the developing countries to the EU proposal for a multilateral agreement on competition within the auspices of the WTO.

For instance, as already noted in Chapter 2, there have been divergent positions as to the necessity of adopting competition rules by developing countries, and this is despite the fact that international organisations such as the IMF and the World Bank, and states with mature competition regimes, such as the US and the EU, have encouraged developing countries to adopt such laws. Similarly, there are various and divergent approaches as to the usefulness of an international agreement on competition for developing countries, as well as the desirable context of such an agreement from a developing country perspective.[801] Among the various arguments developed in relation

798 On the discussion of the "veto power" of the developing countries, which comprise more than 50% of the WTO, see Matoo, A. and A. Subramanian (2004) 'The WTO and the Poorest Countries: The Stark Reality' 3:3 World Trade Review, 385, at 391-2.

799 See Steinberg, R.H. (2002) 'In the Shadow of Law or Power? Consensus – Based Bargaining and Outcomes in the GATT/WTO' 56:2 International Organisation, 339, at 361. At the other end of the spectrum, it has also been suggested that powerful states have preferred sovereign equality rules to weighted-voting at the GATT/WTO, because they provide incentives and opportunities for collecting the information necessary for a successful agenda-setting process. See Steinberg (2002) ibid.

800 See Finger, M. and A, Winters (2002), 'Reciprocity in the WTO', in Hoekman, B., A. Mattoo, and P. English (eds) Development, Trade and The WTO (World Bank), 50, at 51.

801 See for instance, Singh, A. (2003), supra n. 795; Bhattacharjea, A. (2006), 'The Case for a Multilateral Agreement on Competition Policy: A Developing Country Perspective' 9:2 Journal of International Economic Law, 293; Aubert, C. (2003)

to this debate, this section focuses on four main factors that led to the rejection by developing countries of the EU proposal to include a competition agreement within the WTO context.

i. Developing countries, competition law, and industrial policy

The first relevant argument put forward by developing countries against a WTO competition agreement is based on the assumption that competition law and policy in developing countries should include broad industrial policy exceptions. This point was raised by India in the context of the discussions at the Working Group on Trade and Competition. In one of its communications India noted that, *'...[D]eveloping countries do not yet have the kind of well-developed safety nets that exist in industrial countries to provide for those displaced by import competition. There is thus a greater need to cushion its impact by suitable industrial restructuring measures ..., which would also enable developing countries to embrace greater trade liberalization...'*.[802]

This concern has also been pointed out by various scholars. For instance, Singh, looking at the development of East Asian countries, China, as well as Italy and other European countries, has suggested that a combination of competition with co-operation between firms is more likely to increase societal welfare rather than competition alone.[803] Along the same lines, Bhattacharjee notes that with the exception of the US, all other industrialised countries have used for long periods extensive exemptions from the application of competition rules in order to promote social and political objectives, and only progressively have they moved towards more efficiency-related objectives.[804]

In fact, the Doha Declaration takes these arguments into account by including the notion of flexibility, and the EU would accept exemptions as far as such exemptions would be clearly set. Nonetheless, this channel of argument was never finally put into a more specific context, due to the withdrawal of the issue from the agenda in 2004. Given the importance of the issue for developing countries, more work would be needed on this issue in the context of any future multilateral talks on competition, as the recent

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'Competition Policy for Countries with Different Development Levels', paper presented at the CEPR 'Competition Policy in International Markets' Workshop, 17/18 October 2003, <http://www.cepr.org/meets/wkcn/6/6613/papers/Aubert.pdf> (lat visited on 21 May 2007); Hertel, T.W., B. M. Hoekman and W. Martin (2002) 'Developing Countries and a New Round of WTO Negotiations' 17:1 The World Bank Research Observer, 113; Hoekman and Holmes supra n. 726.

802 See Communication from India, WT/WGTCP/W/216, 26 September 2002.

803 See Singh (2003), supra n. 795, at 14.

804 See Bhattacharjee (2006), supra n. 801 , at 316-8.

experience of the negotiations has highlighted that certain developing countries are still not acquainted with the notion of competition law or more particularly with the optimal application of competition law.

Along the same lines, the Representative of Kenya stressed in Cancun, *'...[We] believe that this Ministerial Conference should therefore focus on how to expand the space of understanding the Singapore Issues and launch a process of improving that understanding. Kenya cannot accept the launching of negotiations on issues that we do not clearly understand and whose implication on our economies have not been assessed. Moreover, although Kenya attaches a lot of importance to Technical Assistance and Capacity Building, we are fully convinced this should be provided to enhance understanding of issues involved before negotiations are launched.'*[805]

ii. Implementation issues: lack of institutional capacity and need of technical assistance

The last statement by the Kenyan representative, i.e. concerning the need for technical assistance, is another issue raised by a number of developing countries, and relates to the costs that they would have to bear in order to develop efficient enforcement of competition law. This is an issue that has been raised with regard to a number of agreements adopted in the context of the Uruguay Round, such as the agreements on customs valuation, technical standards, sanitary and phytosanitary measures, and intellectual property rights. Implementation of all these norms by developing countries requires the purchasing of equipment, the training of people, the establishment of systems of checks and balances etc.[806]

Finger and Winters have pointed out that even though these agreements do not go so far as to regulate domestically the issues they regulate at the international level, their content is binding and thus they have significant influence on the behaviour of the contracting parties, which have to frame their national legislation in accordance with the international rules included in the agreements.[807] On the other hand, all these

805 See 'Comments by Kenya on the second revision of the Draft Cancun Ministerial text' of 14 September 2003, WT/MIN(03)/W/21; See also 'the Declaration of the Group of 77 and China on the Fifth WTO Ministerial Conference, Cancun, Mexico, 10-14 September 2003', <http://www.g77.org/main/docs/FinalG77Decl-22aug-5thWTO.pdf>, (last visited on 21 May 2007) at 15.

806 For an evaluation of the costs that developing countries have to bear in order to set up domestic institutions that would apply the measures adopted under the various agreements, see Finger, J.M, and Ph. Schuler (2000) 'Implementation of Uruguay Round Commitments: The Development Challenge' 23:4 The World Economy, 511.

807 See Finger and Winters, supra n. 800, at 51.

agreements contain technical assistance clauses,[808] according to which industrialised countries should help developing countries with the institutional set up needed in order to apply the rules that stem from the agreements. Nonetheless, these provisions are not binding, something that has caused complaints by developing countries that industrialised countries have not done much to assist them.[809] In fact, in the field of competition law a number of developing countries raised their concern that industrialised countries have not practically offered enough technical assistance, and therefore they are not able to establish institutions that would efficiently enforce competition rules.[810]

In the same context, Hertel et al. make a reference to similar issues raised with regard to intellectual property rights discussed during the Uruguay Round of negotiations. The authors note that even though there was a final agreement on the issue (the TRIPS agreement), poor countries have not yet created intellectual property regimes, and most importantly they have not identified the alternative options that could be used to upgrade and enforce their national product, health and safety standards, or to regulate sectors which are subject to market failure.[811] The authors conclude that on such issues the WTO rules should allow for experimentation and learning and must be coupled with technical assistance to help these countries establish efficient enforcement bodies.[812]

Given that there are still unaddressed issues with regard to the enforcement of rules provided by agreements that have been already adopted in the context of the WTO, further commitments by developing countries on competition enforcement would create more extensive financial costs for them. Nonetheless, competition law is not a major priority for a number of developing countries which suffer from poverty and a number of significant co-related financial and social problems. Thus, it comes as no surprise that the governments of many of these countries have not been eager to spend part of their limited budget on the enforcement of competition law, and have been therefore extremely reluctant to accept binding WTO provisions on competition.

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808 See for instance Art 9 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures, Art 67 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), and Art 20(3) of the Agreement on Implementation of Article VII (Customs Valuation).

809 See Finger and Winters, supra n. 800, at 51-52.

810 Interview with EC Commission official (Brussels 20/7/2003).

811 Hertel, T.W., B. Hoekman and W. Martin (2002), supra n.801, at 129.

812 Ibid.

iii. Export Cartels

Apart from the institutional difficulties faced by these countries and the need for technical assistance, of major concern among the representatives of developing countries has been the fact that export cartels are very often exempted from the application of competition laws of industrialised countries. In a recent study, Levenstein and Suslow have found that out of the fifty five countries that they examined thirty four have explicit export cartel exemptions, seventeen have implicit exemptions, while only four of them have no statutory exemptions.[813]

In the case of export cartels, producers from a country agree to cooperate in order to fix prices or allocate market shares only in a foreign market and not the market where they are based. On an economic basis, there may be instances where export cartels increase the domestic total welfare of the exporting country; nevertheless, at the same time they also decrease international total welfare.[814] This happens since due to the existence of an export cartel, domestic firms become more efficient than they would be if the operation of the cartel had not been exempted from the application of competition law. At the same time the creation of the cartel may increase prices on an international level, and thus decrease total welfare internationally.

As Fox and Ordover have pointed out, export cartels and the negative impact they have on international trade could be easily nullified if nations would agree to prohibit this particular practice;[815] this is recognised in a 1996 Commission Communication, where Brittan and Van Miert noted that *'...[A]lthough such cartels are covered by the legislation of most importing countries, they are hard to tackle due to a lack of information in the importing country. An international agreement to outlaw export cartels would put an end to these "beggar thy neighbour" policies'.*[816]

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813 See Levenstein, M.C. and V. Suslow (2005) 'The Changing International Status of Export Cartel Exemptions' 20 American University International Law Review, 785, at 806.

814 See Crampton, P.S. and C.L. Witterick (1997) 'Trade Distorting Private Restraints and Market Access; Learning to Walk Before We Run' 24 Empirica, 53, at 56.

815 See Fox, E.M. and J. A. Ordover (1995) 'The Harmonisation of Trade Law and Competition Law: The Case for Modest Linkages of Law and Limits to Parochial State Action' 19:2 World Competition Law and Economics, 5, at 18-19. Eleanor Fox has also argued in a later paper, that export cartels could be also prohibited under Article 11.1 (b) of the Safeguard Agreement, under which states "...shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side", and in Article 11.3 this prohibition is extended to the "...adoption or maintenance by public and private enterprises of non governmental measures equivalent to those referred to in paragraph 1". See Fox, E (1999) 'Competition Law and the Millennium Round.' 2:4 Journal of International Ecomomic Law, 665, at 675.

816 See COM (96) 284, supra n. 729.

At the WTO the issue of export cartels arose as one of the most contradictory ones. Several developing countries expressed their concern with regard to the negative effects that cartels originating from other (industrialised) countries had on their economies, while other developing countries argued that export cartels should be exempted from the competition rules of developing countries in the context of flexibility and progressivity that should be offered to them.[817]

The opposition to the possible inclusion of export cartels in a WTO agreement came mainly from the US, which has been the oldest and most prominent supporter of this type of business practice.[818] In its submissions to the working group, the US on the one hand argued that *'...laws of most countries do not reach outbound joint export activities that do not have anti-competitive spillover effects in their home markets - i.e., the kind of effects at which antitrust laws are aimed...*", and went on to suggest that the OECD Recommendation on Hard Core Cartels, excludes export cartels from its application, as far as such exclusions are transparent and no broader than necessary to achieve their overriding policy perspectives.[819]

In view of its earlier commitment to include export cartels in a possible WTO agreement on competition, the EU did not deny that some sort of international mechanism was needed in order to address these practices. Nevertheless given the consistent US opposition to such a prospect and the fact that in the EU export cartels are in practice excluded from the application of competition rules, since EU competition rules apply only to practices that have an effect on the trade between the Member States, the EU offered only voluntary international cooperation with regard to export cartels.[820]

As expected, these positions were not welcomed by developing countries. India again, through a submission at the WTO Working Group on Trade and Competition, noted that, '*...[U]ntil such time as developed countries are willing to consider the impact of mergers on consumers in foreign countries, to rescind the exemption of export cartels in their competition laws, to give serious consideration to enforcing the UNCTAD Set of measures to control RBPs, and to extend the benefits of "positive*

817 For a review of the relevant positions taken at the Working Group on Trade and Competition, see Bhattacharjea, A. (2004) 'Export Cartels – A Developing Country Perspective' 38:2 Journal of World Trade, 331, at 334-6

818 Export Cartels have been exempted in the US from the application of competition rules since 1918 when the Web- Pomerence Act was enacted. In 2003 there were 153 registered export cartels there. See Levenstein and Suslow, (2005), supra n. 813, at 790 and 792.

819 See Communication from the US, WT/WGTCP/W/203, of 15 August 2002, paras. 7-8.

820 See Communication by the European Community and its Member States WT/WGTCP/W/184, of 22 April 2002, in Section III.B.

comity" in competition law enforcement to developing countries, the latter will have to retain the right to challenge foreign mergers and RBPs that have an effect on domestic consumers."[821]

This position, especially with regard to export cartels, was confirmed by an EU official that was interviewed in the context of this study, who noted that *'it has been made clear that developing countries would not accept a WTO agreement on competition if such an agreement would not include a clear ban on export cartels. On the other hand, the EU as well as the US and a number of other countries are not ready to accept such a commitment'.*[822]

It is quite a paradox that both the US and the EU, with the arguably the most mature competition systems, major enthusiasm for competition law and expressed antipathy towards cartels did not seem ready to accept a commitment on the prohibition of export cartels. On the other hand, this observation is a clear indication that what is of utmost importance in the context of the negotiations of competition at the international level is the reassurance that national interests are satisfied before any sort of commitments may be taken.

iv. Developing countries and concerns relating to agriculture

All the issues so far discussed that have led developing countries to the opposition of a WTO competition agreement are directly related to competition law and policy. Nonetheless, it was also mentioned in the context of the discussion about the possible inclusion of competition rules in the WTO, that the negotiations at the WTO include a number of other co-related issues. One of them is the regulation of agriculture, which has been an issue of major concern among developing countries, and is linked to the debate on competition.

In fact, a great amount of academic text has been dedicated to the discussions on agriculture at the WTO, and estimations of the effects of further liberalisation of agriculture on developing countries vary.[823] What is beyond doubt is that developing

821 See Communication from India, WT/WTGTCP/W/1, of 26 September 2002, at para 3.

822 Interview with EC Commission official (Brussels20/7/2003).

823 On the complex issue of agriculture in the WTO and its effects on developing countries, see Anderson, K. and W. Martin eds (2005) Agricultural Trade Reform and the Doha Development Agenda (World Bank and Palgrave McMillan); Anderson, K. (2003) 'How Can Agricultural Reform Reduce Poverty?' Discussion Paper, Centre for International Economic Studies, No 0321; Beghin, J.C. and A. Aksoy (2003) 'Agricultural Trade and the Doha Round: Lessons from Commodity Studies', Centre for Agricultural and Rural Development, Iowa State University, Briefing Paper 03-BP 42; Fabiosam, J., J. Beghin, S. de Cara, A. Elobeid, C. Fang, M.

countries have repeatedly expressed their disapproval of agricultural policies followed primarily by the EU, but also by rich countries such as the US and Japan. For instance in Cancun, in a letter to the WTO regarding the draft Ministerial Declaration, Mauritius, on behalf of the African Union, the African Caribbean and Pacific, and the Least Developed Economies, made clear that these countries were not satisfied with the progress made during the discussions on agricultural reform at the WTO level, and requested a number amendments of the Draft Declaration.[824] These changes would not be accepted by developed countries and thus the talks reached a dead end.

Two general observations may be made with regard to the indirect importance of agriculture to the development of the talks on competition. The first is that the WTO is a forum where differentiated and conflicting aims are pursued by the Member States. It is also an indication that at the multilateral level, progress of one issue may depend upon the relevant progress on another not directly related issue. Thus apart from analysis on the extent to which competition law is important to developing countries, any future attempts to include competition law in the WTO should take into serious consideration these related policies.

The second observation is similar but relates to the EU. As mentioned above, it has been suggested in the relevant literature that the EU initially proposed the inclusion of competition policy in the WTO framework in order to slow down agricultural reform. This argument is not proven here; nonetheless, the persistence of the EU on the Singapore Issues had profound effects on the development of the negotiations on agriculture.

6.3.3. Back to the European Commission: did everybody in the Commission really want an agreement at the WTO?

As shown, only hard core cartels qualified for possible further negotiations at the WTO in Doha. In contrast, the inclusion of vertical restraints and of types of abuse of dominance by firms within a competition agreement, something that was initially

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Isik, H. Matthey, A. Saak, P. Westhoff, D. Scott Brown, B. Willot, D. Madison. S. Meyer and J. Kruse (2005) 'The Doha Round of the World Trade Organisation and Agricultural Markets Liberalisation: Impacts on Developing Economies' 27:3 Review of Agricultural Economics, 317.

824 See Communication from Mauritius, WT/MIN(03)/W/17, of 12 September 2003. It has to be noted that the fact that the Communication was sent on behalf two regional organisations, i.e. the African Union and CARICOM is a clear indication of the coordinated action of developing countries at the WTO. In addition this position may further strengthen the argument made in Chapter 5 that the proliferation of regional plurilateral agreements, may lead to a situation that international negotiations are conducted by the representatives of those organisations.

proposed by the European Commission, did not find any favour at the WTO. Furthermore, the Commission, even though it initially insisted that the Dispute Settlement Mechanism should be included in a possible agreement on competition, it had by this time limited this proposal by accepting the much softer peer review system, due to the opposition expressed by the US.

On the other hand, it became clear in Cancun that not even the minimal proposal of the EU, which included core principles like non-discrimination, transparency and due process, a provision on hard core cartels and modalities for cooperation and technical assistance, could survive the negotiations, due mainly to the opposition expressed by developing countries.

The additional argument made in this section is that, in parallel with the realisation that exogenous factors (i.e. the opposition expressed by the US and developing countries) would block the EU proposal for the adoption of a competition agreement at the WTO, there have also been endogenous factors that have had an effect on the development of the EU position. In particular, it is argued that the EU proposal for a competition agreement at the WTO has mainly been a product of DG Trade, while DG Competition, which is responsible for competition law and policy, was much more reluctant about the inclusion of competition in the WTO.

In fact, this argument has been recently raised by Chad Damro, who in discussing the theory of venue shopping, according to which '*actors will choose the venue, depending on its institutional features, through which it may expect to achieve the best results*',[825] notes that the Directorate General (DG) for Trade may have different interests in the field of competition law and policy than those of DG Competition. He further argues that *'it should be noted that Brittan and DG Trade were the primary advocates of this position. DG Competition had little interest in promoting such a competition measure in the WTO'.*[826] He also notes that DG Trade promotes the inclusion of competition within the WTO in the context of the broader attempt to pursue non–trade goals within the organisation. On the other hand, DG Competition prefers avoiding such issue linkages (between trade and non-trade goals and consequently trade and competition), since such linkages increase the likelihood of political intervention in the performance of its mandate, which is the optimal application of the EU competition

825 Damro, C. (2006) 'The New Trade Politics and EU Competition Policy: Shopping for Convergence and Co-operation' 13:6 Journal of European Public Policy, 867, at 868.

826 Ibid, at 878.

rules.[827] The research undertaken in the context of this work builds upon Damro's argument by analysing the position of the EC Commission, which represents the EU at the WTO. [828]

As an EU official noted when interviewed, the whole idea of proposing a binding agreement at the WTO was a creature of DG Trade and from the beginning of the talks at the WTO there were voices within DG Competition opposing such a prospect.[829] Such voices became more persistent as the negotiations proceeded. As already noted, the proposal for a competition WTO agreement came from Sir Leon Brittan, who was at the time the Commissioner in charge of external trade. It has also been noted that Karel Van Miert at least officially supported the promotion of the issue at the WTO. Nonetheless, during the next four to five years or so the dynamics changed, at least with regard to DG Competition. In 1999 both Commissioners Brittan and Van Miert had to resign because of the resignation of the entire Santer Commission. Pascal Lamy became in the same year the Commissioner for Trade and Mario Monti became the Commissioner for Competition.

Throughout his tenure, the main aim of Mario Monti, who is an economist, was to introduce more efficiency-centred economic analysis on the cases reviewed by the Commission, bringing therefore the EU competition regime closer to the one developed in the US. Monti never appeared to be against the inclusion of competition in the WTO, but also expressed the view that the Commission should be realistic as to what could be achieved at this level. In 2002 he clearly expressed this position by stating that '*...we have to be pragmatic and focus initially on what can be achieved*'.[830] As noted by an interviewee, from a strategic point of view, and in view of the continuous opposition both by the US and a large number of developing countries, at a certain point in the negotiations, Monti and his staff realised that by insisting on the inclusion of competition in the WTO the Commission was '*betting its money on a lost horse*'.[831] Thus it appeared that following the resignation of Brittan and Miert from the

827 Id, at 873.

828 In particular, the Commission negotiates in consultation with the so-called 133 Committee, which consists of representatives from the 27 EU Member States on the basis of Article 133(3) EC.

829 Interview with EC Commission Official (Brussels 20/7/2003).

830.See Monti, M. (2002) 'A Global Competition Policy?' European Competition Day, Copenhagen 17 September 2002, < http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/02/399&format=HTML&aged=0&language=EN&guiLanguage=en> (last visited on 21 May 2007), where former Commissioner Monti expressed nevertheless his belief that a WTO Agreement should be adopted by 2005.

831 Two EC Commission officials confirmed this suggestion (Brussels, 20 and 21/7/2003).

Commission, DG Competition started taking the position that competition law and policy should be pursued in every possible forum (international organisation), and not only at the WTO.

On the opposite side of the spectrum, DG Trade remained committed to the WTO. It has to be pointed out that in terms of competence, the possibility of including competition at the WTO was an 'all- or- nothing' situation for DG Trade, as the WTO is the only international organisation where the EU is represented on competition matters exclusively by this Directorate General. On the other hand, and in line with Damro's argument, DG Trade considers the WTO as an expanded version of the EU model. This argument has been recently re-confirmed by an EU trade official, who has noted that: *'WTO 'feels European' in its mission and even its politics: starting from the opening of trade between members on a largely voluntary basis, arriving at binding rules (with consequences), and the pooling of sovereignty, but this time on a global scale'.*[832]

The divergence of approaches has been described by an EU official interviewee who noted that: *'International Organisations in a sense lead their own life. They try to develop their own arguments in order to justify their own existence, and this is the case with the EC Commission as well. WTO would be good for the Commissioner for Trade, while if the ICN will take the lead then the merit goes to Monti'.*[833]

6.4 The future of competition at the WTO and alternative options

As the chapter has argued, both external and internal factors have played a major role in the way that the EU, which put the issue on the table of negotiations, first had to limit its proposal, and then withdraw the proposal altogether. Despite this development, it would be far from accurate to state that competition law in the WTO is a finished story, and a number of factors lead to this conclusion.

First, the WTO as an institution has developed its own dynamics with regard to the possible inclusion of competition law and policy. At the moment, the talks in general at the WTO have slowed down dramatically, but in view of the globalisation of markets, and the ongoing aim of more developed countries to further liberalise world markets, it would be realistic to expect that at some time in the near future the negotiations will be launched again.

832 See Baldwin, M. (2006) 'EU Trade Politics – Heaven or Hell?' 13:6 Journal of European Public Policy, 526, at 533.

833 Interview with EC Commission Official (Brussels 20/7/2003).

Second, there is no doubt that, even in the absence of a WTO competition agreement, the organisation will still deal with competition issues since a number of WTO agreements contain competition-related provisions. Such provisions are found in GATT, as well as in TRIPS, the General Agreement on Trade in Services (GATS) and the 'Reference Paper' which complements the WTO Telecommunications Agreement.[834] The existence of these provisions may lead to the examination of particular cases on the basis of competition law. In fact, the WTO Dispute Settlement has already reviewed two cases on this basis. The first was the *Kodak/Fuji* case,[835] and the second the *Telmex* case.[836] Quite surprisingly, in view of the consistent opposition of the US regarding the adoption of a multilateral agreement on competition, both cases were examined on the basis of complaints submitted by the US government.

The *Kodak/Fuji* case related to a complaint by the US government that the Japanese Fuji Film company with the assistance of the Japanese government, which, according to the US, by not properly enforcing the relevant antitrust legislation, had prevented all the major Japanese distributors from distributing the products of foreign competitive firms, and thus had excluded Eastman Kodak, a US company, from the Japanese Market.[837] The complain was based on Article XXIII:1(b) of the GATT, according to which *'[I]f any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of ...(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement...'*. The WTO Panel which examined the case found that there was no infringement by the Japanese Government, mainly due to the fact that there was no proof that Japanese law was applied in a discriminatory manner to US firms, on the basis of the historical existence of Keiretsu in the Japanese markets.[838]

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834 See OECD (1999) 'Trade and Competition Policies for Tomorrow' (OECD, Paris) at 59-75 (Chapter 4).

835 See Panel Report, Japan: Measure Affecting Consumer Photographic Film and Paper, WT/DS44/R.

836See Panel Report, Mexico: Measures Affecting Telecommunications Services, WT/DS204/R.

837 It has to be noted that when the dispute arose, Sir Leon Brittan expressed the view that '...Europe has important export interests in this area. The European market of photographic film and paper is open to competition. Our industry would like the same conditions to prevail in other markets as well. We therefore welcome the critical analysis of market conditions in Japan, which this panel will conduct'. See Commission (EC) 'Kodak-Fuji Case – EU to Join the WTO/GATT Panel: Statement by the European Commission', IP/96/931.

838 See Furse, M. (1999) supra n. 125.

On the other hand, the *Telmex* case related to the privilege granted by Mexican legislation to the dominant company, Telmex, to fix the rate to be paid by all foreign carriers terminating calls in Mexico. In this case, the WTO panel found that Mexico infringed its obligations under the Reference Paper as it failed to maintain appropriate measures to prevent anti-competitive practices by firms that are a 'major supplier', it failed to ensure interconnection at cost-oriented rates, and it also failed to ensure reasonable and non-discriminatory access and use of telecommunications networks.[839]

Thus, irrespective of whether competition law and policy as such will return to the WTO agenda of negotiations, it is quite logical to suggest that more competition-related cases will reach the Dispute Settlement Mechanism in the future, in view of the fact that competition provisions are found in a number of WTO agreements. Nevertheless, as it has been argued, this case-specific analysis based on sector- specific competition provisions cannot replace a multilateral competition agreement, as such an application of the law might lead to an inconsistent competition policy across sectors.[840] In parallel, the problems identified in Chapter 2 with regard to the international aspects of competition law and policy still exist, which means that international solutions are still needed in order to face these international problems. Bilateral and plurilateral agreements may provide solutions, but such solutions are by definition limited.

In any case, both of the two major international institutions which carried out work in this field before the launch of competition talks at the WTO have consistently continued their work: UNCTAD being the institution mainly dealing with the relevant problems faced by developing countries; and OECD being considered as the group dominated by rich industrialised countries. In addition, in 2001 the ICN was launched, and has probably become the most important forum for discussions on the multilateral aspects of competition law and policy. The next section attempts to expose the main features of this 'virtual' institution, and evaluate the reaction of the EU regarding its operation.

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839 The legal basis of the decision was Articles 1.1 and 2.2(b) of the Reference Paper, and 5(a)and (b) of the GATS Annex on Telecommunications. For an analysis of the Panel Report, see Fox, E.M. (2006) 'The WTO's First Antitrust Case – Mexican Telecom: A Sleeping Victory for Trade and Competition' 9 Journal of International Economic Law, 271; Lee, K.Y. (2005) 'The WTO Dispute Settlement and Anti-competitive Practices: Lessons Learnt from Trade Disputes', The University of Oxford Centre for Competition Law and Policy, Working Paper (L) 10/05; Marsden, P. (2004) 'WTO Decides First Competition Case With Disappointing Results' Competition Law Insight, May, 3.

840 Shelton, J.R. (1999) 'Competition Policy: What Chance For International Rules?' 1:2 OECD Journal of Competition Law and Policy, 51, at 56.

6.4.1 The genesis and operation of the ICN

As noted above, the establishment of the ICN was first proposed by the ICPAC Report in 2000, and was the palpable US response to the EU proposal for a binding competition agreement under the auspices of the WTO. In fact, this kind of behaviour from powerful states, i.e. proposing the creation of new organisations in cases where they do not intend to support the adoption of binding international rules, or where they feel that the negotiations under the auspices of an international organisation has reached a dead end, has been analysed in the political science literature.

In particular, as Steinberg notes: *'[W]hen aimed at a group of states—and in its most potent form—coercion takes the form of a threat to exit the organization that is unable to achieve consensus... In other cases, the exit tactic may involve simply ignoring the deadlocked organization and creating a new organization that will become a source of future legal benefits in the issue area'*.[841] Similarly, Krisch, discussing the relationship between hegemony and international law, notes that dominant states have two major options with regard to their position towards international law. The first is to support the adoption of international agreements where there is the belief that international commitments would have a positive effect on the domestic markets, as in the case of the WTO where the US has pushed for increased legalisation. The second alternative is to withdraw from international law and to turn to other strategies which do not necessarily involve violations of existing law; but it will certainly include shifts away from legal mechanisms in areas central to the dominant state's interests, and in particular attempts to reduce the legal constraints on the tools of dominance, such as those on the use of force.[842]

Amidst the various problems identified and objections raised with regard to the possible inclusion of competition law in the WTO, the US proposal found considerable support within the community of competition experts. In September 2000, Joel Klein reaffirmed the ICPAC's proposal for the creation of a Global Competition Initiative, comparable to the work carried out by the OECD Competition Law and Policy (CLP) Committee, and in particular by the OECD Global Forum of Competition, which would encompass a larger number of participating countries, since the OECD's membership was too limited and consequently it could not serve as the organisation to address itself

841 See Steinberg (2002), supra n. 799, at 349.

842 Krisch, N. (2005) 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' 16:3 The European Journal of International Law, 369, at 379.

competition issues of a global scale.[843] Commissioner Monti, who has been considered as one of the strongest proponents of the work undertaken by the ICN,[844] welcomed the proposal of Joel Klein.[845]

A few months later, in February 2001, forty representatives of competition authorities and experts met in Ditchley Park in the UK and examined the possible way forward with regard to the establishment and operation of this new organisation. The ICN was finally launched only one and a half years after the ICPAC proposal at the Fordham Corporate Law Institute's annual international antitrust conference by officials from 14 jurisdictions.[846] Since then the development and work of the ICN has been significant. More than 80 states participate in the Network, which, according to its website, is the *'only international body devoted exclusively to competition law enforcement'*.[847]

The ICN is a virtual organisation without a permanent secretariat. It is led by a steering Group of 15 experts-representatives of competition authorities, and holds an annual Conference where representatives of all Member States, along with a limited number of invited business representatives and academics, participate. Most of its work is carried out by the various working groups set up to examine particular issues,[848] and in particular issues relating to merger notifications and procedures, capacity building, technical assistance, cooperation on cartels, the relationship between sectoral regulation and competition, the role of competition in the telecommunications sector, and recently the analysis of unilateral conduct. Thus, it may be argued that, to a certain extent, the issues covered by the ICN working groups are similar to the topics discussed at the WTO. The major differences with regard to the operation of these institutions are the following two.

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843 See Klein, J. (2000) 'Time for a Global Competition Initiative?', Speech Delivered at the EC Merger Control 10th Anniversary Conference, Brussels, Belgium, <http://www.usdoj.gov/atr/public/speeches/6486.pdf> (last visited on 21 May 2007) at 7. As noted in Chapter 3, the OECD encompasses 31 Members. The CLP includes representatives from these states as well as particular observers from other non-OECD countries. In addition in the context of the Global Forum on Competition (GCF), which was created in parallel with the ICN in 2001, business and consumer representatives participate in some of the CLP and GCF meetings.

844 See Kolasky, W. (2005) 'Mario Monti's Legacy: A US Perspective' 1:1 Wilmer Cutler Hale and Dorr LLP, 159, at 176.

845 See Monti, M. (2000) 'The Main Challenges of a New Decade of EC Merger Control', Speech delivered at the EC Merger Control 10th Anniversary Conference, Brussels, Belgium, 14-15 September 2000, <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/00/311&format=HTML&aged=0&language=EN&guiLanguage=en> (last visited on 21 May 2007).

846 See US DoJ 'US and Foreign Antitrust Officials Launch International Competition Network: New International Venue Will Assist In Global Convergence On Important Antitrust Enforcement Issues' Press Release of 25 October 2001.

847 See the ICN webpage at http://www.internationalcompetitionnetwork.org/index.php/en/about-icn

848 The members of the Working Groups mainly work by internet, telephone, fax machine and videoconference. See ibid.

First, no trade officials are invited at the ICN Conferences, despite the fact that for a decade or so, the negotiations for a multilateral agreement at the WTO were carried out by trade and not competition officials.[849] It should be noted that with regard to the EU participation at the ICN, and based on the arguments raised above regarding the different preferences between the Commission's trade and competition officials at the WTO, it comes as no surprise that EU competition officials have been rather satisfied with this development, as the work of the ICN is carried out by competition experts, while trade experts are actually excluded. As Janow has noted, the informal but often repeated motto for the ICN has become *'...all competition all of the time'*.[850]

This is something that has created criticism within trade officials. For instance, Bernard Hoekman from the World Bank, who has been one of the most influential commentators of the role of competition in the international trade system, has noted that *'...[T]he ICN is an inter-agency entity, not an inter-governmental body, reflecting a desire on the part of the "competition community" not to have to engage with trade and other officials on modalities of international cooperation (disciplines) in "their" area'*.[851]

Second, the ICN does not exercise a rule making function. According to the ICN website, *' ...[W]here the ICN reaches consensus on recommendations, or "best practices", arising from the projects, it is left to the individual competition authorities to decide whether and how to implement the recommendations, through unilateral, bilateral or multilateral arrangements, as appropriate'*.[852] Thus, the ICN only produces soft law instruments in the way that such instruments are being produced by bilateral enforcement cooperation agreements, discussed in Chapter 3, and similar to the OECD recommendations on hard core cartels and enforcement cooperation. In practice, the

849 To give a characteristic example: at the last Conference of the ICN in Cape Town, a UK official from the Department of Trade and Industry flew to Cape Town for just one day to attend a regional workshop organised by a local NGO, TRALAC, which took place one day before the ICN annual Conference. The official did not attend the ICN Conference as he was not invited.

850 See Janow, M.E. (2003) 'Observations on Two Multilateral Venues: the International Competition Network (ICN) and the WTO' In Hawk, Barry E. (Ed.), Annual Proceedings of the Fordham Corporate Law Institute Conference on International Antitrust Law & Policy (New York: Juris), 47, at 53

851 See Hoekman, B. and K. Saggi (2005) 'International Cooperation on Domestic Policies: Lessons from the WTO Competition Policy Debate', in S. Evenett and B. Hoekman (eds), Economic Development and Multilateral Trade Cooperation. (Palgrave McMillan and World Bank), at 456.

852 ibid.

various working groups have already issued a number of soft law instruments such as recommended practices and guiding principles in the fields that they cover.[853]

The ICN is one of the most characteristic examples of the transgovernmentalism, also discussed in earlier chapters of the thesis.[854] Cooperation under transgovernmentalism involves specialised domestic officials cooperating with minimal supervision by foreign ministers, and is also based on networks since cooperation is based on *'loosely-structured, peer –to-peer ties developed through frequent interaction rather than formal negotiation'*.[855] As Raustiala notes, the result of such networks is the diffusion of regulatory rules. Power still plays a role in these organisations; nonetheless, on such occasions power is *'soft power, which is defined as power to attract, which is different from traditional hard power, defined as the power to coerce'*.[856] It would be rational to expect that the work of the ICN is led by industrialised countries like the US, the EU and Canada. In fact, of the 15 members of the ICN's steering group, which led the cooperation on the way to the last meeting of the ICN in Moscow in May 2007, only David Lewis for the South African Competition Tribunal, Eduardo Perez Motta from the Mexican Competition Commission, and Igor Artemiev from the Federal Antimonopoly Service of Russia, are not representatives from wealthy industrialised countries.[857]

That said, in the absence of a multilateral agreement on competition and in view of the need for multilateral cooperation, forums such as the ICN and the OECD Global Forum on Competition definitely play an important role in the development of international competition norms. These forums develop mechanisms of cooperation and interaction between experts from competition authorities, academia and business worldwide, through which ideas and experiences are exchanged with the aim of reaching common understandings; they use soft law instruments without threatening a

853 See in detail ICN (2006) 'A Statement of Mission and Achievements, Up Until May 2006'.

854 Chapter 3. See also Slaughter, A-M. (2004) 'Sovereignty and Power in a Networked World Order' 40 Stamford Journal of International Law, 283.

855Raustiala, K. (2002) 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law' 43 Virginia Journal of International Law, 1, at 5.

856 Ibid, at 51.

857 The other members of the Steering Group are representatives from Germany, Canada, Australia, the EU, France, Ireland, Israel, Italy, Korea, Japan, Switzerland, while the US is the only state with two participants, Thomas Barnett, the DoJ Antitrust Division Assistant Attorney General, and Deborah Majoras, the Chairman of the FTC, reflecting the institutional framework of the competition enforcement in the US. See the ICN website, at http://www.internationalcompetitionnetwork.org/media/library/icn_steering_group.pdf. (last visited on 2 Mat 2007)

country's sovereignty.[858] Thus, the major development at the multilateral level in the last five years has been a shift from attempts to include competition law in a binding agreement to the creation of mechanisms (the OECD CLF and particularly the ICN) which contribute to the achievement of convergence on particular issues. Given the complexities of the operation of competition rules at the national level, discussed in Chapter 2, this shift is to a certain extent reasonable, since only where such convergence is achieved may firmer international rules be adopted.

The recent history of multilateral cooperation/negotiations on competition shows that officially the EU shares this opinion. Having in fact to withdraw support for a WTO competition agreement, since it became clear that no consensus could be reached, the EU seems to have realised that at the multilateral level it had to follow the second best scenario, i.e. participation in alternative multilateral fora, such as the ICN, which produce soft law instruments. As noted above, Mario Monti was from the very beginning a major proponent of the ICN, and since then the Commission, and in particular DG Competition as DG Trade does not participate in the ICN, has been very active in the context of the works of this virtual organisation. The Commission co-chairs the Cartels Working Group, and also has co-chaired the Working Group on Competition Advocacy.[859] In addition, representation of the EU at the annual meetings of the ICN is of the highest level. For instance both Nelie Kroes and Philip Lowe (the Commissioner for Competition and the Director General of DG Comp respectively) attended the last annual meeting of the ICN in Moscow, and this is indicative of the importance that the EU top competition bureaucracy places on the ICN.[860]

6.5 Conclusion and evaluation of the role of the EU

This chapter has attempted to observe the development of multilateral talks on competition law and policy. It started by briefly discussing the debate initiated under the auspices of a number of international organisations, such as the League of Nations, where the issue was discussed in 1925, the proposed International Trade Organisation,

858 See Bode, M. and O. Budzinski (2005) 'Competing Ways Towards International Antitrust: the WTO versus the ICN', at 14.

859 See the website of the ICN at www.intenrationalcompetitionnetwork.org.

860 On the other hand, and as is relevant to the argument raised above that the trade experts' community questions the legitimacy of the operation of the ICN, it should be argued that within the EC Commission there is divergence in approaches as to the function of the ICN. As opposed to competition officials, trade officials of the EU at least informally have expressed their dissatisfaction regarding their obligatory absence of the ICN meetings and in general the work of the ICN. Interview with EC Commission Official, (Brussels 22/7/2003).

where discussions took place in 1947, and UNCTAD, under the auspices of which the RBP Code was adopted in 1980. The major part of the chapter has been devoted to the talks on the adoption of a multilateral agreement at the WTO, with a focus on the development of the EU position, and the way that the US and developing countries reacted to this proposal. Finally, and in view of the failure of the WTO talks, the chapter has discussed the operation of the ICN, which is currently the most active organisation in this field.

As seen, the debate over the possible adoption of a multilateral agreement on competition law is now almost a century old. Even though no agreement has been concluded to date, the long history of negotiations is a clear indication that this debate is an active one, and that some sort of multilateral agreement should be achieved some time in the near future. On the other hand, the examination of the development of the WTO negotiations has exposed the difficult problems that have to be addressed before such an agreement is concluded, as well as the various exogenous and endogenous dynamics that develop and have an influence on the position of particular countries in the context of the negotiations.

For instance, it has been suggested that in the EU a network of influential academics and officials emerged in the early 1990s which, under the leadership of Lord Brittan, expressed the position that the time has come for the conclusion of a binding international competition agreement. On the other hand, as argued in the chapter, variant and sometime diverse factors led to the development of this position, and include the idea that the EU model of international governance should be expanded at an international level, the belief that a multilateral agreement on competition would open up foreign markets to EU firms, and finally, that the negotiations on competition would slow down the relevant talks on agriculture.

On the other side, the chapter has argued that the US and a large number of developing countries opposed the EU position for various and diverse reasons. For the US, mainly because of its traditional position that a binding agreement on competition would be a threat to its sovereignty and because of the belief of the superiority of the US competition law in relation to any other national law, a multilateral agreement on competition could lead to the distortion of competition standards.

Developing countries also opposed the EU proposal, first because of the wide-spread concern that the adoption of such an agreement would undermine their need to foster industrial policy in order to face their dramatic economic problems, and more

importantly develop strong enterprises that would be able to compete at the international level. From a similar perspective, it has been argued that the adoption and application of competition law is not a priority for developing and least developed countries, since the enforcement of such law would require the establishment of new institutions and the employment of qualified experts - a project arguably too expensive for states that suffer from poverty and a number of other socio-economic problems.

On the other hand, it has been argued that the reluctance of these states to proceed with the adoption of a WTO competition agreement is also linked to the hesitation of major industrialised countries to accept a prohibition of export cartels, which are exempted from their competition laws and harm the producers and consumers of the importing countries. In a more demanding way, the view was also expressed that a multilateral competition agreement should include a relevant prohibition for industrialised countries, while excluding from its application developing countries on the basis of flexibility, a notion which, along with progressivity, technical assistance, and capacity building, was extensively discussed in the context of negotiations at the WTO.

Finally, it has been suggested that the negotiations on competition law and policy have been influenced by the parallel negotiations on other trade issues, agriculture being the most directly linked. As observed, developing countries expressed the position that in case no further commitments would be undertaken by industrialised states, and in particular by the EU, on agricultural subsidies, then they would not offer their consent for the adoption of an agreement on competition. In fact, this *quid pro quo* nature of the WTO negotiations is an issue raised by the US with regard to the inappropriateness of this institution to accommodate competition provisions. It has also been argued that the EU put the issue of competition on the table of negotiations in order to slow down the talks on agriculture, in view of the demand of developing countries for rapid reforms. Irrespective of the validity of these arguments, the fact that the controversy developed in the context of the negotiations on agriculture is a clear indication that the extent to which competition law could be formally incorporated in the broader international trade system in the future will to a certain extent depend on agreement on various other issues.

With regard to the content of such a possible agreement, among the various issues that were negotiated at the WTO, only hard-core cartels were finally promoted as a competition-related problem that may have an effect on the operation of international

trade. Nonetheless the notion of hard-core cartels, as in the case of the OECD recommendation on this issue, does not include export cartels, at least in the view of industrialised countries. In fact, this development reflects the concern developed mainly in the US and expressed by the ICPAC Report that the real effects of anticompetitive practices on international trade have not been properly quantified yet. According to the report:

'...the level of quantitative and empirical economic analysis concerning private and government anticompetitive restraints that inhibit market access still remains quite limited... The uneven quality of the evidence in many specific instances is also reflected in the corresponding absence of empirical analyses that determine or estimate the magnitude of the effects of these competition policy problems on global trade flows or the global economy. This very issue is itself a matter of debate'.[861]

Apart from hard-core cartels, all the other issues that were included in the Doha Declaration, which as noted has been the peak of the negotiations at the WTO, relate to the application of core principles such as transparency, non-discrimination and procedural fairness in the application of competition law, the need for voluntary cooperation, and, most importantly, the support that has to be offered to developing countries in order to develop efficient competition policies. Nevertheless, even this minimum version of the competition agenda could not survive the negotiations, as in Cancun the negotiations reached a dead end.

Apart from the reasons that led to the collapse of the WTO talks, the chapter has also discussed the alternative multilateral solutions, and in particular the ICN. As noted in various parts of the chapter, the ICN is the outcome of a proposal first expressed by the US and supported mostly by the competition officials of a number of countries, including the EU. On the other hand, trade experts have been opposed to the work carried out by this virtual organisation. In this regard, it has been suggested that the interests of the particular groups that are developed in the context of multilateral talks on a given issue may vary considerably. This is for instance the case within the EC Commission, where as already noted, the preferences of DG Trade and DG Competition officials as to the most appropriate international organisation to host competition law provisions are not identical and are in fact sometimes conflicting. Trade officials are keen on the adoption of competition law within the WTO context, while the competition

861 See ICPAC Report, at 224-225.

officials support the ICN and the OECD. A similar situation has been identified with regard to the US, where despite the long-lasting opposition by the competition officials to the possible adoption of WTO competition agreement, the US trade representatives agreed to include competition law in the Doha Declaration.

Irrespective of this development of different lobbies that have emerged in the process of the negotiations for a multilateral agreement on competition, the chapter has also identified some of the main characteristics of the ICN as a form of international cooperation. In particular, it has been argued that even though the issues discussed at the ICN are similar to these discussed at the WTO, the major difference between the two institutions is that while the aim of the WTO talks was (is) the adoption of a binding agreement, the relevant aim of the ICN is the publication of best practices and recommendations which do not bind the participating countries. Thus, the ICN has been a more expanded version of transgovernmental cooperation as this has been described in the context of the discussion of bilateral enforcement cooperation agreements.

In view of its non-binding nature, the amount of the work that has been carried out at the ICN is significant, as a great number of reports, best practices and recommendations have been published on issues (such as mergers and the relationship between competition and sectoral regulation) which did not survive the relevant negotiations at the WTO. Hence, a lesson that has been learnt in the context of the analysis of multilateral talks on competition is that there may be no formal binding agreement on the issue before a common understanding has been reached on the issues that are to be included in such an agreement. In this regard, organisations such as the ICN, the OECD and UNCTAD are very important for the development of a competition culture.

Reverting to the role that the EU has played in the field of multilateral talks on competition law and policy, it may be argued that recent history of these talks has showed that the influence of the EU - which as exposed in Chapters 4 and 5 has been significant in the formation and to a certain extent the application of competition law in the context of bilateral and plurilateral-regional trade agreements - has not been as influential at the international level. The EU supported for more than 10 years the inclusion of competition law and policy in the WTO. Nonetheless, its proposal faced opposition both by the US and developing countries for a number of reasons discussed in the chapter. Even though the official position of the EU - until the collapse of the negotiations in Cancun - held that the proposal for a WTO competition agreement was

among its main aims, as the chapter has argued, in view of the opposition by a number of countries to the possible adoption of the agreement, the dynamics within the Commission changed over time with DG Competition questioning the extent to which a competition agreement at the WTO was a feasible project.

In parallel, it has been argued that the US came up with a more realistic proposal which supported the creation of a multilateral institution to serve as a forum for discussions on competition issues, a proposal which led to the establishment of the ICN. To this end, and in view of the fact that DG Competition supported the establishment of the ICN and actively participates in its work, it could be argued that the EU has been a follower rather than the leader in the development of international competition law at the multilateral level, the US being the clear leader.

At the same time, as observed mainly in Chapter 4, the EU, in the context of its enlargement strategy, has mainly shifted its interest to the adoption of bilateral trade agreements which in practice demands the co-signing parties to adopt and/or harmonise their competition regimes with its own regime. Furthermore, as shown in Chapter 5, the EU has focused on the development of its own plurilateral system of competition, which has been the model followed by most of the other plurilateral agreements in the world.

Chapter 7: Conclusion – Main findings of the study

7.1 General observations

This thesis has examined the process of internationalisation of competition rules through the analysis of different types of international agreements that include competition provisions. The thesis initially pointed out that competition law and policy co-exists with a number of other national policies which may also have an influence on the application of competition rules. Despite the identification of numerous factors upon which the particular application of competition law is dependent at national level, this thesis has not attempted to question the usefulness and validity of competition law and policy. In fact, statistics compiled for the purposes of the study show that competition law is a legal instrument adopted by more than half of the countries in the world, while most of them have adopted competition law in the last 15 years. These statistics may themselves answer the question regarding whether competition law is considered an important instrument for the regulation of business practices in economies that become increasingly liberalised.

On the other hand, the discussion developed in the second chapter of the thesis reminds us that competition rules are not a *panacea*, a solution for all the problems that may arise from the activities of private firms in the markets. In contrast, other public policies and sectoral regulations co-exist with competition laws on a national level and are employed to address the various issues related to the activity of such firms.

Furthermore, it should be kept in mind that competition policy and the co-related policies which deal with business activity encompass very important interests of the states which apply these policies, as, in view of the liberalisation of national markets, the role of private undertakings registered in particular states is very important for the economies of these states. In fact, in liberalised economies these firms have on many occasions replaced state monopolies in the markets previously dominated by the state. In turn, in view of the liberalisation of international markets, and the fact that these national firms have to compete in these markets, the governments of particular states often apply competition rules in such a fashion as to give these firms enough strength to be able to survive in the international competitive environment. This observation is particularly relevant to developing countries, which as shown in various parts of the thesis have questioned the need for competition policy and in any event they have demanded preferential application of competition rules in order to have the opportunity

to support their domestic firms to such an extent that these firms may become competitive in the international markets.

The argument that competition law deals with very sensitive aspects of national economies is also validated by the observation made in the context of this thesis that extraterritorial application of competition rules is a regular phenomenon in the field of competition. As also noted, the most frequent user of competition rules in an extraterritorial manner is the US, which is the country with the most sophisticated competition regime in the world. Following the US example, the EU is also eager to use its competition rules extraterritorially, and this example has recently been followed by other countries.

Nonetheless, as also noted in various parts of the thesis, international problems need international solutions. Hence, the unilateral application of competition rules may temporarily provide solutions to business practices that have an anticompetitive effect on multiple national markets; however the increasing appearance of such practices dictates that some sort of international cooperation is needed in order to overcome the problems that stem from these practices. In addition, it has also been stressed that, in view of the internationalisation of business activity, the variant and sometimes divergent characteristics of national competition rules may create problems in the future if no agreement is reached as to their optimum application, or at the least as to certain common standards on the application of competition rules.

In this regard, it has been suggested that international law is needed in order to put into context the cooperation of nation states on competition law and policy. To this end, the thesis has examined four types of agreements: bilateral and tripartite enforcement cooperation agreements on competition; bilateral trade agreements that include competition provisions; plurilateral trade agreements which include competition law; and finally, it has attempted to analyse the process of negotiations that have taken place to date for the adoption of a multilateral agreement on competition. The following section briefly sums up the main arguments developed in the process of the detailed analysis of these agreements.

7.2 Main findings of the study with regard to the operation of international agreements which are devoted to or include competition provisions

The first type of agreements discussed in the context of the present study is enforcement cooperation agreements. As mentioned, these agreements follow the relevant recommendation of the OECD, whose work has been substantial in the field of international competition law. The agreements do not harmonise the competition rules of the signing states, but do provide a number of cooperative mechanisms that aim at helping the signing countries to overcome problems that may arise where both jurisdictions review a particular business practice. As noted in the context of the detailed analysis of the agreements, mainly based on the agreements signed between the EU and the US, this type of agreement may provide valuable solutions regarding the cooperation of the signing countries; they nonetheless have certain limitations. These limitations mainly refer to the fact that they do not provide for the exchange of confidential information, and more importantly the fact that they are soft law instruments that the signing parties apply on a discretionary basis. In this regard, it has been suggested that the second generation of agreements, which are agreements that are binding on the parties and provide for exchange of confidential information, are welcomed.

On the other hand, in the context of the examination of the agreements, it has been argued that soft law is a necessity in various regulatory fields where no consensus has been reached as to the optimum application of the legal instrument that it regulates. In view of the observation made in Chapter 2 that there is not a universal common understanding about the optimum application of competition law and policy, the existence of soft law cooperation agreements, as well as other soft law instruments, such as the recommendations and best practices issued by the OECD and the ICN, are important instruments towards the development of a common understanding of these concepts.

Following the examination of enforcement cooperation agreements, the thesis moved onto the examination of bilateral trade agreements that include competition provisions. The main characteristic of these agreements is that they have included competition provisions in a very broad context of provisions that relate to trade liberalisation, peace and security and a number of other issues related and not related to competition law and policy.

Further to this general observation, as argued in Chapter 4, there are two different models of such agreements. The first model, followed by agreements signed by the US and Canada, provide for cooperation of the signing parties on cases of mutual interest. In contrast to this model, bilateral trade agreements signed by the EU provide for the harmonisation of competition laws of the signing parties. In addition it has been argued that, even though no dispute settlement is provided by these agreements in case a conflict arises as to the application of competition rules by the signing parties, bilateral free trade agreements are much closer to hard law than the enforcement cooperation agreements.

Another important issue that has been raised in the context of the examination of bilateral agreements - both enforcement cooperation agreements and trade agreements that include competition law provisions - is that these agreements increase national power, in the sense that it is easier for the economically and politically stronger party to control and impose its preferences to their co-signing parties. As noted in various parts of Chapters 3 and 4, this is the reason why the US has been the prominent user of bilateral enforcement cooperation agreements, and this is also why the EU has pursued the conclusion of bilateral trade agreements, mainly with neighbouring countries, that include competition provisions.

As opposed to bilateral agreements, plurilateral regional agreements secure a more balanced distribution of powers among the participating countries. As noted in Chapter 5 which discussed these agreements, plurilateral regional trade agreements have certain similarities with the bilateral trade agreements that include competition law provisions, in the sense that they include competition law and policy in the context of a far broader nexus of regulations.

In addition, it has been shown that, as with the relevant bilateral agreements, there are two main models followed by plurilateral agreements concerning competition law and policy. The first is the model followed by NAFTA and one agreement concluded by African states (SACU, and partly by SADC) which provides for enforcement cooperation of the contracting parties. In contrast to this model, and following the example of the EU, most of the other agreements reviewed in this study include substantive competition provisions that apply to cases where the business practices under consideration have an effect on the regional trade.

Further to this general observation, it has also been noted that in terms of institutional set up there are also two main models followed by regional agreements.

The first model is the one developed by the EU and followed by a number of other similar agreements, and provides for the establishment of a supranational body to apply the competition rules of the trading block. Some of those agreements also have a regional Judicial Body established to review the decisions issued by the supranational body. As opposed to this institutional setting, the regional competition rules in MERCOSUR are applied by two intergovernmental bodies that consist of representatives of the governments of the states that participate in the bloc. EAC is another such example, as an intergovernmental body has the competence to apply the rules.

What nevertheless should be taken into account is that the level of development of competition regimes in these trading blocs varies considerably. The EU is by far the most developed regional bloc in the world, while most of the other regional blocs have only recently adopted competition rules, and most of them have not yet applied these rules in practice, or have not even established the institutions that should apply these rules.

That said, as argued in the context of the examination of plurilateral regional agreements, the proliferation of such agreements, and especially in view of the fact that the attempts to adopt a multilateral agreement on competition law have not been fruitful, these agreements may become of primary importance in the near future. This assumption is based on the argument that, following the example of the EU, a handful of regional blocs and not particular nation states may participate in future multilateral negotiations.

In fact this argument has been to a certain extent validated in the context of the discussion about the attempts to conclude a multilateral agreement on competition under the auspices of the WTO which has been developed in Chapter 6. As the chapter has shown, developing countries have coordinated their actions and on particular occasions they expressed a common position at the negotiations, representing not only particular groups of states, but also regional blocs such as the African Union and CARICOM.

Apart from this general observation the chapter has reviewed the history of negotiations at the multilateral level with regard to the adoption of a competition agreement. The major part of the chapter has been devoted to the examination of the negotiations that took place for almost 10 years under the auspices of the WTO. In particular the chapter has reviewed the development of the proposal put forward by the

EU for a WTO competition agreement, and the reactions that this proposal met both by the US and the vast majority of developing countries.

This discussion brought to the surface a number of arguments developed in the context of the observations made in previous parts of the thesis. For instance, it exposed the traditional position of the US that the unilateral application of competition rules is preferable in cases where an anticompetitive practice takes place in the territory of a state which has no competition law in place or is unwilling to apply the law. It also exposed the perception prevailing among the US competition community that US law is superior to other national competition laws, and therefore a multilateral agreement would not be desirable as such an agreement could lead to the distortion of competition standards due to the *quid pro quo* nature of the WTO negotiations.

This last assumption, with regard to the nature of the negotiations at the WTO, simply restates the argument raised in various parts of the thesis that competition law and policy is not an end in itself. As repeatedly noted, the particular application of competition law and policy at a national level takes into account other important policies and in view of the absence of a multilateral agreement, this phenomenon is magnified at the international level where policies not directly linked to competition law, as well as the divergent policies of various countries, are found.

This has been exposed vividly in the context of the presentation of the reasons that led a number of developing countries to oppose the EU proposal for the adoption of a multilateral competition agreement at the WTO. In particular, it has been noted that the proposal was rejected on the basis of the fact that these countries consider industrial policy to be a far more important policy than competition policy, since the application of industrial policy may assist them in creating firms strong enough to compete in the international markets. In addition, it has been noted that the opposition of developing countries to the inclusion of competition and the other Singapore Issues in the list of the WTO agreements have been due to the fact that these countries have been dissatisfied with the process of negotiations on agriculture, which is another indication that in general multilateral negotiations on competition may depend upon the negotiations on issues not directly related to competition.

Irrespective of these arguments, the discussion on the WTO negotiations on competition also revealed that at least two policy networks have been developed in the process of the negotiations. In particular, it has been suggested that both in the EU and the US trade officials have been more sympathetic to the possible adoption of a

competition agreement under the auspices of the WTO than their competition colleagues. This divergence in preferences has been more evident in the context of the work carried out at the ICN, which is dominated by competition experts and which excludes trade experts.

The analysis of the ICN's work has also validated the arguments made in the context of the argument that in cases where there is no clear common understanding as to the optimum application of a legal instrument on a national level, soft law is employed to overcome the various problems that emerge with regard to this legal instrument at the international level. As regards competition law and policy in particular, the fact that a *'culture of competition'* - that is a common understanding on how competition operates, what the proper economic approach is, and to what extent the operation of competition law and policy may have an influence on international trade - has not been reached has made the contribution of the ICN to the field of international competition law, through a number of recommendation and best practices, of major significance.

7.3 The role of the EU

On the other hand, the examination of the various types of international agreements and the negotiations on the adoption of a multilateral competition agreement has provided some useful insights with regard to the central question that this thesis has attempted to address, i.e. the role of the competition law and policy of the EU in the formation and application of international agreements on competition. The main finding of the thesis is that, depending on each particular type of agreement, the role of the EU varies.

In particular, the thesis has argued that the EU policy with regard to bilateral and tripartite enforcement cooperation agreements is rather neutral, in the sense that the EU has signed agreements only with its most important partners, and has not seemed eager to extend this nexus of cooperation to other states. This lack of enthusiasm of the EU as regards signing more agreements of this kind may be attributed to the fact that the EU bureaucracy considers this type of semi-formal cooperation as not particularly effective, due to the discretionary nature of enforcement cooperation agreements. On the other hand, as noted, the EU tries to find ways which would allow it to conclude a second generation enforcement cooperation agreement with the US, and this could open up the way for the adoption of further agreements in the future. That said, as things stand now,

it seems unlikely that the EU would proceed to the conclusion of more agreements of this type.

As opposed to enforcement cooperation agreements, the EU has invested a lot of resources on the negotiation and application of bilateral trade agreements which include competition provisions. In particular, it has been pointed out that it has used this type of agreement in order to expand its legal regime, including competition, to a large number of neighbouring countries, and to prepare the field of accession of some of these countries to the EU. The first such agreements have already led to the accession of 12 countries, while in the way that the EU has been expanded in the last 50 years it would not be risky to argue that more countries should join the EU in the future. In addition, as mentioned in the context of the discussion, the EU has actively pursued the smooth operation of these agreements by providing significant funding to its co-signing countries in order to draft the laws and set up enforcement institutions.

On the other hand, it has been noted that the closer the relationship of the EU with its co-signing parties, the more detailed bilateral trade agreements are. This argument is also valid with regard to the competition provisions found in these agreements. As observed, the agreements signed with acceding and candidate countries, as well as – to a certain extent- with Mediterranean countries, imposed the harmonisation of these countries' competition rules with those of the EU. In contrast, in the agreements with certain ex-USSR states, the relevant wording is far looser. Irrespective of this observation, it is beyond doubt that the EU has played a major role both with the formation and application of bilateral trade agreements which include competition provisions.

The EU has also had an influential role with regard to the establishment (or drafting) of competition regimes in other plurilateral regional blocs. This thesis has argued that such influence, at least in terms of competition, may be attributed primarily to the fact that a number of blocs have to a certain extent followed the EU competition regime, and less so to the attempts of the EU itself to impose its regime on these blocs. In fact, when the Treaty of Rome was signed in 1957 nobody could have expected the degree of influence that the newly established regional bloc would have in the field of international relations and international law. One of the fields where the EU has had such a spectacular influence is competition law and policy. The relevant chapter of this thesis that discussed plurilateral regional trade agreements briefly reviewed the competition regime of the EU and argued that this regime has to a certain extent become

the model for the development of the competition regimes of various other regional blocs across the globe.

On the contrary, the discussion developed in Chapter 6 has revealed that in the field of multilateral competition negotiations the EU has been the follower, and the US the clear leader. This has been observed primarily in the context of the negotiations for a competition agreement in the WTO, where in the mid 1990s it took the initiative to pursue the inclusion of a competition agreement within the international trade system, but faced fierce opposition both by the US and a number of developing countries and eventually the collapse of the talks in Cancun. In addition the secondary role of the EU has also been observed with regard to the formation of the ICN, which at the moment is the most active international (virtual) organisation in the field of competition law and policy. As argued, the idea about the establishment of the ICN was in fact a creature of the US bureaucracy, which, when it felt that the EU was very actively pursuing the inclusion of competition at the WTO, proposed the creation of the ICN as a way, among other things, to escape a binding multilateral agreement. The EU having realised that its proposal for a WTO competition agreement could not survive the difficult negotiations, just had to follow the proposal of the US and support the, admittedly very important, work of the ICN.

7.4 Final remarks

Marie-Laure Djelic very accurately pictured the process of internationalisation of competition law:

'The case of antitrust is an illustration that something we can call 'globalization' is indeed happening. But it also shows that this globalization is very much a process in the making, partly open ended, quite complex and messy. Globalization is not, far from it, a state of things or a reality. Globalization is not 'the end of history' – rather it is our history in the making.'[862]

This study has attempted to observe through the lens of the EU the internationalisation of competition rules, mainly by analysing international norms, which even though not unproblematic attempt to put into context this complex and messy process. The major finding of the thesis with regard to the role of the EU in the formation and application of international competition agreements confirms Djelic's

862 See Djelic, M-L. (2005) 'From Local Legislation to Global Structuring Frame: The Story of Antitrust' 5:1 Global Social Policy, 55, at 71

argument in the sense that, depending on the particular type of agreements, the influence of the EU varies.

The other main argument of the thesis is that, in view of the fact that competition law is a relatively new legal instrument, there is a considerable way to go before consensus is reached as to the optimum operation of competition law and policy, and probably even a longer way before countries agree to adopt a binding multilateral agreement on competition. Because as Gerber has very convincingly opined *'only when international obligations created an explicit alignment of the interests of the decision-makers did convergence achieve notable success'.* [863]

863 Gerber, D. J. (1999) 'The U.S. – European Conflict Over the Globalisation of Antitrust Law: A Legal Experience Perspective' 34:1 New England Law Review, 123, at 133.

APPENDIX I: Economic theories applied to competition law

i. Classic theory

It was in the late 17th century when Adam Smith published his seminal work, 'The Wealth of Nations',[864] where the theory of the market economy was invented. Smith, influenced by other major scholars of this era, like Cantillon, Turgot, and Hume, who had already tried to explain why competition appears in markets, or put simply, why for instance an individual buyer wants to outbid his rivals,[865] was the first one to use the concept of competition as a *"general organising principle of the economic analysis and economic society".*[866]

He considered individuals as egoistic creatures with no knowledge about common interest or socially benefiting solutions, and described competition as a race by individuals which would make these individuals improve their production and force the price of the traded products to its *'natural level'*, or to the lowering of profits to a minimum.[867] It follows that Smith saw competition as a process which would restrain individuals from colluding on prices at the expense of society.[868] Against this natural tendency of individuals, Smith did not propose the establishment of a competition or antimonopoly policy, since on a theoretical level he actually paid no attention to monopolies.[869] Nonetheless it has been suggested in the literature that Smith advocated for some kind of competition policy, since he proposed that in order to maintain the process of competition the state had to make sure that (i) external institutional arrangements that define property rights, would guarantee legal protection for market transactions, protect the freedom of choice and prohibit unfair behaviours, (ii) internal institutional arrangements which reduce unfair behaviour by moral rules, and (iii) he

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864 Smith A. (1776) An Inquiry into the Nature and Causes of the Wealth ofNations (Dublin , Whitestone).

865 Budzinski O. (2003) 'Pluralism of Competition Policy Paradigms and the Call for Regulatory Diversity' Philipps-University of Marburg Volkswirtschaftliche Beitraege No. 14/2003 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=452900> (Last visited on 21 May 2007).

866 McNulty P.J. (1968) 'Economic Theory and the Meaning of Competition' 82:4 Quarterly of Economics, 639, at 646-647.

867 Ibid, at 643.

868 According to one of his most cited expressions: 'People of the same trade seldom meet together (...) but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.' See Smith, supra n 864, at 183.

869 The concept of monopoly and its effects was first challenged somewhat 75 years after the publication of The Wealth of Nations by Dionysius Lardner. See Stigler, supran. 65 , at 1

recommended that politicians should not follow any suggestions made by entrepreneurs.[870]

ii. Neoclassical economics

Almost a hundred and fifty years after the emergence of the classical economic theory, another team of economists, including Cournot, Dupuit, Jevons, Edgeworth, Clark and Knight, added to Smith's theory by attempting to incorporate scientific methods, and in particular mathematics, in the analysis of markets. These new scientific tools offered them the opportunity to observe that market prices depend on the subjective relative value of goods (the marginal utility) rather than on objective values of the factors of production included in the goods (which was the classical understanding).[871]

What clearly makes this theory different from the classic theory is that it attempts to analyse the *effects* of competition, rather than considering competition as the ordering force. In doing so, neo-classical economists created *price theory* and developed the standard models of monopoly, oligopoly, and polypoly.[872] They further developed this analysis by creating the notion of *perfect competition*, which is the equilibrium of a polypolistic market.[873] This model is built upon two major theorems. The first indicates that under a situation of perfect competition, the market itself will generate a Pareto-efficient allocation of resources. The second states that if a king plans to achieve a certain distribution among his subjects, this distribution may be equally achieved by the market mechanism, provided that he is unimpaired in distributing initial resource endowment.[874]

The concept of perfect competition assumes that a large number of firms operate in a specific market, they produce identical products, there is lack of innovation, both buyers and sellers have complete information about prices, and no firm is able to control prices. Should perfect competition prevail, then allocative and productive efficiency [875] will be achieved and this will bring an overall public welfare.[876] The

870 Budzinski, supra n. 865, at 4.

871 Ibid, at pp4-5.

872 McNulty, supra n. 866, at 641.

873 Furse, M. (1996) 'The Role of Competition Policy: A Survey' 17:4 European Competition Law Review, 250, at 251.

874 Liesner, J. and D. Glynn (1987) 'Does Anti-trust Make Economic Sense?', 8:4 European Competition Law Review, 344, at 348.

875 According to one of the most influential proponents of the neo-classical theory, Frank Knight, allocative efficiency is : 'the assignment or allocation of the available productive forces and materials among the various lines of industry', and productive

opposite situation from perfect competition is a monopoly, where in its extreme form, there is a single seller in the market and many buyers. The assumption in a monopoly situation is that it is not impossible for other firms to enter the market and the single seller is therefore able to control the prices (the monopolist is a *price setter*).[877] This model, even though it encompasses certain limitations, has been to a great extent the basis of most of the subsequent competition theories.

iii. Alternatives of the perfect competition model

It has been pointed out above that the model of perfect competition has certain limitations. A number of economists in the beginning at the 20th century found it impossible to explain a number of phenomena in the market which could not be explained under the perfect competition model. Such phenomena included the impact of advertising strategies in the choice of consumers, the fact that associations had institutionalised at the time, information exchange and other forms of cooperation in the market, and also the fact that there was continual industry concentration in some markets.[878] Edward H. Chamberlain, in his book *'The Theory of Monopolistic Competition'*, [879] developed two main alternatives to the neo-classical model (perfect competition vs. monopoly).

Monopolistic competition

The first alternative is the concept of *monopolistic competition.* Monopolistic competition indicates a market where each seller chooses the best strategy, knowing the strategies followed by other sellers.[880] What the model of monopolistic competition added to the neo-classical model is the following: Whereas according to the neo-classical model sellers have two options (either to sell at the market price or withdraw from it), and take industry demand as a fact, according to the monopolistic competition model, sellers do not take demand as a fact but they try to alter it by distinguishing their

efficiency is 'the effective coordination of the various means of production in each industry into such groupings as will produce the greatest result'. Knight F. (1933) The Economic Organisation (University of Chicago Press), at 9.

876 For a comprehensive analysis of these notions, see Scherer, F.M. and D.R. Ross (1990) Industrial Market Structure and Economic Performance (Houghton Mifflin, 3rd edition), Chapters 1,2.

877 Mehta, K., (1999) 'The Economics of Competition', in Faull and Nikpay (eds), " The EC Competition Law of Competition", (Oxford University Press), at paras 1.58- 1.61.

878 Peritz, supra n. 42 , at 106.

879 Chamberlain, E.H. (1933) The Theory of Monopolistic Competition (Harvard University Press), pp 55-69.

880 Smith, P. and D. Begg, (2000) Economics (McGrow, Hill Publishing, 6th edition), Chapter 10.

product from other sellers' similar products, either by offering something better for the same price, or by changing the buyer's impression about the product through advertisement.[881]

Oligopoly

The second, and, in terms of the evolution of economic theory relevant to competition, more important invention of Chamberlain, is the concept of *oligopoly*. Oligopoly is a market with few sellers, selling identical products, and each recognising that its own price depends not only on its own output, but also on the actions and strategies of other important competitors.[882] Chamberlain observed that in an oligopolistic market, if rivals act logically, the result is the same as it would be if there was a monopolistic agreement between them.[883] His theory was based on the ability of firms which operate in concentrated markets to react quickly to the strategies of the other firms in the same market. He therefore introduced an economic logic of cooperation between firms to explain the lack of price competition in markets with few firms and by that he produced a model alternative to price competition in markets with many firms.[884]

iv. Workable competition and the Harvard School.

Given the shortcomings of the theory of perfect competition, and based on the findings of Chamberlain, J. M. Clark introduced the concept of *workable competition.*[885] According to this concept, since perfect competition is unattainable, governments should try to achieve the results which are closest to the perfect competition ideal.[886] In order to achieve this goal, a number of factors, relating to the structure of the markets, conduct and performance of firms should be analysed to quantify the deviations of a particular industry from perfect competition.

Despite the fact that the concept of workable competition has certain limitations, and notably it is both difficult to select the particular criteria by which the workability of competition may be assessed and to weigh up whether these criteria have been

881 Peritz, supra n. 42, at 108.

882 Smith and Begg , supra n. 880, Chapter 10.

883 Stigler, G. (1964) 'A Theory of Oligopoly' 72:1 Journal of Political Economy, 44.

884 Peritz, supra n.42, at 108.

885 Clark J.M. (1940) 'Toward a Concept of Workable Competition' 30:2 The American Economic Review, 241.

886 In Clark's words, '...one may hope that government need not assume the burden of doing something about every departure from the model of perfect competition'. See Clark, ibid, at. 256.

fulfilled[887] it was the central theoretical basis in the establishment of the principles of the Harvard Law School, which dominated the competition policy applied in the US for more than thirty years. Despite its certain limitations, the European Court of Justice has made explicit reference to this theory and defined the notion of workable competition.[888]

Based on the static model – i.e. the one that examines markets using an absolute distinction between monopoly and perfect competition - researchers of the Harvard School were the first to use data gathered in relation to different markets and apply them to specific industries.[889] According to their theory, market structure is the one that determines the conduct of the firms and consequently the performance of the market. Thus, the major outcome of this thinking was the creation of the Structure – Conduct - Performance paradigm. Based on this paradigm, proponents of the Harvard school of thought suggested that high concentration in a specific market is the main, if not the only, determinant of barriers to entry.[890] The aim of any competition policy should be to avoid concentrated markets and high entry barriers.[891] Hence competition enforcement should be focused on structural remedies. As a consequence, the role of competition authorities and subsequently governments is very important. The theory of the Harvard school suggests that where the structure is wrong, then the government must intervene in order to change this structure. If the conduct is wrong, then the government should intervene by, for instance, making sure that restrictive practices must be registered.[892]

887 Jones, A. and B. Sufrin (2004) EC Competition Law: Text, Cases and Materials (Oxford University Press), at 14. For an early comment on the concept, see Sosnick, S.H. (1958) 'A Critique of Concepts of Workable Competition' 72:3 The Quarterly Journal of Economics, 380.

888 Moreover the notion of workable competition has been used by the European Court of Justice in the Metro case: "The powers conferred upon the Commission under Article [81(3)] show that the requirements for the maintenance of workable competition may be reconciled with the safeguarding of objectives of a different nature and to this certain restrictions on competition are permissible, provided that they are essential to the attainment of those objectives and they do not result in the elimination of competition for a substantial part of the Common Market". See Case 26/76 Metro SB v. Commission [1977] E.C.R. 1875, para 20.

889 Furse, supra n. 873 , at 253.

890For instance, Carl Kaysan and Donald Turner, suggested that "...an unreasonable degree of market power as such must be illegal...": Kaysen, C. and D. Turner, (1959) Antitrust Policy (Cambridge University Press), at 111; Joe Bain defined barriers to entry as "...the advantages of established sellers in an industry over potential entrant sellers, these advantages being reflected in the extent to which established sellers can persistently raise prices above a competitive level without attracting new firms to enter the market": Bain, J.S. (1956) Barriers to New Competition (Harvard University Press), at .3.

891 Mehta, supra n. 877, at paras 1.09- 1.11.

892 Liesner and Glynn, supra n 874, at .356.

v. The Chicago School

The proponents of the Chicago school of thought came to question the Structure – Conduct - Performance paradigm by showing that the causal link between concentration, entry barriers and monopoly profits was not so strong and at times even non-existent.[893] They thus gave a different definition of entry barriers. According to Stigler, entry barriers are costs that the new entrants have but the incumbents did not suffer, a definition obviously different from the one given by Bain.[894] According to Chicagoans, barriers to entry could exist either because of economies of scale and scope, or by the intervention of governments in the market, in the form of intellectual property laws, state aid, import tariffs etc.[895]

Utilising the concepts of economies of scale and scope they showed that the causal link is not between market concentration and high profit but between firm size leading to increased efficiency and sometimes to increased profits. The outlining argument of this theoretical school was that governments should intervene in the markets only in cases of hard-core cartels and horizontal mergers that could either create monopoly directly or facilitate cartelisation by drastically reducing the number of remaining sellers in the market.[896]

vi. Game theory models

These arguments by the proponents of Chicago school altered the Harvard Structure – Conduct - Performance paradigm. That said, a new string of economic thinking, also known as new industrial economics, has returned to the basic paradigm but also considers the conduct and performance of the market as important in the evaluation of competitiveness of a market. By using game theory it is mostly focused on the conduct or strategic behaviour of firms in oligopolistic situations and tries to find whether the possibility of collusion is likely or not.[897]

893Mehta, supra n. 877 , para 1.12.

894 Stigler, G. (1968) 'Barriers to Entry, Economies of Scale and Firm Size', in Irwin R.D. (ed) The Organisation of Industry (Homewood), pp 67-70.

895 Mehta, supra n. 877, at para 1.47.

896 Posner, R. (1979) 'The Chicago School of Antitrust Analysis' 127 University of Pennsylvania Law Review, 925, at 928.

897 Werden, G. (2004) 'Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law With Oligopoly Theory' 71 Antitrust Law Journal, 719; Schmalense R. (1982) 'Antitrust and the New Industrial Economics' 72:2 Papers and Proceedings of the Ninety-Fourth Annual Meeting of the American Economic Association, 24; for a comment, see Jacquemin, A. (2000) 'Theories of Industrial Organisation and Competition Policy: What are the Links?' European Commission Forward Studies Unit, Working Paper, 2000 <http://ec.europa.eu/comm/cdp/working-paper/industrial-organisation_en.pdf> (Last visited on 21 May 2007).

vii. Contestable markets

Another variant to perfect competition is the theory of contestable markets, developed in the last twenty-five years. According to William Baumol, who first developed the theory, a market is contestable if "*entry is absolutely free, and exit is absolutely costless*".[898] The theory of contestable markets is based on the distinction between fixed and sunk costs that a firm has to face in its attempt to enter the market. Fixed cost is a cost that cannot be recouped by a firm. To give a practical example, in the case of an airline, a fixed cost is the amount of money paid for the advertisement of the routes it provides. On the other hand, an aircraft is not necessarily a fixed cost, since it can be sold at the second-hand market.[899] If there is no second-hand market for aircrafts, an airline which wants to terminate its operations would not be able to sell the aircrafts, and would thus suffer, according to the contestability theory, sunk costs. The theory holds that if there were no sunk costs the firm would be able to enter and exit the market at anytime.

What the theory of contestability adds to economic thinking is that it no longer matters whether there are many firms in the market (as the model of perfect competition would suggest) in order for the market to be competitive. What matters, is the existence of potential competition, that is the ability of a firm to freely (i.e. without sunk costs) enter or exit the market. Thus, competition law and policy should not be focused on issues relating to price, profits and behaviour of market players, but rather examine whether there are sunk costs in a market and, furthermore, whether these costs can be eliminated or recovered. This distinction is crucial since it shifts the interest of Governments from the market itself to the perimeters of the market.[900]

Two points must be stressed with regard to the theory of contestability. The first is that it has been suggested in the literature that the theory lacks consistent assumptions and cannot be applied in real world situations.[901] Secondly, the theory has been very rarely applied in competition cases.[902]

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898 Baumol W.J. (1982) 'Contestable Markets: An Uprising in the Theory of Industry Structure' 72:1 The American Economic Review, 1.

899 Liesner and Glynn, supra n. 874, at 353

900 Ibid, at 354.

901 For a comprehensive criticism of the theory, see Shepherd W.G. (1984) 'Contestability vs. Competition' 74:4 The American Economic Review, 572.

902 Oldale, A. (2000) 'Contestability: The Competition Commission Decision on North Sea Helicopter Services' 21:8 European Competition Law Review, 345.

viii. Dynamic competition, innovation, and technological efficiency

Joseph Schumpeter was the first economist to systematically study the relationship between competition and innovation.[903] Not satisfied with the static model of perfect competition,[904] Schumpeter emphasised dynamic technological efficiency, as opposed to the Pareto or allocative efficiency of the static analysis. He argued that what really matters in markets is not a price mechanism, which according to neo-classical economists would lead to static allocative and productive efficiency, but rather the pace of innovation.[905] Thus what competition policy should be aiming at is to create the conditions in which technological innovation could reach a maximum.

Based on this observation, he further argued that in highly competitive markets where many firms operate, these firms do not have the resources needed to innovate seriously. Instead, according to his theory a monopolist has the resources and he can also afford the risk of investing these resources in research and development projects. Thus, Schumpeter's contribution to economic analysis of competition has been a breakthrough, since it opened up a new debate on the importance of innovation in estimating the level of competition in a market.

ix. The Austrian School

Another influential school of thought regarding the evolution of economic thinking on competition matters has been the Austrian School of thought.[906] The School challenged neo-classical economics both in the methodological and political contexts and developed their theory about competition around two main arguments. The first is that markets should be analysed in dynamic terms. Like Schumpeter, they held that

903 Schumpeter J. (1943) Capitalism, Socialicm and Democracy (London , G. Allen & Unwin).

904 The static analysis totally ignores the time dimension, as it is looking at an equilibrium situation. It is totally concerned about the allocation of resources, in the context of fixed technology and perfect information, and therefore does not take into account the effect that the dissemination of information and the product and process innovation may have in the markets. See Mehta, supra n. 877, at paras. 1.118-1.127. These assumptions have led commentators to argue that static analysis leads to a conceptually dubious "Nirvana approach". See Desmetz H. (1969) 'Information and Efficiency: Another Viewpoint' 12 The Journal of Law and Economics, 1, at .3

905 In his words, 'The fundamental impulse that keeps the capitalist engine in motion comes from the new consumers' goods, the new methods of production and transportation, the new markets, the new forms of industrial organization that capitalist enterprise creates.' See Schumpeter, supra n. 903, at 82.

906 Menger is considered the father of the Austrian School in the late 19th century. Nonetheless Fredrich Hayek has been its most prominent advocate.

what really matters is the market process and not the notion of competitive equilibrium on which neo-classical economics were built upon. The second central element of Austrian analysis is that of entrepreneurship, which was defined as the alertness of traders to spot opportunities in the markets, not yet spotted by rivals.[907]

Austrians and mainly Hayek developed a theory based on the process of discovery and thus analysed competition from a behavioural point of view.[908] The main question of Hayek's research was about the 'division of knowledge', which according to his work was the central aspect of economics as a social science.[909] Hayek came to the conclusion that all aspects of knowledge division may be addressed by the markets themselves, where competition as a competitive process is the driving force of a system for information exchange.[910]

In sum, the Austrian School thought of competition as an active process centring at least as much on innovation as around price, and believed that the entrepreneurial quest for profits lay at the heart of the economy. Market process not only reveals information and knowledge about scarcities, but also it satisfies them in the best possible way. As a result, the role of the government should be twofold. First, to make sure that entrepreneurship, the market's most important driving force, is not hampered. Secondly, to abstain from intervening directly in the market, as the market itself can create solutions that no human brain can invent.[911]

x. Ordoliberalism

The notion of Ordoliberalism (constitutional liberalism) played a major part in the development of German competition law and subsequently of EU competition law.[912] It was developed at the University of Freiburg in the 1920s, initially by an

907 See Liesner and Glynn, supra n. 874, at 362. See also Kirzner I.M. (1997) 'Entrepreneurial Discovery and the Competitive Market Process: An Austrian Approach' 35:1 Journal of Economic Literature, 60.

908 On this point there is a similarity between the Austrian and the Chicago Schools.

909 Three subsequent questions have to be addressed: a) how individuals acquire knowledge that may be useful to them?; b) how is subjective knowledge disseminated?; and c) how is knowledge controled in order to reveal possible errors? Streit, M.E. and M. Wohlgemuth, (1997) 'The Market Economy and the State Hayekian and Ordoliberal Conceptions', Max-Planck-Institut zur Erfoschung von Wirtschaftssystemen, Diskussionbeitrag 06-97, <http://www.dundee.ac.uk/cepmlp/journal/assets/images/Streit-onHayek97.pdf> (last visited on 21 May 2007) at 9.

910 For a detailed analysis of these ideas see Hayek, F.A. (1978) New Studies in Philosophy, Politics, Economics and the History of Ideas (London, Routledge).

911 See Liesner and Glynn, supra n. 874, at 362.

912 Ibid; See also Horton T.J. and S. Schmit (2002) 'A Tale of Two Continents: The Coming Clash of the Conflicting Economic Viewpoints in Europe and the United States', <http://www.orrick.com/fileupload/205.htm#_ftn1> (last visited on 21 May 2007). It

economist, Walter Eucken, and two lawyers: Franz Bohn and Hanns Grossmann-Doerth.[913]

Ordoliberals brought together law and economics in order to overcome what has been described by Eucken as the "great antinomy" in the history of economic knowledge. In the past, economists were either examining economic phenomena from a theoretical point of view totally ignoring facts (theoretical economics), or, on the opposite side, their studies were solely based on facts, totally ignoring theory (this latter method was used by the historical school, which dominated German academia in the early twentieth century).[914] To overcome this intellectual gap Eucken called for the integration of legal and economic knowledge. Ordoliberals considered economic freedom as part of political freedom and they sought an economy composed, to the extent possible, of small and medium-sized companies.[915]

Several characteristics differentiate Ordoliberalism from any other economic school that attempted to analyse the concept of competition. The most significant of these characteristics is the fact that it is based on humanist values rather than efficiency or other purely economic concerns. The aim of the ordoliberal society as this was envisaged by its inventors was to search for a 'third way' between democracy and socialism, between the US "west" model and the Soviet "east" one. [916] This model would create a social system where individuals would be as free as possible not only from political interference, but also from economic power. Competition would be the driving force which would secure sustained economic development and stability and would further control economic power, which allows infringements on the liberty of other people. Freedom of people in turn is regarded as the most significant precondition of moral behaviour.[917] Hence, ordoliberals argued that the crucial point with regard to competition law is not the market itself but the existence and acts of the largest firms in the market. They saw the existence of such firms as a threat to economic and

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is interesting to note that until the appointment of Philip Lowe, all the other General Directors of the Directorate General for Competition since the establishment of the EC Commission came from Germany.

913 This team was soon joined by a larger group of (mainly) younger legal and economic scholars. See Gerber, D.J. (1994) 'Constitutionalising the Economy: German Neo-Liberalism, Competition Law and the 'New' Europe' 42 American Journal of Comparative Law, 25, at 28-29.

914 Ibid, at 40-41.

915 Ibid, at 37.

916 Ibid, at 36.

917 Streit and Wohlgemuth, supra n. 909, at 7.

subsequently political freedom of people and thus proposed that the actions of such large firms should be controlled by the state.[918]

918 Thomas and Horton, supra n. 87; See UNCATD (2005) 'Exclusionary Anti-competitive Practices: Their Effects on Competition and Development'. Supra n. 1, at 101.

APPENDIX II: General information about plurilateral regional agreements discussed in Chapter 5

This appendix is supplementary to Chapter 5 of the thesis. The appendix is organised geographically and sets out some general information relating to key dates, membership and institutions for each of the agreements discussed.

A. Europe

i. The EU

The establishment of the EU goes back to 1951, when six countries[919] decided to enter the European Coal and Steel Community (ECSC). In 1957 these same states created the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM). The aim of the EEC was the creation of a common market which would be achieved with the adoption of a common external tariff, the attainment of undistorted competition, the gradual co-ordination of the participating states' economic and monetary policies, and gradual harmonisation of their fiscal and social policies.[920] The EEC and ERATOM Treaties were merged in 1965, when the European Community was created.

The bloc has been built around four main institutions.[921] Two bodies have predominantly legislative functions: the Council of Ministers, which consists of governmental representatives of the Member States, and the European Parliament, which consists of members elected by the citizens of the Member States. The other institutions are: the European Court of Justice, which is the judicial body with the competence to decide upon cases based on EU law,[922] and the European Commission, which is the administrative body of the EU, with some quasi-judicial and legislative powers.

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919 Belgium, France, Germany, Italy, Luxemburg, and the Netherlands.

920 See Articles A2 and A3 EC.

921 On the complex legislative procedure in the EU as it stands today, see Craig and De Burca supra n. 548, at 139-149. See also Tsebelis, G. and G. Garrett (2001) 'The Institutional Foundations of Intergovernmentalism and Supranationalism in the European Union', 55:2 International Organisation, 357. The structure of the Union, the competences of its Institutions, the decision procedures, and the relationship between the EU and its Member-States, will be discussed in this study only to the extent that these arrangements directly relate to competition law and policy.

922 Since 1989 various competences of the ECJ have been transferred to the Court of First Instance (CFI), while in 2004, the Civil Service Tribunal was established, with the competence to examine case relating to the civil service. See Article 225a EC.

In the early years of its existence, the pace of cooperation and coordination in the EU was slow. In particular, the 1960s were characterised by tensions between the European Commission and the French Government, led by the French President, Charles De Gaulle, which advocated that all the decisions at the European level should be taken following a unanimous decision by the Member States,[923] thus slowing down law-making and heading to what is called '*euroschlerosis*'.[924]

In the 1970s and 1980s the EU was significantly enlarged. The 6 initial Member States had become 10 by 1986, with the gradual accession of Denmark, Ireland, the UK, Greece, Spain and Portugal. In 1986 the Single European Act (SEA), the first major amendment of the Treaty of Rome, was signed. The SEA provided for a number of important substantive and institutional changes in the EU system.[925] It reactivated the original ambition of creating a single internal market, where the free movement of goods, persons, services and capital should be ensured, by the end of 1992.

The second major amendment of the initial EC Treaty was the Treaty of Maastricht, signed in 1992, which established the European Union, and thus is called the Treaty of the European Union (TEU). The TEU provided for the establishment of an economic and monetary union (EMU), and also introduced the three-pillar structure of the Union. Apart from the Economic Communities Pillar, which was included in the strategy of the EU since its conception, the Common Foreign and Security Policy Pillar and the Justice and Home Affairs Pillar were set up.[926]

The Treaties of Amsterdam of 1997 and Nice of 2000, further expanded and deepened the cooperation between the Member States in the fields of security and defence, and judicial affairs, and also provided for changes in the judicial system and decision making.[927] In parallel, in the last 20 years, the number of member States of the EU has been more than doubled. The first and small waive of enlargement occurred in 1995, when Austria, Sweden and Finland joined the EU. In addition, on May 1 of 2004,

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923 Known as the Luxembourg accords. See Craig and De Burca, supra n. 548, at pp13-14.

924 See Sloot, T., and P. Verschuren (1990) 'Decision – Making Speed in the European Community' 29:1 Journal of Common Market Studies, 75.

925 For a brief review of the amendments, see Campbell, A. (1986) 'The Single European Act and its Implications' 35:4 The International and Comparative Law Quarterly, 932.

926 As to the former it included issues of foreign and security policy and enabled the Council to define common positions that should be followed by the Member States. As to the later, it provided for cooperation on judicial and police issues as well as on international criminal matters. See Craig and De Burca, supra n. 548, at pp. 25-26

927 For a brief review, see Ibid, at 28-52.

another 10 countries joined the EU,[928] and on January 1st of 2007, Bulgaria and Romania finally entered the Union, increasing the number of the EU states to 27, thus creating a Union with a population of more than 450 million habitants. 15 of the Member States use the euro as their common currency,[929] and in view of all these developments, the European Union has become a phenomenon unique in history.

B. South America

i. The Andean Community

In 1969, five of the LAFTA members, namely Bolivia, Colombia, Ecuador, Peru and Chile, signed the Cartagena Agreement, which set up the Andean Pact, a sub-regional organisation with its own distinct legal identity[930] with the aim of creating a customs union.[931] Venezuela entered the group in 1973, while Chile withdrew in 1976.[932] While the institutions provided by the agreement were established,[933] developments over the creation of a customs union in this region were very slow in the 1970s, while in the 1980 negotiations were totally stagnant.[934]

The institutional set up of the Andean Community was restructured in 1987 with the Protocol of Quito, which largely followed the structure of the European Union.[935] Economic integration gained momentum in the 1990's when intraregional trade was substantially increased, partly due to the achievement in 1993 of a free trade area for the

928 Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.

929 These include the states that entered the EU before 2000, with the exemption of Denmark, Sweden and the UK. Slovenia uses the common currency as from January 1st of 2007, and Cyprus and Malta as from 1st January 2008.

930 As stated in article 48 of the Cartagena Agreement.

931 See Avory, W.P. (1972) 'Sub-Regional Integration in Latin America: The Andean Common Market', 11:2 Journal of Common Market Studies, 85.

932 For a brief history of the Andean Community, see the Community's website at <http://www.comunidadandina.org/ingles/quienes/brief.htm>.

933 These institutions are the following: the General Secretariat, which is the executive body of the Andean Community and has the competence to initiate the legislative process, by formulating legislative proposals; legislation is adopted by the Council of Ministers, whose membership varies, in accordance with the subject; and finally the Andean Community Court of Justice (set up in 1969) is the regional judicial institution of the agreement. See Ferreira R.M. (2005) 'Regional Cooperation Agreement and Competition Policy – The Case of Andean Community', in M. Mashayekhi, and T. Ito (eds) Multilateralism and Regionalism: The New Interface (UNCTAD, Geneva and New York), chapter 11, at 145.

934 See the website of Andean community, supra n. 932.

935 Two supranational bodies, the General Secretariat and the Commission, were offered executive and rule making powers (respectively), while on the top of the administrative hierarchy are the Presidential Council and the Council of Foreign Ministers. The Andean Court of Justice is the competent Court to review cases relating to the regional legislation. See Malamud, A. (2001) 'Spillover in European and South American Integration: An Assessment.' LASA 2001 Meeting Paper, Latin American Studies Association. <http://136.142.158.105/Lasa2001/MalamudAndres.pdf> (last visited on 21 May 2007), at 11-13.

four out of five Member States (excepting Peru), the establishment of a common external tariff in 1995,[936] but also because of a number of pieces of common legislation that was adopted at the time in a number of fields, such as agriculture, investment, intellectual property and competition.[937]

Regional integration was slowed down in 2000 due to political and economic problems faced by the Member States, but it regained momentum in 2003.[938] The free trade area was completed in January 2006, when Peru fulfilled the relevant obligations. Bolivia and Peru have not yet implemented the common external tariff; nonetheless, considerable recent attempts to strengthen further integration have been made. That said, in June 2006 Venezuela left the agreement and joined the rival regional grouping, MERCOSUR.

ii. MERCOSUR

MERCOSUR was established in 1989 by the Treaty of Asuncion.[939] The driving force behind the adoption of the MERCOSUR agreement was similar to that of the establishment of the EU: the hope of limiting the possibilities of traditional military hostility between the major regional powers, Brazil and Argentina.[940] The founding members of the agreement were Brazil, Argentina, Uruguay and Paraguay. As noted, Venezuela also entered MERCOSUR recently, while in the 1990s, Bolivia and Chile became associate members. MERCOSUR's initial aim was to create a customs union and a common market based on four freedoms (free movement of goods, persons, services and capital).

In terms of institutional set up, MERCOSUR is an intergovernmental and not a supranational organisation, in the sense that it has an administrative secretariat but its competences are limited in comparison to the competences of the EC institutions. The Council of the Common Market[941] resembles to the Council of Ministers and the

936 Bacquero Herrera, M. (2004) 'The Andean Community: Finding her Feet within Changing and Challenging Multidimensional Conditions' 10 Law and Business Review of the Americas, 577, at 583.

937 See Commission (EC) (2007) 'Andean Community Regional Strategy Paper 2007-1013', 12.04.2007 (E/2007/678), at 3-4.

938 Ibid.

939 Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, <http://www.sice.oas.org/trade/mrcsr/mrcsrtoc.asp> (last visited on 21 May 2007).

940 World Bank (2005) Global Economic Prospects 2005: Trade, Regionalism and Development (World Bank), at p. 36

941 Which consist of the Ministers for Foreign Affairs and Economy and the Meetings of the Heads of States. In addition there are Meeting of the Ministers of Agriculture and Industry, Justice, and Internal and Social Affairs.

European Council of the EU Treaty,[942] and the Common Market Group, which consists of four officials (and four deputies) from each member state Ministry of Foreign Relations, Ministry of the Economy and Central Bank, is the main executive body of the institution, and also has the competence to conduct international negotiations based on the guidelines provided by the Council.[943]

The initial seven years of the operation of MERCOSUR were a great success, as trade and investment between Brazil and Argentina was quadrupled, and MERCOSUR became the third largest trade-bloc in the world, after the EU and NAFTA.[944] Nonetheless, subsequent crises in the economies of Brazil and Argentina had an impact on the smaller and dependent economies of Paraguay and Uruguay, and thus created major problems for the successful operation of MERCOSUR. This period was characterised by the regular use of trade protectionist measures by the participating countries, whose main aim was to resolve their domestic problems, and thus the negotiations were postponed for further regional integration.[945]

In general MERCOSUR has achieved many of its initial objectives, but is still quite far from achieving the common market goal. The CU currently applies to 90% of products; nevertheless MERCOSUR members still use the safety clause and temporarily impose high customs tariffs on selected products like cars, electronic equipment and chemicals.[946] In addition, there are no common market regulations in the agricultural sector, and regarding the four freedoms, improvement has been achieved only in relation to the free movement of goods.[947] Finally, it should be pointed out that the dispute settlement system of the bloc has not proved to be effective.[948]

942 See Vervaele, J. AE (2005) 'MERCOSUR and Regional Integration in Latin America' 54 International and Comparative Law Quarterly, 387, at 391. For a detailed analysis of the institutional set up of MERCOSUR, see Porrata Doria R.A. Jr. (2004) 'MERCOSUR: The Common Market of the Twenty First Century?' 32 Georgia Journal of International and Comparative Law, I, at pp. 14-24.

943 See in detail, Bouzas, R. and H. Soltz (2001) 'Institutions and Regional Integrations: The Case of MERCOSUR' in Bulmer-Thomas, V. (ed.), Regional Integration in Latin America and the Caribbean (London, Institute of Latin American Studies, University of London).

944 See Porrata Doria, supra n. 942, at 48.

945 Ibid, at 57.

946 See Vervaele supra n. 942, at 396.

947 See Vervaele supra n. 942, at 398

948 See Porrate Doria, supra n. 942, at 61-64.

C. North America

i. North American Free Trade Agreement (NAFTA)

NAFTA, which was concluded by Canada, Mexico and the US, entered into force in 1994.[949] It has been argued that two main developments led to the formation of NAFTA. First, the decision by the US Government in the mid-1980s to pursue the adoption of preferential trading agreements as a complementary mechanism to the multilateral trade liberalisation, and second the decision of the Mexican government at the same time to liberalise Mexican external trade by removing quantitative restrictions, and gradually eliminating tariffs.[950]

According to NAFTA, within a period of 14 years the signing parties have to gradually eliminate tariffs imposed on goods imported from another signing party. The agreement includes detailed provisions relating to agricultural products, which are excluded from the provisions on tariff elimination. It also provides for the WTO compatible use of anti dumping and countervailing duty measures.[951] NAFTA furthermore includes rules relating to investment, labour, intellectual property rights, financial services, telecommunications and public procurement and detailed rules of origin. The agreement has been complemented by the North American Agreement for Environmental Cooperation,[952] and the North American Agreement on Labor Cooperation.[953]

It should be noted that none of the contracting parties entered the negotiations with the intention to create a political and social union. A political union would be in conflict with traditional belief in the US that such a union would considerably undermine the country's political autonomy. Canadian and Mexican governments were also concerned with the possible imbalances that could occur due to the bargaining power of the US.[954] Such considerations had various implications. First they had an impact on the type of the agreement, which took the form of a free trade agreement and

949 North American Free Trade Agreement, 8 December 1992, Canada-Mexico-United States, 32 I.L.M. 289.

950 See Krueger (2000), supra n. 507, 761-763.

951 Canada unsuccessfully attempted to negotiate the possible abolishment of antidumping measures. See Hoekman, B. (1998) 'Free Trade and Deep Integration: Antidumping and Antitrust in Regional Agreements' World Bank Policy Research Working Paper No. 1950, at pp. 27-28.

952 North American Agreement on Environmental Cooperation, 8 September 1993, Canada-Mexico-United States, 32 I.L.M. 1480.

953 North American Agreement on Labor Cooperation, 14 September 1993, 32 I.L.M. 1499.

954 Abbott, F.M. (2000) 'NAFTA and the Legalisation of World Politics: A Case Study' 54:3 International Organization, 519, at 522.

not a customs union. Second, they had an impact on the institutional set up provided by the Agreement, since NAFTA does not provide for a supranational body to enforce its provisions. This role has been granted to the Free Trade Commission, which consists of government representatives[955] whose role is nevertheless strictly supervisory as it does not have the competence to adopt secondary legislation. Third, despite the fact that NAFTA's provisions are characterised by a high degree of precision and obligation, the parties were not willing to create a strong regional judicial institution similar to the ECJ. Instead, a moderate level of authority was granted to a dispute settlement mechanism.[956]

ii. The Free Trade Agreement of the Americas (FTAA)

Of the various regional projects in South and North America, the most ambitious one has been the negotiations over a Free Trade Agreement of the Americas (FTTA), launched in 1994. With the exception of Cuba, all countries in the Americas participated in the negotiations whose initial aim was the adoption of a very detailed free trade agreement and a free trade area by January 2005. Nine FTAA Negotiating Groups were created in the following areas: market access; investment; services; government procurement; dispute settlement; agriculture; intellectual property rights; subsidies, antidumping and countervailing duties; and competition policy. The aim of the FTAA project is to integrate the countries which participate in smaller regional blocs in North and South America (such as NAFTA, MERCOSUR, the Andean Community, and CARICOM), and in this regard it includes elements from all these blocs.[957]

That said, and despite the early optimism regarding the progress of the negotiations, a number of concerns raised primarily by Brazil[958] and other members of MERCOSUR,[959] relating mainly to agricultural liberalisation, the use of anti-dumping

955 The Commission is assisted by a Secretariat. See NAFTA, article 2002.

956 See Mestral A.L.C. de (2006) 'NAFTA Dispute Settlement: Creative Experiment or Confusion?', in Bartels, L and Ortino, F. (eds.) Regional Trade Agreements and the WTO Legal system (Oxford University Press), and Abbot, supra n. 954.

957 Smith, S.C. (2006) 'The Free Trade Agreement of the Americas: Is There Still a Place for the World Trade Organisation' 13 Tulsa Journal of International and Comparative Law, 321, at 334.

958 See De Moura, A. Borges (2004) 'The Brazilian Perspective of the FTAA' 10 Law and Business Review of the Americas, 695.

959 In Particular, in El Salvador in June 2003, these countries announced their decision to follow a three-track approach with regard to the issues under negotiation in the context of the FTAA. According to this view, certain issues would be dealt with at the multilateral level (agricultural subsidies, trade remedy disciplines, and a number of other issues that MERCOSUR was not eager to negotiate such as investment, aspects of services, intellectual property rights, competition policy and government procurement), the remaining issues at the FTAA level, and the market access negotiations on tariffs, agriculture and services would be addressed through a bilateral track. See Stephenson, S.M. and G.C. Hufbauer (2004) 'The Free Trade Area of the Americas: How Deep an

measures, and intellectual property rights,[960] led to the Ministerial Declaration, issued in November 2003 in Miami,[961] according to which particular countries may opt out from a number of areas, such as intellectual property, anti-dumping, agricultural subsidies, investment, and competition.[962] Aside from this development, negotiations have slowed down and the goal of free trade area in 2005 has been postponed, and in general the future of the FTAA is in serious jeopardy, especially in view of the undergoing negotiations between the Member States of Mercosur and the Andean Community on the establishment of a new free trade agreement, the South American Community of Nations.[963]

iii. Central American Free Trade Agreement, plus Dominican Republic (CAFTA –DR)

The most recent free trade agreement in the region is the Central American Free Trade Agreement, signed in 2004,[964] is designed to eliminate tariffs between the US and Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua, plus the Dominican Republic. It is argued that the major proponents of the agreements were US clothing manufacturers, many of whom have been shifting their factories to Central America.[965] At the same time, Central American States were eager to enter such an agreement in order to ensure preferential treatment from the US on the trade in textiles, compared to textiles from China.[966] The agreement also includes provisions on government procurement, services, investments and intellectual property rights, and has been implemented by the US on a rolling basis, as countries make sufficient progress to meet

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Integration in the Western Hemisphere?' <http://www.aeaweb.org/annual_mtg_papers/2005/0107_1015_1402.pdf>, (last visited on 21 May 2007), at 34.

960 See Rivas-Campo, J.A. and R. Tiago Juk Benke (2003) 'FTAA Negotiations: Short Overview' 6:3 Journal of International Economic Law, 661, especially in pp. 667-669.

961 FTAA (2003) 'Free Trade Area of the Americas Eighth Ministerial Meeting Miami, USA, November 20, 2003, Ministerial Declaration', <http://www.ftaa-alca.org/Ministerials/Miami/Miami_e.asp> (last visited on 21 May 2007).

962 Ibid, in para 10.

963 See the Presidential Declaration and Priority Agenda, issued at the First Meeting of Heads of State of the South American Community of Nations, Brasilia, 30 September 2005, <http://www.comunidadandina.org/ingles/documentos/documents/casa_2005_4.htm> (last visited on 21 May 2007).

964 The Dominican Republic – Central America – United States Free Trade Agreement, Signed in August 5, 2004, <http://www.ustr.gov/Trade_Agreements/Regional/CAFTA/CAFTA-DR_Final_Texts/Section_ Index.html> (last visited on 21 May 2007)

965 Dimon, D. (2006) 'EU and US Regionalism: The Case of Latin America' XX:2 The International Trade Journal, 185, at 207-208.

966 ibid

the commitments imposed by the agreement.[967] On the other hand, it should be pointed out that the conclusion of CAFTA –DR has created major concerns both in the US, where the agreement was passed by the Congress on a two vote margin,[968] as well as in Costa Rica, Guatemala and El Salvador.[969]

D. Caribbean

i. The Caribbean Community (CARICOM)

CARICOM, was established by the Treaty of Chaguaramas, signed on 4 July 1973, and revised in 2001. It consists of 15 Member States,[970] most of which are small islands, and with the exception of Haiti and Suriname, former British colonies.[971] The objectives of CARICOM, identified in Article 6 of the Revised Treaty, are wide raging,[972] while the Revised Treaty also provides for the right of establishment, free movement of goods, services, persons and capital. In terms of trade, the aim of the contracting Parties was to create a CARICOM Single Market and Economy (CSME) by December 2005. The Single Market was finally established in 2006, and is based on freedom of movement of goods, services, capital, business enterprise and labour within an area bounded by a customs union.[973] Currently 12 Member States participate in the Single Market, which is expected to be fully implemented in 2008.[974]

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967 See analytically the export portal of the US Government, at <http://www.export.gov/fta/complete/CAFTA/index.asp?dName=CAFTA> (last visited on 21 May 2007).

968 The major concerns were raised by organised labour, the sugar industry and certain textile associations. See Balsanek, K.L., R. E. DeFrancesco, M. A. Frank, D. T. Hardin, and M. R. Nicely (2006) 'International Legal Development in Review: 2005 Business Regulation' 40 International Lawyer, 217, at 244.

969 In fact there have been public protests in these countries, while Costa Rica has not yet ratified the Treaty. See Malkin, E. (2006) 'Central American Trade Deal Is Being Delayed by Partners', New York Times, March 2, 2006.

970 The Members are: Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Lucia, St. Kitts and Nevis, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago.

971 The total population of the Member States is 14 millions, while most of the CARICOM Member States have a population that does not exceed three hundred thousand inhabitants.

972 And include, improvement of standards of living and work, achievement of full employment of labour and other factors of production, acceleration, and coordination of sustained economic development and convergence, expansion of trade and economic relations with third States, achievement of enhanced levels of international competitiveness, organisation for increased production and productivity, achievement of a greater measure of economic leverage and effectiveness of Member States in dealing with third States, groups of States and entities of any description, and the enhanced co-ordination of Member States' foreign and foreign economic policies and enhanced functional co-operation.

973 See Girvan, N. (2007) 'Towards a Single Development Vision and the Role of the Single Economy' <http://www.caricom.org/jsp/single_market/single_economy_girvan.pdf> (last visited on 21 May 2007), at 8.

974 See SICE (2007) 'Establishment of the CARICOM Single Market and Economy: Summary of Status of Key Elements'. <http://www.sice.oas.org/TPD/CAR/csme_summary_key_elements_e.pdf> (last visited on 21 May 2008).

In terms of institutional set up, the revised Treaty of Ghaguaramas, provides for the operation of a plethora of institutions, mainly intergovernmental.[975] According to the Treaty, the principal organs of CARICOM are the Conference of Heads of Government and the Community Council of Ministers.[976] The former, which consists of the Member States' Heads of Governments, is the legislative organ of the organisation with the competence to provide policy direction, enter into treaties, establish the institutions of CARICOM, and take decisions regarding the financial affairs of the Community.[977] The Community Council of Ministers is responsible for the Community's strategy planning and the coordination of the three pillars of the Community – economic integration, functional cooperation and external relations.[978] These two institutions are assisted by four functional organs, provided by Article 10(2) of the Revised Treaty. These include the Council for Finance and Planning (COFAD), the Council for Trade and Economic Development (COTED), the Council for Foreign and Community Relations (COFCOR), and the Council for Human and Social Development (COHSOD),[979] and several other bodies.

The main supranational administrative institution of CARICOM is the Secretariat, which has powers similar, but not equal, to the European Commission, as it does not have the competence to propose or adopt legislation, and it operates as a resource rather than an enforcing organisation.[980] Finally, in April 2005 the Caribbean Court of Justice was set up to serve both as the Court with competence to decide upon issues relating to the provisions of the Revised Treaty,[981] and as the court of final appeal for the Member States' domestic, civil and criminal matters. These extended competences of the Court are expected to lead to a harmonious development of jurisprudence in the region and thus assist the accomplishment of CARICOM's goals.[982]

975 See in detail, Bravo, K.E. (2005) 'CARICOM, The Myth of Sovereignty, and Inspirational Economic Integration', 31 North Carolina Journal of International Law and Commercial Regulation, 145, at 178-192.

976 See the Revised Treaty of Chuagaamas, in Art 10(1).

977Ibid, art. 11 and 12.

978 Ibid, art. 13.

979 See also id. art. 14-17.

980 Bravo, supra n. 975, at 187.

981 Article 211 of the Revised Treaty.

982 For recent analysis of the function and possible problems that the newly established Court may face, see McDonald, S.A. (2004) 'The Caribbean Court of Justice: Enhancing the Role of International Organisations', 27 Fordham International Law Journal, 930; Birbsong, L. (2005) 'The Formation of The Caribbean Court of Justice: The Sunset of the British Colonial Rule in the English Speaking Caribbean', University of Miami Inter-American Law Review, 197.

E. Africa

i. The West African Economic and Monetary Union (WAEMU)

The Treaty establishing WAEMU was signed in January 1994 by seven countries[983] which shared the same currency, the CFA Franc since 1960, through the West African Monetary Union (WAMU).[984] It has been suggested that the underlying reason for the creation and strengthening of the regional bloc was the devaluation of the CFA franc by 50 percent in 1994. The contracting parties felt that they had to supplement the monetary union with a customs union and a common market.[985]

The EU model has been followed by WAEMU. In particular, the aim of the bloc is to achieve a single market based on the free movement of goods, persons, services, and capital. The similarities of the WAEMU system with the EU is further exposed by the fact that there are four main regional institutions established, in accordance with the EU system: a Conference of Heads of States, a Council of Ministers, a Commission, a Court of Justice and an inter-parliamentary Committee.[986] As a general statement regarding the development of WAEMU, it could be argued that it has succeeded in the elimination of internal tariffs and its Member States apply a common external tariff since 2000. Nonetheless, there are still substantial obstacles both regarding internal trade and deviations from the common external tariffs.[987]

ii. The East African Community (EAC)

The East African Community encompasses three African States, namely Kenya, Uganda and Tanzania. Initially, the EAC agreement was signed in 1967, but it collapsed

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983 Traite de l'Union Economique et Monetaire Ouest Africaine (UEMOA) < http://www.uemoa.int/actes/traite/TraiteUEMOA.pdf> (last visited : 21 May 2007). The Member States of WAEMU are : Benin, Burkina Faso, Ivory Coast, Mali, Niger, Senegal, and Togo.

984See Claeys, A.S. and A. Sindzingre (2003), 'Regional Integration as a Transfer of Rules: 'The Case of the Relationship between the European Union and the West African Economic and Monetary Union (WAEMU)', paper presented at the Development Studies Association Annual Conference, Glasgow, University of Strathclyde, 10-12 September 2003, <http://www.devstud.org.uk/publications/papers/conf03/dsaconf03claeys.pdf>, (last visited on 21 May 2007), at 7-8. In 1997, Guinea Bissau joined the Union. All the eight members of WAEMU are also members of a larger group of 15 countries called the Economic Community of West African States (ECOWAS), discussed below.

985 Van de Boogaerde, P. and C. Tsangarides (2005) 'Ten Years After the CFA Franc Devaluation: Progress Toward Regional Integration in the WAEMU', IMF Working Paper, WP/05/145, at 3-5.

986 Clayes and Sindzingre (2003), supra n. 984, at p 10.

987 Hinkle, L.E. and M. Schiff (2004) 'Economic Partnership Agreements Between Sub-Saharan Africa and the EU: A Development Perspective.' 27:9 The World Economy, 1321, at 1325.

ten years later.[988] It was revived in 1999 under the Treaty of East African Co-operation, which was signed in Arusha. Since January 1st, 2005, the Community operates as a customs union,[989] and currently Burundi and Rwanda are negotiating their accession in EAC. According to the Treaty establishing EAC, the Member States further aim to create a common market and a monetary Union. The general aims of the Treaty are further specified by a five-year Development Strategy, which identifies twelve areas of cooperation, including social and trade policy.[990]

With regard to trade remedies, and on the basis of Article 75 of the Treaty, the protocol which establishes the Customs Union, adopted in 2004, contains a number of provisions addressing issues related to antidumping, countervailing duties and safeguard measures.[991] These provisions do not abolish these trade measures; nonetheless, they provide that the Member States will cooperate with other Member States and the regional institutions in the process of investigation relating to these measures.[992]

In terms of institutional set up, the basic structure of EAC is very similar to the structure of the EU. The main institutions provided by the Treaty are the Assembly, which is the legislative organ of the Community, the Council of Ministers, which has the competence to take the political decisions as to the development of the Community and to adopt secondary legislation (regulations, directives and decisions), the EAC Court of Justice, and the Secretariat, a supranational organisation which has the responsibility to implement the articles of the Treaty, as well as regulations and directives adopted by the Council.[993]

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988 See Mugomba, A.T. (1978) 'Regional Organisations and African Underdevelopment: The Collapse of the East African Community' 16:2 The Journal of Modern African Studies, 261; Kirkpatrick, C. and M. Watanabe (2005) 'Regional Trade in Sub-Saharan Africa: An Analysis of East African Trade Cooperation 1970-2001' 73:2 The Manchester School, 141.

989 See Mc Intyre, M.A. (2005) 'Trade Integration in East African Community: An Assessment for Kenya', IMF Working Paper, 05/143, at 9-12.

990 See EAC (2001) 'The Second East African Community Strategy Paper', <http://www.eac.int/documents/Development%20Strategy.pdf>, (last visited on 21 May 2007), paragraph (ix).

991 See Articles 16-19 of the Protocol on the Establishment of the East African Customs Union.

992 The protocol also provides for the establishment of an intergovernmental Committee on trade remedies (in Article 24) and relevant Dispute Settlement procedure (Article 41) to resolve disputes that may arise relevant to these trade remedies. the See Mullei, A.K. (2005) 'Integration Experience of East African Countries', Presentation delivered at the Symposium Marking the 30th Anniversary of Banco de Mozambique, Maputo, Mozambique, May 17 2005, <http://www.centralbank.go.ke/downloads/gov_speeches/Mozambique-paper.pdf> (last visited on 21 May 2007), at 10-14.

993 See the website of EAC, at http://www.eac.int/institutions.htm.

iii. The Common Market of Eastern and Southern Africa (COMESA)

The Common Market of Eastern and Southern Africa (COMESA) was established by a Treaty signed on 5 November 1993 in Kampala, Uganda and ratified a year later in Lilongwe, Malawi. COMESA was formed in order to replace the former Preferential Trade Area (PTA) which had been in existence since 1982,[994] and is one of the largest regional blocs in Africa, as it includes 20 Member States,[995] covers 42.6% of total African surface, and accounts for 44.6% of the total population of the continent and 32% of the total GDP.[996]At the same time COMESA's Member States are characterised by strong differences in their economic and social backgrounds, while the region in general is characterised by low growth rates, political instability and is severely economically affected by the spread of HIV, as well as by volatile international agricultural prices.[997]

The Treaty provides for the creation of a free trade area, a customs union, and the gradual creation of a monetary Union. On the other hand, antidumping measures and countervailing duties are not abolished by the Treaty. Nonetheless, it is provided that in cases of investigation about dumping and subsidies, the Member States have to cooperate.[998] The Free Trade Area was launched in 2000, with 11 out of the 20 Member States participating while the other nine trade on preferential terms. The aim of COMESA's Member States is to form a fully fledged customs union by 2008.[999]

With regard to the institutional set up of the group, the Treaty provides for the operation of four organs with decisions making powers. These include the COMESA Authority, which consists of the Heads of Governments of the Member States, the COMESA Council of Ministers, the Committee of Governors of Central Banks, and the regional Court of Justice (operational since 1998).[1000] Hence, as in the case of a number of African regional blocs, the institutional set up of COMESA is similar to the EU one.

994 See P. Khandelwal, supra n. 501, at 8.

995 COMESA's member countries are: Angola, Burundi, Comoros, D.R.Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, Zimbabwe.

996 See Carmignani, F. (2005) 'The Road to Regional Integration in Africa: Macroeconomic Convergence and Performance in COMESA' 15:2 Journal of African Economies, 212, at 213.

997 Ibid, at 213-218.

998 See Articles 51-54 of the COMESA Treaty.

999 See COMESA's website at http://www.comesa.int/about/Overview/view.

1000 See Chapters 4 and 5 of the COMESA Treaty, Articles 7-44.

iv. The Southern African Customs Union (SACU)

The Southern African Customs Union includes five Member States: South Africa, which is economically, and politically the major force in the region; Botswana; Lesotho; Namibia; and Swaziland (called the BLNS countries). The agreement was first signed in 1910, and provided for free movement of manufactured goods, a common external tariff and a revenue sharing formula.[1001] Since then, the agreement has been amended twice, first in 1969, and more recently in 2002. Today, SACU operates as a full customs union.

In terms of institutional set up, the main institutions of SACU are the Council of Ministers, which has legislative powers, and the Commission, which is a supranational body responsible for the implementation of the provisions of the agreement, as well as the decisions of the Council.[1002] The new SACU agreement also provides for the creation of an *ad hoc* tribunal to decide upon any dispute that may arise with regard to the application of the agreements' provisions. The tribunal is to be set at the request of the Council and will be composed of three members.[1003] The Tribunal is not yet operational, and efforts are under way currently to bring it into operation by August 2008.[1004]

SACU is characterised by the high level of dependence of the smaller SACU member countries on South Africa, which accounts for 90% of total SACU GDP. In addition, as a result of the most recent amendment of the agreement, it has assumed absolute discretion over external trade policy, and in particular decisions on anti-dumping, safeguard measures and countervailing duties that should be applied to non-members of the agreement.[1005] Compared to the 1969 agreement, the new SACU agreement provides for the establishment of supranational bodies to review the application of such trade measures.[1006]

1001 Gibb, R. (1997) 'Regional Integration in Post–Apartheid Southern Africa: The Case of Renegotiating the Southern African Customs Union', 23:1, Journal of Southern African Studies, 67, at 73-75.

1002 On the operation and problems faced in SACU, see Kirk, R. and M. Stern (2005) 'The New Southern African Customs Union Agreement' 28:2 The World Economy, 169.

1003 See Article 13 of the SACU agreement.

1004See Mandigora, G. (2007) 'Dispute Settlement Mechanisms in Bilateral and Regional Trade Arrangements', Tralac discussion paper, <http://rta.tralac.org/scripts/content.php?id=6130> (last visited on 21 May 2007).

1005 See Kirk and Stern, supra n. 1002, at 169-175.

1006 See Joubert, N. (2004) 'The Reform of South Africa's Anti-Dumping Regime' WTO, managing the Challenges of WTO Participation, Case Study No 38.

v. The Southern African Development Cooperation (SADC)

The Southern African Development Cooperation was created in 1992, when eleven countries signed the Declaration and Treaty establishing the SADC, in Windhoek, Namibia (amended in 2001), with the aim of promoting peace and development in the region.[1007] The origins of SADC go back to 1980, when the Frontline States[1008] signed the Treaty of Arusha, with the aim of resisting the influence of South Africa in the region.[1009] To date, SADC includes fourteen Member States,[1010] and is a good example of the overlapping membership that characterises African regional trade agreements. All the five SACU members are also members of SADC, while nine of SADC's members are members of COMESA,[1011] and one of SADC's members (Tanzania) is also a member of EAC.

With regard to trade, a protocol was signed in 1996, which led to the establishment of a free trade area in 2000, in which all the Member States participate, except Angola and the D.R. Congo.[1012] Currently the aim of SADC's Member States is liberalise 85 percent of all intra–SADC trade by 2008 and fully liberalise trade by 2012. In addition, SADC has announced its intention to have a common external tariff, and thus become a customs union by 2010, and to establish a central bank by 2016.[1013]

In terms of the institutional set up of the bloc, the supreme policy making and legislative organ is the Summit, which consists of the Heads of State of All the Member States.[1014] The Council of Ministers is another important institution provided by the Treaty, which has the competence to oversee the functioning and development of SADC and to recommend to the Summit the establishment of other institutions and organs.[1015] The Council is assisted by another two intergovernmental organs, the Committee of

1007 On the objectives of SADC, see Article 5 of the Amended Declaration and Treaty Establishing the Southern Africa Development Community. Done and entered into force on August 14, 2001 in Blantyre, Malawi, <http://www.sadc.int/english/documents/legal/treaties/amended_declaration_and_ treaty_of_sadc.php> (last visited on 21 May 2007).

1008 Angola, Botswana, Lesotho, Malawi,Mozambique, Swaziland, Tanzania, Zambia, and Zimbabwe.

1009 Following the collapse of Apartheid, South Africa eventually joined SADC in 1994. See Khandelwal, supra n. 501, at 12.

1010 Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.

1011 Angola, D.R.Congo, Madagascar, Malawi, Mauritius, Seychelles, Swaziland, Zambia, and Zimbabwe.

1012 See Khandelwal, supra n. 501, at 12.

1013 See Khandelwal, ibid, at 12 -13; see also Kalenga, P. (2004) 'Implementation of the SADC Trade Protocol: Some Reflections' Trade Brief. Stellenbosch: TradeLaw Centre for Southern Africa.

1014 See Article 10 of the Amended Declaration and Treaty Establishing the Southern Africa Development Community, supra n. 1007.

1015 See Article 11 of the Amended Treaty.

Ministers and the Committee of Officials,[1016] while the Secretariat is a centralised supranational organ that has the competence to apply the Decisions of the Summit.[1017] Finally, Article 16 of the SADC Treaty provides for the creation of a regional Tribunal, which has been operational since November of 2005.[1018]

vi. The Economic Community of West African States (ECOWAS)

The Economic Community of West African States (ECOWAS) was established in 1975, with the adoption of the Treaty of Lagos (amended by the Treaty of Cotonou in 1993) with the aim of economically integrating the countries of this particular region. ECOWAS contains 15 Member States;[1019] nonetheless, unlike WAEMU, whose members participate in ECOWAS, the process of integration has been particularly slow, due to the lack of political commitment in a region devastated by poverty and wars. To give a practical example, the GDP of the 15 Member States is half of that of Norway, while the average price for electricity is 4.5 times the average charges of OECD countries, and international calls are four times the average prices charged in OECD countries.[1020]

In terms of institutional set up, Article 6(1) of the Treaty provides for the establishment of a number of intergovernmental and supranational institutions. In particular, the article provides for the creation of '...a)the Authority of Heads of State and Government; b) the Council of Ministers; c) the Community Parliament; d) the Economic and Social Council; e) the Community Court of Justice; f) the Executive Secretariat; g) the Fund for Co-operation, Compensation and Development; h) Specialised Technical Commissions; and i) Any other institutions that may be established by the Authority.' Thus the institutional set up provided by the ECOWAS Treaty is similar to the one provided by the EU Treaty.

1016 See Articles 12 and 13 of the Amended Treaty.

1017 See Articles 14 and 15 of the Amended Treaty.

1018 See Articles 16 and 32 of the Amended Treaty, and the website of the African International Courts and Tribunals, at <http://www.aict-ctia.org/courts_subreg/sadc/sadc_home.html.> (last visited on 21 May 2007)

1019 The Members are: Benin, Burkina Faso, Cape Verde, Cote D'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo. Mauritania was also a member of ECOWAS until 1999, when it withdrew from the agreement.

1020 Kaplan, S. (2006) 'West African Integration: A New Development Paradigm?'29:4 The Washington Quarterly, 81, at 84.

F. Asia

i. Association of South East Asian Nations (ASEAN)

The Association of South East Asian Nations (ASEAN) was first established in 1967, when the five original member countries[1021] signed the Bangkok Declaration, with the aim of pursuing peace and political stability in the region. Following a Preferential Trading Agreement, signed in 1977, members of ASEAN finally signed a Free Trade Agreement in 1995.[1022] The expressed aim of the ASEAN members is to have a fully integrated area by 2010 for the five original Member States plus Brunei (ASEAN-6), and by 2015 for the remaining four members.[1023] In addition, ASEAN members have agreed to have an economic community by 2020.[1024]

In terms of institutional set up, ASEAN is an intergovernmental organisation, whose highest decision making institution is the ASEAN summit, which consists of the heads of governments and convenes on an annual basis. The body responsible for the application of the ASEAN Free Trade Agreement (AFTA) is the Council of Ministers, which includes ministerial level representatives from each member state, plus the Secretary General of ASEAN. Thus the role of ASEAN Secretariat, which is an independent supranational body, is limited – as expected - mainly due to concerns that it would threaten the sovereignty of the Member States.[1025]

J. Cross-regional

i. Asia – Pacific Economic Cooperation (APEC)

The second noteworthy example of regional agreement is the Asia-Pacific Economic Cooperation (APEC), set up in 1989, which is an informal forum that

1021 Indonesia, Malaysia, The Philippines, Singapore and Thailand. Brunei Darussalam joined ASEAN in 1984, Vietnam in 1995, Laos and Myanmar in 1997, and Cambodia in 1999.

1022 For an analytical overview of the ASEAN project until the conclusion of the FTA, see Tan, L.H. (2005) 'Will ASEAN Economic Integration Progress Beyond a Free Trade Area?' 53 International and Comparative Law Quarterly, 935, at 936-939.

1023 Nonetheless, it has to be noted, that a sensitive list of products, primarily agricultural products, is excluded from the inclusion list. In addition, recent research has shown that tariffs have been eliminated by the ASEAN-6 countries only for 65% of the products of the inclusion list. Thus the 2010 and 2015 deadlines should be extended. See Cuyvers, L., P. De Lombaerde and S. Verhestraeten (2005) 'From AFTA towards and ASEAN Economic Community ...and Beyond.' Centre for ASEAN Studies Working Paper, January 2005, pp. 5, 7.

1024 Ibid, pp. 9 onwards.

1025 See Hunt, M. (2002), 'From "Neighbourhood Watch Group" to Community? The Case of ASEAN Institutions and the Pooling of Sovereignty'. 56:1 Australian Journal of International Affairs, 99.

promotes economic liberalisation and contains 21 countries.[1026] As already mentioned, APEC is a cross-regional organisation, as it includes Member States from four continents. The aim of APEC's founding Members at the time of its establishment was to bring the WTO Uruguay Round negotiations to a successful end. In particular, it has been argued that the US has used the adoption of this cross-regional arrangement as leverage for the difficult negotiations with the EU.[1027] The official aim of APEC's participating countries is freer trade for the industrialised countries by 2010 and for developing member countries by 2020.

1026 The Members of APEC are Australia, Brunei Darussalam, Canada, Chile, the People's Republic of China, Hong Kong, China, Indonesia, Japan, the Republic of Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, the Philippines, the Russian Federation, Singapore, Chinese Taipei, Thailand, the United States of America, and Vietnam.

1027 See Park S-H (2005) 'Increasing Sub-regionalism within APEC and the Bogor Goals: Stumbling Block or Building Block?', <www.apec.org.au/docs/koreapapers2/SX-SHP-Paper.pdf>, (last visited on 21 May 2007), at 3.

Bibliography

Articles and Working Papers

Abbott, F.M. (2000) 'NAFTA and the Legalisation of World Politics: A Case Study' 54:3 International Organization, 519

Abbott, K., R. Keohane, A. Moravcsik, A- M Slaughter, and D. Snidal (2000), 'The Concept of Legalisation' 54:3 International Organisation, 401

Abbott, K. W, and D. Snidal (2000), 'Hard and Soft Law in International Governance' 54:3 International Organisation, 421

Abeyratne, R. (2001) 'Competition and Liberalisation in Air Transport' 24:4 World Competition, 607

Accominotti, O., and M. Flandreau (2005) 'Does Bilateralism Promote Trade? Nineteenth Century Liberalisation Revisited' CEPR Discussion Papers 5423

Akbar, Y and G. Suder (2006) 'The New EU Merger Regulation: Implications for EU-U.S. Merger Strategies' 48:5 Thunderbird International Business Review, 667

Albers, M. (2002) 'Energy Liberalisation and EC Competition Law' 25 Fordham International Law Journal, 909

Alter, K.J. (1998) 'Who Are the 'Masters of the Treaty'? European Governments and the European Court of Justice' 52:1 International Organisation, 121

Anderson, K. (2003) 'How Can Agricultural Reform Reduce Poverty?' Discussion Paper, Centre for International Economic Studies, No 0321

Anderson, R.D., and P. Holmes (2002) 'Competition Policy and the Future of the Multilateral Trading System' 5:2 Journal of International Economic Law, 531

Archibugi, D. and C. Pietrobelli, (2002) 'The Globalisation of Technology and it implications for Developing Countries. Windows of Opportunity or Further Burdens?' 70:9 Technological Forecasting and Social Change, 861

Atwood, J. R. (1993), 'Positive Comity: Is it a Positive Step?' in Barry Hawk (ed.) 1992 Annual Proceedings of the Fordham Corporate Law Institute International Antitrust Law and Policy Conference (New York: Fordham Corporate Law Institute)

Aubert, C. (2003) "Competition Policy for Countries with Different Development Levels", paper presented at the CEPR 'Competition Policy in International Markets' Workshop, 17/18 October 2003, < "http://www.cepr.org/meets/wkcn /6/6613/papers/Aubert.pdf> (lat visited on 21 May 2007)

Avory, W.P. (1972) 'Sub-Regional Integration in Latin America: The Andean Common Market', 11:2 Journal of Common Market Studies, 85

Bacquero Herrera, M. (2004) 'The Andean Community: Finding her Feet within Changing and Challenging Multidimensional Conditions' 10 Law and Business Review of the Americas, 577

Bakhoum, M. (2006) 'Delimitation and Exercise of Competence between the West African Economic and Monetary Union (WAEMU) and its Member States in Competition Policy' 29:4 World Competition, 653

Baldwin, M. (2006) 'EU trade Politics – heaven or hell?' 13:6 Journal of European Public Policy, 526

Balsanek, K.L., R. E. DeFrancesco, M. A. Frank, D. T. Hardin, and M. R. Nicely (2006) 'International Legal Development in Review: 2005 Business Regulation' 40 International Lawyer, 217

Banks, J.D. (1998) 'The Development of the Concept of Extraterritoriality under European Merger Law and its Effectiveness under the Merger Regulation following the Boeing/Mc Donnell Douglas Decision 1997' 19:5 European Competition Law Review, 306

Barnet, S. E. (2004), 'Conflicts of Jurisdiction and International Comity in Extraterritorial Antitrust', 18 Emory International Law Review, 555

Baumol W.J. (1982) 'Contestable Markets: An Uprising in the Theory of Industry Structure' 72:1 The American Economic Review, 1

Bavasso, A. F. (1998), 'Boeing /McDonnell Douglas: Did the Commission Fly Too High?' 19:4 European Competition Law Review, 243

Bebr G. (1953) 'The European Coal and Steel Community: A Political and Legal Innovation' 63 Yale Law Journal, 1

Beghin, J.C. and A. Aksoy(2003) 'Agricultural Trade and the Doha Round: Lessons from Commodity Studies', Centre for Agricultural and Rural Development, Iowa State University, Briefing Paper 03-BP 42

Benidickson , J. (1993) 'The Combines Problem in Canadian Legal Thought' 43:4 The University of Toronto Law Journal, 799

Bercero, I.G. and S. Amarasinha (2001) 'Moving the Trade and Competition Debate Forward' 4:3 Journal of International Economic Law, 481

Berg, W. (2004) 'The New EC Merger Regulation: A First Assessment of it Practical Impact' 24 Northwestern Journal of International Law and Business, 683

Bhattacharjea, A. (2004) "Export Cartels – A Developing Country Perspective" 38:2 Journal of World Trade, 331

Bhattacharjea, A. (2006), 'The Case for a Multilateral Agreement on Competition Policy: A Developing Country Perspective' 9:2 Journal of International Economic Law, 293

Bilal, S. (2004) 'Can the EU Be a Model and a Driving Force for Regional Integration in Developing Countries?' Paper presented at the Second Annual Conference of the Euro-Latin Study Network on Integration and Trade, Florence, Italy, October 29-30, 2004, <http://www.ecdpm.org/Web_ECDPM/Web/Content/Download.nsf/0/22194B4 795A077D5C1256F9E0053FC38/$FILE/Bilal%20-%20EU%20model%20of%20RI %20Draft%20rev.pdf> (last visited on 21 May 2007)

Birbsong, L. (2005) 'The Formation of The Caribbean Court of Justice: The Sunset of the British Colonial Rule in the English Speaking Caribbean', University of Miami Inter-American law Review, 197

Bode M., and O. Budzinski (2005) 'Competing Toward International Antitrust: The WTO vs. the ICN', Marburg Papers on Economics, 03/2005

Boeder T.L, and G. J. Dorman (2000), 'The Boeing /Mc Donnell Douglas Merger: The Economics, Antitrust Law and Politics of the Aerospace Industry' 1: XLV Antitrust Bulletin, 119

Brady R.A. (1945) 'The Role of Cartels in the Current Cultural Crisis' 35:2 The American Economic Review, 312

Bravo, K.E. (2005), 'CARICOM, The Myth of Sovereignty, and Inspirational Economic Integration', 31 North Carolina Journal of International Law and Commercial Regulation, 145

Brittan, L. (1992) Competition Policy and International Relations (Brussels: Centre For European Policy Studies)

Brown, O., F. Haq Shaheen, S. Rafi Khan, and M. Yusuf (2005) 'Regional Trade Agreements: Promoting conflict or building peace?' International Institute for Sustainable Development Working Paper

Budzinski O. (2003) 'Pluralism of Competition Policy Paradigms and the Call for Regulatory Diversity' Philipps-University of Marburg Volkswirtschaftliche Beitraege No. 14/2003

Burley, A.-M. (1992) 'Law among liberal States: Liberal Internationalism and the Act of State Doctrine' 92:8 Columbia Law Review, 1907

Burnside, A. and Y. Botteman (2004) 'Networking Amongst Competition Agencies' 10:1 International Trade Law & Regulation

Burnside A., and H. Crossley (2005) 'Cooperation in Competition: A New Era' 30:2 European Law Review, 234

Cacciato, C. (1996) 'Subsidies, Competition Laws, and Politics: A comparison of the E.U. and U.S.A.', Centre for West European Studies, University of Pittsburgh, Policy Paper No. 2

Calvani, T. (2005) 'Conflict, Cooperation, and Convergence in International Competition' 72 Antitrust Law Journal, 1127

Campbell, A. (1986) 'The Single European Act and its Implications' 35:4 The International and Comparative Law Quarterly, 932

Carmignani, F. (2005) 'The Road to Regional Integration in Africa: Macroeconomic Convergence and Performance in COMESA' 15:2 Journal of African Economies, 212

Claeys, A.S. and A. Sindzingre (2003), 'Regional Integration as a Transfer of Rules: 'The Case of the Relationship between the European Union and the West African Economic and Monetary Union (WAEMU)', paper presented at the Development Studies Association Annual Conference, Glasgow, University of Strathclyde, 10-12 September 2003, <http://www.devstud.org.uk/publications/papers/conf03/dsaconf 03claeys.pdf>, (last visited on 21 May 2007)

Clark J.M. (1940) 'Toward a Concept of Workable Competition' 30:2 The American Economic Review, 241

Cocuzza, C., and M. Montini (1998) 'International Antitrust Co-operation in a Global Economy' 19 European Competition Law Review, 156

Commanor, W. and P. Rey (1997) 'Competition Policy Towards Vertical Restraints in Europe and the United States' 24 Empirica, 37

Cosma, H. A. and R. Whish, (2003) 'Soft Law in the Field of EU Competition Policy' 14:1 European Business Law review, 25

Crampton, P.S., and C.L. Witterick, (1997) 'Trade Distorting Private Restraints and Market Access; Learning to Walk Before We Run' 24 Empirica, 53

Crampton, P.S. and B.A. Facey, (2002) 'Revisiting Regulation and Deregulation Through the Lens of Competition Policy', 25:1 World Competition, 25

Cremona, M. (2003) 'State Aid Control: Substance and Procedure in the Europe Agreements and the Stabilisation Association Agreements', 9:3 European Law Journal 265

Cuyvers, L., P. De Lombaerde and S. Verhestraeten (2005) 'From AFTA towards and ASEAN economic community ...and beyond.' Centre for ASEAN Studies Working Paper, January 2005

Damro, C. (2006) 'The new trade politics and EU competition policy: shopping for convergence and co-operation' 13:6 Journal of European Public Policy, 867

Dana, W. F. (1902) 'The Supreme Court and the Sherman Anti-Trust Act' 16:3 Harvard Law Review, 178

Danzon P. and Li-Wei Chao (2000) 'Does Regulation Drive out Competition in Pharmaceutical Markets?' XLIII Journal of Law and Economics, 311

Daugbjerg, C. (1999) 'Reforming the CAP: Policy Networks and Broader Institutional Structures' 37:3 Journal of Common Market Studies, 407

De Bievre, D. (2006) 'The EU regulatory trade agenda and the quest for WTO enforcement' 13:6 Journal of European Public Policy, 851

De Moura, A. Borges (2004) 'The Brazilian Perspective of the FTAA' 10 Law and Business Review of the Americas, 695

De Noronha Goyos, D. (1997) 'The Globalisation of Competition Law: A Latin American Perspective' 3(1) International Trade Law Review, 20

Desmetz H. (1969) 'Information and efficiency: Another Viewpoint' 12 The Journal of Law and Economics, 1

DiMaggio P. J. and W.W. Powell (1983) 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields' 48 American Society Review, 147

Dimon, D. (2006) 'EU and US Regionalism: The Case of Latin America' XX:2 The International Trade Journal, 185

Dixit, A. and J.E. Stiglitz (1977) 'Monopolistic Competition and Product Diversity' 67:3 The American Economic Review, 297

Dixit, A (1984) 'International Trade Policies for Oligopolistic Competition' 94, The Economic Journal, 1

Djelic, M-L. (2005) "From Local Legislation to Global Structuring Frame: The Story of Antitrust" 5:1 Global Social Policy, 55

Dobson, P. (2005) 'Vertical Restraints Policy Reform in the European Union and United Kingdom' Loughborough University Research Series, Paper 2005:2

Ehlermann, C-D (1992) 'The Contribution of EC Competition Rules to the Single market' 29 Common Market law Review, 257

Ehlermann, C-D. (1994) 'The International Dimension of Competition' Policy' 17 Fordham International Law Journal, 833

Ehlermann, C-D (2000) 'The Modernization of EC Antitrust Policy: A Legal and Cultural Revolutions' 37 Common Market Law Review, 537

Ehlermann, C-D and J. Rattlif (2005) 'Mario Monti's Legacy for Competition Policy in Article 82' Wilmer Cutler Pickering Hale and Dorr Antitrust Series, paper No 50

Eichengreen, B. and J. A. Frankel (1995) 'Economic Regionalism: Evidence from Two 20th Century Episode' 6:2 The North American Journal of Economics and Finance, 89

Elgstrom, O. (2007) 'Outsiders' Perceptions of the European Union in International Trade Negotiations', 45 Journal of Common Market Studies, 949

Emmert, F., F. Kronthaler, and J. Stephan, (2005) 'Analysis of Statements made in favour of and against the adoption of competition law in developing and transition economies'. Paper presented in Brussels 19 and 20 April 2005, in the context of the EU financed project: Competition Policy Foundations for Trade Reform, Regulatory Reform, and Sustainable Development

Evenett, S.J., M.C. Levenstein, and V. Y. Suslow (2001) 'International Cartel Enforcement, Lessons from the 1990s' 24:9 World Economy, 1221

Fabiosam, J., J. Beghin, S. de Cara, A. Elobeid, C. Fang, M. Isik, H. Matthey, A. Saak, P. Westhoff, D. Scott Brown, B. Willot, D. Madison. S. Meyer and J. Kruse (2005) 'The Doha Round of the World Trade Organisation and Agricultural Markets Liberalisation: Impacts on Developing Economies' 27:3 Review of Agricultural Economics, 317

Fikentscher, W. (1994) 'Competition Rules for Private Agents in the GATT/WTO System' 49 Swiss Review of International Economic Relations, 281

Fikentscher, W. (2001) 'Market Anthropology and Global Trade' 1:1 The Gruter Institute Working Papers on Law, Economics, and Evolutionary Biology

Finger, J.M, and Ph. Schuler (2000) 'Implementation of Uruguay Round Commitments: The Development Challenge' 23:4 The World Economy, 511

Finnemore, M. and S. J. (2001) 'Alternatives to "Legalization": Risher Views of Law and Politics' 55:1 International Organization, 743

Forrester, I.S. QC, and A.P. Komninos (2006) 'EU Administrative Law: Competition Law Adjudication' Sectoral Report on Adjudication in the Competition Field, American Bar Association, European Union Administrative Law Project, <http://www.abanet.org/adminlaw/eu/SectRptAdj-Competition--Komninos_spring 2006 . pdf > (last visited on 21 May 2007)

Fox E.M. and L.A. Sullivan (1987) 'Antitrust – Retrospective Prospective: Where are we coming from? Where are we going?' 62 New York University Law Review, 936

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

Fox, E.M. and J. A. Ordover (1995) 'The Harmonisation of Trade Law and Competition Law: The Case for Modest Linkages of Law and Limits to Parochial State Action' 19:2 World Competition Law and Economics, 5

Fox, E. M. (1997), 'Toward World Antitrust and Market Access' 91:1 American Journal of International Law, 1

Fox, E.M. (1999) 'Competition Law and the Millennium Round' 2:4 Journal of International Economic Law, 665

Fox, E.M. (2003) 'Antitrust and Regulatory Federalism: Races Up, Down, and Sideways' 75 New York University Law Review, 1781

Fox, E (2006) 'Monopolization, Abuse of Dominance and the Indeterminacy of Economics: The US/EU Divide' Utah Law Review, 725

Fox, E.M. (2006) 'The WTO's First Antitrust Case – Mexican Telecom: A Sleeping Victory for Trade and Competition' 9 Journal of International Economic Law, 271

Friederiszick H.W, L-H. Roller and V. Verouden (2006) 'European State Aid Control: an economic framework', <http://ec.europa.eu/dgs/competition/esac.pdf>, (last visited on 21 May 2007)

Freeman, L. N. (1995) 'U.S. – Canadian Information Sharing and The International Antitrust Enforcement Assistant Act of 1994' 84 Georgetown Law Journal, 339

Furnish, A (1970) 'A transnational Approach to Restrictive Business Practices', 4 International Lawyer, 317

Furse, M. (1999) 'Competition Law and the WTO Report: "Japan- Measures Affecting Consumer Photographic Film and Paper' 20:1 European Competition Law Review, 9

Galindo Sanchez, R. (2005) 'New Antitrust ANDEAN Regulation', < http://www.brigardurrutia.com.co/figuras/funciones/documento.asp?ruta=/publicaciones/87/NewAntitrustAndean2005_rgs.pdf>, (last visited on 21 may 2007)

Geradin, D. and N. Petit (2004) 'Competition Policy in South Mediterranean Countries' 3:1 Review of Network Economics, 65

Gerber, D.J. (1994) 'Constitutionalising the Economy: German Neo-Liberalism, Competition Law and the 'New' Europe' 42 American Journal of Comparative Law, 25

Gerber, D.J. (1999) 'The U.S. – European Conflict Over the Globalisation of Antitrust Law: A Legal Experience Perspective' 34:1 New England Law Review, 123

Gibb, R. (1997) 'Regional Integration in Post –Apartheid Southern Africa: The Case of Renegotiating the Southern African Customs Union', 23:1, Journal of Southern African Studies, 67

Giotakos, D., L. Petit, G. Garnier, and P. De Luyck (2001) 'General Electric Honeywell- An insight into the Commission's investigation and decision' 3 Competition Policy Newsletter, 5

Girvan, N. (2007) 'Towards a Single Development Vision and the Role of the Single Economy' http://www.caricom.org/jsp/single_market/single_economy_girvan.pdf (last visited on 21 May 2007)

Glenn, J.K. (2004) 'From Nation-States to Member States: Accession Negotiations as an Instrument of Europeanization' 2 Comparative European Politics, 3

Gottschalk, K. and S. Schmidt (2004) 'The African Union and the New Partnership for Africa's Development: Strong Institutions for Weak States?' 4 Internationale Politik und Gesellschaft, 138

Grewlich, A. S. (2001) 'Globalisation and Conflict in Competition Law: Elements and Possible Solutions' 24:3 World Competition, 367

Griffin, J. P. (1994), 'EC and US Extraterritoriality: Activism and Cooperation' 17 Fordham International Law Journal, 353

Griffin, J. P. (1998), 'Antitrust Aspects of Cross- Border Mergers and Acquisitions' 19:1 European Competition Law Review, 12

Griffin, J. P. (1999) 'What Business People Want From A World Antitrust Code' 34:1 New England Law Review, 39

Goodnow, F.J (1897) 'Trade Combinations at Common Law' 12:2 Political Science Quarterly, 212

Gross, L. (1948) 'The Peace of Westphalia, 1648-1948' 42:1 The American Journal of International Law, 20

Gugler, K., D.C. Muller, B. B. Yurtoglu, and C. Zulehner (2003) 'The effects of mergers: an international comparison' 21 International Journal of Industrial Organisation, 625

Howse, R. (2002) 'From Politics to Technocracy-and Back Again: The Fate of the Multilateral Trading Regime' 96:1 American Journal of International Law, 94

Ham, A. D. (1993) 'International Cooperation in the Anti-trust Field and in Particular the Agreement between the United States of America and the Commission of the European Communities' 30 Common Market Law Review, 571

Hawk, B. (1995) 'System Failure: Vertical Restraints and EC Competition Law' 32 Common Market Law Review, 973

Hertel, T.W., B. M. Hoekman and W. Martin (2002) 'Developing countries and a New Round of WTO Negotiations' 17:1 The World Bank Research Observer, 113

Higgott, R. (2005) 'The Theory and Practice of Global and Regional Governance: Accommodating American Exceptionalism and European Pluralism' GARNET Working Paper No 01/05

Himelfarb, A. J. (1996) 'The International Language of Convergence: Reviving the Antitrust Dialogue between The United States of America and the European Union with a Uniform Understanding of Extraterritoriality' 17:3 University of Pennsylvania Journal of International Economic Law, 909

Hinkle, L.E. and M. Schiff (2004) 'Economic Partnership Agreements Between Sub-Saharan Africa and the EU: A Development Perspective.' 27:9 The World Economy, 1321

Hoekman B. (1997) 'Competition Policy in the Global Trading System: A Developing Country Perspective' World Bank Policy Research Working Paper No 1735

Hoekman, B. (1998) 'Free Trade and Deep Integration. Anti-Dumping and Antitrust in Regional Agreements' World Bank Policy Research Working Paper, No. 1950

Hoekman, B and P Holmes (1999)'Competition Policy, Developing countries and the WTO' 22:6 The World Economy, 875

Hoekman B. and P.C. Mavroidis (2002) 'Economic Development, Competition Policy and the World Trade Organisation' World Bank Policy Research Working paper No 2917

Holmes, P., J. Mathis, TCA Anant, and S. J. Evenett (2003) 'EU – India Study Report on Competition Policy', <http://www.evenett.com/chapters/compfinaljune.pdf> (last visited on 21/3/2007)

Hoj, J. and M. Wise, (2004) 'Product Market Competition and Economic Performance in Japan', OECD Economics Department Working Paper No 387, ECO/WKP (2004)

Holscher, J. and J. Stephan (2004) 'Competition Policy in Central Eastern Europe in the Light of EU Accession' 42:2 Journal of Common Market Studies, 321

Horton T.J. and S. Schmit (2002) 'A Tale of Two Continents: The Coming Clash of the Conflicting Economic Viewpoints in Europe and the United States', <http://www.orrick.com/fileupload/205.htm#_ftn1> (last visited on 21 May 2007)

Howse, R. (2002) 'From Politics to Technocracy-and Back Again: The Fate of the Multilateral Trading Regime' 96:1 American Journal of International Law, 94

Hufbauer, G.C. and B. Kotschwar (1998) 'The Future of Regional Trading Arrangements in the Western Hemisphere', Paper prepared for the Michigan State University 10th Anniversary Conference. Institute of International Economics Paper, <http://www.iie.com/publications/papers/paper.cfm? ResearchID=318>, (last visited on 21 May 2007)

Hufbauer, G.C., and Y. Wong (2005) 'Prospects for Regional Free Trade in Asia', IIE Working Paper, WP 05-12

Hughes, E.J. (1999) 'The Left Side of Antitrust. What Fairness means and Why it Matters' 77 Marquette Law Review, 265

Hunt, M. (2002), 'From 'neighbourhood watch group' to community? The case of ASEAN institutions and the pooling of sovereignty'. 56:1 Australian Journal of International Affairs, 99

Hurt, S.R. (2003) 'Co-operation and coercion? The Cotonou Agreement between the European Union and ACP states and the end of the Lome Convention' 24:1 Third World Quarterly, 161

Ivaldi, M. and O. Bertrand (2006) 'European Competition Policy in International Markets', <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=951594> (last visited on 21 May 2007)

Jacquemin, A. (2000) 'Theories of Industrial Organisation and Competition Policy: What are the Links?' European Commission Forward Studies Unit, Working Paper, 2000 <http://ec.europa.eu/comm/cdp/working-paper/industrial-organisation_en.pdf> (Last visited on 21 May 2007)

Janow, M.E. and C. R. Lewis (2001) 'International Antitrust and the Global Economy: Perspectives on The Final Report and Recommendations of the International Competition Policy Advisory Committee to the Attorney General and the Assistant Attorney General for Antitrust' 24:1 World Competition, 3

Janow, M.E. (2003) 'Observations on Two Multilateral Venues: the International Competition Network (ICN) and the WTO' In Hawk, Barry E. (Ed.), Annual Proceedings of the Fordham Corporate Law Institute Conference on International Antitrust Law & Policy (New York: Juris), 47

Jayasuriya, K. (2001) 'Globalisation, Sovereignty, and the Rule of Law: From Political to Economic Constitutionalism?' 8:4 Constellations, 443

Joubert, N. (2004) 'The Reform of South Africa's Anti-Dumping Regime' WTO, managing the Challenges of WTO Participation, Case Study No 38

Kaczorowska, A. (2000), 'International Competition Law in the Context of Global Capitalism' 21:2 European Competition Law Review, 117

Kalenga, P. (2004) 'Implementation of the SADC Trade Protocol: Some Reflections' Trade Brief. Stellenbosch: Trade Law Centre for Southern Africa

Kalijarvi, T.V. (1963) 'Obstacles to European Unification' 348 Annals of the American Academy of Political and Social Science, The New Europe: Implications for the United States, 46

Kallaugher, J. and B. Sher (2004) 'Rebates Revisited: Anti-competitive Effects and Exclusionary Abuse Under Article 82' 25:5 European Competition Law Review, 263

Kaplan, S. (2006) 'West African Integration: A New Development Paradigm?'29:4 The Washington Quarterly, 81

Khandelwal, P. (2004) 'COMESA and SADC: Prospects and Challenges for Regional Trade Integration' IMF Working Paper, WP/04/227

Kiriazis, G. (2001) 'Jurisdiction and cooperation issues in the investigation of international cartels', <http://europa.eu.int/comm/competition/speeches/text/sp2001 _010_en.pdf> (last visited on 21 May 2007)

Kirk, R. and M. Stern (2005) 'The New Southern African Customs Union Agreement' 28:2 The World Economy, 169

Kirkpatrick, C. and M. Watanabe (2005) 'Regional Trade in Sub-Saharan Africa: An Analysis of East African Trade Cooperation 1970-2001' 73:2 The Manchester School, 141

Kirzner I.M. (1997) 'Entrepreneurial Discovery and the Competitive Market Process: An Austrian Approach' 35:1 Journal of Economic Literature, 60

Kolasky, W. (2004) 'What is Competition? A comparison of US and Europe Perspectives' 49:1/2 Antitrust Bulletin, 29

Kolasky, W. (2005) 'Mario Monti's Legacy: A US Perspective' 1:1 Wilmer Cutler Hale and Dorr LLP, 159

Kovacic W.E. and C. Shapiro (2000) 'Antitrust Policy: A century of Economic and Legal Thinking' 14:1 Journal of Economic Perspectives, 43

Krisch, N. (2005) 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' 16:3 The European Journal of International Law, 369

Krueger, A.O. (2000) 'NAFTA's Effects: A Preliminary Assessment' 23:6 The World Economy, 761

Krugman, P. (1983) 'New Theories of Trade Among Industrial Countries' 73:2 The American Economic Review, 343

Krugman, P. (1991) 'The Move to Free Trade Zones' in Policy Implications of Trade and Currency Zones (Federal Reserve Bank of Kansas City, Kansas City)

Krugman, P. (1997) 'What Should Trade Negotiators Negotiate About?' 35:1 Journal of Economic Literature, 113

Laird, S,. R. Peters and D. Vanzetti (2004) 'Southern Discomfort: Agricultural Policies, Trade and Poverty' Centre for Research in Economic Development and International Trade, University of Nottingham, Working Paper No. 04/02

Lee, K.Y. (2005) 'The WTO Dispute Settlement and Anti-competitive Practices: Lessons Learnt from Trade Disputes' The University of Oxford Centre for Competition Law and Policy, Working Paper (L) 10/05

Levenstein, M., V. Suslow and L. Oswald, (2003) 'International Price Fixing Cartels and Developing Countries: A Discussion of Effects and Policy Remedies', William Davidson Working Paper, No 538

Levenstein, M. and V. Y. Suslow (2004) 'Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy' 71 Antitrust Law Journal, 801

Levenstein, M.C. and V. Suslow (2005) 'The Changing International Status of Export Cartel Exemptions' 20 American University International Law Review, 785

Levy, N. (2005) 'Mario Monti's Legacy in EC Merger Control' 1:1 Competition Policy International, 99

Lie, J. (1997) 'Sociology of Markets' 23 Annual Review of Sociology, 341

Liesner, J. and D. Glynn (1987) 'Does Anti-trust make Economic Sense?', 8:4 European Competition Law Review, 344

Litan, R.E. and C. Shapiro (2001) 'Antitrust Policy During the Clinton Administration' Competition Policy Centre, University of California, Berkeley, Working Paper No CPC01-22

Litwack, J.M. (1992) 'Legality and Market Reform in Soviet-Type economies' 5:4 The Journal of Economic Perspectives, 77

Lloyd, P.J. (2002) 'Competition Policy in the Asia-Pacific Region' 14:2 Asian-Pacific Economic Literature, 1

Maher, I. (2002) 'Competition law in the international domain: Networks as a new form of governance' 29:1 Journal of Law and Society, 112

Malaguti, M-C. (1998) 'Restrictive Business Practices in international Trade and the Role of the World Trade Organisation' 32:3 Journal of World Trade, 117

Malamud, A. (2001) 'Spillover in European and South American Integration: An Assessment.' LASA 2001 Meeting paper, Latin American Studies Association. <http://136.142.158.105/Lasa2001/MalamudAndres.pdf> (last visited on 21 May 2007)

Malkin, E. (2006) 'Central American Trade Deal Is Being Delayed by Partners', New York Times, March 2, 2006

Mandigora, G. (2007) 'Dispute settlement mechanisms in bilateral and regional trade arrangements', Tralac discussion paper, <http://rta.tralac.org/scripts/content.php?id =6130> (last visited on 21 May 2007)

Mansfield, E.D. and E. Reinhardt (2003) 'Multilateral Determinants of Regionalism: The Effects of GATT/WTO on the Formation of Preferential Trading Agreements' 57 International Organization, 829

March, J.G. and J.P. Olsen (1998) 'The institutional dynamics of International Political Orders' 52:4 International Organization, 943

Markert, K. E. (1968) 'Recent Developments in International Antitrust Co-operation' 13 Antitrust Bulletin, 355

Marcos, P. (2007) 'Downloading Competition law from a Regional Trade Agreement: A New Strategy to Introduce Competition Law to Bolivia and Ecuador' Berkeley Program in Law & Economics Latin American and Caribbean Law and Economics Association (ALACDE) Annual Papers (University of California, Berkeley), Paper 050107'8

Marsden, P. (2004) 'WTO Decides First Competition Case With Disappointing Results' Competition Law Insight, May, 3

Mathis, J. (2005) The Southern African Custom Union (SACU) Regional Cooperation Framework on Competition Policy and Unfair Trade Practices (UNCTAD, Geneva and New York)

Matoo, A. and A. Subramanian (2004) 'The WTO and the poorest countries: the stark reality' 3:3 World Trade Review, 385

Maur, J-M. (2005) 'Exporting Europe's Trade Policy' 28:11 World Economy, 1565

McCrudden, C. (2006) 'Legal research and the social sciences' 122 Law Quarterly Review, 632

McDavid, J.L., and L. K. Marshall, (2001) 'Antitrust Law: Global Review Regimes'. The National Law Journal, <http://www.hhlaw.com/publications/pdf/ McDavidMarshall_NLJ_sep25_01.pdf> (last visited on 21 May 2007)

McDonald, S.A. (2004) 'The Caribbean Court of Justice: enhancing the Role of International Organisations', 27 Fordham International Law Journal, 930

McGowan, L. and M. Cini (1999) 'Discretion and Politization in EU Competition Policy: The Case of Merger Control' 12:2 Governance, 175

McGowan, L. (2007) 'Theorising European integration: Revisiting neofunctionalism and testing its suitability for explaining the development of EC competition policy?' 11:3 European Integration online papers, 1

Mc Intyre, M.A. (2005) 'Trade Integration in East African Community: An Assessment for Kenya', IMF Working Paper, 05/143

McNulty P.J. (1968) 'Economic Theory and the Meaning of Competition' 82:4 Quarterly of Economics, 639

Mertikopoulou, V. (2007) 'DG Competition's Discussion paper on the Application of Article 82 of the EC Treaty to Exclusionary Abuses: 'The Proposed Economic Reform From a Legal Point of View' 28:4 European Competition Law Review, 241

Metzer, J-M. (2000) 'Seattle: Failure or new departure?' OECD Observer, July 2000

Meunier, S. and K. Nicolaidis (2006) 'The European Union as a conflicted trade power' 13:6 Journal of European Public Policy, 906

Meyer, J. W., J. Boli, G. M. Thomas, and F. O. Ramirez (1997) 'World Society and the Nation State' 103:1 American Journal of Sociology, 144

Miller, D.L. and J. Davidow (1982) 'Antitrust in the United Nations: A Tale of Two Codes' 18:2 Stanford Journal of International Law, 347

Monti, G. (2002) 'Article 81 and EC Public Policy' 39 Common Market Law Review, 1057

Morawetz V. (1910) 'The Sherman Anti-trust Act' 11:1 American Economic Association Quarterly, 321

Morris, D. (2003) 'Dominant Firm Behaviour under UK Competition Law' Paper presented to the Fordham Corporate Law Institute Thirtieth Annual Conference on International Antitrust Law and Policy, New York City 23-24 October 2003, <http://www.competition-commission.org.uk/our_peop/members/chair_speeches/pdf/ fordham2003.pdf> (Last visited on 21 May 2007)

Mugomba, A.T. (1978) 'Regional Organisations and African Underdevelopment: The Collapse of the East African Community' 16:2 The Journal of Modern African Studies, 261

Muhara, L. (2007) 'Brief on Progress and Challenges of the Competition and Fair Trading Commission in Malawi' Paper delivered at the 8th Session of the Intergovernmental Group of Experts, UNCTAD, Geneva, 17-19 July 2007

Mullei, A.K. (2005) 'Integration experience of East African Countries', Presentation delivered at the Symposium Marking the 30th Anniversary of Banco de Mozambique, Maputo, Mozambique, May 17 2005, <http://www.centralbank.go.ke/downloads/gov_speeches/Mozambique-paper.pdf> (last visited on 21 May 2007)

Murphy, G. (2001), 'Canada, Australia and New Zealand Competition Authorities Sign Cooperation Arrangement' 22:8 European Competition Law Review, 322

Narlikar, A. and J. Odell (2003) 'The Strict Distributive Strategy for a Bargaining Coalition: The Like Minded Group in the World Trade Organization', Paper Presented at a Conference on Developing Countries and the Trade Negotiation Process, UNCTAD, Gneva, 6-7 November 2003

Narlikar, A. and D. Tussie, (2004) 'The G 20 at the Cancun Ministerial: Developing Countries and Their Evolving Coalitions in the WTO' 27:7 The World Economy, 947

Nazzini, R. (2006) 'Article 81EC: Between Time Present and Time Past: A Normative Critique on 'Restriction of Competition' in EU Law' 43:2 Common Market Law Review, 497

Nicolaides, P. (2000) 'An Essay on Economics and the Competition Law of the European Community' 27 Legal Issues of economic Integration, 7

Nordlander, C. (2004) 'Discovering Discovery: US Discovery of EC Leniency Statements' 25:10 European Competition Law Review, 646

Nyirabu, M. (2004) 'Appraising Regional Integration in Southern Africa' 13:1 African Security Review, 21

Oldale, A. (2000) 'Contestability: The Competition Commission Decision on North Sea Helicopter Services' 21:8 European Competition Law Review, 345

O'Rourke, K.H. and G. Williamson, (2004), 'Once more: When Did Globalisation Begin?' 8 Journal of European Economic History, 109

Ostry, S. (1995) 'New Dimensions for Market access: Challenges for the Trading System', in OECD, New Dimensions in Market Access in a Globalising World Economy (OECD, Paris) 25

Parisi, J. J. (1999) 'Enforcement Co-operation among Antitrust Authorities', 20:3 European Competition Law Review, 133

Park S-H (2005), Increasing Sub-regionalism within APEC and the Bogor Goals: Stumbling Block or Building Block?", <www.apec.org.au/docs/koreapapers2/SX-SHP-Paper.pdf>, (last visited on 21 May 2007)

Parker Willis, H. (1912) 'Political Obstacles to Anti-Trust Legislation' 20:6 The Journal of Political Economy, 588

Patterson, D. E, and C. Shapiro (2001) 'Trans-Atlantic Divergence in GE/Honeywell, Causes and Lessons' <http://faculty.haas.berkeley.edu/shapiro/divergence.pdf> (last visited on 21 May 2007)

Paul, J. R. (1991) 'Comity in International Law' 32:1 Harvard International Law Journal , 2

Pauwelyn, J. (2001) 'The Role of Public International Law in the WTO: How Far Can We Go?' 95:3 The American Journal of International Law, 534

Petersmann, E-U. (1994) 'Proposals For Negotiating International Competition Rules In The GATT-WTO World Trade And Legal System' 49 Swiss Review of International Economic Relations, 231

Petersmann, E.U. (1999) 'Legal Economic and Political Objectives of National and International Competition Policies: Constitutional Functions of WTO 'Linking Principles' for Trade and Competition' 34:1 New England Law Review, 145

Philpott, D. (1995) 'Sovereignty: An Introduction and Brief History', 48 Journal of International Affairs, 353

Piccioto, S. (1998) 'Globalisation, Liberalisation, Regulation' Paper delivered at he Conference on "Globalisation, the Nation-Sate and Violence', Sussex University, 16 April 1998, <http://www.lancs.ac.uk/staff/lwasp/glibreg.pdf> (last visited on 21 May 2007)

Pitofski, R. (1999) 'Competition Policy in a Global Economy- Today and Tomorrow' 2:3 Journal of International Economic Law, 403

Porrata Doria R.A. Jr. (2004) 'MERCOSUR: The Common Market of the Twenty First Century?' 32 Georgia Journal of International and Comparative Law, 1

Posner, R. (1979) 'The Chicago School of Antitrust Analysis' 127 University of Pennsylvania Law Review, 925

Potter, P.B. (1943) 'Universalism Versus Regionalism in International Organisation' 37:5 The American Political Science Review, 850

Raustiala, K. (2002) 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law' 43 Virginia Journal of International Law, 1

Reinker, K. S. (2004) 'Case Comment: Roche vs. Empagran' 28 Harvard Journal of Law and Public Policy, 297

Reismann (1991), 'A Hard look at soft Law: Panel Report', 82 American Society of International Law, 371

Riley, A. (1995) 'The Jellyfish Nailed? The Announcement of the EC/US Competition Co-operation Agreement' 16:3 European Competition Law Review, 185

Rivas-Campo, J.A. and R. Tiago Juk Benke (2003) 'FTAA Negotiations: Short Overview' 6:3 Journal of International Economic Law, 661

Rodger, B. (2000) 'Competition Policy, Liberalism and Globalization: A European Perspective' 6 Columbia Journal of European Law, 289

Rodrik, D. (1999) 'How Far will International Economic Integration Go?' 14:1 The Journal of Economic Perspectives, 177

Rostow.E. (1960) 'British and American Experience With Legislation Against Restraints of Competition' 23:5 The Modern Law Review, 477

Sapir, A. (2000) 'Trade Regionalism in Europe: Towards an Integrated Approach' 38 Journal of Common Market Studies, 151

S.B.T. (1966) 'Petrol Solus Agreements: British Common Law of Restraint of Trade in a New Context' 52:4 Virginia Law Review, 690

Scherer, F.M. and R.S. Balous, (1994) 'Unfinished Tasks: The New International Trade Theory and Post Uruguay Round Challenges', Research Paper, British-North American Committee, Issues Paper No. 3.

Schmalense R. (1982) 'Antitrust and the New Industrial Economics' 72:2 Papers and Proceedings of the Ninety-Fourth Annual Meeting of the American Economic Association, 24

Schmidt, A. (2001) 'Non-Competition Factors in the European Competition Policy: The Necessity of Institutional Reforms' Centre for Globalisation and Europeanisation of the Economy, Discussion Paper No 13

Schmidt C.A.J. (2002) 'The Defence of Competition in the Mercosur', <http://www.seae.fazenda.gov.br/document_center/papers-and-articles/2002-1/3-pdfwin32>, (last visited on 21 May 2007)

Schutze, R. (2006) 'Supremacy Without Pre-emption? The Very Slowly Emergent Doctrine of Community Pre-Emption' 43 Common Market Law Review, 1023

Shelton, J.R. (1999) 'Competition Policy: What Chance For International Rules?' 1:2 OECD Journal of Competition Law and Policy, 51

Shepherd W.G. (1984) 'Contestability vs. Competition' 74:4 The American Economic Review, 572

Singh, A. (2003) 'Competition and Competition Policy Development in Emerging Markets: International and Developmental Dimensions' ESRC Working Paper No246

Slaughter, A-M. (2004) 'Sovereignty and Power in a Networked World Order' 40 Stamford Journal of International Law, 283

Sloot, T., and P. Verschuren (1990) 'Decision – Making Speed in the European Community' 29:1 Journal of Common Market Studies, 75

Smith, K.E. (2005) 'The Outsiders: The European Neighbourhood Policy' 81:4 International Affairs, 757

Smith, S.C. (2006) 'The Free Trade Agreement of the Americas: Is There Still a Place for the World Trade Organisation' 13 Tulsa Journal of International and Comparative Law, 321

Slaughter, A-M. (1993) 'International Law and International Relations Theory: A Dual Agenda' 87 American Journal of International Law, 205

Sokol, D. D. (2007) 'Why is this Chapter Different From all the Others? An Examination of why Countries Enter Into Non-Enforceable Competition Policy Chapters in Free Trade Agreements', Legal Studies Research Paper Series, Research Paper No. 2007-13

Spaak, F. and J.N. Jaeger (1961) 'The Rules of Competition Within the European Common Market' 26:3 Law and Contemporary Problems, 485

Springman, C. (2005) 'Fix Prices Globally, Get Sued Locally? US Jurisdiction Over International Cartels' 72 University of Chicago Law Review, 265

Steinberg, R.H. (2002) 'In the Shadow of Law or Power? Consensus – Based Bargaining and Outcomes in the GATT/WTO' 56:2 International Organisation, 339

Stephenson, S.M. and G.C. Hufbauer (2004) 'The Free Trade Area of the Americas: How Deep an Integration in the Western Hemisphere?' <http://www.aeaweb.org/annual_mtg_papers/2005/0107_1015_1402.pdf>, (last visited on 21 May 2007)

Stewart, T. (2001), 'Challenges of Developing a Competition Regime in CARICOM', <http://www.iadb.org/sds/doc/IFM-Taimoon_Stewart-E.pdf.> (last visited on 21 May 2007)

Stigler, G. (1971) 'The Theory of Economic Regulation' 2:1 Bell Journal of Economics and Management, 1

Stigler G. (1982) 'The Economists and the Problem of Monopoly' 72:2 The American Economic Review, 1

Streit, M.E. and M. Wohlgemuth, (1997) 'The Market Economy and the State Hayekian and ordoliberal conceptions', Max-Planck-Institut zur Erfoschung von Wirtschaftssystemen, Diskussionbeitrag 06-97, <http://www.dundee.ac.uk/cepmlp/journal/assets/images/Streit-onHayek97.pdf> (last visited on 21 May 2007)

Subbioto, R. and F. Amato (2002) 'Reform of the European Competition Policy Concerning Vertical Restraints' 69:1 Antitrust Law Journal, 147

Szepesi, S. (2004) 'Comparing EU Free Trade Agreements: Competition Policy and State Aid' ECDPM InBrief 6E), ECDPM, Maastricht

Tan, L.H. (2005) 'Will ASEAN Economic integration progress beyond a Free Trade Area?' 53 International and Comparative Law Quarterly, 935

Tavares de Araujo Jr, J. (2000) 'Competition Policy and the EU-MERCOSUR Trade Negotiations', paper presented at the Working Group on EU- MERCOSUR Trade Negotiations. Paris, May 12-13, 2000, <http://www.sice.oas.org/compol/Articles/ cpeumerc.doc>, (last visited on 21 May 2007)

Tallberg, J. (2002) 'Delegation to Supranational Institutions: Why, How, and with What Consequences?' 25:1 West European Politics, 23

Timberg, S. (1973) 'An International Antitrust Convention: A Proposal to Harmonise Conflicting National Policies Towards the Multinational Corporation' 8 Journal of International Law and Economics, 157

Tsebelis, G and G Garett (2001) 'The Institutional Foundations of Intergovernmentalism and Supranationalism in the European Union' 55:2 International Organization, 357

Vachudova, M.A. (2002) 'The Leverage of the European Union on the Reform in Post Communist Europe', Paper presented at the Workshop "Enlargement and European Governance" ECPR Joint Session Workshops, Turin, 22-27 March 2002, <http://www.essex.ac.uk/ecpr/events/jointsessions/paperarchive/turin/ws4/Vachudova.pdf> (last visited on 21 May 2007)

Van de Boogaerde, P. and C. Tsangarides (2005) 'Ten Years After the CFA Franc Devaluation: Progress Toward Regional Integration in the WAEMU', IMF Working Paper, WP/05/145

Van Kraay, F.G.A. (1977) 'Proposed EEC Regulation on the Control of Mergers' 26:2 International and Comparative Law Quarterly, 468

Van Miert, K. (1998), 'International Cooperation in the Field of Competition: A View From the EC', in Barry Hawk (ed.) 1997 Fordham Corporate Law Institute International Antitrust Law and Policy Conference, (New York: Fordham Corporate Law Institute), 13

Venit, J. (2003), 'Brave New World: The Modernisation and Decentralisation of Enforcement under Articles 81 and 82 of the EC Treaty' 40 Common Market Law Review, 545

Vervaele, J. AE (2005) 'MERCOSUR and Regional Integration in Latin America' 54 International and Comparative Law Quarterly, 387

Vickers, J. (2005) 'Abuse of Market Power' 115 The Economic Journal, 244

Walker, F. (1905) 'The Law concerning Monopolistic Combinations in Continental Europe' 20:1 Political Science Quarterly, 13

Walker, W. K (1992) 'Extraterritorial Application of U.S. Antitrust Laws: The Effect of the European Community- United States Agreement' 33 Harvard International Law Journal, 583

Waller, S.W. (1997), 'Internationalisation of Antitrust Enforcement' 77 Boston University Law Review, 343

Weil, P. (1983), 'Towards Relative Normativity in International Law?' 77 American Journal of International Law, 413

Weiler J.H.H. (1991) 'The Transformation of Europe' 100:8 Yale Law Journal, 2403

Werden, G. (2004) 'Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law With Oligopoly Theory' 71 Antitrust Law Journal, 719

Wionczek, M.S. (1970) 'The Rise and Decline of Latin American Economic Integration' 9:1 Journal of Common Market Studies, 49

Willimsky S.M. (1997) 'The Concept(s) of Competition' 18:1 European Competition Law Review, 53

Wood, D. P. (1995), 'The Internationalisation of Antitrust Law: Options for the Future' 44 De Paul Law Review, 1289

Wood, D. P. (1999) 'Is Cooperation Possible' 34:1 New England Law Review, 103

Woolcock, S. (2004) 'The Singapore Issues in Cancun: a failed negotiation ploy or a litmus test for global governance?' LSE working paper, <http://www.lse.ac.uk/collections/internationalTradePolicyUnit/pdf/theSingapore IssuesInCancunRev1.pdf> (last visited on 21 May 2007)

Yang, Y. and S. Gupta (2005) 'Regional Trade Arrangements in Africa: Past Performance and the Way Foreword', IMF Working Paper, WP/05/36

Young, O.R. (1991) 'Political Leadership and Regime Formation: On the Development of Institutions in International Society' 45 International Organisation, 281

Young, A.R. and J. Peterson (2006) 'The EU and the New Trade Politics' 13:6 Journal of European Public Policy, 795

Yntema, H. (1966), 'The Comity Doctrine' 65:1 Michigan Law Review, 9

Chapters of Edited Books

Bellis, J.F. (1997) 'The treatment of dumping, subsidies and anticompetitive practices in regional trade agreements' in Demaret, P., J.-F. Bellis and G. García Jiménez (eds), Regionalism and Multilateralism after the Uruguay Round: Convergence, Divergence and Interaction. (European Interuniversity Press, Brussels)

Bliss M. (1991) 'The Yolk of the Trusts: A Comperison of Canada's Competitive Environment in 1889 and 1989', in Khemani R.S., and W.T. Stanbury (eds), Historical Perspectives on Canadian Competition Policy (The Institute for Research on Public Policy, Halifax N.S)

Bouzas, R. and H. Soltz (2001) 'Institutions and Regional Integrations: The Case of MERCOSUR' in Bulmer-Thomas, V. (ed.), Regional Integration in Latin America and the Caribbean (London, Institute of Latin American Studies, University of London)

Cernat L. (2005) 'Eager to Ink but Ready to Act? RTA Proliferation and international Cooperation on competition policy', in Brusick P., A.M. Alvarez and L. Cernat (eds) Competition Provisions in Regional Trade Agreements: How to Assure Development Gains (UNCTAD, Geneva and New York)

Desta, M.G., and N. J. Barnes (2006) 'Competition Law and Regional Trade Agreements' in Lorand Bartels and Federico Ortino (eds.) Regional Trade Agreements and the WTO Legal System (Oxford University Press), p. 239

Evenett, S.J. (2005) 'What can we learn from the competition provisions of RTAs?', in Brusick P., A.M. Alvarez and L. Cernat (eds) Competition Provisions in Regional Trade Agreements: How to Assure Development Gains (UNCTAD, Geneva and New York)

Ferreira R.M. (2005) 'Regional Cooperation Agreement and Competition Policy – The Case of Andean Community', in M. Mashayekhi, and T. Ito (eds) Multilateralism and Regionalism: The New Interface" (UNCTAD, Geneva and New York)

Finger, M. and A, Winters (2002), 'Reciprocity in the WTO', in Hoekman, B., A. Mattoo, and P. English (eds) Development, Trade and The WTO (World Bank)

Graham, E. (2002) 'The Relationship Between International Trade Policy and Competition Policy', in Z. Drabek (eds.), Globalization Under Threat: The Stability of Trade Policy and Multilateral Agreements (Edward Elgar Publishing)

Hoekman, B. and K. Saggi (2005) 'International Cooperation on Domestic Policies: Lessons from the WTO Competition Policy Debate', in S. Evenett and B. Hoekman (eds), Economic Development and Multilateral Trade Cooperation. (Palgrave McMillan and World Bank)

Holmes, P., A. Papadopoulos, O. Kayali, and A. Sydorak (2005) 'Trade and Competition in Regional Trade Agreements: A Lost opportunity?' in Brusick, Alvarez and Cernat (eds)

Competition Provisions in Regional Trade Agreements: How to Assure Development Gains (UNCTAD, Geneva and New York)

Holmes, P., H. Müller, A. Papadopoulos, and A. Sydorak (2008 forthcoming), 'A Taxonomy of International Competition Cooperation Provisions' in S. Evenett (ed) Handbook on Competition, Trade and Development (Edward Elgar)

Horna, P.M., and BO Kayali, (2007) 'National Implementation of Competition – Related Provisions in Bilateral and Regional Trade Agreements', in Alvarez, A-M and L. Wilse Samson (eds) Implementing Competition –Related Provisions in Regional Trade Agreements: is it possible to obtain development gains? (UNCTAD, Geneva and New York)

Irwin, D. (1993) 'Multilateral and Bilateral Trade Policies in the World Trading System: An Historical Perspective' in De Melo, J. and A. Panagariya (eds.) New Dimensions in Regional Integration, (New York: Cambridge University Press)

Iyori, H. (1997), 'Japanese Cooperation in International Antitrust Law Enforcement' in Ulrich, H. (ed) Comparative Competition Law: Approaching an International System of Antitrust Law, (Nomos Verlagsgesellschaft Baden-Baden)

Jacoby, N.H. (1975) 'Multinational Corporations and National Sovereignty', in P.M. Boarman and H. Schollhammer (eds.) Multinational Corporations and Governments. Business-Government Relations in an International Context (Praeger Publishers, New York)

Janow, M. E. (2000) 'Transatlantic cooperation on competition Policy' in Evenett, S. J., A. Lehman and B. Steil (eds) Antitrust Goes Global: What Future for Transatlantic Cooperation? (Brookings Institution Press)

Jatar, A.J. and L. Tineo (1998) 'Competition Policy in the Andean Countries: Ups and Downs of A Policy in Search of its Place', in Rodriguez Mendoza, M., P. Correa and B. Kotschwar (eds.) The Andean Community and the United States: Trade and Investment Relations in the 1990s, (Organization of American States)

Jenny, F. (2001) 'Globalisation, Competition and Trade Policy: Convergence, Divergence and Cooperation', in Yang-Ching Chao, Gee San, Chang Fa Lo and Jiming Ho (eds) International and Comparative Competition Law and Policies (Kluwer Law International)

Jenny, F. and P. Horna (2005) 'Modernization of the European System of the Competition Law Enforcement: Lessons for Other Regional Groupings', in Brusick, Alvarez and Cernat (eds) Competition Provisions in Regional Trade Agreements: How to Assure Development Gains (UNCTAD, Geneva and New York)

Jordana, J. and D. Levi-Faur (2004) 'The Politics of Regulation in the age of Governance', in Jordana, J. and D. Levi-Faur (eds) The Policy of Regulation: Institutions and Regulatory Reforms for the Age of Governance (Edward Elgar Publishing)

Lipimile, G.K. and E. Gachuiri (2005) 'Allocation of Cases Between National and Regional Competition Authorities: The Case of COMESA', in Brusick, Alvarez and Cernat (eds) Competition Provisions in Regional Trade Agreements: How to Assure Development Gains (UNCTAD, Geneva and New York)

Mestral A.L.C. de (2006) 'NAFTA Dispute Settlement: Creative Experiment or Confusion?', in Bartels, L and Ortino, F. (eds.) Regional Trade Agreements and the WTO Legal system (Oxford University Press)

Moschel, W. (2002) 'The Relationship between Competition Authorities and Sector Specific Regulators', in D. Tzouganatos (eds.) EU Competition Law and Policy: Developments and Priorities, Proceedings from Athens Conference, April 19th 2002 (Nomiki Vivliothiki SA)

Motta, M. and A. De Streel (2003) 'Exploitative and Exclusionary Excessive Prices in EU Law' in Elerman C-D and I. Atanasiu, European Competition Law Annual 2003: What Is an Abuse of a Dominant Position? (Hart Publishing)

Papadopoulos, A. (2007) 'Bilateral Enforcement Cooperation' in Marsden, P. (ed.) Handbook of Research in Trans-Atlantic Antitrust (Edward Elgar Publishing)

Pelkmans, J. and P. Brenton (1999) 'Free Trade with the EU: Driving Forces and the Effects' in O. Memedovic, A Kuyvenhoven and W. Molle (eds.) Multilateralism and Regionalism in the Post-Uruguay Round Era: What Role for the EU? (Kluwer, Boston)

Preub, U. (1999) 'Political Order and Democracy: Carl Schmitt and his influence' in Ch. Mouffe, (ed.), The challenge of Carl Schmitt (New York: Verso)

Rill, J. F. and C. C. Wilson (2000) 'The A.C. Nielsen Case' in Evenett, S. J., A. Lehman and B. Steil (eds) Antitrust Goes Global: What Future for Transatlantic Cooperation? (Brookings Institution Press)

Slaughter, A-M (2000) 'Governing the Global Economy through Government Networks' in Byers, M. (ed.) The Role of Law in International Politics: Essays in International Relations and International Law (Oxford University Press)

Stigler, G. (1968) 'Barriers to Entry, Economies of Scale and Firm Size', in Irwin R.D. (ed) The Organisation of Industry (Homewood)

Zach, R. (1998), 'International Cooperation Between Antitrust Enforcement Agencies: A view from a Small Country' in Ulrich, H. (ed.) Comparative Competition Law: Approaching an International System of Antitrust Law (Nomos Verlagsgesellschaft Baden-Baden)

Books

Amato, G. and L. Laudati (eds) (2001) The Anticompetitive Impact of Regulation (Edward Elgar Publishing)

Anderson, K. and W. Martin eds. (2005) Agricultural Trade Reform and the Doha Development Agenda (World Bank and Palgrave McMillan)

Bain, J.S. (1956) Barriers to New Competition (Harvard University Press)

Baldwin, R. and M. Cave (1999) Understanding Regulation: Theory, Strategy and Practice (Oxford University Press, New York)

Biondi, A, P. Eeckhout, and J. Flynn (eds.) (2004) The Law of State Aids in the European Union (Oxford University Press)

Braithwaite, J. and P. Drahos (2000) Global Business Regulation (Cambridge University Press)

Braudel F. (1979) The Wheels of Commerce: Civilization and Capitalism15th –18th Century (vol. 2. New York: Harper & Row)

Byers, M. and G. Nolte (2003) United States Hegemony and the Foundations of International Law (Cambridge University Press)

Chamberlain, E.H. (1933) The theory of Monopolistic Competition (Harvard University Press)

Clough S.B. and C.W. Cole (1941) Economic History of Europe (Boston MA, D.C. Heath)

Craig, P. and Gr. De Burca, (2003) EU Law: Text, Cases, and Materials (Oxford University Press)

Dabbah, M. (2003) The Internationalisation of Antitrust policy (Cambridge University Press)

Dinan, D. (2004) Europe Recast: A History of the European Union (Lynne Rienner)

Doern, G. and S. Wilks (eds.) (1996) Comparative Competition Policy: National Institutions in a Global Market (Oxford University Press)

Furse M. (2004) Competition law of the EC and the UK (Oxford University Press, 4th edition)

Gellhorn W. and W.E. Kovacic (1994) Antitrust Law and Economics in a Nutshell (West Publishing)

Gerber, D. (2000), Law and Competition in the twentieth Century: Protecting Prometheus (Oxford University Press)

Gilpin, R. (1987) The Political Economy of International Relations (Princeton University Press)

Goyder, E.C. (2003) EC Competition Law (Oxford University Press, 4th Edition)

Hayek, F.A. (1978) New Studies in Philosophy, Politics, Economics and the History of Ideas (London, Routledge)

Held, D., D. Golblatt, A.G. McGrew, and J. Perraton (1999) Global Transformations: Politics, Economics and Culture (Stanford University Press)

Jones, A. and B. Sufrin (2004) EC Competition Law: Text, Cases and Materials (Oxford University Press)

Kaysen, C. and D. Turner, (1959) Antitrust Policy (Cambridge University Press)

Kenwood, A.G. and A.L. Lougheed, (1971) The Growth of International Economy (London, Allen & Unwin)

Knight F. (1933) The Economic Organisation (University of Chicago Press)

Kurzer, P (2001) Markets and Moral Regulation: Cultural Change in the European Union (Cambridge University Press)

Leonard, M. (2005) Why Europe Will Run the 21st Century? (Fourth Estate)

Marsden, P. (2003) A Competition Policy for the WTO (Cameron May)

Marsden, P. (ed) (2007) Handbook of Research in Trans-Atlantic Antitrust (Edward Elgar Publishing)

Maxton, G.P. and J. Wormland (2004), Time for a Model Change: Re-engineering the Global Automotive Industry (Cambridge University Press)

Monti, G. (2007), EC Competition Law (Oxford University Press)

Odudu, O (2006) The Boundaries of EC Competition law: The Scope of Article 81 (Oxford University Press)

Peritz R.J.R (1996) Competition Policy in America, 1888-1992: History, Rhetoric, Law (New York: Oxford University Press)

Prosser, T. (1997) Law and The Regulators (Oxford University Press, New York)

Rodger, B. and A. McCulloch (2004), Competition Law and Policy in the EC and UK: An Introduction to Practice and Policy (Cavendish Publishing, 3rd edition)

Scherer, F.M. and D.R. Ross (1990) Industrial Market Structure and Economic Performance (Houghton Mifflin, 3rd edition)

Schumpeter J. (1943) Capitalism, Socialicm and Democracy (London , G. Allen & Unwin)

Shaw, M. (2004) International Law (Cambridge University Press, 5th edition)

Sierra J.L. B. (2000) Exclusive Rights and State Monopolies Under EC Law: Article 86 (former Article 90) of the EC Treaty (Oxford University Press)

Smith A. (1776) An inquiry into the nature and causes of the wealth of nations (Dublin , Whitestone)

Smith, P. and D. Begg, (2000) Economics (McGrow, Hill Publishing, 6th edition)

Trebilcock M. (1986), The Common Law of restraint of Trade, (Toronto: Carswell)

Trebilcock M. and R. Howse (1999) The Regulation of International Trade (Routledge, 2nd edition)

Weatherill, S. (2005) EU Consumer Law and Policy (Edward Elgar Publishing)

Whish (2003) Competition Law, (Butterworths, 4th edition)

Zanettin, B. (2002) Cooperation Between Antitrust Agencies at the International Level (Hart Publishing)

Speeches

Adedeji, A. (2002) 'History and Prospects for Regional Integration in Africa' Speech presented at the Third Meeting of the African Development Forum, Addis Abeba, 5 March 2002, <http://www.uneca.org/eca_resources/Speeches/2002_speeches/ 030502adebayo.htm.> (last visited on 21 May 2007)

Brittan, L (1999) 'The Need for a Multilateral Framework of Competition Rules' OECD Conference on Trade and Competition, Paris, France, 29-30 June, in OECD (1999) Trade and Competition Policies - Exploring the Ways Forward (Paris, OECD)

Finckenstein, K. von (2001), 'International Antitrust Cooperation: Bilateralism or Multilateralism?', Speech delivered in Vancouver, 31 May 2001, <http://www.apeccp.org.tw/doc/Canada/Policy/1a.htm> (last visited on 21 May 2007)

Galindo – Rodriguez B. (2007) 'European Competition Policy Development, and Protectionism' Speech delivered at the Sixth Annual ICN Conference, Moscow, <http://www.internationalcompetitionnetwork.org/media/library/conference_6th_moscow_2007/34SpeechofBlancaRodriguezGalindoEuropeanCommissiononCompetitionandDevelopment.pdf >. (last visited 21 May 2007)

Griffin, J.M. (2000) 'An Inside Look At A Cartel At Work: Common Characteristics of International Cartels', Presented the American Bar Association Section of Antitrust Law 48th Annual Spring Meeting, Washington D.C. April 6, 2000, <http://www.usdoj.gov/atr/public/speeches/4489.htm> (last visited on 21 May 2007)

Hammond, S. (2006) 'Charting New Waters in International Cartel Prosecution', Speech presented at the Twentieth Annual National Institute on White Collar Crime, March 2, 2006, < http://149.101.1.32/atr/public/speeches/214861.pdf> (last visited on 21 May 2007)

James, C. (2001) 'International Antitrust in the Bush Administration', Canadian Bar association on Competition Law, Ottawa, Canada, 21 September 2001, <www.usdoj.gov/atr/public/speeches/9100.pdf> (last visited on 21 May 2007)

Klein, J.I (1996), 'A Note of Caution with Respect to a WTO Agenda on Competition Policy', Speech delivered at the The Royal Institute of International Affairs, Chatham House, London, November 18, 1996, <http://www.usdoj.gov/atr/public/speeches/ 0998.htm> (last visited on 21 May 2007)

Klein, J.I. (1999) 'Luncheon address' delivered at the Anti-Cartel Enforcement Conference, Westin Grand Hotel, Washington, D.C. September 30, 1999, <http://www.usdoj.gov/atr/public/speeches/3727.htm>(last visited on 21 May 2007)

Klein, J.L.(1999) 'A Reality Check on Antitrust Rules in the World Trade Organization, and a Practical Way Forward on International Antitrust', speech at OECD Conference on Trade and Competition, Paris, 29–30 June 1999, in Trade and competition rules : exploring the ways forward. (Paris, OECD)

Klein, J.L. (2000) 'Time for a Global Competition Initiative?', Speech Delivered at the EC Merger Control 10th Anniversary Conference, Brussels, Belgium, <http://www.usdoj.gov/atr/public/speeches/6486.pdf> (last visited on 21 May 2007)

Kroes, N. (2005) 'The First Hundred Days'. Speech delivered at the 40th Anniversary of the Studienvereinigung Kartellrecht 1965-2005, International Forum on European Competition Law, Brussels, <http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/05/205&format=HTML&aged=0&language=EN&guiLanguage=en> (last visited on 21May 2007)

Kroes, N. (2005) 'Preliminary Thought of Policy Review on Article 82' Speech delivered at the Fordham Corporate Law Institute, 23 Sptember 2005, <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/537&format=HTML&aged=0&language=EN&guiLanguage=en'> (last visited on 21 May 2007)

Mogens, P.C. (2001) 'Towards basic rules on trade related competition policy', Speech delivered in Brussels, 2 March 2001, <http://trade.ec.europa.eu/doclib/docs/2004/november/tradoc_120130.pdf> (last visited on 21/3/2007)

Monti, M. (2000) 'Cooperation between competition authorities- a vision for the future' Speech delivered at the Japan Foundation Conference, Washington DC, 23 June 2000, <http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/00/234|0|RAPID&lg=EN> (last visited on 21 May 2007)

Monti, M. (2000) 'The Main Challenges of a New Decade of EC Merger Control', Speech delivered at the EC Merger Control 10th Anniversary Conference, Brussels, Belgium, 14-15 September 2000, <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/00/311&format=HTML&aged=0&language=EN&guiLanguage=en> (last visited on 21 May 2007)

Monti, M. (2001) 'The Future for Competition Policy in the European Union' Speech delivered at Merchant Taylor Hall, London, 9 July 2001, <http://www.europa.eu.int/rapid/start/cgi/guesten.ksh_p?action.gettxt=gt&doc=SPEECH/01/340□0□ RAPID&lg=EN> (last visited on 21 May 2007)

Monti, M. (2002) 'A Global Competition Policy?' European Competition Day, Copenhagen 17 September 2002, <http://europa.eu/rapid/pressReleasesAction.do? reference=SPEECH/02/399&format=HTML&aged=0&language=EN&guiLanguage=en> (last visited on 21 May 2007)

Monti, M. (2004) 'A reformed Competition Policy: Achievements and Challenges for the Future' Speech delivered at the Center for European Reform, Brussels, 28 October 2004, <http://www.cer.org.uk/pdf/speech_monti_oct04.pdf> (last visited on 21 May 2007)

Pate, H. (2004) 'Antitrust in a Transatlantic Context- From the Cicada's Perspective'. Speech presented at "Antitrust in a Transatlantic Context" Conference, Brussels, Belgium, June 7, 2004, <http://www.usdoj.gov/atr/public/speeches/203973.pdf> (last visited on 21 May 2007)

Rosch J.T. (2007) 'I Say Monopoly, You say Dominance: The Continuing Divide on the Treatment of Dominant Firms, is it the Economics?' Speech Delivered at the at the International Bar Association Antitrust Section Conference Florence, Italy September 8, 2007, <http://www.ftc.gov/speeches/rosch/070908isaymonopolyiba. pdf> (last visited on 1 October 2007)

Stark, C. (2000) 'Improving Bilateral Antitrust Cooperation', Speech delivered in Washington D.C., 23 June 2000, at p.2, <http://www.usdoj.gov/atr/public/speeches/5075.htm> (last visited on 21 May 2007)

Yong, O.K. (2006) 'Opening Remarks at the 2nd ASEAN Conference on Competition Policy and Law, Bali, Indonesia, 14-16 June 2006', < http://www.aseansec.org/18507.htm> (Last visited on 21 May 2007)

Zedillo, E. (2006) 'The WTO's Biggest Problem at 10: Surviving the Doha Round', Speech delivered at conference "WTO at 10: Governance, Dispute Settlement and Developing Countries," Columbia University, April 7, 2006, <http://www.ycsg.yale.edu/center/forms/doha.pdf> (last visited on 21/3/2007)

Official Documents and reports

EU

Commission (EC) (1995) 'Report of the Group of Experts, "Competition Policy in The New Trade Order: Strengthening International Competition and Rules', COM(95) 359 final

Commission (EC) (1996) Communication to the Council 'An international framework of competition rules', COM (96) 284

Commission (EC) (1996) 'How a Unified Stategy Can Help European Business. Background note on the Market Access Strategy', MEMO/96/108

Commission (EC) (1998), 'EC Commission report to the Council and the European Parliament on the Application of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, 1 January to 31 December 1997'. Brussels, 11 May 1998

Commission (EC) (1999) 'EC Commission report to the Council and the European Parliament on the application of the agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, Brussels, 2 April 1999', <http://europa.eu.int/comm/competition/ international/bilateral/usa/1998_comm_report_app_comp_law_en.pdf> (last visited on 21 May 2007)

Commission (EC) (1999) 'White Paper on The Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty', Brussels, 28.04.99, Commission Programme 99/027

Commission (EC) (2002) Communication to the Council and the European Parliament 'Trade and Development: Assisting Developing Countries to Benefit from Trade', 18 September 2002, COM(2002) 513 final

Council and Commission (EC) (2002) 'Joint Statement of the Council and the Commission on the Function of the Network of Competition Authorities', <http://ec.europa.eu/comm/competition/ecn/joint_statement_en.pdf> (last visited on 21 May 2007)

Commission (EC) (2003) 'Glossary of terms used in competition related matters', <http://ec.europa.eu/comm/competition/general_info/glossary_en.html#aV> (last visited on 21May 2007)

Commission (EC) (2003) 'Report from the Commission to the Council and the European Parliament on the application of the agreements between the European Communities and the Government of the United States of America and the Government of Canada regarding the application of their competition laws, 1 January 2002 to 31 December 2002', <http://europa.eu.int/comm/competition/international/ bilateral/canada/2002_report_en.pdf> (last visited on 21 May 2007)

Commission (EC) (2003) 'Wider Europe— Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours', Brussels 11 March 2003, COM (2003) 104 final

Commission (EC) (2003) 'Technical Assistance Programmes and Projects Provided by the European Community and its Member States in the Field of Trade and Competition Policy' WT/WGTCP/W/223

Commission EC (2004) 'Communication from the Commission, 'European Neighbourhood Policy; Strategy Paper' Brussels, 12 May 2004, COM (2004) 373 final

Commission (EC) (2004), 'European Neighbourhood Policy: STRATEGY PAPER', COM (2004) 373 final

Commission (EC) (2005) 'Discussion paper on the Application of Article 82 of the EC Treaty to Exclusionary Abuses', Public consultation document [2005] <http:// ec.europa.eu/comm/competition/antitrust/others/discpaper2005.pdf>

Commission (EC) (2005) 'Country Report: Egypt' Brussels, 2 March 2005 SEC(2005) 287/3

Commission (EC) (2005) 'Country Report: Lebanon' Brussels, 2 March 2005 SEC(2005) 289/3

Commission (EC) (2005) 'Country Report: Armenia' Brussels, 2 March 2005 SEC(2005) 285/3

Commission (EC) (2005) 'Country Report: Azerbaijan' Brussels, 2 March 2005 SEC(2005) 286/3

Commission (EC) (2005) 'Country Report: Georgia' Brussels, 2 March 2005 SEC(2005) 288/3

Commission (EC) (2005) 'State Aid Action Plan: Less and better targeted state aid: a roadmap for state aid reform 2005-2009', Brussels, 7.6.2005, COM(2005) 107 final

Commission (EC) (2006) 'ENP Progress Report: Jordan' Brussels, 4 December 2006, SEC(2006) 1508/2

Commission (EC) (2006) 'ENP Progress Report: Tunisia' Brussels, 4 December 2006, SEC(2006) 1510

Commission (EC) (2006) 'ENP Progress Report: Ukraine' Brussels, 4 December 2006, SEC(2006) 1505/2

Commission (EC) (2006) "The Fight Against Cartels", <http://europa.eu.int/comm/competition/citizen/cartel_stats.html>

Commission (EC) (2006) 'Screening Report: Turkey – Chapter 8, Competition Policy',<http://ec.europa.eu/enlargement/pdf/turkey/screening_reports/screening_report_08_tr_internet>en.pdf> (last visited, 21 May 2007)

Commission (EC) (2006) 'Screening Report: Croatia – Chapter 8, Competition Policy', <http://ec.europa.eu/enlargement/pdf/croatia/screening_reports/screening_ report_08_hr_internet_en.pdf> (last visited on 21 May 2007)

Commission (EC) (2006) 'Commission Staff Working Paper accompanying the : Communication from the Commission to the Council and the European Parliament on Strengthening the European Neighbourhood Policy; ENP Progress Report, Morocco', COM (2006) final

Commission EC (2007) 'Vademecum Community Rules on State Aid' <http://ec.europa.eu/comm/competition/state_aid/studies_reports/vademecum_on_rules_2007_en.pdf > (last visited on 21 May 2007)

Commission (EC) (2007) 'Andean Community Regional Strategy Paper 2007-1013', 12.04.2007 (E/2007/678)

OECD

OECD (1994) 'Merger Cases in the Real World: A Study of Merger Control Procedures' (OECD, Paris)

OECD (1999) 'CLP Report on Positive Comity', DAFFE/CLP (99)

OECD (1999) 'Trade and competition Policies for Tomorrow' (OECD, Paris)

OECD (2001) 'Trade and Competition Policies- Options for a Greater Coherence' (OECD, Paris)

OECD (2001) 'Promoting Competition in Postal Services' 3:1 OECD Journal of Competition Law and Policy, 7

OECD Joint Group on Trade and Competition (2001) The Role of 'Special and Differential Treatment' at the Trade, Competition and Development Interface, OECD COM/TD/DAFFE/CLP(2001)21/FINAL

OECD (2002) Fighting Hard-Core Cartels: Harm, Effective Sanctions and Leniency Programme (OECD Paris)

OECD (2002) 'Regulatory Reform for Greece' 3:4 OECD Journal of Competition Law and Policy, 7

OECD Global Forum on Competition (2002) 'OECD Global Forum on Competition: Contribution by UEMOA', CCNM/GF/COMP/WD(2002)30

OECD Global Forum on Competition (2003) 'The Objectives of Competition Law and Policy' OECD Secretariat Note, CCNM/GF/COMP(2003)3

OECD Global Forum on Competition (2004) 'Regulatory reform: stock-taking of experience with reviews of competition law and policy in OECD countries and the relevance of such experience for developing countries' CCNM/GF/COMP(2004)

OECD Global Forum on Competition (2004) 'Challenges/obstacles faced by competition Authorities in Achieving Greater Economic Development Through the Promotion of Competition: Contribution from Algeria' CCNM/GF/COMP/WD(2004)21

OECD (2004) 'Competition Law and Policy in Russia: An OECD Peer Review' (OECD, Paris)

OECD (2004) 'Regulating Market Activities by Public Sector', OECD Competition Committee, DAF/COMP(2004)36.

OECD (2005) 'Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation' (OECD, Paris)

OECD (2006) 'Competition Provisions in Regional Trade Agreements' OECD Trade Policy Working Paper No 31. COM/DAF/TD(2005)3/FINAL

UNCTAD

UNCTAD (2003) 'WTO Core Principles and Prohibition: Obligations Relating to Private Practices, National Competition Laws and Implications for a Competition Policy Framework' UNCTAD/DITC/CLP/2003/2

UNCTAD (2004) 'Cooperation and Dispute Mediation Mechanism in MERCOSUR Related to Competition law and Policy', Communication submitted by Brazil Ministry of Justice, <http://r0.unctad.org/en/subsites/cpolicy/docs/IGE1104/Brazil_ cooperation.pdf> (last visited on 21 May 2007)

UNCATD (2005) 'Exclusionary Anti-competitive Practices: Their Effects on Competition and Development' UNCTAD/DITC/CLP/2005/4

UNCTAD, (2005) 'Review of Recent Experiences in the Formulation and Implementation of Competition Law and Policy in Selected Developing Countries' UNCTAD/DITC/CLP/2005/2

UNCTAD (2005) 'Communication submitted by Turkey to the Fifth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices' <http://www.unctad.org/sections/wcmu/docs/tdrbpconf6p043_en.pdf> (last visited on 21 May 2007)

UNCTAD (2006) 'Voluntary Peer Review of Competition Policy: Tunisia' (UNCTAD/DITC/CLP/2006/2)

UNCTAD (2006) 'COMPAL Global Annual Report 2005' UNCTAD/DITC/CLP/2006/1

UNCTAD (2007) 'Criteria for evaluating the effectiveness of competition authorities' Submission by Romania to the Inter-governmental Group of experts < http://www.unctad.org/sections/wcmu/docs/c2clp_ige8p15Romania_en.pdf> (last visited on 21 July 2007)

WTO

WTO (1996) Singapore Ministerial Conference of the Parties to the WTO, Singapore Ministerial Declaration WT/MIN(96)/DEC

WTO Working Group on Trade and Investment (1998) 'Bilateral, Regional, Plurilateral, and Multilateral Agreements' WT/WGTI/W/22

WTO Working Group on the Interaction between Trade and Competition Policy (1999) 'The fundamental principles of competition policy' WT/WGTCP/W/127

WTO (2001) 2001 Doha Ministerial Declaration, WT/MIN(01)/DEC/1

WTO (2004) 'Decision Adopted by the General Council on 1 August 2004', WT/L/579

WTO (2006) 'Trade Policy Review, Report by the Secretariat: East African Community' WT/TPR/S/171

ICN

CN (2003) 'A Report on the First Annual Conference of The International Competition Network', Naples, 28-29 September 2002

ICN(2005) "Report of the Working Group on Antitrust Enforcement in Regulated Sectors to the fourth ICN Annual Conference", Bonne, June 2005, <http://www.internationalcompetitionnetwork.org/media/library/conference_4th_bonn_2005/Interrelations_Between_Antitrust_and_Regulation.pdf.> (Last visited on 21 May 2007).

ICN (2006) 'A Statement of Mission and Achievements, Up Until May 2006'

ICN (2007) 'Cooperation Between Competition Agencies in Cartel Investigations', Cartels Working Group Report, Presented at the ICN Annual Conference, Moscow, May 2007, <http://www.internationalcompetitionnetwork.org/media/library/conference_6th_moscow_2007/19ReportonCooperationbetweencompetitionagenciesincartelinvestigations.pdf> (last visited on 21 May 2007)

World Bank

World Bank (2005) Global Economic Prospects 2005: Trade, Regionalism and Development (World Bank)

Other

ABA, Antitrust Division, (2003) 'Comments and Recommendations on the Competition elements of the Doha Declaration', <http://www.abanet.org/antitrust/at-comments/2003/05-03/doha.pdf> (last visited on 21 May 2007)

AEPLAC (2007)'Assessment of institutional standing in the fields of competition and state aid', report presented in the context of the EU funded TACIS programme, <http://www.aeplac.am/pdf/2007/Compet/Compet.pdf> (last visited on 3 August 2007)

African Union (2007) 'African Union in a nutshell', <http://www.africa-union.org/root/au/AboutAu/au_in_a_nutshell _en.htm> (last visited in 21 May 2007)

APEC (1999) 'APEC Principles to Enhance Competition and Regulatory Reform', <http://www.oecd.org/dataoecd/48/52/2371601.doc> (last visited on 21 May 2007)

APEC Committee on Trade and Development (2006) 'Annual Report to the Ministers' APEC#206-CT-01.6

Croatian Competition Agency (2006) 'Annual Report of the Croatian Competition Agency for 2005) <http://www.aztn.hr/eng/pdf/izvjesca/ANNUAL%20REPORT% 20aztn%202005%20eng.pdf> (last visited on 21 May 2007)

Danish Competition Authority (2004) 'Wider Nordic antitrust cooperation', Press Release of 02.03.2004, <http://www.ks.dk/english/news/press-releases/2004/wider-nordic-antitrust-cooperation/> (last visited on 21 May 2007)

EAC (2001) "The Second East African Community Strategy Paper", <http://www.eac.int/documents/Development%20Strategy.pdf>, (last visited on 21 May 2007)

EAC Secretariat. (2006) 'Role of EAC in promoting competition in the region', by Dr Flora Mndeme Musonda, Director of Trade, EAC, <http://www.cuts-international.org/7up3/Role_EAC.pdf>, (last visited on 21 May 2007)

EAC (2006) 'Regional Cooperation on Competition Policy and Law – The Experience of the east African Community', <http://www.unctad.org/sections/ wcmu/docs/ c2clp_ige7p25_en.pdf> (last visited on 21 May 2007)

FTAA (2003) 'Free Trade Area of the Americas Eighth Ministerial Meeting Miami, USA, November 20, 2003, Ministerial Declaration', <http://www.ftaa-alca.org/Ministerials/Miami/Miami_e.asp> (last visited on 21 May 2007)

Group of 77 (2003) 'Declaration of the Group of 77 and China on the Fifth WTO Ministerial Conference, Cancun, Mexico, 10-14 September 2003', <http://www.g77.org/main/docs/FinalG77Decl-22aug-5thWTO.pdf>, (last visited on 21 May 2007)

International Chamber of Commerce (1996), 'ICC Statement on International Cooperation between Antitrust Authorities', 28 March 1996, Doc. 225/450 Rev.3

International Chamber Commerce (1999), 'ICC recommendations to the International Competition Policy Advisory Committee (ICPAC) on exchange of confidential information between competition authorities in the merger context', Commission on Law and Practices relating to Competition, 21 May 1999 Doc. Document 225/525

International Competition Policy Advisory Committee (2000), "ICPAC Final report to the Attorney general and the assistant attorney general for Antitrust", <http://www.usdoj.gov/atr/icpac/finalreport.htm> (last visited on 21May 2007)

Kenya (2003) 'Comments by Kenya on the second revision of the Draft Cancun Ministerial text' of 14 September 2003, WT/MIN(03)/W/21

SADC Secretariat (2007) 'SADC Expert Group Meeting on Competition Law and Policy' < http://www.sadc.int/attachments/calendar/251/1892_Expert%20Group% 20Meeting%20on%20Competition%20Law%20&%20Policy%20Record%20(Draft).pdf> (last visited on 21 May 2007)

UNICE (1999) 'Preliminary UNICE Comments on the Commission Discussion Paper: Trade and Competition: WTO framework on Competition rules', UNICE Paper No 1/30/1

Submissions to the WTO Working Group on Trade and Competition

EU

Communication from the European Community and its Member States, WT/WTGTCP/W/1, of 11 June 1997

Communication from the European Community and its Member States, WT/WTGTCP/W/45, of 24 November 1997

Communication from the European Community and its Member States, WT/WTGTCP/W/62, of 5 March 1998

Communication from the European Community and its Member States, WT/WTGTCP/W/115, of 29 May 1999

Communication from the European Community and its Member States, WT/WTGTCP/W/130, of 12 July 1999

Communication from the European Community and its Member States, WT/WTGTCP/W/140, of 8 June 2000

Communication from the European Community and its Member States, WT/WTGTCP/W/152, of 25 September 2000

Communication by the European Community and its Member States WT/WGTCP/W/184, of 22 April 2002

Communications from the European Community and its Member States WT/WTGTCP/W/193, of 1 July 2002

Communications from the European Community and its Member States WT/WTGTCP/W/222, of 19 November 2002

Communications from the European Community and its Member States WT/WTGTCP/W/234, of 26 June 2003

US

Communication of the US, WT/WGTCP/W/6, of 19 June 1997

Communication from the US, WT/WGTCP/W/116, of 25 May 1999

Communication from the US, WT/WGTCP/W/203, of 15 August 2002

Other

Communication from India, WT/WGTCP/W/216, 26 September 2002

Communication from Mauritius, WT/MIN(03)/W/17, of 12 September 2003

Press Releases

EU

Commission (EC) 'Following an undertaking by Microsoft to change its licensing practices, the European Commission suspends its action for breach of the competition rules' Press Release of 17 July 1994, IP/94/653

Commission (EC) 'Kodak-Fuji Case – EU to Join the WTO/GATT Panel: Statement by the European Commission', IP/96/931

Commission (EC) 'Commission clears the merger of Halliburton and Dresser in the area of oilfield services' Press Release of 8 July 1998, IP/98/643

Commission (EC) 'Commission opens procedure against Air France for favouring Amadeus reservation system', Press Release of 15 March 1999, IP/99/171

Commission (EC) 'Commission acts to prevent discrimination between airline computer reservation systems', Press Release of 25 July 2000, IP/00/835

Commission (EC) 'The Commission prohibits GE's Acquisition on Honeywell', press release of 3 July 2001, IP/01/939

Commission (EC) "EU-Chile Association Agreement to be signed today in Brussels" Press Release of 18 November 2002, IP/02/1696

Council (EC) "2640th Council Meeting, General Affairs and External Relations" Press Release of 21 February 2005, 6419/0521

US

US DoJ 'Department of Justice Clears WorldCom/MCI Merger after MCI agrees to sell its Internet Business' Press Release of 15 July 1998

US DoJ 'Justice Department requires divestitures in merger between General Electric and Honeywell' press release of 2 May 2001

US DoJ 'Statement by Assistant Attorney General Charles A. James on the EU's decision regarding the GE/Honeywell acquisition' press release of 3 July 2001

US DoJ 'Department of Justice and Microsoft Corporation reach effective settlement on antitrust lawsuit' Press Release of 2 November 2001

US DoJ 'U.S. and foreign antitrust officials launch International Competition Network: New International Venue Will Assist In Global Convergence On Important Antitrust Enforcement Issues' Press Release of 25 October 2001

Other

Andean Community Press Release of June 8, 2001, 'European cooperation for harmonizing rules on free competition in the Andean region' < http://www.comunidadandina.org/INGLES/ press/press/np8-6-01.htm> (last visited on 21 May 2007)

Legislation (Legally binding and soft law instruments)

EU

Treaty establishing the European Community as Amended by Subsequent Treaties. Rome, 25 March 1957, <http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/ pdf/12002E_EN.pdf>

- Regulations

Council Regulation (EEC) No 17/62 Implementing Articles 85 and 86 of the Treaty, OJ 13, 21.02.1962, p. 204

Council Regulation (EEC) No 19/65, on application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices, OJ. 36, 06.03.1965, p. 53

Commission Regulation (EEC) No 1983/83 of 22 June 1983 on the application of Article 85(3) to categories of exclusive distribution agreements, OJ L 173, 30.6.1983, as amended by Commission Regulation (EC) No 1582/97 of 30 July 1997 , OJ L 214, 6.8.1997, p. 2

Council Regulation (EEC) No 4064/89 of 21 December 1989, OJ L 395, p. 1

Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid, Official Journal L 142, 14.05.1998, p.1

Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 (now Art.88) of the EC Treaty Official Journal L 83/1, 27.03.1999, p. 1

Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ L 336, 29.12.1999, p. 21

Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ L 203, 01.08.2002, p. 30

Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003, p. 1

Commission Regulation (EC) No 358/2003 of 27 February 2003 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector, OJ L 053, 28.02.2003. p.8

Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, p. 1

Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC)No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 140, 30.4.2004, p. 1

Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, OJ L 123, 27.04.2004, p.11

- Guidelines and Notices

Commission (EC) (2004) Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, O.J. C 31/5

Commission (EC) (2004) Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.04.2004, p. 43

Commission (EC) (2004) Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ C 101, 27.04.2004, p. 54

Commission (EC) (2004) Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ C 101, 27.04.2004, p. 65

Commission (EC) (2004) Notice - Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ C 101, 27.04.2004, p. 81

Commission (EC) (2004) Notice - Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.04.2004, p. 97

Commission (EC) (2004) Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, OJ C 325, 22.12.2005, p. 7

US

Antitrust Civil Process Act, 15 U.S.C. s. 1313 (c)(3)

Clayton Act, 15 USC ss 7 A (h), 18 (a)

Federal Trade Commission Act, 15 U.S.C. s. 57-2 (b)

Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C s 6a (1994)

International Antitrust Enforcement Assistance Act, U.S.C. 6204 (1)

UK

UK Extradition Act, 2003, c. 41

OECD

OECD Recommendation of the Council concerning cooperation between member countries on restrictive business practices affecting international trade of 5 October 1967 [C(567)53(Final)].

OECD Recommendation of the Council of 3rd July 1973 [C (73) 99 (Final)]

OECD Recommendation of the Council of 25th September 1979 [C (79) 154 (Final)]

OECD Recommendation of the Council of 21st May of 1986[C (86) 44 (Final)]

OECD Recommendation of the Council of 27th and 28th July of 1995 [C (95) 130 (Final)]

OECD Recommendation of the Council concerning Effective Action Against Hard Core Cartels, 25 March 1998 – [C (98)35 (Final)]

OECD (2005) Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartel Investigations, DAF/COMP(2005)25/FINAL, 16 November 2005

UNCTAD

The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, U.N. Doc. TD/RBP/CONF 10/Rev. 1 (1980), endorsed by G.A. Res. 63, U.N. Doc. A/RES/35/63 (1980), reprinted in 19 I.L.M. 813 (1980)

WTO

Agreement Establishing the World Trade Organisation, Final Act Embodying the Results of the Uruguay Round of Negotiations, Marrakech, 15 April 1994 (hereinafter WTO Agreement), <http://www.wto.org/english/docs_e/legal_e/final_e.htm#TRIPs> (last visited on 21 May 2007)

Andean Community

Andean Community, Decision 285, Rules and regulations for preventing or correcting distortions in competition caused by practices that restrict free competition. <http://www.comunidadandina.org/INGLES/ normativa/d285e.htm> (last visited on 21 May 2007

COMESA

Draft COMESA Competition Regulations, <http://www.tralac.org/pdf/COMESA_Competition_ Regulations_-_21.10.2002.doc> (last visited on 21 May 2007).

Draft COMESA Competition rules, <http://www.tralac.org/pdf/COMESA_Competition_ Rules_-_21.10.2002.rtf> (last visited on 21 May 2007)

EAC

'Protocol on the Establishment of the East African Customs Union', <http://www.eac.int/EAC_CuctomsUnionProtocol.pdf> (last visited on 21 May 2007)

MERCOSUR

Common Market of the Southern Cone (MERCOSUR), Protocol of the Defense of Competition < http://www.ftaa-alca.org/Wgroups/WGCP/English /cpa/cpa3_e.asp> (last visited on 21 May 2007)

WAEMU

Reglement 02/2002/CM/UEMOA relatif aux pratiques anticoncurrentielles a l'inturieur de l'UEMOA

Reglement 03/2002/CM/UEMOA relatif aux procudures applicables aux ententes et abus de positions dominantes a l'inturieur de l'UEMOA

Reglement 04/2002/CM/UEMOA relatif aux aides d'Itat a l'Inturieur de l'UEMOA et aux modalitus d'applications de l'article 88(c) du traitu

Directive 01/2002/CM/UEMOA relative û la transparence des relations financieres d'une part entre les etats membres et les entreprises publiques, et d'autre part entre les Etats membres et les organisations internationales ou ıtrangeres

Directive 02/2002/CM/UEMOA relative a la coopuration entre la commission et les structures nationals de concurrence des Etats membres pour l'application des articles 88, 89 et 90 du trait2 de l'UEMOA

Other

Draft International Antitrust Code, as a GATT- MTO – Plurilateral Trade Agreement: Antitrust and Trade Regulation Report (BNA) at 126 (Special Supplement No 1628, 19 August, 1993)

Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America, <http://www.fco.gov.uk/Files/kfile/USExtradition_210503.pdf> (last visited on 21 May 2007)

North American Agreement on Environmental Cooperation, 8 September 1993, Canada-Mexico-United States, 32 I.L.M. 1480

North American Agreement on Labor Cooperation, 14 September 1993, 32 I.L.M. 1499

US – EU (2002), Best Practices on Cooperation in Merger Investigations, <http://ec.europa.eu/comm/competition/mergers/others/eu_us.pdf> (Last visited on 21 May 2007)

Cases

EU

A. ECJ and CFI decisions

Airtours plc v. Commission of the European Communities, Case T-342/99, [2002] ECR II-02585

Ahlstrom and Others v. E.C. Commission (Re Wood Pulp Cartel), Joined Cases C-89, 104, 114, 116, 117 and 125-129/85, [1998] E.C.R. 5193

British American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v Commission, Joined Cases 142 and 156/84, [1986] ECR – 1899

Commission v. Council, (ERTA), Case 22/70, [1971], ECR-263

Etablissements Consten SA & Grundig-Verkaufs-GmbH v. Commission, [1966], Cases 56 and 58/64, [1966], ECR – 299

Europempballage Corporation & Continental Can Co. Inc. v. Commission, Case 6/72, [1973] ECR – 215

Gencor Ltd v Commission, Case T-102/96, [1999] ECR II-0753

Kramer, Cases 3, 4, and 6/76, [1976], ECR-1279

Metro v. Commission (NoI), Case 26/76, [1977] ECR 1875

Microsoft v. Commission , Case T-201/04, [2007]

Opinion 1/76 on the Draft Agreement Establishing a Laying-up Fund for Inland Waterway Vessels, [1977] ECR-741

Remia and others v. Commission, Case 42/84, [1985] ECR 2545

Schneider Electric SA v Commission of the European Communities, Case T-310, [2002] ECR II-04071

Société Technique Minière (S.T.M.) v Maschinenbau Ulm GmbH (M.B.U.), Case 56/65, [1966] ECR-235

Tetra Laval BV v. Commission of the European Communities, Case T-5/02, [2002] ECR II-04381

Van Gend en Loos v. Nederlandse Administratie Belastingen, Case 26/62, [1963] ECR - 1

Walt Wilhelm and others v Bundeskartellamt, Case 14-6, [1969] ECR-1

B. Commission decisions

Boeing/McDonnell Douglas [1997], O.J. L336/16

BPCL/ICI, [1984] O.J. L 212/1

ENI/Montedison, [1987] O.J. L 5/13

Olivetti/Canon, [1988] O.J. L 52/60

Exxon-Shell, [1994] O.J. L 144/21

GEC-Siemens/Plessey, [1990] O.J. C 239/2

Kali&Salz/MdK/Treuhand, [1994] O.J. L186/38

Mannesmann/Vallourec/Ilva, [1994] O.J. L 192/15

Mercedes Benz/Kassbohrer, [1995] O.J. L211/1

Nestle/Perrier, [1992] O.J. L 356/1

Stichting Baksteen, [1994] O.J. L 131/15

Philips-Osram, [1994] O.J. L 378/37

SEP et autres/Peugeot SA, EC Commission Decision, of 5/10/2005, Cases F-2/36.623/36.820/37.275

Synthetic Fibres, [1984] O.J. L 207/17

US

Empagran S.A. v. Hoffman La Roche LTD. ET AL, Opinion of the Court of Appeals, No 01-7115c (2005)

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

Hoffman La Roche vs. Empagran, SA 124 2359 (2004)

Timberlane Lumber Co. v Bank of America, 549F.2d 597 (9th Cir 1976)

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

United States of America v. Nippon Paper Industries Co. LTD et Al., 109 F.3d (1st Circ. 1997), p.9

United States v. Pilkington plc, 1994-2 Trade Cas. (CCH) ¶70842

WTO

Panel Report, Japan: Measure affecting Consumer Photographic Film and Paper, WT/DS44/R

Panel Report, Mexico: Measures Affecting Telecommunications Services, WT/DS204/R

Other

Darcy vs. Allein (1602) 11 Co. Rep. 84b

Dyer's case, (1414) 2 Hen. 5, 5 Pl. 26

WAEMU Court of Justice, opinion 003/2000/CJ/UEMOA.

International Agreements discussed in the thesis

1. Bilateral enforcement cooperation agreements on competition

US-Germany (1976) Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices.

US-Australia(1982) Agreement between the Government of the United States of America and the Government of Australia relating to Cooperation on Antitrust Matters.

EU-US (1991) Agreement between the Government of The United States of America and the Commission of the European Communities Regarding The Application of Their Competition Laws

US-Canada (1995) Agreement between the Government of Canada and the Government of the United Mexican States regarding the Application of their Competition Laws. (1995)

Australia-Taipei (1996) Cooperation and Coordination arrangement between the Taipei Economic and Cultural Office and the Australian Commerce and Industry Office regarding the Application of Competition and Fair Trading Laws.

N. Zealand- Taipei (1996) Co-operation and Co-ordination arrangement between the Taipei economic and cultural office and the New Zealand Commerce and Industry Office regarding the Application of the Competition and Fair Trading Laws.

EU-US on pos. com. (1998) Agreement between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles on the Enforcement of their Competition Laws.

Australia- Papua New Guinea (1999) Co-operation and Co-ordination Agreement between the Australian Competition and Consumer Commission and Papua New Guinea Consumer Affairs Council.

US/Australia (1999) Agreement between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance

US-Brazil (1999) 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.

US - Israel (1999) Agreement between the Government of the United States of America and the Government of The State of Israel on the Application of their Competition Laws.

US-Japan (1999) Agreement between the Government of the United States of America and the Government of Japan concerning Cooperation on Anticompetitive Activities.

EU-Canada (1999) Agreement between the European Communities and the Government of Canada regarding the application of their competition laws

US-Mexico (2000) 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.

Canada –Chile (2001) Memorandum of Understanding between the Commissioner of Competition (Canada) and the Fiscal Nacional Economico (Chile) Regarding the Application of their Competition Laws.

Canada -Mexico (2001) Agreement between the Government of Canada and the Government of the United Mexican States Regarding the Application of their Competition Laws.

Russia-Brazil (2001) Agreement on cooperation in the sphere of competition policy between the Government of the Federative Republic of Brazil and the Government of the Russian Federation

Australia-Fiji MOU (2002) Memorandum of Understanding between the Commerce Commission of the Fiji Islands and the Australian Competition and Consumer Commission (April 2002)

Australia-Korea (Sept 2002) Cooperation Arrangement between the Australian Competition and Consumer Commission and the Fair Trade Commission of the Republic of Korea regarding the application of their competition and consumer protection laws (September 2002)

Canada-UK (2003) Cooperation arrangement between the Commissioner of Competition (Canada) and her Majesty's Secretary of State for Trade and Industry and the Office of Fair Trading in the United Kingdom regarding the application of their Competition and Consumer Laws. (October 2003)

EU-Japan (2003) Agreement between the Government of Japan and the European Community concerning Cooperation on Anticompetitive Activities.

US-Canada pos. com. (2004) Agreement between the Government of the United States of America and the Government of Canada on the application of positive comity principles to the enforcement of their competition laws.

2. Bilateral trade agreements of the EU

Agreements with (former) candidate countries

BULGARIA: Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part (*OJ L 358 , 31/12/1994 p.3*).

CROATIA: Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part *(OJ L 26, 28/1/2005, p.3)*

ROMANIA: Europe Agreement establishing an association between the European Economic Communities and their Member States, of the one part, and Romania, of the other part (*OJ L 357 , 31/12/1994 p.2*).

TURKEY: Agreement establishing an Association between the European Economic Community and Turkey and the Additional Protocol *(OJ C113, 24/12/1973, p1)*
Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995, on implementing the final phase of the Customs Union (*OJ L35, 13/2/96, p.1*).

Euro-Mediterranean Agreements

ALGERIA: Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part

EGYPT: Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the Arab Republic of Egypt, of the other part

ISRAEL: Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the State of Israel, of the other part *(OJ L147, 21/6/2000, p.3)*

JORDAN: Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part *(OJ L129, 15/2/2002, p.3)*

LEBANON: Interim Agreement on trade and trade-related matters between the European Community, of the one part, and the Republic of Lebanon, of the other part (*OJ L262, 30/9/2002, p.2)*

MOROCCO: Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the Kingdom of Morocco, of the other part *(OJ L70, 18/3/2000 p.2)*

PALESTINIAN AUTHORITY: Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestine Liberation Organization (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the other part (*OJ L 187, 16/07/1997 p.3)*

TUNISIA: Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the Republic of Tunisia, of the other part *(OJ L97, 30/3/1998, p2)*

Agreements with Eastern European and Central Asian Countries

ARMENIA: Partnership and Cooperation Agreement establishing a partnership between the European Community and its Member States, of the one part, and the Republic of Armenia, of the other part *(OJ L239, 9/9/1999 p.3)*

AZERBAIJAN: Partnership and Cooperation Agreement establishing a partnership between the European Community and its Member States, of the one part, and the Republic of Azerbaijan, of the other part *(OJ L 246, 17/9/1999, p.3)*

GEORGIA: Partnership and Cooperation Agreement establishing a partnership between the European Community and its Member States, of the one part, and Georgia, of the other part *(OJ L 205, 4/8/1999, p.3)*

KAZAKHSTAN: Partnership and Cooperation Agreement establishing a partnership between the European Community and its Member States, of the one part, and the Republic of Kazakhstan, of the other part *(OJ L 196, 28/7/1999, p.3)*

KYRGYZSTAN: Partnership and Cooperation Agreement establishing a partnership between the European Community and its Member States, of the one part, and the Kyrgyz Republic, of the other part *(OJ L 196, 28/7/1999, p.48)*

MOLDOVA: Partnership and Cooperation Agreement establishing a partnership between the European Community and its Member States, of the one part, and the Republic of Moldova, of the other part *(OJ L 181, 24/6/1998, p.3)*

RUSSIA: Agreement on Partnership and Cooperation establishing a partnership between the European Community and its Member States, of the one part, and the Russian Federation, of the other part *(OJ L 327, 28/11/1997, p.3)*

UKRAINE: Partnership and Cooperation Agreement establishing a partnership between the European Community and its Member States, of the one part, and the Ukraine, of the other part *(OJ L 49, 19/2/1998, p.3).*

UZBEKISTAN: Partnership and Cooperation Agreement establishing a partnership between the European Community and its Member States, of the one part, and the Republic of Uzbekistan, of the other part *(OJ L 229, 31/8/1999, p.3).*

Agreements with Mexico, Chile and South Africa

MEXICO: Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part *(OJ L276, 28/10/2000, p.45)*
Decision No 2/2000 of the EC-Mexico Joint Council of 23 March 2000 *(OJ L 157, 30/6/2000, p.10).*

CHILE: Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part - Final act *(OJ L 352, 30/12/2002, p.3)*

SOUTH AFRICA: Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part (*OJ L 311, 4/12/1999, p.3).*

3. Plurilateral-Regional Agreements (founding Treaties)

Andean Community: Andean Subregional Integration Agreement "CARTAGENA AGREEMENT" <http://www.comunidadandina.org/INGLES/normativa/ande_trie1.htm> (last visited on 21 May 2007)

MERCOSUR: Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, <http://www.sice.oas.org/trade/mrcsr/mrcsrtoc.asp> (last visited on 21 May 2007)

NAFTA: North American Free Trade Agreement, 8 December 1992, Canada-Mexico-United States, 32 I.L.M. 289

CAFTA – DR: The Dominican Republic – Central America – United States Free Trade Agreement, Signed in August 5, 2004, <http://www.ustr.gov/Trade_Agreements/Regional/ CAFTA/CAFTA-DR_Final_Texts/Section_ Index.html> (last visited on 21 May 2007)

CARICOM: Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy, < http://www.caricomlaw.org/docs/ revisedtreaty.pdf> (last visited on 21 May 2007)

EAC: EAC Treaty, <http://www.eac.int/documents/EAC%20Treaty.pdf>, (last visited on 21 may 2007)

COMESA: COMESA Treaty, <http://www.comesa.int/comesa%20treaty/comesa%20treaty/ Multi-language_ content.2005-07-01.3414/en> (last visited on 21 May 2007)

SACU: Southern African Customs Union (SACU) Agreement, <http://www.sacu.int/ResourceCentre/Legislation/2002SACUAgreement/tabid/370/Default.aspx> (last visited on 21 May 2007)

SADC: Amended Declaration and Treaty Establishing the Southern Africa Development Community. Done and entered into force on August 14, 2001 in Blantyre, Malawi, <http://www.sadc.int/english/documents/legal/treaties/amended_declaration_and_treaty_of_sadc.php> (last visited on 21 May 2007)

WAEMU: Traite de l'Union Economique et Monetaire Ouest Africaine (UEMOA) < http://www.uemoa.int/actes/traite/TraiteUEMOA.pdf> (last visited : 21 May 2007)

Databases

World Bank, Country Classification <http://web.worldbank.org/WBSITE/ EXTERNAL/DATASTATISTICS/0,,contentMDK:20420458~menuPK:64133156~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html>

UNCTAD database on FDI, <http://stats.unctad.org/FDI/TableViewer/tableView. aspx>

University of Halle, 'Competition Policy Foundations for Trade Reform, Regulatory Reform, and Sustainable Development' <http://www.iwh-halle.de/projects/competition_policy/db/ index.asp>