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## The Future of Global Competition Governance: Lessons From the Transatlantic

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# THE FUTURE OF GLOBAL COMPETITION GOVERNANCE: LESSONS FROM THE TRANSATLANTIC

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## INTRODUCTION

It is the maxim of every prudent master of a family, never to attempt to make at home what it will cost him more to make than to buy. . . What is prudence in the conduct of every private family, can scarce be folly in that of a great kingdom. If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry, employed in a way in which we have some advantage.<sup>1</sup>

The comparative advantage of nations described by Adam Smith in 1784 profoundly influenced the liberal philosophy of trade and regulation that would follow in the course of the next two centuries. His economic rationale justifying domestic production and import consumption heralded the institution of trade agreements maximizing resource allocation and efficiency.<sup>2</sup> As a famous example of Smith's goes, claret and burgundy can be produced in Scotland at thirty times the expense they can be produced in another state and imported for consumption.<sup>3</sup> While affording opportunities for business entrepreneurs through the utilization of materials and processes natural to a given territory, the comparative advantage principal also afforded states an effective means for regulating domestic economies. Production that remained bound to state jurisdictions with imports and exports coming into and leaving the territory of the

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1. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 456-57 (R.H. Campbell et al. eds., 1976).

2. See, e.g., *id.* at 547 (explaining the economic efficiencies that England realized by virtue of importing Portuguese wine).

3. See, e.g., *id.* (highlighting the economic advantages England realized when it exported the surplus tobacco it received from the colonies).

state allowed for efficient, unilateral legal and economic policies to dominate the domestic market.

Globalization and the rise of business enterprises engaged in transnational business transactions present a serious challenge to the tenants of Smith's theory on comparative advantage of nations.<sup>4</sup> Technological developments in communications and transportation coupled with the spread of free trade agreements have, in many respects, removed the location bound character and necessity of commercial activities.<sup>5</sup> Structural changes in businesses themselves through business mergers and acquisitions and the reallocation of management and production facilities in multiple jurisdictions have led to the development of truly multinational enterprises, an entity whose activities have far reaching effects beyond the locations in which it conducts business. The comparative advantage of nations is slowly being dispersed by the competitive advantage of enterprises: advantages unique to firms based on the enterprise itself, not territory.

The state itself, however, remains intrinsically bound to the concept of territoriality. Herein lays the predicament of states and domestic regulation in the confines of a globalized world. Globalization has brought about significant changes in the way states may administer their own domestic policies and regulate their own domestic markets through the development of a global marketplace.<sup>6</sup> The rise of transnational business enterprises engaging in commercial activities in numerous jurisdictions allow for the possibility of actions in one state to have market distorting effects in

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4. See Final Report of the International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust, 33 (2000) [hereinafter ICPAC Report] (noting that an increasing number of nations have opened their borders based on the rationale that competition from abroad spurs innovation and economic efficiencies), <http://www.usdoj.gov/atr/icpac/finalreport.htm> (last visited Feb. 20, 2004).

5. See *id.* at 47 (reporting that in 2000 the U.S. Federal Trade Commission estimated that approximately fifty percent of the transaction it reviewed affected foreign consumers).

6. See *id.* at 33 (explaining that, whereas a century ago only the United States had domestic antitrust laws, by 2000 approximately sixty percent of world's countries had such laws).

another state, subjugating the regulatory policies of the aggrieved state to that of others.<sup>7</sup>

States have responded to the demands inherent to globalization and the global marketplace through various means aimed at limiting adverse affects on domestic regulatory goals. The response of competition regulators presents a fascinating example of a once purely domestic policy responding to globalization through international regulatory means.<sup>8</sup> In an effort to examine this phenomenon, this thesis analyses developments in bilateral cooperation efforts between the United States and European Community on competition law as a paradigm for future state responses to the general strains globalization places on domestic market regulation.<sup>9</sup>

The first section of the Article analyses the area of competition law as an example of a domestic policy that demands a transnational response in order to provide for effective regulation.<sup>10</sup> Specifically, it sets out the organizational changes of transnational business entities that lead to the necessity of extraterritorial measures by states.<sup>11</sup> This section also discusses the domestic competition laws of the United States and European Community alongside the development of bilateral efforts between the two to effectively regulate transnational issues of competition law.<sup>12</sup> Section II

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7. See *id.* at 36 (recognizing that “law is national, but markets can extend beyond national boundaries”).

8. See *id.* 36-37 (highlighting the fact that sound competition policy is a central consideration of the World Trade Organization, the Organization for Economic Cooperation and Development, and numerous other bilateral and multilateral treaties).

9. See discussion *infra* Part III.A (examining the nature of the bilateral cooperation efforts, and favoring gradual convergence of competition laws through such cooperation).

10. See discussion *infra* Part I.B (discussing the domestic framework of the United States and the European Community’s competition regulation).

11. See discussion *infra* Part I.A.1 (noting that changes from globalization such as the decline of trade barriers create new markets, and firms have strong incentives to institute organizational changes in order to participate in the new markets).

12. See discussion *infra* Part I.B (discussing U.S. and E.C. competition policy in the global market as well as agreements such as the 1991 Agreement).

discusses the differences in U.S. and E.C. competition law policies. It sets forth an economic model that describes difficulties and inefficiencies inherent in unilateral attempts at regulating competition law, and applies this model to show the difficulties in bilateral and multilateral competition law harmonization.<sup>13</sup> This Section also includes a description of extraterritorial enforcement of competition law by the United States and European Community to supplement the shortcomings of bilateral cooperation and difficulties in harmonization.<sup>14</sup> Section III concludes with the case for continued and enhanced bilateral competition law cooperation. It endorses maintaining the use of extraterritoriality as a means for soft harmonization and competition law convergence.<sup>15</sup> Future transnational responses to the demands of globalization should follow the U.S. – E.C. approach towards bilateral cooperation, supplemented with extraterritorial competition law enforcement. Such an approach is the most effective and realistic option to maintaining domestic competition policies in the global marketplace.<sup>16</sup>

## I. COMPETITION LAW IN THE CONTEMPORARY ERA OF GLOBALIZATION

### A. COMPETITION POLICY IN A GLOBAL MARKET

Many areas that compose the global marketplace reflect the growing interdependence of states and national economies discussed in the first section of this thesis. Competition law presents an interesting example, especially in relation to its evolution from a

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13. See discussion *infra* Part II.A-C (explaining the differences in U.S. and E.C. competition policy and the different approach each embraces in relation to such policies).

14. See discussion *infra* Part II.D (highlighting the extraterritorial application of U.S. and E.C. law through cases through various decisions).

15. See *infra* Part III (laying out the author's thesis in favor of increased cooperation and arguing against the feasibility or the desirability of rapid harmonization).

16. See *id.* (noting the efficiencies resulting from the bilateral cooperation and arguing that such cooperation has led to gradual procedural and substantive convergence).

purely domestic policy to one requiring international cooperation and/or extraterritorial enforcement of state law beyond national boundaries.<sup>17</sup> Changing organizational structures and contemporary corporate activity, from foreign investment to intra-firm alliances and mergers and acquisitions, compose a foundational characteristic of globalization. Such changes require states to readdress regulatory policies and market control mechanisms, which are diminished by the evolution of the world market from domestic to global.<sup>18</sup> The globalization of competition law highlights the erosion of individual state sovereignty and the emerging power of intra-state cooperation efforts.<sup>19</sup> It also demonstrates how states may assert their own policies through cooperative efforts within the global market without total or complete regulatory harmonization or convergence.<sup>20</sup> Specifically, this section will analyze the changing landscape of the global marketplace, noting the organizational changes and the mechanisms introduced by the U.S – E.C. transatlantic partnership as a model for further international competition law cooperation.

### *1. Organizational Changes from Globalization Affecting Competition Policy*

The decline of trade barriers and restrictions on foreign investment, developments in communication technology, ongoing deregulation, and the spread of government friendly policies towards the market have inevitably led to significant developments in corporate strategies. In particular, cross-border mergers of an unprecedented scale, the global fragmentation of stages of

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17. See ICPAC Report, *supra* note 4, at 33 (observing that national economies have evolved into global ones).

18. See *id.* at 44 (noting that international trade and investment barriers have been reduced to such an extent that it is now more efficient for firms to simply buy firms in other countries than to compete from their home states).

19. See *id.* at 37 (noting that the subject of competition rules has been under intensive consideration at the WTO and other international arenas).

20. See *id.* at 36 (“Formal and informal bilateral arrangements have helped to introduce, deepen, and regularize the structure of enforcement cooperation that now occurs, while the contents of the agreements have gone through several generations.”).

production, and the spread of network-based industries require states to substantially alter the way they enforce competition law.<sup>21</sup>

Firms possess many motivations for organizational change and restructuring, fundamental among which is the drive for profit maximization.<sup>22</sup> Globalization and the opening and developing of new markets, global and domestic, have significant implications on operational costs, most notably in the past two decades from improvements in transportation and communication technology and the globalization of the marketplace. As economist Ronald Coase explains in his famous theorem, firms seek to minimize the costs of all of operations, the internal and external transactions encompassing the whole of the firm's activity.<sup>23</sup> These costs are both influenced by whether the transaction is performed within the firm or by another party outside of the firm in the open market, the relative costs of which will likely determine which option the firm chooses.<sup>24</sup> External developments in the market and the broader economy implicate changes on these costs, requiring re-evaluation by the firm in deciding whether to change such transactions from internal to external, or vice versa.<sup>25</sup> Organizational structural change is the result. The role of globalization and the development of the world

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21. *See id.* (reporting that in 2000 a merger wave encompassed nearly every industry, including financial services, telecommunications, and defense and that this phenomenon increased the number of antitrust merger reviews).

22. *See* R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 390-95 (1937) (examining various aspects in the nature of firms and analyzing why a firm emerges at all in a specialized exchange economy"), available at <http://www.jstor.org/view/00130427/di009864/00p00034/0?config=jstor&frame=noframe&userID=9309bd3b@american.edu/018dd5533b0050115eb08&dpi=3> (last visited Mar. 11, 2004).

23. *See id.* at 387 (explaining that, for the most part, the price mechanism governs most firm activities). *See generally* MICHAEL C. JENSEN, *THE THEORY OF THE FIRM: GOVERNANCE, RESIDUAL CLAIMS, AND ORGANIZATIONAL FORMS* 83-135 (2000) (expanding on the theory of the firm by examining its implications for social responsibility, separation of ownership and control, and corporate objectives).

24. *See* Coase, *supra* note 22, at 395 (explaining that firms will expand and produce their own goods until the marginal costs of producing these goods outweighs the costs of buying the goods on the open market).

25. *See id.* at 404 (predicting that in order to determine the proper course of action, business people will constantly be experimenting as to whether to purchase another unit in the market or produce it themselves).

marketplace have led to an increase in options for the firms beyond that which Coase originally contemplated. However, the soundness of this theorem remains intact for the purposes of describing the motivations for contemporary firm organizational change and the desire of such firms to minimize transaction costs to as near zero as possible.<sup>26</sup>

The global merger wave of the 1990s and the scale of cross-border mergers and acquisitions demonstrate such firm behavior significantly affecting state competition regulators, especially in the transatlantic arena.<sup>27</sup> The worldwide total of mergers and acquisitions rose from \$199 billion in 1995 to \$498 billion in 1999, of which eighty percent involved American and European firms.<sup>28</sup> While acquiring or merging with a local partner in order to gain access to certain markets has remained an important business strategy since the introduction of the Bretton-Woods/GATT system at the end of the Second World War, “[t]he attractiveness of this mode of entry has been further strengthened by the ongoing liberalization of foreign investment regimes and, in some nations, a more relaxed attitude toward foreign takeovers of domestic firms.”<sup>29</sup> In fact, diminished tariff and nontariff barriers have not, as one might expect, reduced the allure of such market entry; high fixed costs remain associated with constructing distribution chains along with other considerations, such as the reputation value of certain firms already established in a particular market.<sup>30</sup> Deregulation and privatization, especially in Europe, have also stimulated the rise in merger and acquisition activity. For example, the opening of many public utilities sectors such as electricity, water, gas, and

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26. See *id.* at 405 (stating that dynamic changes external to the firm will dictate the firms internal organization and future growth).

27. See ICPAC Report, *supra* note 4, 43-46 (highlighting the merger wave that extended into the year 2000).

28. See Simon J. Evenett et al., *Antitrust Policy in an Evolving Global Marketplace*, in *ANTITRUST GOES GLOBAL: WHAT FUTURE FOR TRANSATLANTIC COOPERATION?* 1, 4 (Simon J. Evenett et al. eds. 2001) (providing statistics on cross-border mergers and acquisitions from 1995-1999).

29. *Id.* at 4.

30. See *id.* at 4 (noting that even in those sectors in which the establishment of distribution networks and brand recognition are relatively costly, cross-border mergers are still the most attractive alternative).

telecommunications to competition have led to a surge in cross-border transactions, placing the utilities industry among the top ten in value of sales of total merger and acquisitions between 1995-99.<sup>31</sup>

The changing landscape of the global marketplace though international mergers and acquisitions has raised many problems for domestic competition authorities. The impact of such transnational corporate alliances inevitably carries both positive and negative externalities, often benefiting certain domestic economies to the detriment of others and the marketplace itself.<sup>32</sup> These negative externalities may arise in numerous circumstances, including the creation of dominant firms with controlling market shares capable of engaging in monopolistic practices, distortions of market prices for products or services resulting from favorable policies beyond the territory of an affected domestic market, and even restrictions on future competition through resulting restrictions on new product development.<sup>33</sup> These and other implications from the activities of global enterprises raise important questions as to the extent to which import competition can control the market power of the entities resulting from mergers and acquisitions. They also raise questions as to the proper competition law response to cross-border efficiencies that lower the cost of supplying foreign markets to the exclusion of the domestic market.<sup>34</sup> Competition law, particularly the enforcement of competition law, has responded through increased

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31. See *id.* at 5 (explaining the significance of deregulation to the precipitous rise in merger activity).

32. See *id.* (arguing that mergers that have anticompetitive effects on domestic markets will have the same effects on the international market). For example, numerous European antitrust regulators expressed concerns that the Federal-Mogul and T&N merger would negatively effect both their domestic markets and the worldwide market for automobile parts. *Id.*

33. See, e.g., *id.* (highlighting international regulators' concerns regarding a reduction in future competition resulting from slowed technological development).

34. See Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1, 12 (1997) (noting that the harm that offshore conduct inflicted on another nation's domestic competition was one reason that led to the need for the effects doctrine). The author also highlights the divergent approaches taken by U.S. and European antitrust regulators. *Id.* U.S. regulators focus on transactions that artificially lower output and/or prices. *Id.* European regulators focus on the broader concept of market abuses and the health of small to mid-sized businesses. *Id.*

review by multiple jurisdiction authorities, as well as the institution of competition policies in states formerly without such control mechanisms.<sup>35</sup> While one can view these responses as broadly positive, more regulatory regimes mean more jurisdictions reviewing mergers, more extraterritorial assertions of domestic law, and more enforcement efforts in need of coordination.<sup>36</sup>

In addition to the increase in merger and acquisition activity, evolving attitudes on corporate production strategies present new problems for state competition authorities. Specifically, the fragmentation of multi-step production across national boundaries (i.e. Part 1 is built in State *A* and shipped to State *B* to be combined with Part 2) has replaced traditional notions of single-state production, which was once optimal before globalization developments arose.<sup>37</sup> Such cross-border production strategies have led to a massive increase in the total value of imported components embodied in exports, which now accounts for approximately thirty percent of world trade.<sup>38</sup> The liberalization of foreign investment regimes and reductions in intermediate product tariffs play significant roles in the rise of cross-border production and vertical

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35. See ICPAC Report, *supra* note 4, at 33 (noting that by 2000, approximately sixty states had adopted antitrust laws, mostly in the early 1990s, and that twenty more states were in the process of drafting laws); see also Fox, *supra* note 34, 12-13 (highlighting the approaches to antitrust regulation taken by various industrialized countries); Eleanor M. Fox, *Competition Law: Linking the World, in TRANSATLANTIC REGULATORY COOPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS* 243, 244-45 (George A. Bermann et al. eds., 2001) (explaining early international antitrust issues, stating that economic problems are increasingly transnational, and that nations are increasingly adopting competition laws).

36. See Diane P. Wood, *United States Antitrust Law in the Global Market: Implications for Domestic Law Reform*, 1 *IND. J. GLOBAL LEGAL STUD.* 409, 427-28 (1994) (noting that transactions that might have formerly been reviewed by one country's regulators are now being reviewed by two or three countries).

37. See Lan Cao, *Corporate and Product Identity in the Postnational Economy: Rethinking U.S. Trade Laws*, 90 *CAL. L. REV.* 401, 431-32 (2002) (stating that transnational imports of components are termed "world-wide sourcing" and commenting on the globalization of production).

38. World Trade Organization Economic Research and Statistics Division, *Fragmented Production: Regionalization of Trade?*, at 31 (Staff Working Paper ERSD-2003-01, Aug. 2003) (noting that vertical fragmentation accounts for thirty percent of world trade, but noting that large differences exist between countries and industries to the relative perception of vertical fragmentation), [www.wto.org/English/res\\_e/reser\\_e/ersd200301\\_e.doc](http://www.wto.org/English/res_e/reser_e/ersd200301_e.doc) (last visited Feb. 22, 2004)

disintegration of firms, while complicating traditional antitrust analysis.<sup>39</sup> In addition, the spread of network-based industries raise new questions for competition authorities, particularly whether monopoly power in one product market can be used to leverage power in another product market.<sup>40</sup> It also raises the question of how one should view the fast pass-entry and development of new products in light of likely short-term obsolescence (e.g., computer chips likely to be surpassed quickly in technical capabilities although market power is maintained for a short amount of time).<sup>41</sup>

Further problems arise for competition authorities through new organizational forms taken by global firms. While mergers and acquisitions present perhaps the most visible example of organizational change, other forms such as the joint venture and partial equity stake represent additional means by which global firms are using globalization to increase production efficiency and reduce transaction costs.<sup>42</sup> The joint venture allows two or more separate firms to combine complementary skills or assets for an intended purpose or project.<sup>43</sup> Joint ventures offer the benefits of a merger or acquisition without the full costs associated with such an endeavor, the spreading of development costs often associated with certain undertakings (such as scientific, technical, or other research), and

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39. See Cao, *supra* note 37, at 429 (arguing that the internationalization of corporate activities has changed the dynamic between national regulators and international firms).

40. See, e.g., Fox, *supra* note 34, at 7 (citing the example of British Telecommunications, which used its dominant status in the U.K. market to affect the overall European market for international calling).

41. See Peter Swan, *A Road Map to Understanding Export Controls: National Security in a Changing Global Environment*, 30 AM. BUS. L. J. 607, 610 (2002) (noting that “high-tech” items, such as computer chips with high obsolescence rates should be subject to more revision of controls).

42. See generally SPENCER WEBER WALLER & JEFFREY L. KESSLER, INTERNATIONAL TRADE AND U.S. ANTITRUST LAW 8-21 (2003) (highlighting the special interest that U.S. regulators take in joint ventures with the potential for market disruption).

43. See President’s Council of Economic Advisers, *Economic Organization and Competition Policy*, 2002 Economic Report of the President *reprinted in* 19 YALE J. ON REG. 541, 553 (2002) [hereinafter PCEA Report] (explaining that a joint venture involves two or more separate firms that make substantial contributions to a joint enterprise).

cost savings through the use of services and assets of the participants in the venture.<sup>44</sup> Such enterprises carry their own problems for competition regulators, including problems inherent in horizontal competitors cooperating in a joint venture that leads to a reduction in their ability or incentive to compete independently, the potential for collusion and conspiracy for price fixing, and engaging in other anticompetitive behavior.<sup>45</sup>

In addition to joint ventures, partial equity stakes present additional concerns for competition authorities. A partial equity stake refers to a partial acquisition by one firm of another where the acquiring firm remains legally independent, as opposed to a full merger or complete acquisition where one hundred percent of the shares in one of the corporations are taken, or when two firms exchange all of their shares for those of the new, successor corporation.<sup>46</sup> The acquisition of partial equity stakes is a method that firms increasingly utilize.<sup>47</sup> These acquisitions prompt several competition law concerns, including the effects partial ownership imply on “control” and “ownership” in the decision making process of the partially acquired firm and the potential for alterations in

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44. *See id.* 553-54 (pointing to the economic efficiencies created by joint ventures).

45. *See id.* (arguing that joint ventures may create an environment wherein sensitive price and product information are exchanged between market competitors). *See generally* ALBERTINA ALBORS-LLORENS, EC COMPETITION LAW AND POLICY (2002) (analyzing the European commission’s framework for dealing with anticompetitive practices); SIMON BISHOP & MIKE WALKER, ECONOMICS OF E.C. COMPETITION LAW: CONCEPTS, APPLICATION AND MEASUREMENT (1999) (looking at how E.C. regulation addresses the economic impact of predatory pricing); WEBER WALLER, *supra* note 42 (overviewing the U.S. approach to anticompetitive practices).

46. *See* PCEA Report, *supra* note 43, at 554 (defining the nature of partial equity stakes, and stating that such partial acquisitions are a form of corporate governance that poses concerns about one party’s “control” or ownership” over another party).

47. *See id.* 554-55 (reporting that in the year 2000, twenty-three percent of transactions reported to U.S. regulators involved the purchase of less than fifty percent equity stakes)

production and pricing decisions (especially if the two entities are direct competitors).<sup>48</sup>

## 2. Competition Law Problems in an Integrated Global Market

The impact of these and other organizational changes, as well as new corporate strategies facilitated by globalization, imply significant changes for antitrust analysis and state regulation of competition. Defining the relevant market presents the core aspect of contemporary antitrust analysis.<sup>49</sup> The implications of such a determination range from effects on consumers to competitors, which essentially becomes more complicated as the range of such groups spread across the purview of multiple jurisdictions and regulatory regimes.<sup>50</sup>

In theory, antitrust enforcement and trade liberalization should logically promote competition. The economic motivations behind the United States' Sherman Antitrust Act in 1890, for example, demonstrate the necessity of antitrust enforcement in a market heavily protected from outside intervention through tariffs.<sup>51</sup> Inversely, increased foreign competition should substitute for antitrust activism and domestic competition enforcement as a means for controlling prices, while increased trade liberalization should serve to reduce the scope of antitrust intervention and antitrust conflict between national regulatory authorities.<sup>52</sup>

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48. *See id.* (pointing out that the investing firm can exercise substantial control over the target firm, even if the shares of the target firm are widely dispersed among many firms).

49. *See* ANDREW I GAVIL ET AL., *ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY* 473-74 (2002) (explaining that market definition performs a key role in antitrust analysis in that it facilitates predictions as to whether a particular combination of firms will disrupt a particular market).

50. *See id.* at 474 (highlighting the various factors that regulators must take into consideration, including the geographic reach of a particular product).

51. *See id.* 60-60 (illuminating the ideological origins underpinning the Sherman Antitrust Act).

52. *See* Fox, *supra* note 34, at 9-11 (explaining that this belief in trade liberalism as a vehicle for driving down consumer prices was the rationale underlying the U.S. Department of Justice's overhaul of international antitrust policy in the 1980s). The basic idea was that less government intervention would

However, transnational trade has not eliminated the need for cross-border competition cooperation, but rather enhanced such a need.<sup>53</sup> This is primarily the result of remaining domestic market power not eliminated by trade liberalization and the fact that antitrust conflict has actually become more likely as trade increases.<sup>54</sup> While economic theories often rely exclusively on participants behaving rationally, competition law represents an area where rational decisions often are displaced with those based on political assessments.<sup>55</sup> Antitrust has always been, and remains to be, heavily political and thus subject to the interests and pressures borne by the political officials charged with formulating and enforcing competition policy.<sup>56</sup> The prevalence of domestic interests and lobbying power in initiating antitrust enforcement is especially evident in situations where such firms are subject to foreign

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open markets and drive down prices and that, as a result, international antitrust enforcement would only focus on those transactions that negatively effected prices or output. *Id.*

53. *See id.* (noting that the U.S. policy of trade liberalization only targeted public sector barriers to free trade; many of the trade barriers faced by U.S. firms were the work of private competitors).

54. *See* Wood, *supra* note 36, at 427 (estimating that approximately one-third of mandatory merger notifications of U.S. regulators involved foreign firms).

55. *See, e.g.,* United States v. General Electric Co., 869 F. Supp. 1285 (S.D. Ohio 1994) (involving a price fixing case brought by the U.S. government against General Electric ("GE") and DeBeers, a South African diamond importer). This case provides a premier example of the difficulties in unilaterally enforcing competition laws on foreign corporations against the desire of the home state. The Justice Department indicted GE, a European subsidiary of DeBeers, and two foreign nationals for a price-fixing conspiracy of industrial diamonds. *Id.* at 1288-90. However, despite some advantages and the likelihood of successful prosecution, the government's case fell apart when neither the DeBeers subsidiary nor the foreign individuals appeared in court. *Id.* at 1301-03. In the end, complications arising from service or process, personal jurisdiction, discovery, witness availability, and lack of cooperation from home states uninterested in having their nationals prosecuted defeated the U.S.'s attempt at prosecution. *Id.*

56. *See, e.g.,* Wood, *supra* note 36, at 425-27 (highlighting the network of antitrust exemptions that exist in the United States as a result of domestic pressure to protect certain industries).

competition, and as a result, where competition enforcement is most likely to target the foreign firm over the domestic firm.<sup>57</sup>

In order to implement effective state regulation in the global market, inter-state cooperation on antitrust analysis and enforcement should replace purely domestic competition regulation.<sup>58</sup> This analysis now turns to the premier example of antitrust cooperation between foreign states, specifically that of U.S. – E.C. competition law cooperation.<sup>59</sup>

### B. U.S. – E.C. COMPETITION LAW COOPERATION

The transatlantic arena stands at the epicenter for corporate development and activities in the global market. The overwhelming share of merger and acquisition activities and the centralization of ownership, corporate command, and control centers within the United States and Europe present the transatlantic partnership with increasing capacities to regulate and shape the global market.<sup>60</sup> This also allows the partnership to influence the rest of the world with its own policies and ideas for its functioning. The United States and European Community continually share overlapping authority over

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57. See, e.g., Fox, *supra* note 34, at 1 (restating the U.S. contention that, in the late 1990s, embedded Japanese interests blocked U.S. access to the Japanese marketplace).

58. See *id.* at 3 (arguing that firms “engaged in offshore conduct” may purposefully attempt to harm domestic competition in a particular nation and that the law in the place of the conduct may not effectively address the harm).

59. See ICPAC Report, *supra* note 4, at 36 (noting that in 2000, the United States was a party to bilateral antitrust arrangements with seven other countries). It is important to note that the bulk of antitrust cooperation has come through bilateral arrangements. *Id.* The U.S. – E.C. partnership represents one of the most developed relationships, although varying types of similar bilateral agreements exist between the United States and Canada, the United States and Australia, the European Community and Canada, the European Community and Japan, and Australia and New Zealand. *Id.*; See, e.g., Agreement Between the Government of Australia and the Government of the United States of America Relating to Cooperation on Antitrust Matters, June 29, 1982, U.S.-Austl., 1982 Austl. T.S. no. 13, <http://www.austlii.edu.au/au/other/dfat/treaties/1982/13.html> (last visited Feb. 7, 2004); U.S./Canada Agreement Regarding Application of their Competition and Deceptive Marketing Practices Laws, Aug. 1, 1995, U.S.-Can., 35 I.L.M. 309.

60. See ICPAC Report, *supra* note 4, at 45 (reporting that in 1999, the United States and the European Community announced a combined \$2.9 trillion worth of mergers).

transnational companies seeking to implement the organizational changes discussed in the preceding section.<sup>61</sup> The following section will analyze the domestic frameworks of the United States and European Community for competition regulation and the current structures in place for bilateral competition in the transatlantic arena.

### *1. Domestic Framework*

#### a. European Community

European Community competition laws apply to all sectors of the common market.<sup>62</sup> Articles 81 and 82 (formerly 85 and 86 respectively) of the European Community Treaty provide the core basis of E.C. competition rules.<sup>63</sup> In general, these articles proscribe specific anticompetitive agreements, practices, and actions by “undertakings” as incompatible with the common market.<sup>64</sup> While originally applying exclusively to undertakings established within the jurisdiction of the European Community, the *Wood Pulp Cartel* decision by the European Court of Justice (“ECJ”) extended the reach of Article 81 to include practices initiated in non-E.C. states implemented within the European Community with effects prohibited by Article 81.<sup>65</sup>

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61. See *id.* at 51 (noting that the United States and the European Community have a high level of convergence between their antitrust regime due to their high level of interaction and cooperation).

62. See Consolidated Version of the Treaty Establishing the European Community, Dec. 24, 2002, art. 81, O.J. 2002 C 325/1 [hereinafter E.C. TREATY] (applying E.C. competition law to “all agreements . . . which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market”).

63. See ALBERTINA ALBORS-LLORENS, *supra* note 45, at preface (characterizing Articles 81 and 82 as the two “core competition provisions” in the Treaty Establishing the European Community).

64. See, EC TREATY, *supra* note 62, art. 81 (prohibiting “all agreements between undertakings, decisions by associations of undertaking and concerted practices” that the article defines as incompatible with the common market).

65. See Case 89/95, *Ahlstrom v. Commission*, [1988] E.C.R. 5193, [1988] 4 C.M.L.R. 901, 901 (1988) (holding that Article 85 of the E.C. Treaty, now Article 81, applied to the conduct of U.S. and Canadian wood pulp manufacturers because those manufacturers sold directly to customers in the European Community and

Article 81(1) generally prohibits concerted market behavior “which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.”<sup>66</sup> Specifically, Article 81(1) enumerates specific market activities of “particular” concern, namely price fixing, limitations on production, market-sharing, discrimination among parties, and tie-ins.<sup>67</sup> Of noteworthy importance is Article 81’s exclusive application to joint conduct, essentially requiring two or more parties acting in collusion as opposed to the conduct of a single actor, much like Section 1 of the Sherman Act in the United States.<sup>68</sup> Any such agreements prohibited under the first subsection are deemed automatically void under Article 81(2), unless the agreement meets certain conditions under the exemption clause of Article 81(3), which remains the exclusive decision of the European Commission (the “Commission”).<sup>69</sup>

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engaged in price competition in the common market). This decision is commonly referred to as the *Wood Pulp Cartel*.

66. E.C. TREATY, *supra* note 62, art. 81(1).

67. *See id.* (enumerating activities that may fall within the scope of Article 81). Such activities include undertakings that

directly or indirectly fix purchase or selling prices or any other trading conditions; limit or control production, markets, technical development, or investment; share markets or sources of supply; apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

*Id.*

68. *Compare* EC TREATY, *supra* note 62, art. 81(1) (addressing “agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade”), *with* Sherman Act, 15 U.S.C. § 1 (2000) (implicating “[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States”).

69. *See* E.C. TREATY, *supra* note 62, art. 81(2)-(3) (prohibiting the abuse “by one or more undertakings of a dominant position” within the common market” and outlining the Council and the Commission’s role). This exclusive decision-making power of the Commission will change under Council Regulation 1/2003, which goes into effect in May 2004, allowing the competition authorities and courts of the Member States to make this determination as well. *See* Regulation 1/2003, *infra* note 313, art 45.

Filling the gap left by Article 81's application to joint conduct, Article 82 prohibits the abuse of the dominant position within the common market.<sup>70</sup> As such, "[a]ny abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited," followed by four examples constituting abuse.<sup>71</sup> These examples substantially resemble those proscribed in Article 81(1), although significant differences remain between these two articles.<sup>72</sup> First, a single firm may violate Article 82 acting on its own as the joint conduct or collusion requirement of Article 81 is not present.<sup>73</sup> Also, Article 82 does not contain any exemptions, though both provisions afford national courts the opportunity to request a non-legally binding ruling from the Commission based on information provided by the firm as to whether the Commission would prosecute such activities under either Article 81 or 82.<sup>74</sup> Of notable significance is the fact that Article 82 does not prohibit the acquisition or attainment of the dominant position, only the abuse of such a position, which is a similar aim of Section 2 of the Sherman Act.<sup>75</sup>

While E.C. competition laws cover all sectors of the common market, these rules operate in conjunction with the individual competition regimes of the Member States. Articles 81 and 82 establish direct rights that the courts of the Member States must protect, and which such courts may apply if the Commission has initiated proceedings and the national law of the state authorizes such

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70. See E.C. TREATY, *supra* note 62, art. 82 (prohibiting any abuse by one or more undertakings of a dominant position and outlining what activities may consist of such abuse).

71. See *id.* (providing examples of abuse such as price fixing and limiting production).

72. See *id.* (using identical language as Article 81(1)(a)).

73. See ALBORS-LLORENS, *supra* note 45, 18-19 (noting that the basic distinction between Article 81 and 82 is that Article 81 applies to concerted action, whereas Article 82 applies to unilateral behavior).

74. See CAMERON MARKBY HEWITT, BUSINESS GUIDE TO COMPETITION LAW: THE ESSENTIAL FACTS 88 (1995) (explaining that member states can seek non-binding guidance from the ECJ on the application of Articles 81 and 82).

75. Compare EC TREATY, *supra* note 62, art. 82 (addressing "[a]ny abuse by one or more undertakings of a dominant position"), with Sherman Act, 15 U.S.C. § 2 (2000) (implicating "[e]very person who shall monopolize . . . with any other person or persons . . . any part of trade or commerce among the several States").

application.<sup>76</sup> Also, pending cases before the European courts do not preclude actions in the Member States based on state competition law.<sup>77</sup>

The Commission plays the leading role in competition law enforcement in the European Community.<sup>78</sup> Council Regulation 17, as amended, prescribes the powers and procedures that the Commission may utilize in such enforcement, which includes the institution of legal proceedings to determine the existence of Article, 81 and 82 violations.<sup>79</sup> The Commission may proceed with investigations and rulings on its own initiative, or based upon an application by a Member State or “natural or legal persons who claim a legitimate interest.”<sup>80</sup> If the Commission finds an infringement, it may “require the undertakings or associations of

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76. See STEPHEN WEATHERHILL & PAUL BEAUMONT, EU LAW 883-84 (1999) (explaining that the E.C. competition policy is enforced at the national and community levels).

77. See *id.* 920-21 (noting that Member State courts may apply their own laws to particular transactions).

78. See MICHELLE CINI, THE EUROPEAN COMMISSION: LEADERSHIP, ORGANISATION, AND CULTURE IN THE EU ADMINISTRATION 14-15 (1996) (describing the various roles the Commission plays, including initiator of legislation, administrator, guardian of legal framework, representative of Member States, and conscience voice of European Union).

79. See Council Regulation 17/62, 1962 J.O. (204), *amended by* Council Regulation 59/62 J.O. (1655) [hereinafter Regulation 17] (providing that “[w]hereas, in order to secure uniform application of Articles 85 and 86 in the common market, rules must be made under which the Commission, acting in close and constant liaison with the competent authorities of the Member States, may take the requisite measures for applying those Articles”); Allison J. Himelfarb, Comment, *The International Language of Convergence: Reviving Antitrust Dialogue Between the United States and the European Union With a Uniform Understanding of “Extraterritoriality”*, 17 U. PA. J. INT’L ECON. L. 909, 931 (1996) (stating that European Council Regulation 17 gives the European Commission the authority to investigate antitrust actions). See generally Thomas Horton & Stefan Schmitz, *The Lessons of Covisint: Regulating B2Bs Under European and American Competition Laws*, 47 WAYNE L. REV. 1231, 1236-78 (2002) (providing an overview of the general competition laws set forth in Article 81 and Article 82 of the treaty establishing the European Community).

80. See Regulation 17, *supra* note 79, art. 3 (providing that “[t]hose entitled to make applications are: (a) Member States; (b) natural or legal persons who claim a legitimate interest.”).

undertakings concerned,” to end the violation.<sup>81</sup> A notable contrast is the lack of third party enforcement through private litigation, which plays a fundamental role in competition law in the United States.<sup>82</sup> The absence of third party enforcement is partly attributable to the lack of treble damages and contingency fees in the Member State courts.<sup>83</sup>

Decisions by the Commission pursuant to Council Regulation 17 are subject to judicial review by the Court of First Instance (“CFI”).<sup>84</sup> Both a party to a decision rendered by the Commission, as well as a third party person affected by the decision can make an appeal.<sup>85</sup> Notably, the CFI reviews both the facts and the legality of the Commission’s decision, though determinations on factual findings are limited to whether the Commission’s findings are justified on the record. The CFI has the power to grant interim relief, including suspending an obligation that the Commission has imposed, pending the hearing on appeal.<sup>86</sup> Such rulings from the hearing of the appeal are subject to appeal by the ECJ, but the grounds for challenging a CFI decision before the ECJ are limited to lack of competence,

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81. *See id.* (stating that the “Commission may, before taking a decision under paragraph 1, address to the undertakings or undertakings concerned recommendations for termination of the infringement”).

82. *See* discussion *infra* Part I.B.2 (providing an overview of the U.S. competition law and addressing the role of litigation).

83. *See* Himelfarb, *supra* note 79, at 930 (stating that private parties do not have the incentives to bring claims because the European Union does not allow them to recover treble damages). *But see* Case C-453/99, *Courage Ltd. v. Crehan*, [2001] E.C.R. I-6297, 5 C.M.L.R. 28, para. 36 (2001) (holding that “[c]ommunity law does not preclude a rule of national law barring a party to a contract liable to restrict or distort competition from relying on his own unlawful actions to obtain damages where it is established that that party bears significant responsibility for the distortion of competition”).

84. *See* Paul J. De Rosa, Comment, *Cooperative Joint Ventures in European Community Competition Law*, 41 BUFF. L. REV. 993, 1010 n.82 (1993) (explaining the work of the Court of First Instance).

85. *See* ANTHONY ARNULL, *THE EUROPEAN UNION AND ITS COURT OF JUSTICE* 45 (F.G. Jacobs ed., 1999) (providing an overview of cases involving standing before the CFI).

86. *See* RULES OF PROCEDURE OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES OF 2 MAY 1991, available at <http://www.curia.eu.int/en/instit/txtdocfr/txtsenvigueur/txt7.pdf> (last visited Mar. 13, 2004).

significant breaches of procedure, and infringement of prior judicial decisions.

The epicentre of E.C. merger review is Merger Regulation 4064/89,<sup>87</sup> as amended by Regulation 1310/97<sup>88</sup> and Regulation 139/2004 effective from May 2004.<sup>89</sup> Prior to the Merger Regulation (“ECMR”) becoming effective in 1990, the European Community operated under the assumption that Article 82 applied to merger review, although years of use and litigation before the European courts exhibited the weaknesses of this article, necessitating a new regime.<sup>90</sup> The ECMR essentially encompasses Community competition law governing “concentrations,” (mergers and acquisitions) that may significantly impeded competition within the common market or in a substantial part of it.<sup>91</sup> While Articles 81 and 82 apply in certain situations, the ECMR recognises that these provisions are insufficient to cover all potentially anticompetitive operations.

The ECMR operates what is commonly referred to as a “one-stop shop,” meaning that, except in limited circumstances, all concentrations deemed to have a Community dimension are to be reviewed and subject to authorisation by the Commission.<sup>92</sup> The

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87. Council Regulation 4064/89 on the control of concentrations between undertakings, O.J. 1989 L257/90, available at [http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31989R4064&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31989R4064&model=guichett) (last visited March 24, 2004).

88. Council Regulation 1310/97 amending Merger Regulation 4064/89, O.J. 1997 L180/1, available at [http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31997R1310&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31997R1310&model=guichett) (last visited March 24, 2004).

89. Council Regulation 139/2004 amending Merger Regulation 4064/89, 2004 O.J. (L 24) 1 [hereinafter ECMR] (giving “the Community the objective of instituting ‘a system ensuring that competition in the common market is not distorted’”).

90. See generally MARK R. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER (2d ed., 2001).

91. See ECMR, *supra* note 89, art. 1 (stating that the ECMR applies to all concentrations that have certain market values); see also Stefan Schmitz, *The European Commission’s Decision in GE/Honeywell and the Question of the Goals of Antitrust Law*, 23 U. PA. J. INT’L ECON. L. 539, 542-44 (2002) (explaining Europe bases its antitrust law on German law in the protection and benefit of small and medium enterprises and the benefit of consumers).

92. Under article 3(1) a concentration arises when two or more previously independent undertakings merge or when one or more persons already controlling at least one undertaking acquire direct or indirect control of the whole or parts of

Community dimension determination revolves around the “turnover” of sales of goods and provision of services within the preceding financial year.<sup>93</sup> A concentration will be deemed to have a Community dimension if: (a) the aggregate worldwide turnover is over five billion euros, and (b) the aggregate Community-wide turnover of each of at least two of the undertakings is more than 250 million euros, unless (c) each of the undertakings achieves more than two-thirds of its aggregate Community-wide turnover within one Member State.<sup>94</sup> Merger activity by companies based outside of the Community is deemed covered if they have sufficient turnover in more than one Member State. The 1998 amendments to the ECMR added additional standards for concentrations involving firms with turnover in at least three Member States, notwithstanding that the turnover does not meet the standards originally set.<sup>95</sup>

Proposed transactions falling within the ECMR must undergo a series of mandatory pre-merger notification and procedural undertakings before the Commission Merger Task Force, the entity

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one or more undertakings. See ECMR, *supra* note 89, art 3(1); see also *id.* art. 1(2) (defining the threshold market values for transactions regulated by the ECMR); Stefan Schmitz, *How Dare They? European Merger Control and the European Commission's Blocking of the General Electric/Honeywell Merger*, 23 U. PA. J. INT'L ECON. L. 325, 332-33 (2002) (stating that the one-stop shop principle “ensures that any other national jurisdiction with the European Community need not be notified of the mergers, no matter how much effect they may have in these jurisdictions”); Wood, *supra* note 36, at 420 (contending the drafters of the European Commission's merger regulation produced a “one-stop shopping” system so the parties would know the competency of the Commission).

93. See Jason A. Garick, *International Horizontal Mergers: A Comparison of European Union and United States Regulatory Policy and Procedure*, 7 TRANSNAT'L LAW. 293, 300 (1994) (stating turnover “is calculated by adding the value of the products sold and services provided to separate undertakings or consumers”).

94. See ECMR, *supra* note 89, at art. 1(2) (explaining when a concentration has a community dimension for purposes of the regulation).

95. See Council Regulation 1310/97, *supra* note 88, art. 1 (stating that the standards for a concentration with a Community dimension may also be met if: (a) the combined aggregate worldwide turnover of all the undertakings is 2.5 billion euro, and (b) in each of at least three Member States, the combined aggregate turnover is more than 100 million euro, and (c) in each of at least three Member States included in (b), the turnover of at least two undertakings is more than twenty-five million euro each, and (d) the aggregate Community wide turnover of each of at least two undertakings is more than 100 million euro, unless (e) each of the undertakings concerned achieves more than two-thirds of its aggregate Community wide turnover within one Member State).

charged with administering the ECMR. Notifications on the conclusions of agreements, the announcement of a public bid, or the acquisition of a controlling interest must be made to the Commission and the transaction is not allowed to be consummated until a final decision is rendered.<sup>96</sup> Under Article 4(1), concentrations with a Community dimension “shall be notified to the Commission after the conclusion of the agreement, announcement of the public bid, or acquisition of a controlling interest.”<sup>97</sup> A Phase I review occurs after the Commission invites third party competitors to submit their views on the transaction, and a decision must be taken between twenty-five and thirty-five days under Article 10(1).<sup>98</sup> In the event that serious questions are raised as to the effects the transaction will have on competition, a second stage review will be initiated.<sup>99</sup> Phase II review involves additional requests for information from the parties to the undertaking, a publication to the parties of a Statement of Objections from the Commission, and oral hearings that includes third party complainants. Also, the parties are given access to the Commission’s file under Article 13 following the publication of the Statement of Objections for the purposes of enabling the parties to exercise their rights of defence.<sup>100</sup> Based on its determination as to whether the proposed concentration will create or strengthen a dominant position that would impede effective competition,<sup>101</sup> the

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96. See Schmitz, *supra* note 92, at 351 (noting that the E.C. merger control requires that clearance must be received from the Commission in order for the merger to take place).

97. ECMR, *supra* note 89, art. 4(1)..

98. See *id.* art. 10(1) (stating when the decision period shall begin and end).

99. See *id.* arts. 10(2), 8(1), 8(2). (outlining the process by which a second review should be initiated).

100. See *id.* art. 13 (noting that access to the file is also given to “other involved parties” such as the seller and the company which is the target of the concentration, who have been informed of the Commission’s objections)

101. See ECMR, *supra* note 89, art. 2(1). Article 2(1) provides that in making its decision, the Commission shall consider:

(a) the need to preserve and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or without the Community;

(b) the market position of the undertakings concerned and their economic and financial power, the opportunities available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and

Commission may either allow the transaction to pass, with or without conditions, or prohibit outright the consummation of the transaction.<sup>102</sup> Phase II decisions must be rendered within ninety days of the date of the Phase I ruling and initiation of the Phase II investigation.<sup>103</sup> Parties may appeal decisions by the Commission on substantive and procedural grounds to the Court of First Instance ("CFI") and, from there, to the ECJ, much the same way as they may appeal decisions involving Articles 81 and 82, including appeals from third parties and competitors.<sup>104</sup> Appeals have generally failed and negotiated outcomes with the Commission prior to the appeal are common.<sup>105</sup>

Similar to the United States, the Commission utilises a series of tools and guidelines for assessing the potential anticompetitive effects of proposed merger transactions. Like the Horizontal Merger Guidelines, the recently issued Commission Notice on the Appraisal of Horizontal Mergers ("E.C. Merger Guidelines") sets forth the guiding criteria on how the Commission seeks to analyse proposed mergers within its jurisdiction, though variations in the focus of

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demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

*Id.*

102. See NEIL NUGENT, THE EUROPEAN COMMISSION 274 (2001) (listing the options that the Commission has at the completion of their investigation; approval, which is most common, disapproval, only happening about three times a year, or approval subject to conditions).

103. See *id.* art. 10(3) (nothing that this may be extended by fifteen days when undertakings offer concessions pursuant to Art. 8(2), or twenty days if requested by the parties).

104. See Schmitz, *supra* note 92, at 353-54 (allowing parties to appeal Commission decisions to the European Court of First Instance and then appeal decision of the Court of First Instance to the ECJ on points of law issues only); see also Case C-7/95, John Deere Ltd. v. Comm. of the European Communities, [1998] E.C.R. I-3111, para. 18 (1998) (limiting appeals to points of law and on grounds of lack of competence by the CFI, breach of procedure adversely affecting the appellant, and infringement of community law by the CFI.); STEPHEN WEATHERILL & PAUL BEAUMONT, EU LAW 918-20 (3d ed., 1999).

105. See generally JOELSON, *supra* note 90, at 300 (discussing the deficiency of the pre-1989 regulatory regime for creating undistorted competition in the Common Market).

analysis and the tools used remain.<sup>106</sup> The Commission's appraisal centres around two overlapping issues: the definition of the relevant product and geographic markets, and a competitive assessment of the merger.<sup>107</sup> Similar in format and substance to U.S. guidelines, the E.C. Merger Guidelines set forth a five-pronged set of elements for analysis. The first looks to the likelihood the merger will have anticompetitive effects in the relevant markets, absent countervailing factors.<sup>108</sup> This prong analyses relevant market characteristics, including a reliance on the Herfindahl-Hirschman Index ("HHI") as an indication of the competitive pressures in the market post-merger, the market power that may be created and utilised by the proposed firm, and the risk of creating or allowing for non-collusive oligopolies.<sup>109</sup> The increased risk of coordination plays a significant role under this first prong.<sup>110</sup> The second prong analyses the likelihood buyer power will act as a countervailing force to an increase in market power resulting from the merger, assessing factors such as credible alternatives for buyers to resort to in the case the merged entity increases prices or deteriorates conditions of delivery.<sup>111</sup> Similar to step three of the U.S. guidelines, the third

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106. Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings 2004 O.J. C 31/5 [hereinafter E.C. Merger Guidelines] (providing guidelines for the assessment of horizontal mergers pursuant to Council Regulation No. 139/2004), available at [http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c\\_031/c\\_03120040205en00050018.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c_031/c_03120040205en00050018.pdf) (last visited Apr. 5, 2004).

107. See *id.* para. 10 (explaining that the purpose of assessing market definition is to highlight competitive constraints immediately facing the merged entity).

108. See *id.* para. 11(b) (referring to Section IV of the guidelines).

109. See *id.* paras. 19-21 (identifying appropriate HHI levels to qualify as horizontal competition concerns). HHI regions are marginally higher under the E.C. approach, with an HHI of 2000 or more and an increase of 150 points or more raising serious anticompetitive concerns, as opposed to 1,800 and 100 points respectively under U.S. Horizontal Merger Guidelines. *Id.*

110. See generally Case T-102/96, *Gencor v. Commission*, [1999] E.C.R. II-753; Case T-342/99, *Airtours v. Commission*, [2002] E.C.R. II-2585 (demonstrating that mergers changed the nature of competition in oligopolistic markets to allow sellers, who previously were not able to co-ordinate behaviour, to co-ordinate actions and raise prices, without entering into an agreement or resorting to a concerted practice under the meaning of Art. 81).

111. See E.C. Merger Guidelines, *supra* note 106, paras. 64-67 (stating that the Commission will consider the ability of customers to "counter the increase in market power that a merger would otherwise be likely to create"); see also, e.g.,

prong looks at the likelihood entry by new firms will maintain effective competition, while the fourth prong analyses the efficiencies likely to result from the merger.<sup>112</sup> Likewise, prong five looks at the conditions for a failing firm defence.<sup>113</sup> In addition to the draft E.C. Merger Guidelines, the Commission has also published notices useful for parties to proposed mergers in assessing how the Commission will undertake its review<sup>114</sup> and “Best Practice Guidelines” for handling divestiture commitments.<sup>115</sup>

The recent amendment and reform of the ECMR that will come into effect in May of 2004 is particularly relevant to this analysis. Based on a major review of the ECMR and a Green Paper<sup>116</sup> published in December of 2002, the Council recently passed an additional amended version of the Merger Regulation with

Case IV/M.1313, *Danish Crown v. Vestjyske Slagterier*, O.J. 2000 L20/1; Case IV/M.1225, *Enso v. Stora* O.J. 1999 L 254/9.

112. E.C. Merger Guidelines, *supra* note 106, paras. 68-88.

<sup>113</sup> *Id.* paras. 89-91.

114. *See, e.g.*, Commission Notice on calculation of turnover under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, O.J. 1998 C66/25 (Mar. 2, 1998) (stating the purpose of the notice as expanding upon the text of Articles 1 and 5 of Council Regulation 4064/89, and in doing so elucidating “certain procedural and practical questions which have caused doubt or difficulty”); Commission Notice on the definition of the relevant market for the purposes of Community Competition law, O.J. 1997 C372/5 (Dec. 9, 1997) (providing guidance on how the Commission applies the concept of relevant product and geographic market in its enforcement of Community competition law), [http://europa.eu.int/comm/competition/antitrust/relevma\\_en.html](http://europa.eu.int/comm/competition/antitrust/relevma_en.html) (last visited Apr. 5, 2004).

115. *See* European Commission, Best Practice Guidelines: The Commission’s Model Texts for Divestiture Commitments and the Trustee Mandate under the EC Merger Regulation (2004) (serving as a model as best practice guidelines for notifying parties submitting commitments under the E.C. Merger Regulation), *available at* [http://europa.eu.int/comm/competition/mergers/legislation/divestiture\\_commitments/explanatory\\_note.pdf](http://europa.eu.int/comm/competition/mergers/legislation/divestiture_commitments/explanatory_note.pdf) (last visited Apr. 5, 2004).

116. Report on the Commission Green Paper on the Review of Council Regulation (EEC) No 4064/89, EUR. PARL. DOC. (COM(2001) 745-C-0159/2002/2067(COS)); *see also* Mario Monti, European Competition Commissioner, Review of the EC Merger Regulation – Roadmap for the reform project, Address before Conference on Reform of European Merger Control (Brussels) (June 4, 2002) (providing an overview the main areas of public comment submitted on the amended regulations), *available at* [http://europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=SPEECH/02/252/0/RAPID&lg=EN&display](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/02/252/0/RAPID&lg=EN&display) (last visited Apr. 1, 2004).

significant changes in the manner which mergers will be reviewed by the Commission in the future.<sup>117</sup> Reforms, largely in response to questions over existing system checks and balances and hurried by a series of judgments from the CFI overturning Commission merger decisions,<sup>118</sup> have important substantive ramifications. These include the abolition of the requirement of a binding merger agreement as a pre-condition to notification;<sup>119</sup> a strengthening of the Commission's investigation powers; and, an extension of the Phase II investigation by fifteen days where the parties submit remedies, and by twenty days at the request of the parties or the Commission to look more closely into difficult aspects of particularly complex cases.<sup>120</sup> Additional reforms include state of play meetings between the parties and the Commission, provisions for access to key documents in the Commission file before the Statement of Objections is published, the establishment of a post of Chief Competition Economist for greater expertise in economic analysis, and the creation of peer-review panels in which other states assess the quality and effectiveness of the merger review system.<sup>121</sup>

A particularly noteworthy development on merger review is the Commission's move to the new substantive test prohibiting mergers that would "significantly impede effective competition" ("SIEC

117. See generally ECMR, *supra* note 89 (stating the need to reform the regulation to meet new challenges of a more integrated market and an expanding European Union).

118. E.g., Case T-342/99, *Airtours v. Commission*, [2002] E.C.R. II-2585; Case T-310/01, *Schneider Electric SA v. Commission* [2002] ECR II-4071; Case T-05/02, *Tetra Laval BV v. Commission* 5 C.M.L.R. 17 (2002).

119. See Commission Welcomes Agreement on New Merger Regulation, Press Release IP/031/1621 (November 27, 2003), at [http://europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=IP/03/1621|0|RAPID&lg=EN&display=](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/1621|0|RAPID&lg=EN&display=) (last visited March 17, 2004) (highlighting this change that was made in response to the International Competition Network's guiding principles for merger notification and review); see also International Competition Network, *Guiding Principles and Recommended Practices for Merger Notification and Review*, at [www.internationalcompetitionnetwork.org/guidingprinciples.html](http://www.internationalcompetitionnetwork.org/guidingprinciples.html) (last visited March 17, 2004).

120. See ECMR, *supra* note 89, art. 4(1)

121. See *id.* art. 10(3). Many of these reforms and developments have arisen out of efforts by the International Competition Network and Organization for Economic Cooperation and Development ("O.E.C.D."). See *Guiding Principles for Merger Notification and Review*, *supra* note 115.

test”).<sup>122</sup> Analysis by the Commission has traditionally focused substantive review through the “dominance” test, usually taken to ban mergers creating a market share of forty percent or more. The “dominance test” arises largely out of German competition law and the European Community’s incorporation of that system into the Community level. The move away from “dominance” towards the SIEC test indicates a shift closer to the United States’ “substantially lessening of competition” test, a difference that has contributed to diverging opinions on the potential market effects of proposed mergers and decisions to clear such mergers. The new SIEC test will seemingly allow the European Community to retain case law based on the traditional “dominance” test, while converging towards a SLC approach that allows for greater economic analysis – time will expose the significance or triviality of this shift.

#### b. United States

Described as the Magna Carta of free enterprise, competition law in the United States carries a long and distinctive history dating to the first U.S. antitrust statute enacted in 1890, the Sherman Act.<sup>123</sup> The purpose of this act originated out of popular concern for the U.S. economy during a period when a small number of corporations and individuals had accumulated a vast amount of wealth.<sup>124</sup> Corporate organizations, unconcerned with public interests, were spawning in

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122. See E.C. Merger Guidelines, *supra* note 106 (establishing the new test the Commission shall apply to merger analysis); Press Release, European Commission, EU Gives itself new merger control rules for 21st century (Jan. 20, 2004) (stressing that the purpose of the new test, in part, is to provide guidance to the legal community concerning the legal tests the Commission will apply to mergers), [http://europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=IP/04/70|0|RAPID&lg=EN&display=](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/04/70|0|RAPID&lg=EN&display=) (last visited Apr. 5, 2004).

123. See Sherman Act, 15 U.S.C. §§ 1-7 (2000) (stating that monopolizing any part of the trade or commerce among the several States, or with foreign nations constitutes a felony); see also *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972) (stating that antitrust laws in general, and particularly the Sherman Act, are considered the Magna Carta of free enterprise, and that they are as important as the Bill of Rights). These acts are “are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.” *Id.*

124. See ANDREW I GAVIL ET AL., *supra* note 49, at 60-61 (2002) (explaining the historical origins of the Sherman Act).

large numbers; dangerous business establishments known as “trusts” were growing in number and suppressing competition.<sup>125</sup> In the interests of curbing business excess and abuse while preserving the competitive nature of the U.S. economy, the Sherman Act became one of the first modern competition law statutes and the first of such statutes to become a significant factor in legal and economic life.<sup>126</sup>

The Sherman Act contains two broadly construed substantive sections of importance. Under Section 1, “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”<sup>127</sup> Section 2 makes it a felony offence for “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations.”<sup>128</sup> Fines for such violations now include up to \$10 million for corporations and \$350,000 for individuals and/or three years imprisonment.<sup>129</sup>

Of great importance for the Sherman Act and the U.S. competition law system is the role of the judiciary in hearing *and* deciding such cases.<sup>130</sup> The Sherman Act, for example, may be enforced not only criminally by the U.S. Department of Justice (“DOJ”), but civilly as well by the government and aggrieved parties.<sup>131</sup> This allows for a large amount of case law and evolving judicial precedent that ensures

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125. *See id.* (noting the influence that the rise of industrial organization economics had on antitrust).

126. *See id.* (examining the influence of the Sherman Act and examining various courts discussing the act).

127. 15 U.S.C. § 1. (2000)

128. 15 U.S.C. § 2. (2000)

129. *See id.* (providing that the court shall have discretion in regards to both punishments).

130. *See Wood, supra* note 36, at 414 (stating that the “existence of private parties makes it more difficult for government policymakers to control developments in antitrust law through the exercise of prosecutorial discretion, since the courts perforce deal with the full range of issues”). “Therefore, it is the judiciary that has the greatest influence on antitrust policymaking, not the administrators of the laws.” *Id.*

131. *See id.* at 411-14 (describing the ability of private parties to sue for treble damages or for injunctive relief in order to enforce antitrust laws).

a contemporary and timely competition law system.<sup>132</sup> In fact, the broad language of the Sherman Act essentially demands that the U.S. Judiciary play a vital role by imparting content to the very general phrases contained within the Act. The most important early interpretation of Section 1 came in *United States v. Addyston Pipe & Steel Co.* in 1898, which gave birth to the “rule of reason” commonly applied in Sherman Act cases today.<sup>133</sup> Under the “rule of reason,”

no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party.<sup>134</sup>

Developing out of this decision, only restraints of trade deemed unreasonable violate the Sherman Act.<sup>135</sup>

Of particular importance to the Sherman Act has been the interpretation of the Section 2 prohibition against those who “monopolize.”<sup>136</sup> Under Section 2, becoming a monopoly or achieving monopoly status is not in itself an illegal act, but rather the

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132. *See id.* at 414 (noting the importance of the judiciary in influencing antitrust policy making).

133. *See* 85 F. 271, 279 (6th Cir. 1898) (interpreting whether an association of a group of pipe manufacturers was “a contract, combination, or conspiracy in restraint of trade” and examining the relationship between a contract of association under the common law and contract of association under Section 1 of the Sherman Act).

134. *Id.* at 282.

135. *See* *Standard Oil Co. v. United States*, 221 U.S. 1, 62 (1911) (analyzing Sections 1 and 2 of the Sherman Act). The Court concluded that

the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed, is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act and thus the public policy which its restrictions were obviously enacted to subserve.

*Id.*

136. *See* 15 U.S.C. § 2 (2000) (making it a felony to engaged in monopolizing trade as defined by the statute).

act or attempt at monopolization constitutes such an offence.<sup>137</sup> Hence, a company that becomes a dominant force in its industry is not per se perpetrating an illegal act, and the lack of effective competition in the sector and market occupied by the company is not illegal. A monopoly becomes illegal when a company incorporates unfair means to achieve a dominant position or when monopoly power is used to maintain a dominant position and to exclude competition from the market.<sup>138</sup> The degree of market power that must be shown varies from case to case, although it is often reflected in market share percentage calculations, and the definition of what constitutes unfair monopolizing behavior remains the subject of most cases in this area.<sup>139</sup>

Along with the Sherman Act, several other statutes exist that form the core of U.S. competition law. One of these acts, the Wilson Tariff Act of 1894, specifically Sections 73-76, imposes punitive measures on the abuse of U.S. import laws through agreements or conspiracies between importers and others.<sup>140</sup> The act forbids “[e]very combination, conspiracy, trust, agreement, or contract” between two or more parties where either party is engaged in importing goods from foreign states into the United States, intending to restrain trade or increase market prices.<sup>141</sup> Violations of this act

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137. See *id.* (stating that it is a felony to “monopolize, or attempt to monopolize, or combine or conspire with any other persons or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations”).

138. See *Standard Oil Co.*, 221 U.S. at 16-17 (explaining that monopolization of a particular industry is not per se illegal and that in order fall with the Sherman Act, the monopoly must secure or acquire “the exclusive right in such trade or commerce by means which prevent or restrain others from engaging therein”).

139. See, e.g., *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (holding the defendant guilty of a Section 2 violation for drastically increasing its production capacity of aluminum ingot in anticipation of market demand when the defendant held a dominant position); *In Re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322 (4th Cir. 2004) (providing an additional example of the evolving interpretations given to illegal monopolization).

140. See 15 U.S.C. §§ 73-76 (2000) (discussing agreements involving restrictions in favor of imported goods and delegating the Secretary of Treasury to make rules and regulations necessary for carrying out the Wilson Tariff Act).

141. See 15 U.S.C. § 8 (2000) (providing further that “persons engaged in importation that violates the section shall be guilty of a misdemeanor”).

are almost always brought in conjunction with Sherman Act suits and the act is of little significance on its own.<sup>142</sup>

In addition, the Clayton Act enacted in 1914 forms an enormously important role in the U.S. competition law system.<sup>143</sup> Filling gaps left open in the Sherman Act, the Clayton Act deals with price discrimination, exclusive dealing, and mergers, aiming to reach in their inception acts or practices that may eventually cause anticompetitive effects.<sup>144</sup> Important parts of this act include the provisions authorizing treble damages, costs, and attorneys' fees in private suits by persons injured by antitrust violations,<sup>145</sup> rendering corporations subject to the jurisdiction of any U.S. District Court where they transact business, and making companies vulnerable to suit for antitrust violations.<sup>146</sup>

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142. See Jennifer M. Siegle, *Suing U.S. Corporations in Domestic Courts for Environmental Wrongs Committed Abroad through the Extraterritorial Application of Federal States*, 10 U. MIAMI BUS. L. REV. 393, 411 (2002) (noting that while various statutes grant U.S. courts extraterritorial jurisdiction in antitrust suits, the majority of such suits are brought under the Sherman Act).

143. See Clayton Act, 15 U.S.C. §§ 12 – 27a (2000) (prescribing antitrust laws to protect trade and commerce against “unlawful restraints and monopolies”).

144. See 15 U.S.C. § 13 (2000) (stating that “[i]t shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality.”); 15 U.S.C. §14 (2000) (making it illegal to enter into agreements not to “not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce”); 15 U.S.C. §18 (2000) (prohibiting the acquisition by one corporation of stock of another where “the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly”).

145. See 15 U.S.C. § 15(a) (2000) (stating that the amount of the controversy shall not be taken into account and that any person who shall be injured in his property or business may sue).

146. See 15 U.S.C. § 22 (2000) (stating that “[a]ny suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business”).

The nucleus of merger review in the United States is the Section 7 of the Clayton Act.<sup>147</sup> As amended through the 1976 Hart-Scott-Rodino legislation (“HSR Act”),<sup>148</sup> Section 7A of the Clayton Act directs parties intending to engage in merger and acquisition activities to provide advanced notice to the DOJ and the Federal Trade Commission (“FTC”) and observe specified waiting periods allowing for the review of the competitive implications of the proposed transactions.<sup>149</sup> Like the Sherman Act, the broadly construed wording of the Clayton Act has been the subject of significant judicial interpretation as to its application, especially in regards to acquisitions of and by foreign companies.<sup>150</sup>

The U.S. merger review process is designed to provide competition regulators with the opportunity to review mergers and acquisitions before they occur. The mandatory pre-merger notification program, with filing and waiting period requirements, provides the responsible agencies with the time and information needed to conduct a thorough review.<sup>151</sup> The HSR Act provides the

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147. See Clayton Act of 1914, 38 Stat. 730 (codified as amended by 15 U.S.C. ss 1-12 (2000)).

148. Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (2000).

149. 15 U.S.C. § 7A (2000). In addition to the DOJ and FTC, numerous other public competition authorities exist that share responsibility for formulating and implementing merger policy. For example, the Department of Transportation has exclusive authority to approve agreements between U.S. airlines and foreign carriers. See 49 U.S.C. § 41309 (2000). The DOJ shares jurisdiction over mergers involving banks with four other federal regulators, including the Office of the Comptroller of the Currency and the Board of Governors of the Federal Reserve System. Telecommunication mergers involving service providers are subject to review by the FTC, DOJ, Federal Communications Commission, and the public service commissions of each state in which the parties do business. See Telecommunications Act of 1996 Pub. L. No. 104-104, 110 Stat. 56.

150. *United States v. American Building Maintenance*, 422 U.S. 271 (1975) (interpreting Section 7 as applying to cases of U.S. acquisitions of foreign companies only when the acquired company is actually ‘engaged in commerce,’ i.e. directly involved to some degree in producing, making, or selling in the U.S.); *United States v. Joseph Schlitz Brewing Co.*, 253 F.Supp. 129 (N.D. Cal 1966) (holding that it is sufficient for the acquired company to have a subsidiary in the U.S. for Section 7 to apply).

151. See FTC and DOJ, Annual Report to Congress Regarding the Operation of the Hart-Scott-Rodino Premerger Notification Program, 3-4 (FISCAL year 2001) (hereinafter FTC AND DOJ REPORT) (explaining that the primary purpose of the

starting point for regulatory review of proposed mergers by U.S. authorities. Under the HSR Act, Section 13(b) of the FTC Act,<sup>152</sup> and Section 15 of the Clayton Act,<sup>153</sup> the FTC and DOJ investigate proposed merger transactions meeting specific thresholds for review.<sup>154</sup> Under 2001 HSR reforms, proposed dealings that meet a size of transaction threshold of over U.S. \$200 million must be reported.<sup>155</sup> Transactions resulting in an acquiring person holding over U.S. \$50 million in assets or voting securities must also be reported.<sup>156</sup> In regards to foreign transactions, the nexus with the United States that triggers a filing obligation from merger activity resulting in the acquisition of foreign assets or voting securities are transactions valued above U.S. \$50 million.<sup>157</sup> Also, acquisitions of foreign assets by foreign persons are likewise subject to the same

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law is to perform the necessary antitrust review), *available at* <http://www.ftc.gov/os/2002/09/hsrarfy2001.pdf> (last visited Apr. 12, 2004).

152. Federal Trade Commission Act of 1914, 38 Stat. 717 (codified as amended at 15 U.S.C. § 41-58 (2000)).

153. 15 U.S.C. §18a (2000).

154. See Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, FY 2001, Pub. L. No. 106-553, § 630, 114 Stat. 2762 (2000) (raising the size-of-transaction threshold and modifying the filing and waiting period requirements). It is important to note the peculiar overlapping regulatory scheme present in U.S. competition and merger review. The FTC is charged with the mandate to halt anticompetitive practices from their inception before maturing into actual antitrust violations. 15 U.S.C. § 45 (2000) Specific statutes remain under the jurisdiction of the FTC for enforcement, including the provisions of the FTC Act and the Clayton Act, all of which are enforced by the FTC through civil litigation. *Id.* The Antitrust Division of the DOJ places a principal role in investigating antitrust violations of the Sherman Act and Clayton Act and in bringing the appropriate criminal or civil actions for violations, criminal or civil for Sherman Act violations, civil for the Clayton Act. For merger activity, the DOJ and the FTC share responsibility, engaging in regular consultation under an internal "clearance" agreement between the two agencies and often deferring to the agency with greater expertise in the area of a particular investigation. See JOELSON, *supra* note 90, at 15.

155. 15 U.S.C. § 18a (2000).

156. Adjustments to the size-of-transaction threshold will be made each fiscal year beginning in 2005 to reflect the percentage change of GNP for the previous year. *Id.*

157. 67 Fed. Reg. 11898, 11898 (Mar. 12, 2002) (stating that the threshold was increased from \$15 million to \$50 million).

U.S. \$50 million nexus-with-the-United States test.<sup>158</sup> Recent changes to the HSR Act have also been made regarding filing fees and timelines.<sup>159</sup>

Proposed transactions meeting HSR thresholds become subject to a relatively flexible process whereby the parties remain largely in control of the timelines for investigation. Under the HSR Act, parties have discretion to file merger notifications any time after they sign merger agreements and can delay filing to allow pre-filing discussions with agencies or await the outcome of other jurisdictional reviews. HSR filings, which require little upfront analysis, trigger a thirty day waiting period that can be halted by the withdraw and refiling of HSR forms in order to gain additional time for preliminary review before moving onto the next phase.<sup>160</sup> The vast majority of mergers notified are cleared within the first thirty days of review (95-98%),<sup>161</sup> while “Second Requests” for information are issued for transactions raising competitive concern. Second Requests are heavily document intensive with deadlines for filings and agency decisions, but once parties comply with the request, extensions are possible depending on strategy. During the post-Second Request period, negotiations and agreements on remedies are common.<sup>162</sup> When no agreement is reached, the agency

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158. *See id.* Notably, an exemption exists for acquisitions by foreign persons who do not meet the U.S. \$200 million aggregate sales and assets test. *Id.* at 11901 (“Since the new legislation removes the size-of-person test for acquisitions valued at over \$200 million, the Commission likewise believes that it is appropriate and consistent to require filings from foreign persons, regardless of the size of their U.S. presence, where the transaction is valued at over \$200 million and the \$50 million nexus test of these exemption rules is satisfied”).

159. A three-tiered filing fee structure was implemented, replacing the U.S. \$45,000 flat fee, based on the aggregate total value of the voting securities and assets resulting from the transaction. Acquiring persons now pay U.S. \$45,000 for transactions valued at less than U.S. \$100 million, U.S. \$125,000 for transactions valued at U.S. \$100 million but less than U.S. \$500 million, and U.S. \$280,000 for transactions valued at U.S. \$500 million or more. The waiting period for compliance with additional requests for information or documentary material has been extended from twenty to thirty days for most transactions. 15 U.S.C.A. § 18a (2000).

160. *See* 15 U.S.C § 18a (2000)

161. *See* FTC AND DOJ REPORT, *supra* note 151, Appendix A (detailing the percentages of DOJ and FTC investigations in which second requests were issued).

162. *See id.*

seeking to block the merger must seek an injunction before a federal court. Cases are then litigated on the merits, in the case of the DOJ before the federal court and the FTC before an administrative trial within the agency. The administrative and judicial decisions are subject to federal appellate review.

The essential goal of U.S. competition policy is to “maximise consumer welfare and promote economic efficiency through the optimal allocation of resources in a competitive market context,”<sup>163</sup> an aim reflected in the analytical tools and framework for merger review.<sup>164</sup> Under the premise that antitrust protects the process of competition not competitors,<sup>165</sup> U.S. review seeks to prohibit mergers that “substantially lessen competition” (“SLC”) or tend to create a monopoly.<sup>166</sup> The Horizontal Merger Guidelines<sup>167</sup> and the Non-Horizontal Merger Guidelines<sup>168</sup> provide the analytical framework for analysis by the FTC and DOJ, focusing squarely on “whether the merger is likely to create or enhance market power or to facilitate its

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163. OECD GLOBAL FORUM ON COMPETITION, THE OBJECTIVES OF COMPETITION LAW AND POLICY AND THE OPTIMAL DESIGN OF A COMPETITION AGENCY: UNITED STATES 2, OECD Doc. No. CCNM/GF/COMP/WD(2003)34 *available at* [http://www.oelis.oecd.org/olis/2003doc.nsf/0/ee395192e97c98c5c1256cbf003f70e1/\\$FILE/JT00138532.PDF](http://www.oelis.oecd.org/olis/2003doc.nsf/0/ee395192e97c98c5c1256cbf003f70e1/$FILE/JT00138532.PDF) (last visited Apr. 12, 2004).

164. *See* INTERNATIONAL COMPETITION NETWORK MERGERS WORKING GROUP ANALYTICAL FRAMEWORK SUBGROUP, ANNEX FOR ISSUE PAPER FOR 2002 NAPLES CONFERENCE DESCRIPTION OF ANALYTICAL FRAMEWORK UNDER UNITED STATES MERGER LAW (2002) [hereinafter US Analytical Framework] (outlining an analytical rubric for mergers), *available at* <http://www.internationalcompetitionnetwork.org/afsgusa.pdf> (last visited Apr. 7, 2004).

165. *See* *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (reiterating that damages awarded in antitrust suits are designed to give the injured party the profits they would have made if the illegal competition was not present).

166. *See* US Analytical Framework, *supra* note 164 (describing methods of analyzing U.S. merger law).

167. UNITED STATES DEP'T OF JUSTICE AND FED. TRADE COMM., 1992 HORIZONTAL MERGER GUIDELINES (1992) [hereinafter HORIZONTAL MERGER GUIDELINES], *available at* <http://library.lp.findlaw.com/articles/00002/006674.pdf> (last visited Mar. 25, 2004).

168. U.S. Dep't of Justice, NON-HORIZONTAL MERGER GUIDELINES, *available at* <http://www.usdoj.gov/atr/public/guidelines/2614.pdf> (last visited Apr. 5, 2004).

exercise.”<sup>169</sup> Under the consumer welfare driven SLC test, the responsible agency assesses, in light of market concentration and other factors that characterise the market, whether the merger raises concern about potential adverse competitive effects through market power and the likely net effect of the transaction on price and output.<sup>170</sup> For horizontal mergers market, concentration is a useful indicator of the likely potential competitive effect of a merger and is assessed through the use of the HHI.<sup>171</sup> No public interest test or analysis is employed,<sup>172</sup> and efficiencies, i.e. the lowering of costs

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169. HORIZONTAL MERGER GUIDELINES, *supra* note 167, § 0.2.

The evolution of both sets of merger guidelines reflect the significance of economic analysis in U.S. merger policy. The Horizontal Merger Guidelines were established by the DOJ in 1968, undergoing periodic revision by the FTC and DOJ. The 1982 and 1984 Guidelines marked a dramatic departure towards economic analysis, shifting from a singular focus on market concentration to an evolving economic perspective on the effect of concentration on competition in a particular market. Out of significant academic and theoretical work, this perspective gained judicial recognition in the mid-1970s, and by 1982 reflected the economic consensus that although high concentration could contribute to reduced competition, by itself it was not efficient to bring about that outcome. The 1982 Guidelines and 1984 Revisions codified this view, describing quantitative levels of market concentration that would likely cause the DOJ and FTC to go on to examine the full set of factors and possibly challenge the merger. These revisions resulted in greater firm flexibility during a time of substantial restructuring in the 1980s. The common firm restructures of the time, the first involving mergers between two large firms in the same industry, the second involving the break-up of conglomerates where business lines were often sold to firms competing in the same market as the business line they were acquiring, would have faced greater opposition under the 1968 Guidelines, but led to a total real dollar value of merger activity in the 1980s of more than four times greater than what it had been during the 1970s. 2002 Economic Report of the President, President's Council of Economic Advisers chap 3 *reprinted in* (2002) 19 YALE J. ON REG. 541

170. HORIZONTAL MERGER GUIDELINES, § 2.1 (establishing that the agency will be in charge of determining whether post-merger market conditions are conducive to allowing firms to coordinate their efforts).

171. Under the Horizontal Merger Guidelines, HHI is calculated by summing the squares of the individual market shares of all participants. For example, a market containing five firms with market shares of 40%, 20%, 15%, 15%, and 10% has an HHI of 2550 ( $40^2 + 20^2 + 15^2 + 15^2 + 10^2 = 2550$ ). The HHI ranges from zero (an atomistic market) to 10,000 (pure monopoly). *See generally* HORIZONTAL MERGER GUIDELINES, *supra* note 167, n. 17.

172. *See id.* § 0.2 (establishing the “analytical process that the Agency will employ”).

and improvement of product quality, play an important role in the agency analysis.<sup>173</sup>

Utilising these tools and frameworks, the reviewing agency proceeds through a five-step analytical process to determine whether to allow or challenge the merger.<sup>174</sup> First, the agency assesses whether the merger would significantly increase market concentration.<sup>175</sup> This is defined and measured through product and geographic market definition, identification of firms participating in the relevant market, calculating market shares, and assessing concentration and market shares through HHI analysis. Second, the agency assesses whether the merger, in light of the preceding factors, raises anticompetitive concerns by lessening competition through coordinated interaction or unilateral effects.<sup>176</sup> The third step involves an agency assessment of the concerned market as to whether entry by other participants would be timely, likely, and sufficient, either to deter or to counteract the competitive effects of concern, i.e. the post-merger market cannot collectively or unilaterally profitably maintain a price increase above pre-merger levels.<sup>177</sup> The fourth step involves an efficiency analysis, assessing efficiency gains that reasonably cannot be achieved by the other parties through other means, while the fifth failing firm analysis assesses whether, but for the merger, either party to the transaction would likely fail, causing its assets to exit the market.<sup>178</sup> This step factors in the ability of the firm to meet its financial obligations, the likelihood of successful reorganisation under Chapter 11 of the

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173. *See id.* § 4 (noting that the Agency will take into consideration the efficiencies that the merger is likely to accomplish, which the companies could not accomplish individually).

174. The guidelines and analytical framework for assessing horizontal mergers and non-horizontal mergers are similar, but place differing weight on factors of respective relevance given the differing nature of the horizontal and non-horizontal mergers.

175. HORIZONTAL MERGER GUIDELINES, *supra* note 167, § 0.2.

176. *See id.*

177. *See id.*

178. *See id.*

Bankruptcy Act, and good-faith efforts to solicit alternative offers or acquisitions.<sup>179</sup>

The regulation and administration of competition law in the United States is of specific importance given the peculiar overlapping enforcement scheme. The FTC is charged with the mandate to halt anticompetitive practices before such practices mature into full blown antitrust violations.<sup>180</sup> Specific statutes remain under the jurisdiction of the FTC for enforcement through civil litigation, including the provisions of the Federal Trade Commission Act and the Clayton Act.<sup>181</sup> The Antitrust Division of the DOJ plays a principal role in investigating antitrust violations of the Sherman Act and Clayton Act. The DOJ may bring criminal or civil actions to enforce violations of the Sherman Act, but it can only enforce violations of the Clayton Act through civil actions.<sup>182</sup> In some cases, especially in the area of mergers and acquisitions, the DOJ and the FTC share responsibility, engaging in regular consultation under a “clearance” agreement between the two agencies and often deferring to the agency with greater expertise in the area of a particular investigation.<sup>183</sup>

In addition to actions by the DOJ and FTC, private enforcement plays a fundamental role in the administration of competition law in

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179. HORIZONTAL MERGER GUIDELINES, *supra* note 167, § 5.1.

180. *See generally* Federal Trade Commission Act of 1914, 15 U.S.C. §§ 41 – 58 (2000) (defining the scope of the FTC’s authority).

181. *See, e.g.*, U.S. Dept. of Justice & Fed. Trade Comm., 1995 Antitrust Enforcement Guidelines for International Operations (Apr. 1995) *reprinted in* TERRENCE F. MACLAREN, 1 ECKSTROM’S LICENSING IN FOREIGN AND DOMESTIC OPERATIONS: JOINT VENTURES app. 4A (explaining the various enforcement jurisdictions of the DOJ and the FTC).

182. *Compare* 15 U.S.C. §§1-7 (2000) (codifying the Sherman Act and explaining DOJ jurisdiction), *with* 15 U.S.C. § §14, 18, 19, 20 (2000) (providing recourse only to civil actions).

183. *See* DEPARTMENT OF JUSTICE, DIVISIONAL MANUAL, ANTITRUST DIVISION RELATIONSHIPS WITH OTHER AGENCIES AND WITH THE PUBLIC (Feb. 1998) (explaining the relationship between the DOJ and the FTC and noting that “the Department has referred all civil Robinson-Patman Act matters to the FTC for action, and, second, the FTC routinely refers possible criminal violations of the antitrust laws, such as price fixing, to the Division”), *available at* <http://www.usdoj.gov/atrf/foia/divisionmanual/ch7.pdf> (last visited Feb. 9, 2004).

the United States.<sup>184</sup> The allure of treble damages under the Clayton Act (i.e. three times actual sustained damages plus the costs of the suit and attorneys' fees) provides significant incentive for aggrieved businesses and individuals to initiate actions for competition law violations.<sup>185</sup> The role of "class action" law suits, where a large group of similarly wronged individuals bring an action as a class and not as individuals, plays a major role in private enforcement of antitrust in the United States. In addition, each of the fifty U.S. states may bring their own private actions for damages sustained by the state.<sup>186</sup> While federal antitrust laws also allow for foreign states to bring actions in the United States, for the most part only actual damages are recoverable in such suits by foreign states, rather than treble damages.<sup>187</sup> Violations of federal antitrust legislation are brought within the federal court system, and such suits have a potential for appellate review up to the Supreme Court.<sup>188</sup>

## 2. E.C. – U.S. Bilateral Competition Law Cooperation

Following the introduction of the ECMR in the European Community in 1989, concerns over the new enforcement authority held at the community level in competition enforcement over large transnational mergers and joint ventures grew on both sides of the

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184. See Wood, *supra* note 36, at 414 (explaining that as a result of the existence of private parties, the judiciary has tremendous influence in antitrust policymaking).

185. See 15 U.S.C. §15 (2000) (providing that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee").

186. See 15 U.S.C. §15c (2000) (stating that any attorney general of a state may bring a civil action on behalf of that state for a violation of the Sherman Act).

187. See 15 U.S.C. §15(b) (2000) (stating that "any person who is a foreign state may not recover under subsection (a) of this section an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee").

188. See *e.g.* Standard Oil Co. v. United States, 221 U.S. 1 (1911) (involving a case where defendant oil companies sought a review from an order issued by a circuit court in an antitrust case).

Atlantic.<sup>189</sup> The potential for clashes over jurisdictional prerogatives and remedies, coupled with increasing corporate re-organization strategies fuelled by globalization, resulted in the 1991 Antitrust Cooperation Agreement between the United States and European Community (“1991 Agreement”).<sup>190</sup> Evolving out of existing Organization for Economic Co-operation and Development (“OECD”) recommendations and other existing bilateral arrangements, the 1991 Agreement represented an acknowledgement by both sides of the Atlantic of the extent that evolving business activities transcended traditional national boundaries and the need for concurrent jurisdiction over such activities based on their impact in both American and European markets.<sup>191</sup>

The 1991 Agreement reaches far beyond predecessor agreements on regulatory cooperation.<sup>192</sup> Rather than growing out of animosity resulting from competing claims to jurisdiction, the 1991 Agreement reflects transatlantic consensus that “sound and effective enforcement of competition law is a matter of importance to the

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189. See Merit E. Janow, *Transatlantic Cooperation on Competition Policy*, in ANTITRUST GOES GLOBAL: WHAT FUTURE FOR TRANSATLANTIC COOPERATION 29, 30-31 (Simon J. Evenett et al. eds., 2000) (describing the three developments in the European Community that compelled the creation of the 1991 Agreement). These developments included: (1) the ECJ’s decision in the *Wood Pulp* case that confirmed the extraterritorial application of E.C. competition law and suggested convergence of E.C. and U.S. models on subject matter jurisdiction; (2) the 1992 program in the European Community aimed at the expansion of E.C.-level regulation, which underscored the importance of European integration and competition law enforcement; and (3) the recent adoption by the European Council of the 1990 Merger Regulation, which made it clear that the United States and the European Community would regularly be asserting conflicting claims of jurisdiction and examination over the same mergers. *Id.*

190. Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of the Competition Law, Sept. 23, 1991, U.S.-E.C., U.S. State Dep’t No. 91-216, 30 I.L.M. 1487, 1991 WL 495155 [hereinafter 1991 Agreement].

191. See *id.* at pmbl. (stating that “the sound and effective enforcement of the Parties’ competition laws would be enhanced by cooperation an, in appropriate cases, coordination between them in the application of those laws”).

192. See Janow, *supra* note 189, 33 (noting that the 1991 Agreement was the first such agreement specifically related to competition law as well as the first agreement to recognize the importance of positive comity between the United States and the European Community).

efficient operation” of both markets.<sup>193</sup> The 1991 Agreement contains undertakings by U.S. and E.C. authorities providing for notification of cases that impact upon the important interests of the other party, and for the mutual exchange of information, both through regular meetings of officials and on an ad hoc basis.<sup>194</sup> It further establishes a framework for cooperation and coordination in antitrust enforcement, including a traditional comity procedure obligating each party to take into account the important interests of the other.<sup>195</sup> The 1991 Agreement also contains a positive comity provision, by virtue of which a party may request the other to undertake enforcement action with respect to anti-competitive conduct taking place on its territory that is adversely affecting the requesting party’s interest.<sup>196</sup>

The subsequent 1998 Agreement expanded this notion of positive comity, providing guidelines on how authorities should deal with positive comity requests, while raising the presumption that, in certain cases, either side will normally defer or suspend its own enforcement activities.<sup>197</sup> In effect, the 1998 Agreement clarifies the situations that necessitate referrals between U.S. and E.C. agencies and further articulates the report-back and consultation mechanisms

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193. 1991 Agreement, *supra* note 190, at pmb1.

194. *See* 1991 Agreement, *supra* note 190, arts. 2-3 (regarding inter-party notification and exchange of information).

195. *See id.*, art 5(1) (agreeing that it is in the interest of both parties to address anticompetitive activities that may occur within the territory of one Party, and in addition, “adversely affect important interests of the other Party”).

196. *See id.*, arts. 5(2) (providing that if “a Party believes that anticompetitive activities carried out on the territory of the other Party are adversely affecting its important interests, the first Party may notify the other Party and may request that the other Party’s competition authorities initiate appropriate enforcement activities”).

197. *See* Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, June 4 1998, U.S.-E.C., art. III, U.S. State Dept. No. 98-106, 1998 WL 428268 [hereinafter 1998 Agreement] (providing further that “a Requesting Party may request 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”).

that are triggered when a referral is made.<sup>198</sup> Importantly, Article 3 provides that either party may request the other to “investigate and, if warranted, to remedy anticompetitive activities in accordance with the Requested Party’s competition laws.”<sup>199</sup>

The 1998 Agreement does not, however, apply to mergers due to statutorily imposed deadlines for merger investigations in the European Union,<sup>200</sup> and like the 1991 Agreement, does not provide for the exchange of confidential business information, unless the source of the information consents.<sup>201</sup> Officials on both side of the Atlantic have praised both agreements for facilitating effective communications between the two jurisdictions.<sup>202</sup> In light of the high numbers of cross-border mergers and acquisitions between U.S. and European companies, the increasing interactions between U.S. and E.U. authorities is a seemingly natural development, driven by market forces rather than the need for an underlying agreement.<sup>203</sup>

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198. See *id.* at art. 4 (explaining the procedures for deferral or suspension of investigation in relation on enforcement activity by the Requested Party).

199. *Id.* at art. 3.

200. See Janow, *supra* note 189, at 33 (stating that the short statutory deadlines for merger violations resulted in the non-application of the 1998 Agreement and noting that the provisions apply to all other competition violations).

201. See 1998 Agreement, *supra* note 197, art. 5 (incorporating the 1991 Agreement’s disclosure and confidentiality requirements).

202. See Report from the Commission to the Council and European Parliament on the Application of Agreements Between the European Communities and the Government of the United States of America and the Government of Canada Regarding their Application of Competition Laws, 1 January 2001 to 31 December 2001 (providing an overview of the 1991 Agreement and the 1998 Agreement, and noting the levels of enhanced cooperation, which continue to be a mutual benefit to both parties), [http://europa.eu.int/comm/competition/international/bilateral/documents/us3\\_en.html](http://europa.eu.int/comm/competition/international/bilateral/documents/us3_en.html) (last visited Feb. 20, 2004); William J. Kolasky, Department of Justice, Global Competition Convergence Cooperation: Looking Back and Looking Ahead, Address to American Bar Association Fall Forum (Nov. 7, 2002) (commenting on the successes of the U.S. and E.C. cooperation in antitrust enforcement), available at <http://www.usdoj.gov/atr/public/speeches/200442.pdf> (last visited Feb. 9, 2004).

203. See Janow, *supra* note 189, at 35 (stating that “[g]iven the degree of cross-border mergers and acquisitions activity between U.S. and European firms, increased cooperation and interaction between antitrust officials would appear to be a natural – indeed a market-drive – development and one that does not even require an underlying accord”).

The recent formal adoption of Best Practices for Coordinating Merger Review also plays an important role in the U.S.-EC bilateral relationship.<sup>204</sup> Developed by a joint working group of lawyers and economists from the FTC DOJ and Commission, the document sets forth best practices, which the domestic agencies seek to apply when simultaneously reviewing the same merger transaction. The Best Practices recognise the interest of both jurisdictions reaching consistent and non-conflicting outcomes and the risks divergent approaches have in undermining public confidence in the process, imposing different outcomes, and frustrating the agencies' respective remedial objectives.<sup>205</sup> The Best Practices recommend the establishment of schedules for agencies to confer with each other and encourage senior officials to engage in discussions at key moments in one another's investigations.<sup>206</sup> In addition, they offer merging parties a meeting early in the process to discuss timing issues, encourage joint interviews of parties and third parties, and provide for increased coordination with respect to remedies.<sup>207</sup> The characteristics of transatlantic competition cooperation expose several features that may be of significance for future international cooperation in this area. One very important fact is that, while cooperation between U.S. and E.C. competition authorities appears to have increased, such cooperation has not become "formulaic" or legally binding.<sup>208</sup> Second, cooperation appears especially successful when parties grant waivers for the exchange of confidential information, as illustrated in the WorldCom/MCI and Halliburton/Dresser Industries merger cases.<sup>209</sup> These examples of multi-jurisdictional merger review were effective in that they preserved "independent decision-making authority" on both sides of

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204. See Press Release, U.S. – E.U. Merger Working Group, Best Practices on Cooperation in Merger Investigations (Oct. 30, 2002) [hereinafter Best Practices], <http://www.usdoj.gov/atr/public/international/docs/200405.htm> (last visited Mar. 25, 2004)

205. *Id.*

206. *Id.*

207. *Id.*

208. See *id.* at 42 (noting that while interaction between officials at all levels are common, the cooperation between the U.S. and European competition authorities is not becoming "formulaic").

209. See *id.* (observing that such cases involved independent but coordinated investigations and illustrating the benefits that resulted when the parties granted waivers to the exchange of confidential information).

the Atlantic, exemplified effective staff interaction, created a coordinated resolution of the issues in the same timeframe, and “the divestiture results satisfied the completion concerns of both authorities.”<sup>210</sup> A third characteristic is the fact that cooperation between enforcement agencies and communication between investigating staffs do not necessarily guarantee coordinated or similar outcomes.<sup>211</sup> In a related sense, the fourth characteristic shows that direct conflicts in the form of irreconcilable remedies can take place, as evident in the Boeing/McDonnell Douglas merger and the most recent GE/Honeywell merger failure.<sup>212</sup> In both cases, even in the midst of highly praised and successful cooperation, both sides threatened to initiate trade wars against the other.<sup>213</sup> A final observation supports the contention that even in spite of occasional conflict and disagreement, “the market is itself creating incentives for interagency cooperation.”<sup>214</sup> Following the arguments of traditional game theorists that the incentives for cooperation or accommodation increase in repeat interaction games more than in on-off transactions, the fact that U.S. and E.C. competition authorities are more likely to deal with each other on a regular recurring basis will increase the efficiency and predictability of such cooperation and the chances for similar and coordinated conclusions.<sup>215</sup> While increased interaction and cooperation cannot eliminate the possibility of differing decisions by competition authorities, on a balance repeat interaction is creating new incentives for cooperation.<sup>216</sup>

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210. *Id.* at 43-44.

211. *See id.* at 44 (noting that in the case of the proposed merger between two Swiss pharmaceutical companies provides an example where the two authorities came to different conclusions on the issue of competitive effects).

212. Janow, *supra* note 189, at 44 (stating that although incompatibles remedies can occur, they are rare and that the Boeing/McDonnell Douglas merger provides the best example of such a case).

213. *See id.* 44-45 (describing the Boeing/McDonnell Douglas merger, which involved two U.S. companies with no production assets in the European Community and almost started a trade war).

214. *Id.* at 45.

215. *See id.* at 45 (commenting on the application of game theory to the transatlantic merger cooperation).

216. *See* Janow, *supra* note 189, at 45. (arguing that frequent interaction between agencies will result in new incentives for cooperation). While one may challenge this contention by pointing to US-E.C. trade policy relations that are

To summarize, significant differences in the administration and enforcement of competition law exist between the United States and European Community, but contemporary agreements on competition law cooperation have served to increase interaction between complementary agencies, thereby increasing the efficiency and effectiveness of competition law enforcement in a globalized market. The challenges posed by globalization-influenced cooperate strategies and the potential clash of regulatory regimes charged with overseeing these globalization activities have resulted in the 1991 and 1998 Agreements. These agreements facilitate cooperation and coordination of competition law application, although they remain limited in their overall effectiveness in regulating competition concerns in a globalized market.

## II. DIFFERENCES IN U.S.-E.U. COMPETITION POLICY AND DIFFICULTIES IN HARMONIZATION

Competition law represents an area of extreme sensitivity to national regulatory goals, market power, and political strategy.<sup>217</sup> The application of an economic analysis to the U.S.-E.U. competition policy relationship serves to explain many of the successes and shortcomings of transatlantic antitrust cooperation, as well as difficulties likely to be encountered in the future, as will be discussed throughout this section.

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replete with trade disputes and brinkmanship, significant distinctions separate trade policy and competition policy disputes. *Id.* Specifically, trade disputes regularly revolve around unfair treatment and discrimination, which unsurprisingly leads to escalating tensions and brinkmanship given the nature of discriminating treatment of the foreign product or firm by the foreign government. *Id.* In contrast, when discrimination concerns are absent from the beginning, mitigating influences in merger review operate from the start, whereas many transatlantic mergers involve firms from one or both jurisdictions working to make the necessary adjustments needed to have the transaction cleared. *Id.* at 46. Hence, while regulatory friction may result, the merging parties themselves provide the countervailing influence working to close the transaction. *Id.*

217. See generally, Andrew T. Guzman, *Is International Antitrust Possible?*, 73. N.Y.U. L. REV. 1501 (1998) (discussing the role of antitrust law in national politics).

## A. ECONOMIC MODEL FOR COMPETITION LAW

Economic analysis plays an important role in competition law strategy. From an economic perspective, a globally-efficient level of antitrust exists when antitrust enforcement maximizes overall world welfare by balancing (1) the efficiency gains from economies of scale created by larger firms against (2) the output reduction resulting from the allowance of larger firms to exercise market power.<sup>218</sup> Economically speaking, the level of efficient global antitrust sought arises when the marginal costs of additional size are just equal to the marginal benefits.<sup>219</sup> However, competition law in practice does not exist in the theoretical world of economics and states do not specifically act to promote global efficiency, especially to the detriment of national economies.<sup>220</sup> Hence, the main obstacle to global efficiency remains political, primarily on the basis of national boundaries.<sup>221</sup> States in practice pursue national antitrust policy on a worldwide scale for the benefit of national economies and their constituents, thus skewing the amount of enforcement from its efficient level.<sup>222</sup> In effect, some states will over-pursue such policies, while others will under-pursue them. The unpredictability and often economically illogical decisions of heavily politicized policies in competition law administration and enforcement

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218. *See id.* 1509-10 (describing the effects of efficiency gains and increases in market power on antitrust policy).

219. *See* Michael Abramowicz, *Toward a Jurisprudence of Cost-Benefit Analysis*, 100 MICH. L. REV. 1708, 1725 n.55 (2002) (“A careful cost-benefit analysis of all plausible alternatives, however, should lead to the selection of the alternative for which marginal benefits equal marginal costs.”).

220. *See* Guzman, *supra* note 217, at 1510-24 (comparing a state’s self-interested behavior in antitrust policy with behavior that would maximize global welfare).

221. *See, e.g.*, THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC-CHOICE PERSPECTIVE (Fred S McChesney & William F. Shughart II eds. 1995) (providing various models that exist to describe the policy-making behaviour of national regulators, and suggesting that public policy towards business is a result of political bargains and that it is largely to due the influence of special interest groups).

222. *See* Guzman, *supra* note 217, at 1538 (noting that state’s are more likely to choose a policy that advances their own self-interests rather than a worldwide policy).

admittedly poses a great challenge to any economic analysis of antitrust law.<sup>223</sup>

Professor Andrew Guzman's simplified economic model demonstrating how national antitrust polices are pursued on a worldwide scale involves two states, one that only produces a certain product (*A*), the other that only consumes that product (*B*).<sup>224</sup> Given that each state will pursue a policy beneficial for its national economy and its national constituents, States *A* and *B* will initiate different analyses to control the conduct of firms acting within their territories.<sup>225</sup> According to Professor Guzman, as the producer country, State *A* will adopt a competition policy aimed at maximizing the wealth of producers, seeking to maximize producer profit.<sup>226</sup> As the consumer country, State *B*, conversely, will seek to maximize welfare for consumers by adopting competition laws designed to keep prices for the good as low as possible, thus minimizing producer profits and transferring surpluses to consumers.<sup>227</sup>

Problems in competition policy arise when firms in the producer state decide to merge.<sup>228</sup> In its simplest form within the model, imagine Firm 1 and Firm 2, both producers solely in State *A*, effectuating a merger that would result in both an increase in productive efficiency and an increase in market power.<sup>229</sup> The merger would reduce costs by £250 (+), while increased market power would reduce production by £100 (-), hence creating a world

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223. *See id.* 1538-42 (examining the various challenges that arise from nationalized antitrust laws).

224. *See id.* at 1512 (explaining the economic model in terms of consumers and producers in order to demonstrate the differing objectives of the two groups).

225. *See id.* at 1513 (stating that Country *A*'s interests are aligned with that of the firm while Country *B*'s interests are counter to welfare-reducing activity).

226. *See id.* at 1513 (noting the policy of a producer country and its effects on the consumer country).

227. *See Guzman, supra* note 217, at 1514-15 (detailing the policy of a consumer country).

228. *See id.* at 1515 (describing the effects of a merger of two firms in a producing country).

229. *See id.* at 1513-15 (providing an example and analysis of mergers on efficiency and market power).

surplus of £150 (£250-£100).<sup>230</sup> From a globally optimum viewpoint, the proposed merger would be desirable given the increase in global welfare. However, competition policy is conducted on a national level, and thus the globally optimum analysis will not necessarily be factored at all. In Professor Guzman's example, while State *A* will likely approve the merger given the fact that national welfare will be increased by £250, State *B* will likely reject the merger given its potential loss of £100 due to the decrease in global production that its consumer will bear as a result of the merger.<sup>231</sup> The interests of State *A* and State *B* directly conflict, as gains from the merger for the economy of State *A* must be offset by losses from the economy of State *B*, and hence no agreement between these two states is likely. Whether the merger will actually take place largely depends on State *B*'s ability to block the merger through extraterritorial application of its merger laws, a topic to be discussed in detail later in this section.<sup>232</sup>

In practice, production and consumption of goods often take place in a more mixed context with producers and consumers residing in multiple states.<sup>233</sup> On a more general level, assuming a proposed merger would lead to greater efficiency and more market power, but increased market power enables firms to reduce quantity and raise prices, competition authorities in producer states will often be at odds with competition authorities in consumer states.<sup>234</sup> The globally optimum analysis rarely if ever will supersede the interests of the national economy and its constituents.<sup>235</sup> According to Professor

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230. *See id.* (giving examples of increased in profits and losses in consumer surplus that may result from various mergers).

231. *See id.* (describing the differing views of the producer state and the consumer state to mergers).

232. *See* discussion *infra* Part II.D (providing an overview of the extraterritorial application of competition law in the United States and the European Union).

233. *See* Guzman, *supra* note 217, at 1518-21 (detailing the interactions between firms and consumers in multiple states).

234. *See id.* at 1515 (stating that the policy of an importing country is not aligned with the optimal global policy because it does not consider the increased profits that producers earn).

235. *See id.* (noting that unlike the global optimal policy, the consuming countries' will attempt to prevent activities that increase total welfare when those activities reduce the welfare of its consumer under its jurisdiction).

Guzman, the appropriate simplified formula for this type of economic analysis can be stated as such:

A country whose firms are responsible for X% of global production will take into account X% of the change in global producer surplus generated by a particular activity. A state whose consumers account for Y% of global consumption will take into account Y% of the total change in global consumer surplus generated by the activity.<sup>236</sup>

In many cases, a state will have both producers and consumers and, thus, factor both X and Y into its analysis.<sup>237</sup> From a competition regulation perspective, when X and Y are equal, optimal regulation will be obtained; when X is greater than Y, under-regulation will result; when X is less than Y, over-regulation will result.<sup>238</sup> Accordingly, the general conclusion is that net exporters will tend to under-regulate their competition policy enforcement, as national welfare will increase, while net importers will tend to over-regulate, as national welfare will suffer losses.<sup>239</sup> Hence, in these cases, states have little incentive to cooperate.

Professor Guzman recognized that the power of states to enforce their competition laws on an extraterritorial basis plays an important role in national antitrust policy.<sup>240</sup> The simplified model discussed above assumes states have equal power, while in reality states have different degrees of leverage in the market for enforcement of their competition laws.<sup>241</sup> Hence, states with more power will have a

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236. *Id.* at 1520.

237. *See id.* at 1519 (providing examples to describe optimal global policy in the general case where firms and consumers are located in both countries)/

238. *See Guzman, supra* note 217, at 1519 (describing the effects of this equation on countries that are either net importers or net exporters).

239. *See id.* (describing the behavior of producing and consuming countries as determined by their overall share of producing and consuming benefits and costs).

240. *See id.* at 1521 (arguing that the ability of the state to enforce its laws beyond its own borders affect antitrust laws and that a "country that can apply its laws extraterritorially will underregulate anticompetitive behaviour if it is a net exporter and overregulate such behavior if it is a net importer").

241. *See id.* at 1526 (asserting that cooperative agreements between countries reflects the specific interests of the negotiating parties, not the globally optimal result).

greater capacity to enforce their antitrust laws on other states with less power.<sup>242</sup> Such market power and the ability to enforce antitrust laws extraterritorially depend largely on the attractiveness of a state's domestic market to foreign producers.<sup>243</sup> Extraterritorial application relies greatly on denial of market access.<sup>244</sup> Hence if a state seeking to enforce its competition policy extraterritorially has a large domestic market that foreign firms are greatly dependent upon, the greater the likelihood the state will succeed in extraterritorial enforcement.<sup>245</sup> This stands in contrast to a state with a small domestic market that foreign firms are less dependent upon in which extraterritorial enforcement will be difficult.<sup>246</sup> States maintain significant advantages for extraterritorial enforcement when the cost to the affected firm for antitrust compliance is less than the value of presence in the state's economy.<sup>247</sup> From this perspective, a rational firm will accept antitrust enforcement as a condition of market participation because from a cost-benefit analysis, the benefits of market participation are greater than the losses of antitrust compliance. Hence, the degree a state can impose its competition laws extraterritorial is a function of the size of the state's market and its attractiveness to foreign firms.<sup>248</sup>

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242. See *id.* at 1506 (noting that at "one extreme, for example, is a country that has minimal power over the behavior of foreign firms because those firms do only a small fraction of their business in the country and hold no assets there").

243. See Guzman, *supra* note 217, at 1536 (discussing the unique position of the United States after WWII as the only country able to apply its laws extraterritorially).

244. See *id.* at 1506 (stating that a country will be almost powerless in affecting the behavior of a foreign firm where the foreign firm only does a fraction of its business in that country and holds no assets there).

245. See *id.* at 1506 (arguing that if a firm has a large proportion of its business in a country, that country has considerable leverage on the firm and can penalize the firm with monetary sanction in the event the firm fails to comply with the country's demands).

246. See *id.* (arguing that such a country, even if it threatens to deny access to its domestic market to foreign firm, will still not be effective in influencing the behavior of the foreign firm).

247. See *id.* at 1506 (noting the considerable leverage a country has a firm that has substantial assets in that country and providing examples of sanctions the country can impose on that firm).

248. See Guzman, *supra* note 217, at 1506-08 (noting the differences in the influence countries have over foreign firms where the firm has substantial assets in

The economic model factoring a state's extraterritorial capacity unfolds as such. Imagine State *B*, which cannot apply its laws extraterritorially, and two producers, one within State *B* and one without. Given the non-extraterritorial abilities of State *B*, its competition policies will only be applicable to the domestic producer.<sup>249</sup> Consider what happens when the two producers seek to merge with separate third parties, both resulting in a loss of global welfare.<sup>250</sup> Clearly, from a global perspective State *B* should block the merger through the domestic application of its competition laws. However, this may not be optimal for State *B*, as the foreign merger will likely proceed even in spite of *B*'s objection. The foreign merger will reduce market power and reduce consumer welfare through higher prices, while in the meantime the domestic producer will itself be harmed given its resulting weaker competitive position to the merged firm.<sup>251</sup> Thus, in an effort to increase its own welfare, State *B* will allow the domestic merger. Based on this example of the economic model, it is possible to conclude that states without power to enforce their competition laws extraterritorially will under-regulate antitrust at a globally sub-optimal level.<sup>252</sup>

Globalization has in fact reduced the incentives for states to enforce antitrust policies exclusively to their own domestic firms.<sup>253</sup>

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that country and where the firm does only a small percentage of its business in that country).

249. *See id.* at 1527-28 (providing an examples of situations where there are no extraterritorial application of antitrust laws and analyzing the effects of this situation on the prospects for harmonization).

250. *See id.* at 1526-28 (stating that "in the absence of extraterritoriality, a trading country's optimal antitrust policy is weaker than the optimal global policy, regardless of whether the country is an importer or an exporter").

251. *See id.* at 1510 (analyzing the effects of an increase in market power and positing that "[a]s a firm's market power increases, the firm is able to increase the price of its goods and services above the level that would prevail in a competitive market"). As a result the firm can reduce the amount it sells, raise prices, and increase profits. *Id.* at 1510. Such a result is bad for consumers and reduces overall welfare. *Id.*

252. *See id.* at 1527 (asserting that a state's inability to discipline foreign firms for violation of antitrust laws will result in under regulation).

253. *See* Guzman, *supra* note 217, at 1529 (noting that states will exclude a strict competition state from international treaties so as to avoid application of the more stringent laws to domestic exporters).

This leads to the general result of weaker antitrust policies in states lacking the power to apply their laws extraterritorially as strict domestic policy, and the absence of extraterritoriality prevents local firms from engaging in profit-maximizing anti-competitive activities. This, however, does not stop or prevent similar foreign firms from engaging in the same anti-competitive conduct and reducing domestic consumer surplus in the affected jurisdiction.<sup>254</sup> Likewise, as the global marketplace continues to grow through increased international trade, national policies become less stringent as the beneficial effects of regulating anticompetitive conduct are enjoyed by foreign consumers and decreasingly by domestic ones in states unable to invoke extraterritorial enforcement.<sup>255</sup> Extraterritoriality, in effect, allows countries to block such activities and increases the likelihood for stricter competition policy within the domestic sphere.<sup>256</sup>

## B. DIFFICULTIES IN COMPETITION LAW HARMONIZATION

While the economic model can explain much of the successes and failures of cooperation in transatlantic competition policies, differing economic ideologies and beliefs as to the appropriate role of competition policy, the state, the consumer, and the producer in the marketplace serve to correlate and supplement the economic model's shortcomings.<sup>257</sup> The U.S.- E.U. cooperation in antitrust exemplifies the increasingly difficult task faced by the United States and European Community of reconciling the objectives of protective social regulation with free competition through open trade.<sup>258</sup> The

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254. *See id.* at 1527 (arguing that a state's interest in protecting local firms will result in under regulation when the state is unable to enforce its laws extraterritorially).

255. *See id.* (noting that the full effect of antitrust policy is felt by local firms, whereas the impact on consumers is felt worldwide).

256. *See id.* at 1526 (asserting that full extraterritoriality results in the blockage of welfare reducing activities and restrictive antitrust policies).

257. *See* discussion *infra* Part II.B-C (proving a detailed account of the difficulties in harmonization and noting the different ideological approaches between the E.C and U.S. competition policies, particularly the U.S. emphasis on the consumer approach).

258. *See* Gregory Schaffer, *Reconciling Trade and Regulatory Goals: The Prospects and Limits of New Approaches to Transatlantic Governance Through*

past twelve years since the institution of the 1991 Agreement underscore the resulting divergences inherent in seeking such a balance.

In general, the goals of consumer and social protection through regulation and the aims of free and open trade may be complementary and/or conflicting.<sup>259</sup> The basic theory behind social regulatory policies is both protective and beneficial for the consumer by protecting consumers from market failures through state intervention.<sup>260</sup> Free trade policies aspire to promote competition and lower prices for consumers by providing for a diverse selection of goods and services in the market, thereby increasing consumption possibilities and raising the standard of living.<sup>261</sup> Trade and regulatory policies typically conflict for two primary reasons, the first being that domestic regulators do not account for the impact of their own regulations on foreign consumers or markets.<sup>262</sup> Second, genuine differences exist in constituent preferences and regulatory strategies that prevent total and complete harmonization and necessitate flexibility in any dealings between sovereign states.<sup>263</sup>

The differences in U.S. and E.C. competition policy the previous section of this thesis described emphasize the inherent difficulties in harmonizing the competition law of the United States and European Community.<sup>264</sup> Transatlantic merger cooperation, especially the

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*Mutual Recognition and Safe Harbor Agreements*, 9 COLUM. J. EUR. L. 29, 30 (2002) (commenting on the balance between social regulation and free competition, and noting that depending on the circumstances, these objective can be “complementary or in conflict”).

259. *See id.* (noting that social regulation and free trade are simultaneously complementary and in conflict).

260. *See id.* (stating that the *ideal* social regulatory policies seeks to protect consumers from market failure).

261. *See id.* (asserting that the *ideal* form of free trade policies seeks to offer consumers an increased selection of goods at lower prices).

262. *See id.* (commenting on the lack of voice foreign investors have in domestic political and regulatory processes).

263. *See* Schaffer, *supra* note 258, at 31 (noting the differences between constituent preferences and regulatory strategies and arguing that there is no reason for attempting to harmonize such differences).

264. *See* discussion *supra* Part II.A (elaborating on the systemic differences between U.S. and E.C. competition policies and subsequent difficulty in aligning the two systems).

recent GE/Honeywell case, highlights several differences in the political, social, and economic objectives of the United States and European Union in the aims of competition policy and antitrust enforcement.<sup>265</sup>

With respect to the European Union, the history of the Common Market serves to explain many of the peculiarities present in contemporary policy.<sup>266</sup> The creation and development of the European Union and the Common Market itself finds much of its foundation in rebuilding a war-torn continent following the end of the Second World War and the desire for an economic unity and interdependence, especially in the post-Cold War era.<sup>267</sup> The central goal of the European Economic Community, established in 1958, aimed to establish an integrated common market as a means to “promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States.”<sup>268</sup> The European Economic Community also sought to establish a system that would guard against distortion to competition in the common market.<sup>269</sup> Neither Articles 81 nor 82 are explicitly concerned with mergers, though the Commission has made use of terms within these provisions to control such transactions at a Community level as early as 1973.<sup>270</sup> The relatively late development of the ECMR in 1989

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265. See discussion *infra* Part II.B (using the GE/Honeywell case to further illustrate vital differences in the U.S. and E.C. competition laws).

266. See discussion *supra* Part I.B.1.a (discussing the domestic framework that is the basis of current E.C. competition policies).

267. See Eric S. Hochstadt, *The Brown Shoe of European Union Competition Law*, 24 CARDOZO L. REV. 287, 318 (2002) (describing the political and historical background underlying the European Union’s desire for both unity and independence).

268. Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 2, 298 U.N.T.S. 11 [hereinafter EEC Treaty].

269. See *id.* art. 3(f) (listing the goal of establishing such a system as one of the European Economic Community’s intended objectives).

270. See Case 6/72, *Europemballage Corp. v. E.C. Commission*, [1973] E.C.R. 215, [1973] C.M.L.R. 199, 200-01 (1973) (drawing on Article 82’s use of the term “abuse” to include mergers for the first time); Case 142/84, *British-American Tobacco Co. Ltd v. E.C. Commission*, [1987] E.C.R. 4487, [1988] 4 C.M.L.R. 24, 51-52 (1988) (applying Article 81 to mergers under a 1966 Commission

relies partly on the European focus on rebuilding the Member State economies and becoming more competitive throughout the world, rather than encouraging the type of growth associated with merger activity.<sup>271</sup> At the point when the region became economically unified, the focus shifted to ensuring that merger activities did not erect market barriers in place of national barriers. The focus also shifted to addressing deficiencies in Community law from the lack of an exclusive framework for merger review.<sup>272</sup> Of particular concern for this analysis, E.C. competition policy plays the role of ensuring that private companies do not erect private barriers to trade, while governmental actors and institutions seek to abolish national barriers to trade.<sup>273</sup>

U. S. antitrust law, in contrast, tends to elevate consumer welfare as the ultimate goal of competition regulation.<sup>274</sup> The origins and development of U.S. competition law, beginning with the implementation of the Sherman Act and continuing with subsequent

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Memorandum and holding that Article 81 could apply in transactions falling short of a merger but resulting in closer ties between competitors); *see also* WEATHERILL, *supra* note 76, 940-43 (discussing the origins of the Commission's application of Articles 81 and 82 to mergers).

271. *See* WEATHERILL, *supra* note 76, at 944 (explaining that European Community legislation aimed to prevent mergers from disrupting the Community market).

272. *See id.* (explaining the inadequacies of the existing Community law and stating that the Merger Control Regulation represented a framework for analyzing mergers, in which larger mergers would be regulated at the Community level, and smaller mergers would be subject to the regulation of national authorities).

273. *See generally* Philip Marsden, *The Divide on Verticals*, in ANTITRUST GOES GLOBAL: WHAT FUTURE FOR TRANSATLANTIC COOPERATION?, *supra* note 28, at 117, 117-38 (examining variances in the way one reviews vertical arrangements on competition policy grounds in both America and Europe); Spencer Weber Waller, *Anticartel Cooperation*, in ANTITRUST GOES GLOBAL: WHAT FUTURE FOR TRANSATLANTIC COOPERATION?, *supra* note 28, at 98, 98-116 (examining the European and U.S. mechanisms for cartel investigation, and arguing that currently there is no mechanism that would facilitate easy or significant cooperation for purposes of cartel enforcement).

274. *See* Sarah Stevens, *The Increased Aggression of the EC Commission in Extraterritorial Enforcement of the Merger Regulation and its Impact on Transatlantic Cooperation in Antitrust*, 29 SYRACUSE J. INT'L L. & COM. 263, 284-85 (2002) (noting that, while U.S. antitrust law focuses on the consumer, at the international level, a consensus does not exist as to the overall goals of competition policy).

legislation, explains much of the development of the consumer orientation as a mechanism for combating trusts and preserving competition for the benefit of consumers in the market.<sup>275</sup> Few would argue that maximizing consumer welfare has always been the sole aim of U.S. competition law, but consumer welfare represents the evolved aim of U.S. antitrust policy in its present form, resulting from an “extensive history of case law, enforcement actions, and guidelines.”<sup>276</sup> In large part, U.S. antitrust law incorporates a pure form efficiency-based analysis, whereas competition policy in the European Community often serves as a mechanism for non-efficiency related goals.<sup>277</sup> Interesting aspects of European competition policy, especially evident in recent merger review activity, is the sensitivity to, and focus on, the behavior of dominant firms.<sup>278</sup> As opposed to U.S. antitrust law that is more concerned with ensuring a market structure not conducive to oligopoly price fixing, E.U. competition law focuses more on preventing market leaders from becoming dominant.<sup>279</sup> U.S. competition law, especially evident in merger regulation, can best be summarized as an inquiry into the impact of market activity on consumers, analyzing market conduct that lowers output and raises prices. The E.C. approach, however not only looks at the impact on consumers, but further analyses the unfair competitive advantages and abuses of dominant firms, irrespective of output and pricing efficiencies.<sup>280</sup>

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275. See Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 50 HASTINGS L.J. 871, 899 (1999) (arguing that Congress believed trusts and monopolies possessed market power to raise prices, which would harm consumers).

276. See Hochstadt, *supra* note 267, at 321-22 (describing the sources underlying the evolving nature of U.S. antitrust law and its goals).

277. See Stevens, *supra* note 274, at 285 (contrasting the U.S. efficiency-based system, which focuses on consumers, to the European non-efficiency based system, which also considers the competitive advantages large firms may realize).

278. See Hochstadt, *supra* note 267, at 319 (emphasizing that, historically, European antitrust laws focused largely on dominant firm behavior).

279. See *id.* (elaborating on the inherent differences between the goals of U.S. and European antitrust laws).

280. See generally Eleanor M. Fox, *The End of Antitrust Isolationism: The Vision of One World*, 1992 U. CHI. LEGAL F. 221 (1992) (presenting disharmonies in the competition policies between the European Union and the United States and providing a context for understanding the differences between the two systems);

The recent diverging decisions by U.S. and E.C. competition authorities over the GE/Honeywell merger proposal highlight many of the differences present in contemporary antitrust policy in these respective jurisdictions. U.S. regulators first reviewed the £28 billion proposal to make Honeywell a wholly owned subsidiary of GE, both companies being American firms.<sup>281</sup> The DOJ noted two prime markets that the merger would have affected: 1) military helicopter engines and 2) heavy maintenance, repair, and overhaul (“MRO”) services for aircraft engines, and auxiliary power units (“APU”).<sup>282</sup> Though ultimately approving the merger, the DOJ required the parties to divest Honeywell’s helicopter engine business due to its adverse affect on competition in the sector.<sup>283</sup> The DOJ also required the parties to authorize a different third-party MRO service provider for various Honeywell aircraft engines and APUs, in order to allow for more competition by introducing a new market player.<sup>284</sup> Four months after GE/Honeywell notified U.S. competition authorities of the proposed transaction, the parties notified the Commission, and the Commission responded by opening a full-scale investigation.<sup>285</sup> Negotiations between the Commission and the

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Fox, *supra* note 34, at 1-5 (examining the European and U.S. views of the world competition issue and suggesting options for created world market access).

281. See Schmitz, *supra* note 91, at 565 (explaining that the DOJ reviewed the proposed merger and decided not to challenge it).

282. See *id.* at 566 (noting the limited areas of investigation the DOJ explored, as opposed to the European Commission’s broader investigatory scope).

283. See Press Release, U.S. Department of Justice, Justice Department Requires Divestitures in Merger Between General Electric and Honeywell (May 2, 2001) (describing the terms of the DOJ’s requirements in the GE/Honeywell merger), [http://www.usdoj.gov/atr/public/press\\_releases/2001/8140.htm](http://www.usdoj.gov/atr/public/press_releases/2001/8140.htm) (last visited Feb. 10, 2004).

284. See *id.* (quoting the Director of Operations and Merger Enforcement for the Antitrust Division as stating that “[w]ithout this divesture, the U.S. military would likely have faced higher prices, lower quality and reduced innovation in the design, development, and production of the next generation of advanced U.S. military helicopter engines”).

285. See Press Release, European Commission, Commission Opens Full Investigation into the General Electric/Honeywell Merger (Feb. 3, 2001) (advising the public of the European Commission’s plan to conduct a thorough assessment of the merger’s impact on competition), [http://europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=IP/01/298|0|AGED&lg=EN&display=](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/298|0|AGED&lg=EN&display=) (last visited Feb. 7, 2004); see also Donna E. Patterson

parties failed to result in an acceptable compromise, leading the Commission to, for the first time, block a merger already approved by U.S. regulators.<sup>286</sup> The Commission's decision accentuated the differences in U.S and E.C. policy and analysis, most apparent in the Commission's disregard for the helicopter and MRO service markets, a factor that alarmed the DOJ.<sup>287</sup> Rather, the Commission identified numerous other markets that the merger would potentially adversely affect in the Common Market, specifically the market for jet aircraft engines, avionics, and engine starters.<sup>288</sup> Concerns over the creation or strengthening of a dominant position in aircraft engine sectors and bundling of the new company's products led to the Commission's conclusion.<sup>289</sup> Given the lack of dominance the market shares of the proposed entity would create, the Commission relied heavily on GE's financial strength, a focus on pre-existing dominance that justified the Commission's decision.<sup>290</sup> Further, in addition to customary analysis of the proposal's effects on relevant markets and assessments of horizontal and vertical effects, the Commission also employed an analysis of how positions in unrelated markets might be combined through bundling, even without clear evidence such behavior would emerge.<sup>291</sup> The assessment of

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& Carl Shapiro, *Transatlantic Divergence in GE/Honeywell: Causes and Lessons*, 16 ANTITRUST 18, 22 (2001) (detailing GE's and Honeywell's efforts to provide both U.S. and EU competition authorities with pertinent information prior to merging, and the authorities' response to such information).

286. See Schmitz, *supra* note 91, 592-94 (discussing three recent challenges to European Commission decisions). Both GE and Honeywell have launched separate appeals to the Commission's decision in the Court of First Instance, particularly addressing whether the Commission acted beyond the scope of the Merger Regulation. *Id.* at 594.

287. See *id.* at 568 (reasoning that the Commission's lack of concern with the helicopter and MRO services markets was not surprising, as they had little effect on the Common Market).

288. See *id.* at 568-69 (comparing the Commission's lack of concern with the helicopter and MRO service markets, to its concentration on other markets).

289. See *id.* at 576-77 (exploring the Commission's unprecedented concern with bundling).

290. See *id.* at 585-86 (noting that, because the Commission did not determine that GE and Honeywell would attain market dominance, a valid challenge to the decision exists).

291. See Schmitz, *supra* note 91, at 586 (questioning the Commission's methodology supporting its decision in the merger case). The Commission's

completely different markets and the Commission's focus on bundling and potential risks to unrelated markets underscore deeper focuses of U.S. and E.C. competition policy, as well as post-merger mechanisms available to address disruptive market effects.

GE/Honeywell judiciously identified the true differences in U.S. and E.C. competition law policy.<sup>292</sup> The United States has almost uniformly recognized that its consumer welfare focus is the fundamental difference.<sup>293</sup> While the importance of consumer protection is undoubtedly an important factor in European competition policy, and one can argue that the Commission's decision to block the merger was a consumer protection motivated decision (i.e., blocking the creation of a dominant entity that could have been detrimental to competition and consumers), consumer welfare is the starting point and dominant, overriding interest of the Chicago School-driven U.S. antitrust system.<sup>294</sup> European competition policy may in the end justify its decisions as consumer oriented, but factors such as business protectionism and the prevention of barriers in the Common Market serve as correspondingly important factors as well.<sup>295</sup> As discussed previously, the substantial tests employed in merger assessment are actually quite similar, as both analyze the consequences of the merger for competition and whether or not it will affect competition.<sup>296</sup> The application of these questions, however, highlights the difference in approaches, as consumer welfare is

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analysis has been heavily criticized, especially in regards to the bundling issue and whether such an assessment has a basis in the Merger Regulation, primarily for adverse effects on legal certainty and its blurring of the distinction between merger control and post-merger control through Article 82 investigations. *Id.*

292. *See id.* at 587 (asserting that the United States more clearly identified the fundamental differences between its system, and that of Europe).

293. *See id.* (noting that the United States consistently insists that the division between its system and Europe's is the U.S focus on consumer welfare).

294. *See id.* (acknowledging Europe's commitment to consumers, but emphasizing the dominant position the United States retains in that respect).

295. *See id.* (noting that Europe missed the primary criticism U.S. lawyers offered regarding Europe's main antitrust concerns).

296. *See supra* Part I.B.1.a-b (discussing the similar criteria and tests the U.S. and E.C. use in assessing proposed mergers).

clearly the starting point for the U.S. assessment, while the E.C. emphasis differs.<sup>297</sup>

The contrast in a consumer focused U.S. approach and hybrid focus of the European Community serves to explain many of the procedural and substantive differences evident in recent merger cooperative efforts.<sup>298</sup> The role of judicial review provides one such example. Whereas the Commission decides whether to allow a merger to take place itself, subject to review by the Community judicative, U.S. courts play a more direct role in merger review as the entity charged with blocking the merger itself.<sup>299</sup> In the event a U.S. court determines a merger to “substantially lessen competition,” the DOJ and FTC must seek an injunction and take mergers they wish to prevent to trial in order to prevent such activity.<sup>300</sup> As argued by many scholars critical of the lack of judicial review in the European Community when it comes to merger regulation, the U.S. requirement that an agency must prove its case against a proposed activity before an independent tribunal, rather than empowering an agency to play both judge and jury deciding a matter on its own, accounts for the sometimes profound analytical differences in U.S. and E.C. merger decisions.<sup>301</sup> Had the DOJ decided to block the

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297. See Schmitz, *supra* note 91, at 587 (stating that the U.S. and European tests, while rather similar, do not emphasize the same goal).

298. See James S. Venit & William J. Kolasky, *Substantive Convergence and Procedural Dissonance in Merger Review*, in ANTITRUST GOES GLOBAL: WHAT FUTURE FOR TRANSATLANTIC COOPERATION?, *supra* note 28, at 79, 79-97 (discussing the opportunity recent multinational mergers have given to practitioners desiring to compare the U.S. and European merger systems).

299. See Patterson & Shapiro, *supra* note 285, at 22 (stressing that the primary process difference between the U.S. and Europe judicial systems is that the United States needs to obtain consent from the judiciary to block a merger).

300. See *id.* (pointing out the fact that while U.S. authorities must obtain judicial assistance in obtaining injunctions, the European Commission investigates, prosecutes, and judges each case itself).

301. See, e.g., *id.* at 21 (positing that the U.S. procedural system played a determinative role in the merger case outcome). Regarding the GE/Honeywell conflicting decisions by U.S. and E.C. authorities:

[H]ad the DOJ sought an injunction barring the transaction [because the merged parties would foreclose competitors by winning bids through discounted prices on engines and component parts] . . . it is very unlikely that the Antitrust Division would have prevailed. Attacking a merger based on fears of discounting would be quite a challenge before an

GE/Honeywell merger, it would have had to prove its case before a federal court, as opposed to the Commission, which was able to make the determination on its own, subject to appeal to the European judicative.<sup>302</sup>

A related and concrete example of procedural dissonance is the role of third parties in the merger review process.<sup>303</sup> Under the E.C. system, third parties play a unique role by raising objections in special hearings and receiving access to relevant merger documents not available to the general public.<sup>304</sup> The oral hearing stage of the Commission's investigation provides such an example, where the merging parties must not only answer to the challenges of the Commission, but also to the objections of third parties.<sup>305</sup> The third party competitors' access to highly relevant unpublished documents in preparation for oral hearing further supplements their role.<sup>306</sup> This practice stands in sharp contrast to the more transparent U.S. system, where only judicial proceeding material is available to the general public in the event an injunction is sought, and where third parties

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objective and independent court. U.S. courts long ago abandoned the assumption that size alone inevitably leads to a diminution of competition, and would have great difficulty classifying above-cost discounting as anticompetitive. Lack of concern about the deal by large, sophisticated buyers would have been another major problem for any Division case . . . In short, with independent judicial oversight, with the conventional rights of defense as one would enjoy before a court, and with some burden on the government to actually establish the likelihood of anticompetitive effects, even the most zealous prosecutors in the United States do not bring cases like this one.

*Id.*

302. *See id.* (noting the lack of substantive European checks and balances at the initial decision on whether to approve the merger at issue).

303. *See Venit & Kolasky, supra* note 298, 87-88 (detailing the role competitors play in the U.S. and European merger review process).

304. *See id.* at 95 (noting that the practice of providing merger-related information to competitors enhances the transparency of the proceedings).

305. *See id.* at 88 (relating various factors which stress the important role competitors play in the merger process and that "competitors are normally given the better part of a full day to attack the proposed merger, after the notifying parties have made their defense to the commission's statement of objections").

306. *See id.* (explaining that competitors have abundant preparation time and ample opportunity to attack a competitor's proposed merger).

play a much less prominent role, if one at all.<sup>307</sup> U.S. agencies generally discount third party evidence while conducting investigations and assessing proposed merger transactions, whereas such evidence would be subject to cross-examination and rebuttal in the European Community.<sup>308</sup>

In addition, the role of post-merger relief provides another example of U.S. and E.U. differences.<sup>309</sup> Private enforcement of antitrust laws plays an important role in the United States, where treble damages are available to successful plaintiffs.<sup>310</sup> The ability of third parties to bring cases against companies abusing dominant positions explains largely why U.S. authorities are seemingly more relaxed in approving certain mergers.<sup>311</sup> In the GE/Honeywell case, the U.S. decision to allow the merger to take place reflected much of the reliance on post-merger litigation to address anticompetitive effects that could have arisen, but were improbable enough to allow the transaction to proceed.<sup>312</sup> In contrast, the European Community maintains a large amount of control over enforcement, especially over Article 81, which makes it difficult for states and private parties to enforce violations themselves without going through the

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307. See *id.* at 88 (noting how the third party's opportunity in the European Community to have a full day to attack the merger magnifies how the role of the competitor far exceeds its place in the U.S. system).

308. See Venit & Kolasky, *supra* note 298, at 88 (explaining how in the European Community the competitors may challenge the notifying party's arguments and how the parties have to address the competitor's rebuttals).

309. See Hochstadt, *supra* note 267, at 309 (asserting that the European Union's lack of post-merger relief may be the most significant procedural difference between the European Union and the United States).

310. See *id.* 313-14 (explaining the pecuniary reason behind the prevalence of U.S. private citizens seeking antitrust enforcement).

311. See *id.* at 309-14 (noting that the European Union's fears focused on the likelihood of GE/Honeywell post-merger anticompetitive activities, due to the lack of E.U. post-merger relief and explaining the diverse antitrust enforcement system in the United States).

312. See *id.* at 315-17 (arguing that "[p]rivate enforcement of the antitrust law is also positively correlated to an enforcement agency's degree of independence"). "It is logical to assume that private parties with remedial tools at their disposal will be less inclined to pressure governmental agencies into action of some sort." *Id.*

Community level.<sup>313</sup> While the upcoming enactment of Regulation 139/2004 will allow for more involvement by the Member States in enforcing certain areas of E.C. competition law in state courts, mergers of the required size remain within the sole discretion of the Commission.<sup>314</sup> The Commission's proposed reforms of this provision allow for an increasingly litigation-based approach by demonopolizing the Commission's control over enforcing Article 81.<sup>315</sup> In GE/Honeywell, the lack of meaningful third-party enforcement in the post-merger context partly explains the Commission's focus on potential, unforeseeable effects, as the Commission needed to address such matters at an early stage rather than revisit the matter itself at a latter stage through Article 82 investigations.<sup>316</sup> Further procedural differences in E.C. and U.S. competition law systems include pre-notification procedures, thresholds triggering review, timetables and deadlines governing both notification by the parties, and the conduct of review by the respective governmental agencies.<sup>317</sup>

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313. See Weatherill, *supra* note 76, at 884-95 (explaining the role of the Commission in enforcing antitrust cases and explaining the powers of the Commission). *But see* Case C-453/99, *Courage Ltd. v. Crehan*, 2001 E.C.R. I-6297, [2001] (discussing the *Courage Ltd. v. Berhard Crehan* case). The "direct effect" doctrine of the *Courage* decision provides a potential avenue for third parties to enforce competition policy in a similar manner to the U.S. practices. *Id.*; see also Council Regulation 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1, 2 [hereinafter Regulation 1/2003] (noting that national courts will also play an important role in Community competition enforcement under Council Regulation 1/2003, which goes into effect in May 2004).

314. See Regulation 1/2003, *supra* note 313, at 2 (outlining the Member States' power to authorize their authorities and courts to apply competition laws).

315. See Hochstadt, *supra* note 267, at 310 (explaining that while the European Community does not technically have the sole enforcement power in respect to Articles 81 and 82, there is a lack of private enforcement).

316. See Schmitz, *supra* note 91, at 586 (assessing the lack of legal certainty involved with the European Union's system of merger assessment, and the blurring line between merger control and post-merger, which fall under E.C. Article 82 investigations).

317. See Venit & Kolasky, *supra* note 298, at 88-94 (elaborating on the procedural dissonance between the U.S. and E.U. procedural methods involved in investigating proposed mergers).

The analysis employed by the respective antitrust authorities, the role of the judicial system, and the roles of consumer welfare and business protection are fundamental, and hence not easily harmonized or converged.<sup>318</sup> Coupled with the economic model that seeks to describe how states act based on the interests of national economies, difficulties in harmonizing competition law on a bilateral basis become increasingly apparent while the case for the desirability of such actions appears even more difficult to make.<sup>319</sup> When taken to a multinational forum, the inherent difficulties and differences become even more pronounced.<sup>320</sup>

### C. DIFFICULTIES IN MULTINATIONAL HARMONIZATION AGREEMENT

On the surface, harmonization of laws purports to be a desirable mechanism for promoting efficiency.<sup>321</sup> Structuring a set of laws by and among two or more states logically helps facilitate smooth, joint, and simultaneous application, without the cacophony of disagreements or opposing purposes.<sup>322</sup> Yet efforts on a multilateral scale for an international competition law system have fared with much less success than bilateral agreements, such as the one between the United States and European Community.<sup>323</sup> As the previous

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318. See Diane Wood, *International Harmonization of Antitrust Law: The Tortoise or the Hare?*, 3 CHI. J. INT'L L. 391, 394-96 (2002) (discussing the major substantive and procedural differences existing worldwide that make harmonization difficult).

319. See *id.* at 398 (posing questions regarding economic harms inherent in the current system versus those that may arise as unintended consequences of harmonization).

320. See *id.* 396-97 (concluding that the three different tests used globally in assessing proposed mergers are indicative of the difficulty that may arise in global transactions)

321. See *id.* at 399 (hypothesizing that, currently, two global firms wishing to merge may have to satisfy varying national requirements in different countries, and concluding that merger enforcement harmonization would certainly reduce such transactional costs).

322. See *id.* at 407 (suggesting that if harmonization efforts proceed, countries will not be forced to sacrifice their own systemic values, and eventually they will desire to follow the dominant U.S. and E.U. systems, without undue force).

323. See Spencer Weber Waller, *Neo-Realism and the International Harmonization of Law: Lessons from Antitrust*, 42 U. KAN. L. REV. 557, 558-59

section demonstrates, harmonization between states with similar political and market systems has proven difficult, while initiating cooperation and coordination have been more desirable alternatives.<sup>324</sup> Antitrust represents a set of highly held public values, dearly held. These values are not a set of neutral principles upon which all states can agree upon by gathering in good faith and communicating precisely.<sup>325</sup> Thus, in an effort to better understand the cooperative and coordinated nature of bilateral agreements, it is important to note the significant limitations on harmonization national differences impose, especially on a multilateral scale.<sup>326</sup> This is of particular importance to those agreements between the United States and European Community, as well as to the extraterritorial enforcement of domestic competition law used as an alternative to bilateral or multilateral harmonization.<sup>327</sup>

The latter half of the twentieth century witnessed a handful of unsuccessful attempts to achieve a harmonized international law for competition.<sup>328</sup> The ill-fated League of Nations made the first attempt with an exploration of a system of controlling cartels, but failed to adopt any such measures.<sup>329</sup> The proposed International Trade Organization ("ITO") of the Havana Charter, immediately following the Second World War, contained detailed rules on the substance and enforcement of competition law, and yet the United

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(1994) (noting five failed previous international attempts at harmonizing competition laws).

324. See discussion *supra* Part II.B (exploring the difficulty in harmonizing competition laws).

325. See Waller, *supra* note 323, at 599-603 (arguing that a candid discussion of norms and values, rather than the enactment of specific legal rules, would increase the likelihood of attaining meaningful international harmonization).

326. See *id.* at 601 (expressing the belief that multinational states must first overcome the difficult task of understanding each others' competition laws and policies before they can make any effort to propose common competition laws).

327. See *id.* at 603 (stressing the importance of U.S. and E.U. national competition laws through the fact that other nations see them as the model to be used to develop multilateral competition laws).

328. See Waller *supra* note 323, at 558-59 (referencing previously failed attempts at internationally harmonizing competition laws).

329. See JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 36 (1969) (stating that the League of Nations made efforts to garner international agreement on multiple issues of international economic relationships).

States' refusal to ratify the Charter meant such rules would never come into force.<sup>330</sup> The United Nations ("U.N.") also made two unsuccessful attempts at internationalizing a system of competition law, including a revamped code of the ITO system under the auspices of the United Nations Economic and Social Council ("UNESCO"), and a coordinated non-binding code between the OECD and the United Nations Conference on Trade and Development ("UNCTAD").<sup>331</sup> The most recent efforts for international harmonization have been made in the Doha Round negotiations at the World Trade Organization ("WTO").<sup>332</sup> The proposal has met stark opposition from the United States, as have most other failed attempts discussed. The current proposal will likely suffer a similar fate.

Failed attempts at creating a competition law on an international scale stem from difficulties inherent to competition law itself.<sup>333</sup> The

330. The ITO, intended to supplement the World Bank and International Monetary Fund to complete a liberal-post war economic order gave way to a weaker General Agreement on Tariffs and Trade ("GATT") system that came into effect without explicit rules on competition or with a sufficiently strong mechanism for enforcement. The GATT system came into force with the tacit understanding that competition issues would not be considered within the system. See Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 350 (1997) (discussing the second attempt by the international community to establish a truly harmonized competition law).

331. See The Set of Multilaterally Agreed Equitable Principles and Rules for Control of Restrictive Business Practices, U.N. Doc. TD/RBP/CONF/10, *reprinted in* 19 INTL. LEGAL MATERIALS 813 (1980). As Waller notes, the UNCTAD code is of some significance given the difficulties and frustrations of negotiating a multilateral competition law approach, as key blocs with incompatible objectives developed and led an ineffective, watered down document that was unanimously accepted by the United Nations General Assembly. Waller, *supra* note 350, at 350.

332. See World Trade Organization, Doha WTO Ministerial Declaration, 9-14 November 2001; WT/MIN(01)/DEC/1 (stressing the WTO as a "unique forum for global trade rule-making and liberalization), [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm) (last visited Feb. 21, 2004); Mario Monti, Commissioner for Competition Policy, A Global Competition Policy, Address at European Competition Day (Sept. 17, 2002) (stating that the WTO is the best forum for a world competition policy), *available at* [http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=SPE ECH/02/399\[0\]RAPID&lg=EN&display=](http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPE ECH/02/399[0]RAPID&lg=EN&display=) (last visited Feb. 6, 2004).

333. See Waller, *supra* note 330, at 395 (arguing that competition law is an intimate reflection of a nation's values and goals). "Competition law has potent

administration of an antitrust system stands as a reflection of important economic values unique to every state administering such laws and policies.<sup>334</sup> Internationalizing such a system would be highly inconsistent with the concept of national sovereignty and the rights of individual states to enforce and carry out their own competition rules.<sup>335</sup> Though globalization and contemporary business practices within the global market have taken their own toll on national sovereignty and state regulatory administration, states are still able to manage their own competition law systems through abrogated means, such as bilateral cooperation agreements, that are much less ambitious than that of an international competition law system.<sup>336</sup> Also, common norms on competition law are not easily forged or created, especially in a multilateral sphere where a range of dissimilar ideologies, governmental systems, and economic philosophies are present.<sup>337</sup> The example of the differing consumer

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historical, economic, political, and social roots that make it a market nation's ultimate form of public law." *Id.*

334. *See id.* (explaining why U.S. antitrust laws resemble constitutional provisions and are hailed as a Magna Carta of free enterprise and the European Union's competition provisions are contained in its constitutive treaties).

335. *See id.* at 384 (noting that nations view any form of transnational antitrust enforcement as threatening their sovereignty, or more specifically, their business sector's economic welfare).

336. *See Waller, supra* note 330, at 362 (noting that bilateral cooperation agreements have been much more successful than multilateral ones and that the United States has been the most zealous advocate of seeking such agreements).

337. *See id.* at 395 (explaining the difficulties associated with negotiating agreements on competition law due to the differing values of the respective societies). As Spencer Waller Weber observes:

Harmonization of antitrust law is not just an exercise in the reduction of transaction costs. It is not like deciding which side of the road to drive on, the color of traffic signals, or the shape of traffic signs, where it probably does not matter ab initio what you decide as long as everyone agrees on something. Competition law has potent historical, economic, political, and social roots that make it a market nation's ultimate form of public law. Short of reading a written constitution, a nation's competition law will tell you the most about its economic and political system and whether it puts its faith in commands of the government or the operation of the market. That is why in the United States the antitrust laws are quasi-constitutional in nature and hailed as a magna carta of free enterprise. That is why the European Union placed its competition provisions in its constitutive treaties. That is why competition law is not

based approach of the United States and the business protectionist attitude of the European Community demonstrates some of the complexities in harmonizing the laws of two political and economically similar systems.<sup>338</sup>

Further, the resolve and interest in an international competition law regime necessary for successful implementation may not actually exist.<sup>339</sup> As demonstrated through past failed efforts, the support may be seemingly broad, but it is certainly not deep.<sup>340</sup> Several factors underlie this belief, particularly the infringement upon state jurisdiction and the rights of states to initiate enforcement actions when possible and necessary.<sup>341</sup> Also, the watering down of any proposed rules would almost certainly occur for a significant number of states to agree upon any code. This would impound the “lowest possible denominator” effect common in most multilateral agreements, thereby leading to weak rules and potentially ineffective

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something you negotiate about to reach a common text, unless the major players are deeply committed to the same values.

*Id.*

338. *But see* Rex J. Adhar, *Antitrust Policy in New Zealand: The Beginning of a New Era*, 9 INT’L TAX & BUS. LAW. 329, 335 (1992) (noting recent efforts in the free trade area between Australia and New Zealand). Adhar reports that a free trade area between Australia and New Zealand has been created and deepened, national competition laws have been significantly harmonised, competition law provisions have replaced antidumping law, and amendments have been made to facilitate Trans-Tasman competition enforcement. *Id.* Such efforts stand as a model for deep economic integration with little to no political integration and present the possibility that competition laws may be quite unique and non-transferable to other cultural or economic settings. *Id.* *See generally*, Maureen Brunt, *The Role of Antitrust Policy in the Development of Australian-New Zealand Free Trade*, in 1992 FORDHAM CORP. L. INST 131, 131-93 (Barry Hawk ed., 1993) (analyzing Australian and New Zealand competition policy).

339. *See* Andre Fiebig, *A Role for the WTO in International Merger Control*, 20 NW. J. INT’L L. & BUS. 233, 245 (2000) (noting that the primary obstacle to an international competition law regime is convincing politicians representing divergent national interests that agreement is in their national interest).

340. *See* Waller, *supra* note 330, at 349 (detailing the history of efforts by the League of Nations, the ITO, the GATT, and the U.N. system, and the difficulties in each to create a successful competition law regime).

341. *See* Fieberg, *supra* note 339, at 246 (suggesting that these issues could be resolved if the threats to sovereignty were limited to cases with low political value at the beginning).

means of enforcement.<sup>342</sup> Another factor of overwhelming significance lies within the nature of developed competition law systems where countervailing interests and pressures often exist, that dilute a state's commitment to competition law in certain cases.<sup>343</sup> Such counter-pressures include protectionist trade policies aimed at limiting competition from foreign imports or investment, trade initiatives favoring foreign export cartels, state subsidies for national industries, regulation policies in certain sectors unconcerned with competition, and even the level of commitment to the monopolies established through intellectual property rights.<sup>344</sup> Contemporary calls for an international system of competition law by the Commission represent a deeper issue and power struggle within the Commission between the Member States and the Community.<sup>345</sup>

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342. See Thomas L. Ruffner, *The Failed GE/Honeywell Merger: The Return of Portfolio-Effects Theory?*, 52 DEPAUL L. REV. 1285, 1331 (2003) (arguing that because of the wide variety of antitrust regulations coming from each country, a multilateral agreement will only legitimize the weak and ineffective rules).

343. See Waller, *supra* note 330, at 374 (listing some pressures such as governmental and subgovernmental, business pressures, institutional pressures, private interest groups, transnational coalitions, and international organizations).

344. See *id.* (noting that the competing interests will determine the rate and nature of future progress).

345. See Opinion 1/94, Opinion on Community Competence to Conclude Certain International Agreements, [1994] E.C.R. 5267, 1 CEC (CCH) 153, 235-47 (1995) (explaining areas of joint and exclusive competence held by the Commission). The European Commission's dominant strategy calling for deeper harmonization and outright internationalization of competition law can be attributed to the greater power it would derive through further efforts for competition enforcement at the Community level. *Id.* The Commission is limited to act only in areas of exclusive competence and to accomplish the objectives of the EC Treaty only when Member States cannot achieve such objectives. *Id.* The tension between Member State action and the Community level can be viewed within the twenty-five year period before the passage of the Merger Regulation as the Commission continually lobbied for such legislation and took steps through judicially sanctioned interpretations of Articles 81 and 82 to effectuate Community-level merger review. *Id.* The Commission stands to gain a significant amount of power should its call for internationalization of competition law be held through the WTO, as the ECJ has already approved a sizeable role for the Commission in the WTO. The Commission's push for competition law to be pursued by the WTO has been highly publicized through speeches by Commissioners, a published report, and even a proposal for the WTO to develop international competition law rules. *Id.*

Focused, non-binding recommended practices represent the major contribution of international efforts to pragmatic and useful merger review practice. The OECD has played a central role in these efforts, while the recently created International Competition Network (“ICN”) has shown signs of promise for contributing to the area. The OECD and its Competition Law and Policy Committee have been instrumental in the promotion of competition, specifically through a series of recommendations on bilateral soft cooperation. The first generation of these recommendations were adopted by the OECD in 1967<sup>346</sup> and 1973,<sup>347</sup> specifically in response to a 1960 Report of a General Agreement on Tariffs and Trade (“GATT”) group of experts expressing growing concern over United States extraterritorial application of antitrust laws. These recommendations provided a principle of traditional comity, notification by states investigating competition issues to other states with important interests in the investigation, calls for coordination in procedures against the same anticompetitive business practices, and advise states to share information.<sup>348</sup> Significantly, these recommendations were non-binding and called for cooperation to the extent permitted under

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346. ORG. FOR ECON. CO-OPERATION AND DEV., COUNCIL RECOMMENDATION CONCERNING COOPERATION BETWEEN MEMBER COUNTRIES ON RESTRICTIVE BUSINESS PRACTICES AFFECTING INTERNATIONAL TRADE (Oct. 5, 1967), *reprinted in* 8 I.L.M. 1309 (1969) [hereinafter 1967 RECOMMENDATION].

347. ORG. FOR ECON. CO-OPERATION AND DEV., COUNCIL RECOMMENDATION CONCERNING A CONSULTATION AND CONCILIATION PROCEDURE ON RESTRICTIVE BUSINESS PRACTICES AFFECTING INTERNATIONAL TRADE C (73) 99 (Final) (July 3, 1973) [hereinafter 1973 RECOMMENDATION], *reprinted in* 19 ANTITRUST BULL. 283 (1974).

348. 1967 RECOMMENDATION, *supra* note 347 (providing a list of recommendations for member countries to follow in order to promote an environment conducive to free competition); 1973 RECOMMENDATION, *supra* note 347 (same). It should be noted the OECD adopted an additional recommendation in 1979, though the document adds nothing new and seems to be a reminder to member countries of the basic comity principle at the height of the Uranium case. ORG. FOR ECON. CO-OPERATION AND DEV., RECOMMENDATION OF THE COUNCIL CONCERNING COOPERATION BETWEEN MEMBER COUNTRIES ON RESTRICTIVE BUSINESS PRACTICES AFFECTING INTERNATIONAL TRADE C (79) 154 (Final) (Sept. 25, 1979), *reprinted in* ORG. FOR ECON. CO-OPERATION AND DEV., COMPETITION LAW ENFORCEMENT: INTERNATIONAL CO-OPERATION IN THE COLLECTION OF INFORMATION 78 (1984).

domestic law.<sup>349</sup> The second generation of these recommendations came into effect in the 1986 Recommendation, which is substantively identical to the prior documents, but contains an appendix remedying the lack of precision of its predecessors through detailed procedures and guidelines.<sup>350</sup> The latest development came in the 1995 Recommendation, which places particular emphasis on mergers at the height of the 1990s merger wave and reflects a greater concern for efficient cooperation and coordination of investigations through additional guidelines.<sup>351</sup> The OECD Recommendations have enjoyed a great amount of success as a tool for soft bilateral cooperation, evolving from defensive agreements, to weak cooperation, to active cooperation and positive comity.

In addition, the ICN has proved to be a potentially useful tool for modest soft harmonisation at the international level. Composed of state competition agencies, the ICN provides a network for addressing practical issues of concern and attempts to facilitate procedural and substantive convergence.<sup>352</sup> In a relatively short period of operation, the ICN has published Guiding Principles for Merger Notification and Review<sup>353</sup> and Recommended Practices for

349. OECD JOINT GLOBAL FORUM ON TRADE AND COMPETITION, JOINT GLOBAL FORUM ON TRADE AND COMPETITION, MODALITIES FOR VOLUNTARY COOPERATION 1, OECD Doc. CCNM/GF/COMP/TR(2003)11 (Apr. 01, 2003) (noting how the OECD principally functions as “a forum for voluntary co-operation in the form of policy dialogue”), available at [http://www.oilis.oecd.org/olis/2003doc.nsf/0/4b5b2743398d264bc1256cfc0028c1b/\\$FILE/JT00141961.PDF](http://www.oilis.oecd.org/olis/2003doc.nsf/0/4b5b2743398d264bc1256cfc0028c1b/$FILE/JT00141961.PDF) (last visited Apr. 12, 2004).

350. ORG. FOR ECON. CO-OPERATION AND DEV., COUNCIL RECOMMENDATION CONCERNING COOPERATION BETWEEN MEMBER COUNTRIES ON RESTRICTIVE BUSINESS PRACTICES AFFECTING INTERNATIONAL TRADE C (86) 44 (Final) (June 5, 1986), *reprinted in* 25 I.L.M. 1629 (1986).

351. ORG. FOR ECON. CO-OPERATION AND DEV., COUNCIL RECOMMENDATION CONCERNING COOPERATION BETWEEN MEMBER COUNTRIES ON RESTRICTIVE BUSINESS PRACTICES AFFECTING INTERNATIONAL TRADE C (95) 130 (Final) (July 27-28), 1995, *reprinted in* 35 I.L.M. 1313 (1996)..

352. Int'l Competition Network, *About the ICN* (discussing the purposes of the ICN), at <http://www.internationalcompetitionnetwork.org/aboutus.html> (last visited Apr. 12, 2004).

353. Int'l Competition Network, *Guiding Principles for Merger Notification and Review* (listing the eight guiding principles), at <http://www.internationalcompetitionnetwork.org/icnnpguidingprin.htm> (last visited Apr. 12, 2004).

Merger Notification Procedures,<sup>354</sup> which have already had in impact in the EC through recent Merger Regulation reforms.<sup>355</sup>

Competition law harmonization poses significant difficulties and problems on both a bilateral and multilateral scale as issues discussed in this section demonstrate. The cooperative and coordinative agreements and networks established between the United States and European Community stand as both a testament of success in regards to a difficult issue, as well as an indicator of how difficult competition law harmonization remains, even between the most similar economic and political systems.<sup>356</sup> The contemporary practices of global market participants, which a global competition law system would seek to regulate and bilateral cooperative agreements have emerged to control, suffer from significant defects and shortcomings.<sup>357</sup> This necessitates alternative state action, specifically the extraterritorial application of domestic competition law.<sup>358</sup> This gap-filling mechanism remains an important and effective medium for the contemporary administration of competition law, especially within the United States and European Community, and will likely form the basis for future action until harmonization or convergence can occur.<sup>359</sup>

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354. INT'L COMPETITION NETWORK, RECOMMENDED PRACTICES FOR MERGER NOTIFICATION PROCEDURES (addressing the seven areas that the private and public sectors have identified as the most pressing in international competition), *available at* [http://www.internationalcompetitionnetwork.org/2003\\_practices.pdf](http://www.internationalcompetitionnetwork.org/2003_practices.pdf) (last visited Apr. 12, 2004).

355. *See infra* sec. II.B.

356. *See supra* notes 281-302 and accompanying text (explaining how the different decisions the U.S. and E.U. authorities reached in the GE/Honeywell merger highlight the deep differences between two seemingly systems).

357. *See supra* notes 259-263 and accompanying text (detailing the difficulties of bilateral harmonization in the U.S. – E.C. model).

358. *See* Ariel Ezrachi, *Globalization of Merger Control: A Look at Bilateral Cooperation through the GE/Honeywell Case*, 14 FLA. J. INT'L L. 397, 408 (2002) (discussing the international effects of extraterritorial application of competition laws).

359. *See id.* (arguing that the extraterritoriality of competition laws serves “as the perfect non-diplomatic, undetected platform from which to advance local economic and industrial considerations under the mask of legal arguments”).

## D. THE EXTRATERRITORIAL ENFORCEMENT OF STATE COMPETITION LAW: THE ECONOMIC MODEL IN FORCE

As the economic model discussed in section II.A holds, powerful states with large economies attractive to foreign producers enjoy a great capacity to apply their own competition law on an extraterritorial basis.<sup>360</sup> This model has developed into the common practice of both the United States and the European Community.<sup>361</sup> This activity explains much of the success of the 1991/98 U.S. – E.C. Agreement as well as the persisting improbability for international consensus and agreement or harmonization of competition policy beyond a certain level.<sup>362</sup>

### *1. United States Extraterritorial Application of Competition Law*

The extraterritorial application of competition law in the United States closely follows the development of the U.S. market and the strength of the U.S. economy in the global arena. As the economic model denotes, states with the capacity to apply competition laws on an extraterritorial basis in order to protect domestic markets often do so, whereas states lacking the ability to engage in such enforcement are left without such an option.<sup>363</sup> Similarly, the development of U.S. statutory and common law doctrine on the use of extraterritoriality reflects this growth and emergence of the U.S. economy.<sup>364</sup>

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360. See Guzman, *supra* note 217, at 1506 (explaining that countries vary in their ability to apply their laws extraterritorially, and that if a firm has a small amount of assets in a country, that country will probably not be able to exert control over that firm).

361. See Edward T. Swaine, *The Local Law of Global Antitrust*, 43 WM. & MARY L. REV. 627, 682-83 (2001) (noting that “extraterritorial application of competition laws has been legitimated”).

362. See Kevin C. Kennedy, *Foreign Direct Investment and Competition Policy at the World Trade Organization*, 33 GEO. WASH. INT'L L. REV. 585, 603 (2001) (explaining that although there is near unanimity that there should be competition agreements to fix prices and divide markets, countries agree on little else). Kennedy states that differences exist on mergers, resale price maintenance, parallel imports, vertical restraints, and abuse of a dominant position. *Id.*

363. See Guzman, *supra* note 217, at 1506 (providing examples of differences in countries' ability to apply their laws extraterritorially).

364. See, e.g., Russell J. Davis, *Extraterritorial Application of Federal Antitrust Laws to Acts Occurring in Foreign Commerce*, 40 A.L.R. 343 (2004) (describing

Following several years of inactivity and reluctant enforcement of the Sherman Act, the U.S. Supreme Court took on the issue of extraterritoriality in the 1909 case of *American Banana Co. v. United Fruit Co.*<sup>365</sup> In an action involving the confiscation and damaging of a banana plantation in Costa Rica, the Supreme Court adopted a strict territorial approach, or “vested rights” theory.<sup>366</sup> It held that the Sherman Act could not regulate the alleged monopolization scheme as the seized plantation lay within the *de facto* jurisdiction of Costa Rica and the injury occurred outside of the jurisdiction of the United States.<sup>367</sup> The formulation of the strict territoriality rule that would govern the Court for the next thirty years came through Justice Oliver Wendell Holmes’ holding that “the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.”<sup>368</sup>

The strict territoriality approach did not last long in the United States, as jurisdictional doctrines developed that brought actions taking place abroad with an anticompetitive effect on the U.S. market and U.S. corporations within the scope of U.S. law.<sup>369</sup> The United States adopted the intended effects doctrine in *United States v. Aluminum Co. of America (Alcoa)* in 1945, a case involving judicial interpretation of whether Congress intended U.S. antitrust laws to apply to parties located outside of the United States.<sup>370</sup> In this case,

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comprehensively the statutes and cases involving U.S. federal antitrust laws that have been applied extraterritorially).

365. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

366. *See id.* at 356 (stating that the exercise of jurisdiction over acts that occurred in another country or territory would be unjust and contrary to principle of international comity).

367. *See id.* at 357-58 (stating that “we think it entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of the statute so far as the present suit is concerned”).

368. *Id.* at 356 (quoting *Slater v. Mexican Nat’l R.R.*, 194 U.S. 120, 126 (1903)).

369. *See infra* notes 370-373 and accompanying text (providing examples of case law demonstrating the development of the judicial doctrine).

370. *See United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (holding that, in some circumstances, it is proper to balance the effect of restrictions in a contract with its industrial or commercial advantages, but that it is not proper when a contract is made with intent to establish a monopoly).

the U.S. government challenged Alcoa's monopolization of interstate and foreign commerce and also challenged a related conspiracy in Canada that utilized a quota agreement with its Canadian subsidiary limited and several other European corporations, creating an international cartel known as the "Alliance."<sup>371</sup> Judge Learned Hand, after taking into account *American Banana's* traditional territorial approach "for conduct which has no consequences within the United States," stated that "it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and not these liabilities other states will ordinarily recognize."<sup>372</sup> Out of this general proposition, Judge Learned Hand denoted the intended effects doctrine, which holds that U.S. courts may assert jurisdiction over any foreign firm whose activity is intended to affect, and actually does affect, the domestic market of the United States.<sup>373</sup> The U.S. Supreme Court would later officially adopt this rule and reject the strict territorial approach of *American Banana* in *Continental Ore Co. v. Union Carbide & Carbon Corp.*<sup>374</sup>

Following the *Alcoa* decision, both the judiciary and the legislature focused the scope of the doctrine of extraterritoriality for the United States to enforce competition policy beyond its domestic jurisdiction. The first instance came through the Ninth Circuit's decision in *Timberlane Lumber Co. v. Bank of America*, where the *Alcoa* decision came under scrutiny for not taking into account a comity analysis of other nations' interests.<sup>375</sup> In *Timberlane*, the Court scaled back the intended effects doctrine, adopting a tripartite test to determine whether it should enforce extraterritoriality. The Court stated that: (1) there must be an effect, actual or intended, on American foreign commerce in the alleged restraint, (2) the effect

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371. *Id.* at 440 (stating that there was some evidence that Alcoa took part in the formation of the "Alliance").

372. *Id.* at 443.

373. *See id.* at 444 (stating that both agreements would have been unlawful if they were made in the United States, and so it follows that both were unlawful even if made abroad because they were intended to affect, and did affect, imports).

374. 370 U.S. 690 (1962).

375. *See Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (1976) (stating that the Sherman Act is not limited to trade restraints which have both a direct and substantial effect on our foreign commerce).

must be sufficiently large to present a cognizable injury, and (3) the court should determine whether the interest of the United States are sufficiently strong over the interest of other nations to justify the extraterritorial assertion of authority.<sup>376</sup> In addition, Congress weighed in on the debate through the 1982 Foreign Trade Antitrust Improvements Act stating that a “direct, substantial, and reasonably foreseeable effect” on U.S. commerce from the activity in question must exist in order for the United States, under the *Alcoa* test, to assert jurisdiction over export commerce or wholly foreign conduct.<sup>377</sup>

The Supreme Court considered these statutory and jurisprudential standards for comity in *Hartford Fire Ins. Co. v. California* with the Court formulating a new true conflicts principal for extraterritoriality.<sup>378</sup> In *Hartford Fire*, the Court upheld the extraterritorial jurisdiction of U.S. courts over foreign or multinational corporations in violation of U.S. antitrust law while operating in the U.S. market without considering the interests of the foreign sovereign state.<sup>379</sup> In effect, the comity requirements of *Timberlane* do not bar the enforcement of U.S. antitrust law and a U.S. court should only consider comity where a “true conflict” exists between U.S. and foreign law.<sup>380</sup> A “true conflict” does not exist “where a person subject to regulations by two states can comply with the laws of both.”<sup>381</sup>

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376. See *id.* at 613 (noting that the third prong of the test was the most complicated because in some cases, the application of the direct effects test in the international context might open the door too wide while at other times, it may cause the dismissal of a case “closing the jurisdictional door too tightly”).

377. Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a.(1) (2000).

378. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (examining whether or not the principle of international comity precluded the district court from applying Sherman Act jurisdiction to the actions of foreign reinsurers).

379. See *id.* at 765 (stating that the only substantive issue in the case was whether there was a conflict between domestic and foreign law).

380. See *id.* at 799 (stating that the reinsurers did not claim that British law required them to act in a way prohibited by US law).

381. *Id.* (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 cmt. e (1987)). In dissent, Justice Scalia argued against the Court’s interpretation of the Restatement’s rule, stating that:

The *Hartford Fire* decision has resulted in a general state of confusion for the principles and criteria for U.S. extraterritorial competition law enforcement. By holding that courts should only consider comity when a direct conflict exists, the decision substantially reduced the role of comity, and the *Timberlane* comity analysis has lost much of its significance.<sup>382</sup> While some courts continue to utilize the comity analysis of *Timberlane* and others reject the formula completely, the *Hartford Fire* decision indicates the focus of the Supreme Court on U.S. national antitrust interests and the application and enforcement of extraterritoriality over the issues of comity and those of other states.<sup>383</sup>

Several factors explain the aggressive state of U.S. extraterritorial enforcement from *Alcoa* onwards. As the economic model describes, the United States' behavior is not surprising.<sup>384</sup> Given the power of the U.S. economy and the relative significance of the United States in the global marketplace, the options for undertaking extraterritorial enforcement are more readily available to the United

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Under the Restatement, a nation having some 'basis' for jurisdiction to prescribe law should nonetheless refrain from exercising that jurisdiction 'with respect to a person or activity having connections with another state when the exercise of such jurisdiction would be unreasonable. . . . Rarely would these factors point more clearly against application of United States law. . . . [Therefore, it is] unimaginable that an assertion of legislative jurisdiction by the United States would be considered reasonable, and therefore it is inappropriate to assume, in the absence of statutory indication to the contrary, that Congress has made such an assertion.

*Id.* at 818-20 (Scalia, J., dissenting). Justice Scalia further argued that the true conflict analysis formulated by the majority was "breathhtakingly broad" and would "bring the Sherman Act into sharp and unnecessary conflict with the legitimate interests of other countries – particularly our closest trading partners." *Id.* at 820.

382. See William Sugden, Note, *Global Antitrust and the Evolution of an International Standard*, 35 VAND. J. TRANSNAT'L L. 989, 1010 (2002) (explaining that district courts have disputed how to interpret the *Alcoa* effects test and the *Timberlane* comity factors).

383. See *id.* (stating that the Supreme Court substantially reduced the role of comity).

384. See discussion *supra* Part II.A (describing an economic model that governs competition law and stating that a country's ability to exercise control over firms correlates with the degree to which such firms are dependent on its markets).

States.<sup>385</sup> The increase in transnational business enterprises, a majority of which conduct some form of business in the United States, in the post-World War II era and especially over the past twenty years, has made extraterritoriality an integral and necessary part of U.S. competition policy, given the United States' capacity to act extraterritorially and its desire to protect the competitive nature of the U.S. marketplace.<sup>386</sup> The relative political dominance of the United States is also a factor, as is the lack of any adequate international machinery to address transnational competition problems.<sup>387</sup> In fact, the lack of such an international mechanism is primarily due to economic and political position of the United States and its capacity for extraterritorial competition law enforcement.<sup>388</sup> The United States has not been persuaded that there is a need for such an organization and has seemingly undermined any attempts at accomplishing such an end.<sup>389</sup> The persuasive and coercive power of extraterritoriality coupled with the facility for acting in such a manner best justifies the United States' adoption and enforcement of extraterritoriality in the past and for the future.<sup>390</sup>

## *2. European Community Extraterritorial Application of Competition Law*

Developing in a fashion similar to that of the United States, extraterritorial enforcement of antitrust law by the European

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385. See Guzman, *supra* note 217, at 1506 (stating that a country has considerable leverage over foreign firms where the firms have substantial assets and conduct a large segment of their business in that country).

386. See *id.* at 1521 (arguing that the ability of a particular state to enforce its laws beyond its borders antitrust laws).

387. See *id.* (noting that because developing nations lack market power these nations have a difficult time enforcing their competition laws abroad).

388. See *id.* at 1536-38 (noting that after WWII, the United States was the only country that was in a strong position to apply its laws extraterritorially).

389. See *id.* (noting that the developing countries' efforts to establish an international agreement is a sharp contrast to the position of the United States).

390. See *id.* (observing that because of the United States' favorable position, it does not have a strong incentive to engage in international agreements dealing with competition law).

Community plays an integral role in E.C. competition policy.<sup>391</sup> Although, the evolution of extraterritoriality in E.C. law is a relatively recent phenomenon with the first exercise of such only taking place in 1988, recent activity by the Commission and the ECJ indicate a trend towards aggressive contemporary extraterritorial enforcement.<sup>392</sup> Like the United States, concerns over international comity have become second to enforcement and protection of the E.C. market.<sup>393</sup> As predicted by the economic model, the European Community holds a position to enforce its competition policies in an extraterritorial manner and does so accordingly based on its economic importance in the world marketplace.<sup>394</sup>

Mirroring the economic growth and integration of the E.C. market and the refinement of the extraterritoriality principle in general, extraterritoriality gradually became accepted practice in the European Community. The argument for enforcing Community law against conduct undertaken in non-Member States with harmful effects on the Common Market was set forth as early as 1972 by the Commission in *Imperial Chemical Industries, Ltd. v. Commission*, though the ECJ at that time adopted a more cautious approach and effectively avoided answering the question.<sup>395</sup> In 1998, the ECJ adopted the principle of extraterritoriality in *Wood Pulp Cartel*, holding a foreign-based export cartel that sold products in the

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391. See *infra* notes 395-404 and accompanying text (summarizing the extraterritorial application of E.C. competition law).

392. See *infra* notes 396-397 and accompanying text (referencing the decision in *Wood Pulp Cartel*, where the ECJ applied the principle of extraterritoriality, and tracing the development of this doctrine through various other cases).

393. See *infra* notes 396-403 and accompanying text (providing examples of cases where the concern for the EU market arguably superseded concerns for international comity)

394. See Guzman, *supra* note 217, at 1506 (explaining that as firm's assets and its frequency of transactions increases in a particular country, that country's ability to regulate foreign activity increases).

395. See Case 48/69, *Imperial Chem. Indus., Ltd. v. Commission*, [1972] E.C.R. 619, paras 120-147 (1972) (noting that the behaviors implicated occurred in a third county and holding that this was illegal based upon their effects on the common market of the products).

common market subject to the jurisdiction of E.C. law.<sup>396</sup> The ECJ based jurisdiction on the fact that “[t]he producers in this case implemented their pricing agreement within the Common Market” and found that it was immaterial that they used “subsidiaries, agents, sub-agents, or branches within the Community” for making “their contacts with purchasers within the Community.”<sup>397</sup> The *Wood Pulp Cartel* decision indicates that the reach and enforcement of E.C. competition law on an extraterritorial basis is seemingly co-existent with the U.S. formulation.<sup>398</sup>

The Commission’s use of international comity in decisions to act extraterritorially is also reflective of U.S. law.<sup>399</sup> Though the European Community has formally adopted the 1986 OECD Recommendation for extraterritorial application of competition laws focusing on giving “effect to the principles of international law and comity and to use moderation and self-restraint,”<sup>400</sup> the ECJ has adopted an approach similar to that of the United States in the *Hartford Fire* decision.<sup>401</sup> The CFI’s decision in *Gencor Ltd. v. Commission*, a case involving the merger of South African Platinum Mining Companies, bears much resemblance to *Hartford Fire*, with the ECJ holding that the Commission could apply Community law to a proposed concentration with offices and productive operations lying outside of the common market.<sup>402</sup> The “mere sale within the

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396. See Case 89/95, *Ahlstrom v. Commission*, [1988] E.C.R. 5193, [1988] 4 C.M.L.R. 901, 908 (1988) (holding that foreign-based companies could be subject to these regulations when selling products in the common market).

397. *Id.* at 941.

398. See discussion *supra* Part II.D.1 and accompanying text (explaining major tenets of US extraterritorial competition law).

399. Compare *supra* notes 374-383 and accompanying text, with *infra* notes 402-405 and accompanying text (providing examples of the extraterritorial application of laws in the United States and the European Community).

400. Revised Recommendation of the OECD Council Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting Trade, OECD Doc. No. C (86) 44 (Final) (May 21, 1986)).

401. See *supra* notes 378-383 and accompanying text (analyzing the Court’s decision in *Hartford Fire*).

402. See Case T-102/96, *Gencor Ltd. v. Commission*, [1999] E.C.R. II-753, para. 78-88 (1999) (holding that the court could apply community law to undertakings with registered offices and mining and production operations outside the Community); see also Stevens, *supra* notes 274, at 279 (noting the ECJ’s

Community” was held to be enough for E.C. law to apply, regardless of the location of the sources of supply or production.<sup>403</sup> Further, the ECJ went on to hold that the application of the Merger Regulation is compatible with international law when “it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community.”<sup>404</sup> The similarities between *Gencor* and *Hartford Fire* supports the idea that the doctrinal foundations for Commission and E.C. extraterritorial enforcement bear great similarity to the grounds on which U.S. antitrust law relies on for its use extraterritoriality.<sup>405</sup>

The Commission and the Directorate General’s recent activities have enforced the notions of the ECJ on international comity and highlight many of the contentious issues associated with extraterritorial competition law enforcement.<sup>406</sup> Of notable importance is the 1997 Commission initiation of an in-depth Phase II investigation into the proposed acquisition of McDonnell Douglas Corporation by Boeing Company on the suspicion the proposed merger could adversely affect the common market.<sup>407</sup> Significantly, McDonnell Douglas and Boeing were both U.S. companies, neither

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rejection of the argument that the Commission lacked jurisdiction to intervene in a concentration taking place in a non-member country, where that country had permitted the concentration).

403. *Gencor Ltd.*, [1999] E.C.R. II-753 at para. 87.

404. *Id.* at para. 90.

405. See Stevens, *supra* note 274, at 281 (noting that the similarity between the *Gencor* decision and the *Hartford* decision further reinforces the legitimacy of the Commission’s enforcement objectives).

406. See *infra* notes 407-410 and accompanying text (providing an example of proposed mergers that shows the potential conflicts between comity and extraterritorial application of laws).

407. See Press Release, European Commission, Commission Begins an In-depth Investigation of the Boeing/McDonnell Douglas Merger (Mar. 19, 1997) (announcing that the European Commission would start the second phase of proceedings under E.C. Merger Regulation and that in particular, it would examine how the potential merger would strengthen Boeings strong position in the market for commercial jet aircraft), available at [http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=IP/97/236|0|AGED&lg=EN&display=](http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/97/236|0|AGED&lg=EN&display=) (last visited Feb. 8, 2004); see also Stevens, *supra* note 274, at 266 (mentioning that the European Community held a Phase II investigation into the Boeing/McDonnell Douglas merger based on the argument that the merger may be incompatible with the common market).

of which had production assets in the European Community.<sup>408</sup> Further, the FTC in the United States had already made a ruling that McDonnell Douglas no longer constituted a meaningful competitive force and that the proposed merger would not adversely affect competition or lead to a monopoly in defense and commercial aircraft markets.<sup>409</sup> Though the Commission eventually allowed the merger to proceed, the assertion of jurisdiction by the European Community was significant in that it heralded its willingness to assert extraterritorial jurisdiction over corporations and activities outside of the common market.<sup>410</sup>

The Commission's actions in Boeing/McDonnell Douglas foreshadowed further extraterritorial interventions by the European Community. The most notable of these high profile interventions include the Commission's blocking of a proposed merger between two U.S. telecommunication firms, MCI WorldCom and Sprint Corp in 1999.<sup>411</sup> Though the DOJ set down a similar ruling prohibiting the

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408. See Christopher Carey, *Europeans Ask Bloc for Boeing Rejection; Resistance Could Delay Deal by Several Months*, ST. LOUIS POST-DISPATCH, July 17, 1997, at 1C (noting that U.S. Congressmen and other officials were angered by the E.U. action because Boeing/McDonnell Douglas are based in the U.S. and have no contacts with the European markets other than sales to the European market), 1997 WL 3354510; see also Stevens, *supra* note 274, at 266 (noting that neither companies were European, and that the Commission's decision became an international controversy).

409. See Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger, Roscoe B. Starek III and Christine A. Varney in the Matter of The Boeing Company/McDonnell Douglas Corporation (explaining that "[w]ith respect to the commercial aircraft sector, our decision not to challenge the proposed merger was a result of evidence that (1) McDonnell Douglas, looking to the future, no longer constitutes a meaningful competitive force in the commercial aircraft market and (2) there is no economically plausible strategy that McDonnell Douglas could follow, either as a stand-alone concern or as part of another concern, that would change that grim prospect"), <http://www.ftc.gov/opa/1997/07/boeingsta.htm> (last visited Feb. 4, 2004).

410. See Press Release, European Commission, The Commission Clears the Merger Between Boeing and McDonnell Douglas Under Conditions and Obligations (July 30, 1997) (stating that the E.C. permitted the acquisition and outlining the E.C.'s conditions for their approval) available at [http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=IP/97/729|0|AGED&lg=EN&display=](http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/97/729|0|AGED&lg=EN&display=) (last visited Feb. 7, 2004).

411. See Schmitz, *supra* note 92, 363-65 (describing the Commission's disapproval of the MCI WorldCom and Sprint agreement, and stating that after the

merger over fears of reduced competition, the MCI/Sprint decision by the Commission is significant in that it marked the first time the Commission rejected an entirely non-European merger.<sup>412</sup> Contention between U.S. and E.C. competition authorities reached new heights in 2001 with the Commission's decision to block the proposed GE/Honeywell merger.<sup>413</sup> The distinguishing characteristic of this decision derives from the fact that DOJ had already approved the transaction and that the Commission blocked the merger despite the contrary ruling from US authorities.<sup>414</sup>

Of notable importance to the present legal state of extraterritorial enforcement of competition law by the European Community is the recent collision between the Commission and the CFI over certain Commission merger decisions.<sup>415</sup> The relative youth of extraterritorial doctrines in the European Community, coupled with the new found zeal of the Commission under the leadership of Commissioner Mario Monti, has led to several interesting developments. Since Commissioner Monti entered into office in 1999, the Commission has blocked no less than five mergers, compared to ten over the course of the preceding decade, increasing the average blocking rate from two to six per year.<sup>416</sup> This

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parties received a negative verdict from the Commission, they abandoned their proposal).

412. *See id.* at 364 (stating that the case's prominence is largely because it was the first U.S. corporate merger that the United States prohibited).

413. *See* Ruffner, *supra* note 342, at 1285-87 (describing the E.C. decision and highlighting why the decision was revolutionary in the development of competition law).

414. *See id.* at 1286 (explaining that the European Community's decision to intervene was the realization of one of the worst fears of American companies). The Commission's decision in the GE/Honeywell case has been appealed to the Court of First Instance and may possibly be overturned based on recent decisions by the CFI. *See* Case T-209/01, *Honeywell Int'l Inc. v. Commission*, 2001 O.J. C331/23 (2001) (indicating that Honeywell is appealing the decision); *see also* Case T-210/01, *General Electric Inc. v. Commission*, 2001 O.J. C331/24 (2001) (stating that General Electric is also appealing the decision).

415. *See infra* note 417 and accompanying text (providing an example of a case where the CFI overruled the Commission's decision involving a proposed merger).

416. *See* James Arnold, *Mario Monti: Merger Man on a Mission*, BBC NEWS, Nov. 1, 2002 (analyzing Commissioner Monti's new focus on competition issues and willingness to block deals), available at <http://news.bbc.co.uk/1/hi/business/2385037.stm> (last visited Feb. 6, 2004).

aggressive enforcement, part of which extends into the sphere of extraterritoriality, spawned a series of decisions by the CFI. These decisions, including the *Tetra Laval BV v. Commission* case where the CFI overruled a Commission decision that blocked a proposed merger, denote two important points, namely that the court will in fact act to overrule the Commission on merger decisions, and that such decisions will not necessarily face a lengthy judicial process before a decision is rendered.<sup>417</sup>

The European Communities recent actions and its utilization of extraterritoriality rest on several factors that are comparable to the reasoning behind the aggressive nature of U.S. extraterritorial competition law enforcement. Extraterritoriality did not become a functioning part of E.C. competition law until relatively recently, largely due to fact that internal market had not completed its gradual development until 1992, and E.C. merger review is fairly new in general.<sup>418</sup> Similar to what is to be expected under the economic model, the European Community did not incorporate a policy of extraterritoriality until it was both sufficiently conjoined into a single market and occupied a position of strength and power in the global marketplace.<sup>419</sup> Until the ECJ decided *Wood Pulp Cartel*, the European Community was more concerned with protecting the Common Market from impediments from within.<sup>420</sup> The breaking

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417. See Case T-80/02, *Tetra Laval BV v. Commission*, [2002] E.C.R. II-4519, paras. 32-43 (2002) (examining the applicant's claim that there was a lack of legal basis for the divestiture decision due to the illegality of the prohibition decision); Case T-342/99, *Airtours plc. v. Commission*, [2002] O.J. C191/24 (2002) (annulling the Commission's decision which declared that the concentration at issue was incompatible with the common market and the EEA Agreement); Case T-77/02, *Schneider Electric SA v. Commission*, [2002] E.C.R. II-4201, para. 46 (2002) (annulling the Commission's decision which had ordered the separation of the undertakings).

418. See Schmitz, *supra* note 91, at 551-53 (noting that while the U.S. Clayton Act enshrined the U.S. merger control rules in 1914, the European Community did not enact its Merger Control Regulation until 1990).

419. See Fox, *supra* note 34, at 2 (noting that the European Economic Community addressed many challenges in the mid 1950's, and one of its important goals was to take the "parochialism" out of trade and competition with its own market).

420. See, e.g. *id.* at 2 (stating that after the adoption of the Treaty of Rome, "German sugar growers could not cartelize to keep out French and Belgian sugar, and vice versa; nor could the French, the Germans and the Belgians agree with one

point, wherein extraterritoriality became necessary and organizationally feasible, did not occur until the late 1980s.<sup>421</sup> At that point, globalization was in full force and competition policy goals demanded protection through enforcement beyond the domestic share of the common market.<sup>422</sup>

Significant convergence on the general principles of extraterritoriality and international comity between the United States and European Community has occurred through their respective developments of the competition policy and contemporary enforcement.<sup>423</sup> In the same sense that both jurisdictions began with strict territoriality as the basis for competition law enforcement, both jurisdictions moved away from this principle to that of extraterritoriality in the same form.<sup>424</sup> The effects doctrine of U.S. law and the implementation doctrine of the E.C. law are of striking similarity, and as a former U.S. Assistant Attorney General for the Antitrust Division put it, "very close to, if not indistinguishable from" one another.<sup>425</sup> On the issue of international comity, both the United States and European Community have experienced the phenomenon

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another that each would keep its home territory for itself."). "British Telecom could not obstruct the flow of telephone signals through the United Kingdom. State action, as well as private action, is subject to limits for the good of the community." *Id.*

421. *See, e.g.*, Case 89/95, *Ahlstrom v. Commission*, [1988] E.C.R. 5193, [1988] 4 C.M.L.R. 901 (1988) (providing an example of one of the first cases wherein the European Commission adopted the principal of extraterritoriality and held that a foreign-based export cartel that sold products in the common market was subject to its jurisdiction).

422. *See generally* Fox, *supra* note 34, at 3 (arguing that since business is increasingly global, it is not longer an easy task to distinguish between national and foreign business).

423. *See* Sugden, *supra* note 382, at 1031 (noting that the European response to the Wood Pulp Cartel, IBM, Boeing/McDonnell Douglas, and GE/Honeywell shows the similarities between the E.C. and U.S. systems).

424. *See* Joseph P. Griffin, *EC and U.S. Extraterritoriality: Activism and Cooperation*, 178 *FORDHAM INT'L L.J.* 353, 377 (1994) (noting the similarities between the "implement" vs. "effects" test and analyzing its implications for the future).

425. *See id.* at 377 (quoting the Charles Rule and stating that Sir Leon, the then Commissioner in charge of E.C. competition policy, disagreed with the contention that the Wood Pulp decision was similar to the "effects" test that the U.S. courts apply).

that the widening of extraterritorial competition law enforcement narrows the importance of comity concerns.<sup>426</sup> As the GE/Honeywell merger case demonstrates, the expansion of extraterritorial enforcement has been at the cost of comity.<sup>427</sup> This natural and necessary outcome bears a direct correlation between the degree of extraterritorial enforcement perceived within a jurisdiction's legal capacity and the amount of deference that jurisdiction will give to concerns over international comity.<sup>428</sup>

As this chapter has argued, the use of extraterritoriality by the United States and European Community represents a necessary and economically justifiable response to the demands of a globalized marketplace and the limits of traditional notions of state and domestic market sovereignty.<sup>429</sup> Inherent obstacles impose overwhelming difficulties to harmonizing the competition laws of different jurisdictions, even in the case of the two most similar and highly developed systems found in the United States and European Community, as well as for the creation of a global competition law system that is neither wanted by the United States nor economically desirable for the global marketplace.<sup>430</sup> The questions remain as to what is the most effective way to proceed in the area of U.S. – E.C. competition law cooperation, to the sphere of developing competition law on a global scale, and to future cooperation in

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426. See Sugden, *supra* note 382, at 1013 (arguing that “there is a direct correlation between the degree of extraterritoriality that a jurisdiction perceives within its laws and the scope of deference it will give to international comity concerns, and this is a natural result”).

427. See, e.g., Schmitz, *supra* note 91, at 586 (stating the differences between the U.S. and European systems in approaching the GE/Honeywell question, and noting the “harsh exchange of words and hostility that developed among observers from both sides of the Atlantic”).

428. See Sugden, *supra* note 382, at 1015-16 (commenting on international comity and the expansion of extraterritorial competition law, and arguing that a convergence between the United States and the European Community has taken place in relation to international comity).

429. See discussion *supra* Parts I.A. (noting that due to the phenomenon of globalization, it is not favorable to distinguish between national and foreign firms in relation to the application of jurisdictional principles).

430. See discussion *supra* Part II.C (explaining the challenges in reaching such an agreement and noting that antitrust laws are not neutral principles, but that they are rather linked to deeply held values within a nation).

general. The answer that the following section argues is simply stated: long-term convergence through continued strong extraterritoriality and cooperation by the United States and European Community as a model for future competition law cooperation in the global marketplace.

### III. GLOBALIZATION AND THE FUTURE OF COMPETITION LAW IN THE GLOBAL MARKET

Globalization and the emergence of the global marketplace pose inherent difficulties to states and traditional notions of state sovereignty, especially in the area of competition policy. The need for inter-state cooperation and non-traditional responses to the transnational nature of contemporary business practice is fundamental to effective competition policy, as antitrust law continues to spread throughout the world and corporations become more and more mobile in terms of operational and production capacities.<sup>431</sup> Changes witnessed in the post-World War II era have spurred calls for an international system of competition law, whether it is through supra-national structures or binding codes.<sup>432</sup> These arguments tend to ignore, in fact, the economical rationale for bilateral cooperation over multilateral agreement and the relative success enjoyed by ongoing cooperative relationships, in particular that of the European Community and United States.<sup>433</sup> In response to the needs for the future of competition law in the global marketplace, this thesis argues for the E.C.-U.S. competition law model as a paradigm for future bilateral competition law cooperation and the

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431. See Griffin, *supra* note 424, at 385 (concluding that there is a need for renewed efforts to develop a unified approach to the field of antitrust law).

432. See Fox, *supra* note 34, at 1-3 (noting the view that since competition law has become a world issue, internationalization of the laws is one approach to addressing the problems raised in this field of law, which could maybe be addressed through the World Trade Organization).

433. Department of Justice, William J. Kolasky, Global Competition Convergence Cooperation: Looking Back and Looking Ahead, (Nov. 7, 2002) (discussing the great achievements made in terms of bilateral cooperation and convergence of policy between the United States and the European Community, despite the differences in legal traditions, laws, and cultures), *available at* <http://www.usdoj.gov/atr/public/speeches/200442.pdf> (last visited Feb, 8, 2004).

continued extraterritorial antitrust law.<sup>434</sup> This section sets forth a two pronged line of reasoning. The first section argues for continued and enhanced bilateral cooperation on competition law between the United States and European Community. The second section contends that the most effective means for converging and harmonizing the competition laws of the United States and European Community is continued strong extraterritorial application of competition law as opposed to the creation of new transatlantic institutions or attempting to harmonize competition law on a supra-national level.

#### A. THE CASE FOR CONTINUED AND ENHANCED COMPETITION LAW COOPERATION

Bilateral cooperation coupled with the creation and strengthening of regulatory networks represents the most effective means available for competition law regulation and enforcement in the present globalization era. This section will analyze the advantages afforded by gradual convergence of competition law through cooperation over rapid harmonization through the creation of international codes or use of transnational institutions.<sup>435</sup> With particular regard to competition cooperation between the United States and European Community, the argument for bilateral cooperation modeled on the U.S. – E.C. relationship will be set forth in detail.<sup>436</sup>

Fundamental to competition regulation are the issues of efficiency and reducing transaction costs, both of which can best be effectuated through cooperation. As for the former, the conventional argument holds that multiple jurisdictional authorities and the duplication of required material to satisfy each of the respective competition

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434. See discussion *infra* Parts III.A and III.B (arguing that cooperation between the United States and the European Community makes competition regulation more efficient and reduces the transaction costs).

435. See *infra* notes 440-450 and accompanying text (providing an argument for why complete harmonization is neither attainable and explaining why it is not necessarily desirable).

436. See discussion *infra* Part III.A (arguing that although there are procedural and substantive differences between the United States and the European Community, the networks that resulted from the 1991/98 Agreements have created a system of informal, non-conventional based convergence in competition law regulation).

regulators could be easily made more efficient through a reduction in the amount of reproduction.<sup>437</sup> This end could be achieved through the complete harmonization of competition law regimes, allowing, for example, a proposed merger to file the same paperwork, meet the same deadlines, and provide the same material to each of the jurisdictions initiating an investigation into the effects on competition likely to be caused through the merger.<sup>438</sup> In relation, transaction costs would be cut significantly given the decrease in diversity of the procedural and substantive requirements of each of the jurisdictions, and as a result, corporations and competition authorities would both share in the equities provided by harmonized regimes.<sup>439</sup>

However, the idealistic goal of international uniformity and consensus needed for competition law harmonization is not available, desirable, nor realistically achievable.<sup>440</sup> The contention that competition law needs to be internationalized or that harmonization needs to occur in order to improve efficiency and reduce transaction costs relies on several fallacious assumptions. First of all, the existence of many competition authorities does not itself make the case for hard harmonization. Varying markets and varying economies inherently and inevitably have different economic needs and incorporate different forms of analysis when determining

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437. See Robert Pitofsky, Chairman, United States Federal Trade Commission, EU and U.S. Approaches to International Mergers – Views from the US Federal Trade Commission, Remarks at the Merger Control 10th Anniversary Conference, (Sept. 14-15, 2000) [hereinafter Pitofsky Remarks] (discussing procedural reforms undertaken to simplify the regulatory process and noting the increase in liaison between the U.S. and E.U. staff), available at <http://www.ftc.gov/speeches/pitofsky/pitintermergers.htm> (last visited Feb. 8, 2004).

438. See *id.* (mentioning that although significant efforts have been made over the past ten years towards reforming procedures, such as creating a single merger filing form, such coordination is still difficult).

439. See, e.g., Laura E. Keegan, *The 1991 U.S./EC Competition Agreement: A Glimpse of the Future Through the United States v. Microsoft Corp. Window*, 2 J. INT'L LEGAL STUD. 149, 173-79 (1996) (discussing the cooperation between the United States and European Community in the Microsoft investigation and noting how it had positive results for all parties with respect to efficiency concerns).

440. See discussion *supra* Parts II.B-C (explaining the difficulties in harmonization and noting the competition laws are not a series of neutral principles, but are rather deeply embedded within each nation's value system).

how business activities affect their own domestic markets.<sup>441</sup> As the economic model demonstrates, a proposed concentration may bring a substantial benefit to one jurisdiction while being substantially detrimental to another jurisdiction.<sup>442</sup> The proposed merger of GE/Honeywell provides such an example, where the calculations and analysis incorporated by the Commission indicated an unacceptable risk to the Common Market while the assessment utilized by the American authorities produced a result tolerable to the U.S. marketplace.<sup>443</sup> As discussed in detail previously, other factors played an important role in the decision, including the availability of private litigation in the United States to address anticompetitive behavior engaged in by the effectuated concentration.<sup>444</sup>

In addition, while a cursory glance at mergers like GE/Honeywell and other competition related matters might lead to a conclusion that a harmonized or single authority would increase efficiency and reduce transaction costs, significant increases and reductions are not always likely or possible.<sup>445</sup> On the surface, had a single authority

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441. See discussion *supra* Part II.A (noting the differences in how consumer versus producing states approach competition regulation under the economic model analysis).

442. See discussion *supra* Part II.A (stating that a producing country will adopt a competition policy aimed at increasing the wealth of the producers, which is not always consistent with the consumer country's need to maximize welfare for consumers).

443. See Schmitz, *supra* note 91, at 566 (discussing the GE/Honeywell merger, and noting how the two authorities identified different markets that the potential merger could adversely affect).

444. See Hochstadt, *supra* note 267, at 315-17 (stressing the important role of post-merger relief in the United States).

445. See Francesco Guerrera, *Study of cross-border merger costs adds to calls for reform*, FIN. TIMES (London), June, 23 2003, at 21 (describing the costs of mergers), 2003 WL 57313545. A recent study commissioned by the International Bar Association and the American Bar Association reveals many of the costs companies dealing in cross-border mergers must deal with. *Id.* The so called "tax on mergers" adds up to an average of 3.9 million euros per deal involving multiple competition regulators, with costs from dealings with U.S. regulators averaging around 800,000 euros and costs from dealings with E.C. review averaging 400,000 euros. *Id.* U.S. regulators are the slowest, taking an average of eight months to review a proposed merger. *Id.* Legal fees account for over sixty percent of the total bill, with regulatory charges and consultant fees making up the remaining forty percent. *Id.* However, it should be emphasized that of the fifty-one companies studied in 500 merger reviews in over fifty states, the average merger bid came to

reviewed the GE/Honeywell merger applying the same economic assessments, two authorities and two different procedures would not have needed to be followed. However, such a conclusion ignores the fact that in GE/Honeywell, like other proposed mergers, the product or activity reviewed in one jurisdiction is not always the same product or activity reviewed in another.<sup>446</sup> As discussed in detail previously, the Commission based its decision to block the merger in GE/Honeywell primarily on the basis of avionics and jet aircraft engine production, and the creation or strengthening of the dominant position the proposed concentration would have in these particular sectors.<sup>447</sup> In contrast, the DOJ identified two completely distinct markets that the merger might affect.<sup>448</sup> While some duplicated costs resulted in the merger review by both U.S. and E.C. authorities, the key issues examined turned on different production capacities and their effects on different market sectors.<sup>449</sup> GE/Honeywell had to make its case to the European Community and United States, and the individual competitive setting of both markets. Procedural harmonization may have led to some increase in efficiency and transaction cost reductions. However, any involvement by a single authority would have neglected the respective assessments important to both the United States and European Community, assessments that are unlikely to be given up to the will and behest of an international competition authority or signed away immediately for harmonization without further convergence.<sup>450</sup>

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3.9 billion euros, putting the “tax on mergers” into perspective at around one percent of the total bid. *Id.*

446. See *supra* notes 282-289 and accompanying text (noting how the DOJ and the Commission identified different markets when analyzing the proposed merger).

447. See *supra* notes 286-401 accompanying text (stating that in addition to the market for jet aircrafts engines, avionics, and engine starters, the Commission also considered the potential effects of the bundling of the new company’s products).

448. See *supra* note 281-284 and accompanying text (noting that the DOJ concluded the proposed merger would affect markets such as the helicopter and MRO service sectors).

449. See *id.* (noting that the DOJ was alarmed at the Commissions disregard for the helicopter and MRO service markets).

450. See *supra* notes 333-334 and accompanying text (arguing that administrating the antitrust system is unique to every state’s laws and policies, and that internationalizing such a field is highly inconsistent with the concept of national sovereignty).

The attainability of the required international or even bilateral consensus necessary for competition law harmonization is brought further into question by the proximity between U.S. and E.C. competition law. As this thesis has sought to establish, the United States and European Community represent the two most developed and important competition law regimes in the world, though a close analysis of the differences and distances between the United States and European Community in their enforcement and assessment of trust and anticompetitive behavior reveals the inherent difficulties in harmonizing competition law.<sup>451</sup> The varying calculations and evaluations of recently reviewed merger proposals, including GE/Honeywell and Boeing/McDonnell Douglas, highlight these differences and the importance of certain principles to the two closely aligned and ideologically similar jurisdictions.<sup>452</sup> The market competition and consumer-based focus of the United States contrasts with the private barrier and dominant firm focus of the European Community.<sup>453</sup> Yet, the United States and European Community engage in an effective and advanced competition law cooperation scheme, allowing for jurisdictional differences in policy and enforcement.<sup>454</sup> U.S. – E.C. competition law cooperation provides a

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451. See discussion *supra* Part II.B (examining the different historical foundations for the antitrust laws in the United States and the European Community, and positing that the history explains some of the difference in contemporary policy).

452. See discussion *supra* Part II.B (reviewing the DOJ and the Commission's approach to GE/Honeywell and arguing that the U.S. consumer welfare approach marks one of the fundamental differences between the two systems).

453. See *supra* notes 279-280 and accompanying text (providing that while the Commission also factors consumer welfare in its decision, other factors such as prevention of barriers are equally as important).

454. See, e.g., Keegan, *supra* note 439, 173-74 (discussing how the European Community and the United States were able to cooperate in the Microsoft investigation and negotiations which produced a more efficient outcome). The Microsoft investigation provides an example of decreased transaction costs as a result of cooperation by the United States and European Community. *Id.* In this matter, Microsoft elected to allow for joint information sharing by U.S. and E.C. authorities, where confidential information provided to the US Department of Justice and Federal Trade Commission was allowed to be passed on to investigators in the European Community. *Id.* The joint effort by U.S. – E.C. authorities yielded a joint consent agreement substantially reducing the cost of

means for improving efficiency and reducing transaction costs through interaction and collaborative efforts.<sup>455</sup> Although this model does not achieve the idealistic efficiency and transaction costs goals imagined in an international competition law system or through hard harmonization of U.S. and E.C. laws on competition, it operates effectively and slowly works to converge the two systems.<sup>456</sup>

Substantial convergence can best be accomplished through cooperation and regulatory interaction, as demonstrated in the U.S. – E.C. relationship.<sup>457</sup> Though recent uproar over extraterritorial antitrust enforcement has occurred, the transatlantic relationship for competition law review and enforcement has been widely praised and acclaimed for its effectiveness.<sup>458</sup> Significant progress has been made since the institution of the 1991 Agreement, leading a former Chairman of the FTC to declare, in regards to merger review, “it is hard to imagine how day-to-day cooperation and coordination between enforcement officials in Europe and the United States could be much improved.”<sup>459</sup> Despite the difficulties arising from varying procedural and substantive differences between the two sides, the networks and interactions fostered through the 1991/98 Agreement

compliance for Microsoft, allowing it to avoid a significant amount of document and information duplication. *Id.*

455. *See id.* at 179 (describing the past success in E.C. and U.S. cooperation and noting that the cooperation prevents “duplicative effort” while “reducing investigation and prosecution costs for both jurisdictions”).

456. *See* Pitofsky Remarks, *supra* note 437 (outlining the procedural and substantive convergences between the European Community and the United States in merger review).

457. *See id.* (discussing the 1991 Agreement between the United States and the European Community, noting the increased interactions between the staffs of both jurisdictions, and commenting of the significant convergence of the two systems, ten years after the signing of the agreement).

458. *See* Mario Monti, E.U.-U.S. Cooperation in the Control of International Mergers: Recent Examples and Trends (Mar. 30, 2001) [hereinafter Cooperation in International Mergers] (noting that the E.U.-U.S cooperation is very effective and is a worthy model), available at <http://www.eurunion.org/news/speeches/2001/010330mm2.htm> (last visited on Feb. 8, 2004); *see also* Emma Tucker, *Talks on Competition Rules “Premature”*, FIN. TIMES (London), Oct. 29, 1998, at 6 (mentioning that U.S. officials stated that the dispute over the Boeing/McDonnell Douglas merger was unusual because the European Union and United States have a very good relationship).

459. Pitofsky Remarks, *supra* note 437.

have yielded a significant amount of informal, non-convention based convergence in competition law regulation.<sup>460</sup> In spite of tensions mounting over disagreements in merger review and antitrust enforcement, with each interaction and collaborated effort, regulatory authorities become more and more familiar and educated with the system on the opposite side of the Atlantic.<sup>461</sup> In the aftermath of the Boeing/McDonnell Douglas decision, Joel Klein went so far as to state that disagreement over the case would not have a negative impact on future cooperative relations, but would rather provide an incentive to increase cooperative efforts.<sup>462</sup> The simultaneous initiation and pursuit of various informal programs receive much less attention than conflicts like GE/Honeywell, but may serve more important means over the long-term.<sup>463</sup>

Sustained encounters by transatlantic competition regulators promoted through non-legalistic agreements like the 1991 and 1998 Agreements provide an effective form for competition law convergence and a model for other jurisdictions demanding assistance for competition law enforcement. Informal convergence may arise in numerous ways through the interactions and networks among regulatory authorities.<sup>464</sup> First, interactions by regulators allow authorities to compare experiences and learn from each other's

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460. See *id.* (noting the procedural and substantive convergences between the European Community and the United States ten years after the signing of the 1991 Agreement).

461. See *Cooperation in International Mergers*, *supra* note 458 (noting that there has been a gradual convergence and stating that "this is an organic process, and it is a trend which is very much welcome and to be encouraged").

462. See Joel I. Klein, *Anticipating the Millennium: International Antitrust Enforcement at the End of the Twentieth Century*, Address at the Fordham Corporate Law Institute 24th Annual Conference on International Law and Policy (Oct. 16, 1997) (suggesting that that the Boeing experience made the official acutely aware that in the absence of cooperation and coordination mechanism, antitrust will become a highly politicized area, which could have adverse consequences), available at <http://www.usdoj.gov/atr/public/speeches/1233.htm> (last visited Feb. 8, 2004).

463. See *Cooperation in International Mergers*, *supra* note 458 (highlighting the various degrees of cooperation between the European Union and the United States).

464. See Kolasky, *supra* note 202, 4-7 (mentioning the various interactions that support convergence and cooperation, such as working group meetings).

best practices.<sup>465</sup> Through informal exchanges of information and knowledge, effective mechanisms may be transplanted from jurisdiction to jurisdiction, converging towards a form of regulation through practice and application.<sup>466</sup> Transplants are common throughout the law and facilitated through experience and familiarity with other systems, allowing for practices and procedures to move through networks and individuals. A second and related medium for convergence comes through gradual accounts by regulators of the effects of their decisions on their transatlantic counterparts.<sup>467</sup> “A central normative goal of transgovernmental regulatory cooperative efforts is to create frameworks that conduce national regulators to reflexively take into account the impact of their actions on affected . . . foreign constituents, while remaining deferential to differing national values and priorities.”<sup>468</sup> The account itself by a regulator of the effect of an enforcement action will have on another jurisdiction facilitates convergence through more informed and inclusive decisions.<sup>469</sup>

Difficulties and limitations remain in an approach to convergence relying on informal means such as networks and interaction among regulators.<sup>470</sup> Specifically, the process itself is slow and time-

465. See *id.* at 5 (noting that regulators benefit from studying how their counterparts handle various issues, and simultaneously attain a more refined comprehension as the reasons behind their own approaches).

466. See *id.* 4-7 (describing the various methods of promoting convergence and cooperation). Referring to U.S. – E.C. working group sessions, Assistant Attorney General for the DOJ’s Antitrust Division called this form of information exchange

the convergence process at its very best – that is, a coming together of some of the best and brightest minds at the agencies on both sides of the Atlantic to question and analyze one another’s premises, assumptions and theories in order to come up with the optimal approach to difficult issues.

*Id.* at 5.

467. See *id.* at 5 (noting the importance and effectiveness of the presentations and discussions to familiarize each side with the other’s methods and policy goals).

468. Shaffer, *supra* note 258, at 71.

469. See Pitofsky Remarks, *supra* note 437 (noting the increased staff liaison contacts between the United States and the European Community, and noting the level of convergence between the two systems).

470. See Ricky D. Rivers, *General Electric/Honeywell Merger: European Commission Antitrust Decision Strikes a Sour Note*, 9 ILSA J. INT’L & COMP. L.

consuming.<sup>471</sup> Convergence via this method cannot occur overnight, but requires a significant amount of time and interaction among regulatory authorities. In addition, such a process lacks much of the transparency natural to formal agreements, whereas regulatory cooperation and interaction yields change and reform internally rather than through external obligation.<sup>472</sup> However, the drawbacks and constraints of such an approach represent precisely why this method is most effective for competition law convergence.<sup>473</sup> As argued throughout this thesis, competition law represents a politically and socially sensitive issue unlike other regulatory sectors of the global market.<sup>474</sup> The varying economic and social goals existing throughout the jurisdictions with competition law regimes are not as receptive to harmonization as other matters such as trade or other forms of regulation.<sup>475</sup> The economic model supports this contention by demonstrating the economic considerations and choices taken by jurisdictions in a typical competition law assessment, while the lack of any substantive multilateral agreement underscores the peculiar difficulties intrinsic to regulating competition in a domestic market. Gradual, slow convergence offers a long-term, realistic solution to the demands of a global market by

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525, 539 (2003) (noting that frictions arise when territorial sovereignty is perceived to be at stake).

471. *See id.* 530-35 (maintaining that bilateral agreements do not work when national interests are involved in antitrust disputes).

472. *See* Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT'L L. 478, 496-97 (2000) (noting the drawbacks inherent in bilateral agreements that increase procedural cooperation, but are not legally binding).

473. *See* Anu Piilola, *Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation*, 39 STAN. J. INT'L L. 207, 247 (2003) (noting that voluntary cooperation and informal agreements among national antitrust agencies fosters common understanding and prepares countries for more sophisticated international cooperation).

474. *See* Thomas E. Kauper, *Symposium: Antitrust at the Millennium (Part II) The Legacy of LTV/Republic Steel*, 68 ANTITRUST L.J. 753, 768 (2001) (stating that different nations that have competition policies apply different standards and view competition differently than the United States).

475. *See id.* (contending that adoption of consensus standards in a forum that would include developed and underdeveloped countries may be impossible); *see also* Piilola, *supra* note 473, at 247 (noting that informal, voluntary cooperation allows for flexibility and adaptability of antitrust law to local circumstances).

affording informal interactions and information sharing and the establishment of non-legalistic networks between national regulators.<sup>476</sup>

The informal, regulatory interaction and network based convergence intricate to U.S. – E.C. competition law cooperation has yielded noteworthy substantive and procedural antitrust convergence since the institution of the 1991 Agreement.<sup>477</sup> The flexibility of the bilateral system has resulted in the two jurisdictions moving closer together on non-legal tools, as well as raising the ceiling of domestic laws to facilitate further convergence. As discussed, the sharing knowledge from the U.S. experience with merger review and antitrust has led to significant evolution of E.C. review and the use of economic analysis. Developments are apparent, ranging from substantive similarities in the draft E.C. Merger Guidelines with the U.S. Horizontal Merger Guidelines, and 1997 Commission Notice on market definition to like guidelines in the United States, to significant convergence from ECMR reforms waiting to take effect. Convergence on the SLC and new SIEC test are significant especially in the actual and symbolic move away from the stringent dominant test to one that will allow for more economic analysis similar to the United States. Similarly, significant convergence has occurred in the analysis of merger effects, as the United States has been more inclined recently to challenge monopolistic mergers in addition to traditional challenges of mergers facilitating coordinated effects, while the Commission and the SIEC test demonstrate an evolution from “dominance” based challenges to include transactions

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476. See, e.g., International Competition Network, Memorandum on the Establishment and Operation of the International Competition Network (Sept. 2002) (forming the basis for a “project-oriented, consensus-based, informal network of antitrust agencies”), <http://www.internationalcompetitionnetwork.org> (last visited Feb. 15, 2004). The International Competition Network (“ICN”) consists of regulators rather than state parties and operates similar to the International Organization of Securities Commissions (“IOSCO”) and began operating in September of 2002. *Id.*

477. See Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 41-2 (2002) (maintaining that there is significant cooperation and convergence in competition policies between the United States and the European Union even though there is some amount of competition between them for expanding the geographic scope of their antitrust law).

with collective or oligopolistic effects.<sup>478</sup> As demonstrated in the preceding chapter, convergence has also been apparent in other areas including geographic and product market definition, and to a limited extent in the use of unilateral effects analysis and efficiencies and range effects, though much room exists for further development in these areas through experience.

Likewise, significant convergence in the area of remedies has taken place, from the E.C. adoption of U.S. techniques like the use of trustees and stricter time frames for compliance.<sup>479</sup> The Commission's Notice on Remedies in Merger Regulation draws significantly from an FTC study on divestitures where a general consensus has emerged on requiring merged entities to divest an ongoing business that creates a significant competitor and restores competition to the market, rather than merely divesting an overlapping business.<sup>480</sup> As numerous important officials and actors in the process have recognised, this convergence can certainly be attributed, at least in part, to the high level of interaction between U.S. and E.C. authorities.<sup>481</sup>

Further evidence of convergence came about in 1997 through the publication of the European Community's market definition guidelines whereby the a formula for defining the relevant market for the assessment of the impact of a transaction on competition used by

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478. See *Case 68/94, France v. Commission*, [1998] E.C.R. I-1375 at para. 97, 102-03 (acknowledging the Commission's development of a concept of collective dominance); see also *Case T-102/96 Gencor Ltd. v. Commission* [1999] E.C.R. II-753 at para. 234 (explaining that the Commission's studies on market growth and changes illustrate a tendency toward oligopolistic dominance).

479. See, e.g., Commission Notice on Remedies Acceptable Under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98, 2001 O.J. (C68/3) (setting forth the notion of the Commission's "evolving experience" with various remedies under the Merger Regulation in 1990).

480. See *id.* at para. 13 (stating that where a proposed merger threatens effective competition in the market, the most effective remedy is to help establish conditions for a new competitive entity or strengthen existing competition by divestiture); see also BUREAU OF COMPETITION, FED. TRADE COMM'N, A STUDY OF THE COMMISSION'S DIVESTITURE PROCESS 14 (1999) (concluding that divestitures have been successful remedies for anti-competitive mergers), available at <http://www.ftc.gov/os/1999/08/divestiture.pdf> (last visited Feb. 10, 2004).

481. See, e.g., Pitofsky Remarks, *supra* note 437 (noting the "improvement in coordination and cooperation between the two enforcement authorities").

the Commission was constructed to an almost identical formula used by U.S. authorities.<sup>482</sup> Another example has been the narrowing of the European Community's single firm dominance as a criterion for striking down mergers and U.S. concern over market concentration.<sup>483</sup> A line of E.C. cases on oligopolistic dominance, from *Nestle/Perrier* in 1992 to *Kali and Salz* in 1998 and *Gencor v. EC Commission* in 1999, indicate that mergers increasing concentration and facilitating collective or oligopolistic dominance are capable of contravening the Merger Regulation, bringing E.C. review closer to the criteria traditionally applied by U.S. antitrust regulators.<sup>484</sup> Likewise, American authorities showed equal signs of willingness to move towards the E.C.'s position that a merger can result in anticompetitive effects, moving closer to the E.C.'s criteria of dominance by a single firm.<sup>485</sup> The recent publication of a set of "Best Practices" for coordinating merger reviews drafted by staff

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482. Compare Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law, 1997 O.J. C372/1 (providing the definition of a relevant market), [http://europa.eu.int/comm/competition/antitrust/relevma\\_en.html](http://europa.eu.int/comm/competition/antitrust/relevma_en.html) (last visited Mar. 25, 2004); with HORIZONTAL MERGER GUIDELINES, *supra* note 167 (defining a relevant market).

483. See Frederic Depoortere & Henry Huser, *Substantive Enforcement Standards in Horizontal Mergers Under the EC Merger Regulation*, 17 ANTITRUST 44, 45 (Fall 2002) (stating that the 1998 ECJ *Kali-Salz* decision settled the debate concerning the European Community's use of "single-firm dominance" by recognizing the legal principle of collective dominance under E.C. Merger Regulations).

484. See Commission Decision of 22 July 1992 Relating to a Proceeding Under Council Regulation 4064/89 EEC, 1992 O.J. L356/1 (clearing the Nestle/Perrier merger subject to divestments after applying the E.C. Merger Regulation), [http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=31992D0553](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=31992D0553) (last visited Feb. 8, 2004); see also Case T-102/96, *Gencor Ltd. v. Comm'n of European Communities*, [1999] E.C.R. II-753, (1999) (finding that European law requires proof of a dominant position to make predatory pricing actionable).

485. See, e.g., *Fed. Trade Comm'n v. Staples, Inc.*, 970 F.Supp. 1066, 1093 (D.C. 1997) (granting the FTC preliminary injunction against the merger between Staples and Office Depot after finding that a merger would "substantially reduce competition"); see also Pitofsky Remarks, *supra* note 437 (noting that both the European Community and the FTC concluded that a risk of monopoly existed in the Shell/Montedison joint venture).

attorneys and economists from the Commission, the DOJ, and FTC provides further evidence of the utility of regulatory networks.<sup>486</sup>

These examples provide an important indicator of the success and effectiveness of cooperative efforts, as well as being illustrative of engagement in a cooperative dialogue and the potential for convergence. The U.S. – E.C. competition law cooperation model represents a triumph of the many ways of bringing philosophies and practices on a contentious and litigious issue closer together and adapted to an effective and working relationship necessary for transnational competition law regulation.<sup>487</sup> The similarities of the U.S. and E.C. competition law regimes and the state of current cooperation efforts denote many of the difficulties inherent to competition law itself and offer important inducements to other jurisdictions seeking to effectively coordinate competition law enforcement beyond territorial boundaries.<sup>488</sup> Gradual convergence through informal networks and inter-agency interaction has its limitations, though, which demands supplementation from exterior means, specifically the continued extraterritorial enforcement of

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486. See Best Practices, *supra* note 204 (stating that the objectives of the best practices include reducing the risk of inconsistent outcomes, increasing the transparency in the decision-making process, and promoting the coordination of information and timing of the review), <http://www.usdoj.gov/atr/public/international/docs/200405.htm> (last visited Mar. 25, 2004); Press Release, U.S. Dep't of Justice, United States and European Union Antitrust Agencies Issue "Best Practices" for Coordinating Merger Reviews (Oct. 30, 2002) (noting that the release of the best practices institutionalized the cooperation between the United States and the European Union on merger reviews and is beneficial to both consumers and the business community), [http://www.usdoj.gov/opa/pr/2002/October/02\\_at\\_624.htm](http://www.usdoj.gov/opa/pr/2002/October/02_at_624.htm) (last visited Feb. 10, 2004).

487. See Pitofsky Remarks, *supra* note 437 (contending that although there were many concerns that U.S. and E.U. authorities would take different views of competition policy involving mergers after the adoption of the E.C. Merger Regulation, most observers agree that there was substantial convergence between U.S. and E.U. merger enforcement and a remarkable improvement in cooperation between the two enforcement authorities).

488. See *supra* 457-463 (noting the efficient results of the U.S.-E.U. model and the substantial convergence that has resulted out of the bilateral efforts and informal networks).

domestic competition law.<sup>489</sup> The following section will discuss how further convergence may be achieved through more direct and aggressive means without resorting to forms of hard harmonization.

## B. EXTRATERRITORIALITY AS A MEANS FOR CONVERGENCE AND SOFT HARMONIZATION

In conjunction with bilateral cooperation efforts, the extraterritorial application of a state's competition laws serves as an effective means for implementing state competition policy in a global marketplace and should continue to be used as a realistic alternative to an international competition law system.<sup>490</sup> This controversial, long-term solution provides a medium for regulatory and policy convergence between jurisdictions, while effectively regulating multinational corporate conduct inconsistent with domestic competition policies.<sup>491</sup> As this thesis has demonstrated, extraterritoriality is a functioning policy of both the United States and European Community.<sup>492</sup> This section will rely on examples of extraterritorial enforcement by these two jurisdictions as a basis for arguing that extraterritoriality can serve as a foundation for an informal and versatile global system of competition law while effectuating gradual competition law convergence between systems engaged in bilateral cooperation efforts.

Extraterritorial enforcement of competition law currently stands as a cornerstone principle for the world's most developed domestic

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489. See Ezrachi, *supra* note 358, at 416 (contending that the United States' approach to antitrust enforcement is through a complimentary system of international interaction in the enforcement of national competition laws).

490. See *id.* (stating that the United States is skeptical of a multinational forum for competition issues and instead, focuses on vigorous antitrust law enforcement on domestic unilateral bases in conjunction with the deepening of bilateral agreements).

491. See *id.* at 408 (suggesting that one international effect of extraterritorial application of antitrust laws is that domestic jurisdictions can apply their law extraterritorially to block mergers that have a negative effect on their domestic welfare, even though the merger may have the effect of increasing the global welfare).

492. See *id.* 415-16 (noting that both the United States and the European Union have engaged in extraterritorial application of their antitrust laws but to varying degrees).

competition law systems in the United States and European Community.<sup>493</sup> The development of the respective competition law regimes in each of these jurisdictions demonstrates market control policy adapting to the needs of the domestic economy and external capacity to protect the competition policies of the domestic marketplace. The strict territoriality principle of the *American Banana* decision in the United States gave way to a developing form of extraterritoriality in 1945 as the U.S. played a prominent role in developing and applying its laws to foreign transactions with effects on U.S. commerce and interests in the post-World War II era. States affected by such applications reacted through enacting blocking statutes aimed at limiting extraterritorial enforcement. A 1960 GATT report on the growing concerns over U.S. extraterritorial antitrust law application explicitly prompted the first generation of bilateral agreements arising from 1967 and 1973 OECD Recommendations.<sup>494</sup> At this time, the United States began limiting extraterritoriality as in the 1976 *Timberlane* decision, introducing the jurisdictional rule of reason accounting for comity in other nations' interests.<sup>495</sup> Similarly, the Commission attempted to obtain the right to use extraterritoriality in the 1972 *ICI-Dyestuffs* case, where the ECJ waived the opportunity to incorporate the doctrine.<sup>496</sup> Likewise, extraterritoriality played a key role in the implementation of the 1991 Agreement, coming into effect upon U.S. concerns over the ECJ's acceptance of a "quasi-effects" extraterritoriality doctrine in *Wood Pulp Cartel*. The desire to avoid conflicts and the negative effects of extraterritoriality was instrumental in the creation of the 1991 Agreement and bilateral frameworks from OECD Recommendations.

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493. See Waller, *supra* note 330, at 380 (contending that while the European Union has engaged in extraterritorial enforcement of its own competition laws, it has done so more cautiously than the United States because of its emphasis on harmonization or internationalization of competition law).

494. See 1967 RECOMMENDATION, *supra* note 347; 1973 RECOMMENDATION, *supra* note 347.

495. See *Timberlane Lumber Co v. Bank of America*, 549 F.2d 597, 608 (9th Cir. 1976) (determining that anti-trust laws can extend over the conduct of other nations).

496. See Case 48/69, *Imperial Chemical Industries Ltd. v. Commission*, [1972] E.C.R. 619.

The use of extraterritoriality as a formidable regulatory principle is vital to state regulation of transnational business activity.<sup>497</sup> As the analysis of competition laws and policies of the United States and European Community throughout this thesis demonstrates, attitudes and beliefs as to what constitutes impermissible or unsustainable conduct in a marketplace vary significantly.<sup>498</sup> Notions of the anticompetitive effects dominant firms or concentrations have on the market in the European Community varies notably from the consumer welfare focus of the United States.<sup>499</sup> As decisions in merger cases affecting separate markets like GE/Honeywell and Boeing/McDonnell Douglas demonstrate, decisions and calculations by one jurisdiction will not always coincide with those instituted by other jurisdictions.<sup>500</sup> States have a vital interest in protecting their own markets from activities having anticompetitive effects, regardless of whether such activities are conducted and implemented within its own jurisdiction. As globalization continues to spread and strengthen, activities will become further and further removed from the markets they effect and, as increasingly clear in the case of U.S. – E.C. merger cases, jurisdictions will need to react to protect their

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497. See Waller, *supra* note 330, at 389 (observing that many businesses in the United States and European Community are beginning to see competition law enforcement as an affirmative tool to aid them in entering foreign markets). Trade and investment disputes have revealed many of the illusions of the market access promoted through free trade agreements, leading to extraterritorial enforcement of domestic laws and policies, whether it is through merger review or the employment of unilateral trade remedies such as section 301 of the U.S. Trade Act of 1974. *Id.* The pursuit of individual trade disputes as forms of private collusion and government-tolerated exclusion represent an increasing reliance by businesses on extraterritoriality and antitrust enforcement. *Id.*

498. See Kauper, *supra* note 474, at 768 (suggesting that different nations view competition differently than the United States, with some countries embodying trade or industrial policies and others overly protecting small businesses).

499. See Eric J. Stock, *Explaining the Differing U.S. and E.U. Positions on the Boeing/McDonnell-Douglas Merger: Avoiding Another Near-Miss*, 20 U. PA. J. INT'L ECON. L. 825, 863 (1999) (arguing that the assumptions and focuses of U.S. and E.U. competition law led to profoundly different results in the Boeing/McDonnell-Douglas case).

500. See *id.* 841-42 (suggesting that the difference in focus in the Boeing/McDonnell-Douglas merger was due to the contrasting philosophies in U.S. and E.U. law, including the United States' interest in improving consumer and social welfare in contrast to the European Union's consideration of certain non-economic interests that are harmed by significant economic concentrations).

own markets when other states act in contravention to their interests.<sup>501</sup> The GE/Honeywell case provides a recent example where the United States approved the merger without substantial regard for its effect on the E.C., market, to which the European Community reacted by blocking the merger given the feared detrimental effects the concentration would have on certain market sectors.<sup>502</sup> Had extraterritoriality not been an option for the European Community, the merger would have proceeded without respect to the E.C. marketplace. Yet through extraterritoriality, the European Community was able to effectuate its competition policies and act in what it believed to be the best interests of the Common Market.

Further, the role of comity in extraterritoriality is becoming less important in both the United States and European Community.<sup>503</sup> The watering-down of the extraterritoriality principle in the *Timberlane Lumber* case in the United States that formulated a three-part test instituting a comity analysis was displaced in the *Hartford Fire* case where comity now only comes into play if there is a "true conflict" between U.S. law and the laws of another involved state.<sup>504</sup> In fact, the role of comity in U.S. jurisprudence at all is somewhat in question with some U.S. jurisdictions working around the comity issue in order to avoid giving such credence to the laws of foreign states.<sup>505</sup> Similarly, decisions such as *IBM v. Commission*, where the ECJ significantly weakened the role of comity by holding a European court should not consider comity until after a decision is

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501. See Rivers, *supra* note 470, at 533-34 (maintaining that there is a need for an organizational mechanism that eliminates national interest from the equation in international antitrust decisions).

502. See *id.* (arguing that the European Union's decision to block the GE/Honeywell merger reflected its interest in protecting its aerospace industry).

503. See Yeo Jin Chun, *The GE-Honeywell Merger Debacle: The Enforcement of Antitrust/Competition Laws Across the Atlantic Pond*, 15 N.Y. INT'L L. REV. 61, 69-70 (2002) (noting that both regimes have adopted positions against comity in the area of antitrust law).

504. See *id.* (discussing the significance of the *Hartford Fire* and *Wood Pulp Cartel* decisions and noting Scalia's dissent to the court's decision regarding the role of international comity).

505. See *id.* 70-71 (noting recent decisions in American courts limiting the extraterritorial reach of U.S. antitrust laws with the doctrine of international comity).

made, illuminate a trend in the European Community lessening the role of comity similar to that of the United States.<sup>506</sup>

The importance of extraterritoriality for future global competition regulation lies not only within its inherent capacity to enforce domestic policies in other jurisdictions, but also the potential for competition law convergence through its use.<sup>507</sup> U.S. – E.C. merger review cases provide numerous examples of the gradual convergence faculty of extraterritoriality. The Boeing/McDonnell Douglas case is illustrative through the European Community's use of extraterritoriality and initial declaration that the merger would result in anticompetitive effects on the common market although the merger had already been cleared by U.S. authorities.<sup>508</sup> Working in conjunction with the merging parties, the U.S. and E.C. authorities devised a compromise arrangement to allow the merger to proceed in both jurisdictions.<sup>509</sup> The effect of the European Community's use of extraterritoriality and the brokering of the agreement making the merger acceptable to the laws of both the United States and European Community caused the analysis and terms of acceptability in both jurisdictions to converge slightly. The United States made concessions to the European Community to allow the merger to

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506. See Case 60/81, *IBM v. EC Commission*, [1981] E.C.R. 2639, 3 C.M.L.R. 635 (1981) (holding that the European Community's decision to initiate a proceeding against IBM was not reviewable until after a final decision was rendered by the Commission).

507. See Brian Peck, *Extraterritorial Application of Antitrust Laws and the U.S.-E.U. Dispute over the Boeing and McDonnell Douglas Merger: From Comity to Conflict? An Argument for a Binding International Agreement on Antitrust Enforcement and Dispute Resolution*, 35 SAN DIEGO L. REV. 1163, 1184 (1998) (suggesting that the extraterritorial application of U.S. antitrust law has decreased the conflict between U.S. and foreign antitrust law because more countries have adopted competition laws compatible with U.S. law).

508. See Press Release, European Union Commission Delegation, *The European Commission Takes a Favorable Decision in Principle on the Merger of Boeing and McDonnell Douglas After Concessions Offered by Boeing* (July 23, 1997) (announcing the decision to approve the Boeing/McDonnell-Douglas merger after negotiations with Boeing), <http://www.eurunion.org/news/press/1997-3/pr50-97.htm> (last visited Feb. 15, 2004).

509. See *id.* (laying out the compromise agreement). “The Commission welcomes the result of the negotiations: it will protect the interests of airlines purchasing aircraft in international markets and will thus be good for consumers. It also confirms the effectiveness of the European Union's competition laws.” *Id.*

proceed, shifting its policies slightly and allowing a foreign jurisdiction to exert some control over a merger involving only U.S. domestic corporations.<sup>510</sup> In the future, cases and reviews by both U.S. and E.C. authorities will be characterized by slight, slow convergence in areas where U.S. authorities would be conscious of E.C. standards for a similar merger to proceed. Also, U.S. regulators will now be forced to make concessions in their own domestic competition policies in light of past E.C. extraterritoriality to allow such mergers to proceed and have the opportunity for successful review by the European Community.

The GE/Honeywell case provides another important example of competition law convergence through extraterritoriality with a different outcome.<sup>511</sup> Following the United States' clearance of the merger, the European Community issued a ruling blocking the transaction from taking place.<sup>512</sup> In this case, no deal could be brokered as in Boeing/McDonnell Douglas.<sup>513</sup> Unlike the former case, concessions could not be made by the respective U.S. and E.C. authorities for the merger to have been acceptable to the laws and policies of the United States and European Community, unlike the

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510. See U.S. Information Agency, *Case Study: The Boeing-McDonnell Douglas Merger*, 4 USIA Electronic Journal (Feb. 1, 1999) (stating that even though the European Union had no jurisdiction over the merger, it was in a position to level crippling fees on the sales of Boeing aircraft to European airlines, which were forecasted to account for one-third of all sales of new aircraft until 2007 ), <http://usinfo.state.gov/journals/ites/0299/ijee/boeing.htm> (last visited Feb. 15, 2004).

511. See Kolasky, *supra* note 202, at 5 (quoting Oliver Wendell Holmes, "sunshine is the best disinfectant" in regards to recent cooperation efforts between the DOJ and the Commission to clarify the assessments and issues leading to the diverging decisions in GE/Honeywell).

512. See Commission Decision of 03/07/2001 declaring a concentration to be incompatible with the Common Market and the EEA Agreement, Case No COMP/M.2220, General Electric/Honeywell (July 3, 2001) (finding the proposed merger to be incompatible with the Common Market because the merger would strengthen a dominant position in the market and impede competition for large commercial jet aircraft engines, large regional jet aircraft engines, corporate jet aircraft engines, avionics and non-avionics products, as well as small marine gas turbines).

513. See Kevin Guerrero, *A New "Convincing Evidence" Standard in European Merger Review*, 72 U. CIN. L. REV. 249, 271 (2003) (stating that even though the United States and the European Union closely coordinated on the transaction, they failed to come to a unanimous agreement on approval of the merger).

convergence that did occur in Boeing/McDonnell Douglas.<sup>514</sup> However, the use of extraterritoriality by the European Community in this case to block the merger of two U.S. corporations arguably led to some convergence in analysis and implementation of U.S. competition policy.<sup>515</sup> This was accomplished by demonstrating the tendency for the European Community to react to transactions deemed incompatible with the competition policies of the Common Market and conveying to U.S. competition authorities the terms and conditions the European Community would institute then and in future mergers in reviewing such transactions and allowing them to proceed in the European Community.<sup>516</sup>

The practice of extraterritoriality is not without its problems.<sup>517</sup> As alluded to throughout this discussion, achieving convergence of significance through extraterritoriality takes a considerable amount of time.<sup>518</sup> Extraterritorial enforcement actions such as that of the European Community in Boeing/McDonnell Douglas and

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514. *See id.* (noting that the disagreement was due to the different perspective of the scope of antitrust enforcement between the United States and the European Union).

515. *See* John O. McGinnis, *The Political Economy of International Antitrust Harmonization*, 45 WM. & MARY L. REV. 549, 564-65 (2003) (arguing that the criticism of the European Union's merger laws after the GE/Honeywell decision prompted changes in the E.U. regime).

516. *See* Report on the Commission Green Paper on the Review of Council Regulation (EEC) No 4064/89, EUR. PARL. DOC. (COM(2001) 745-C-0159/2002/2067(COS)), at 7 (stating that following the European Community's decision to block the GE/Honeywell merger, the Commission opened the door for comments on its use of the "market dominance" test employed and even hinted at changing its "market dominance" test for an American style "substantially less competition" test), available at <http://www.europarl.eu.int/meetdocs/committees/econ/20020521/466246en.pdf> (last visited Feb. 14, 2004); *see also* Schmitz, *supra* note 91, at 588-89 (suggesting that the European Commission hinted of the possibility of a change from the traditional market dominance test to an American-style "substantially less competition" analysis, but the real distinction between the European and American systems remained the underlying differences in the goals of merger control).

517. *See* Rivers, *supra* note 470, at 530 (arguing that the use of extraterritoriality causes friction between foreign governments and led to the adoption of bilateral agreements between the United States and the European Union to promote more cooperation in the enforcement of competition laws).

518. *See supra* sections II.D.1, II.D.2, and III.B (focusing on the extraterritorial application of U.S. and E.U. antitrust law)

GE/Honeywell achieved modest amounts of convergence over the span of lengthy investigations and negotiations. As is the case with regulatory cooperation and the establishment of informal networks discussed in the previous section, establishing a competition law system that will be effective in regulating transnational business activities and the global economy will take a significant amount of time. In fact, one may view the slow, time consuming convergence offered through extraterritorial competition law enforcement as an advantage given the nature of competition law itself.

In addition, extraterritorial enforcement presents an unsettling and contentious aspect to international relations and trans-governmental networks.<sup>519</sup> The application of one state's domestic law to the jurisdiction of another state impedes upon traditional notions of state sovereignty.<sup>520</sup> The GE/Honeywell and Boeing/McDonnell Douglas merger cases present such an example where in both cases the European Community imposed its own policies on the U.S. market through extraterritoriality in a merger involving U.S. corporations.<sup>521</sup> As with other cases of extraterritoriality and competition law issues, public outcry in the United States as the invaded jurisdiction resulted in calls for sanctions and even a trade war with the Europeans over their actions, primarily in the aftermath of GE/Honeywell.<sup>522</sup> Herein lays perhaps the biggest problem with extraterritorial enforcement of competition law, specifically when the outcry and anger spurs retributive and reprisal action in other international economic spheres such as trade law through countervailing measures and anti-dumping

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519. See Stevens, *supra* note 274, at 283 (contending that aggressive extraterritoriality poses many challenges, including the risk of clashes between substantive and procedural norms and the temptation to pursue economic self-interest by the intervening party).

520. See Rivers, *supra* note 470, at 530 (noting that the extraterritorial application of one nation's laws on another nation violates the most fundamental principle of national sovereignty).

521. See Stevens, *supra*, note 274, at 275 (contending that the United States questioned the European Union's interest in the U.S. merger and some suspected that it was acting to protect its own industry).

522. See *id.* (describing House and Senate resolutions condemning the European Union's intervention).

statutes.<sup>523</sup> A more related and responsive reaction by some jurisdictions has been through statutory blocking statutes aimed to thwart discovery actions in competition law investigations in order to cause a "true conflict" required for a comity analysis such as the test in *Hartford Fire*.<sup>524</sup> Statutes and retribution come with the terrain of extraterritoriality, though as the principal gains acceptance throughout the global economic community and becomes an accepted practice the less backlash will likely occur.<sup>525</sup>

An additional and related problem with extraterritoriality and transplanting this principle throughout the global market remains the issue of capacity and the ability of some states to exert their competition policies on an extraterritorial basis.<sup>526</sup> Critics would argue this principal may be acceptable for the United States and European Community given the strength of their economies and the allure of their respective markets to foreign businesses, but would be difficult for smaller and weaker states to act in such a manner if they wish to attract the same business activity. In many ways this is the nature of extraterritoriality and the free market itself; however, the use of extraterritoriality and the development of this principal in both the United States and European Community will likewise be mimicked in other jurisdictions in the process of developing their own competition law regimes.<sup>527</sup> The development of the

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523. See Himmelfarb, *supra* note 79, at 920-21 (stating that foreign nations have also developed numerous defenses against personal jurisdiction in response to the United States' extensive use of legislation that authorizes extraterritoriality).

524. See, e.g., Joseph P. Griffin, *Jurisdiction and Enforcement: Foreign Reactions to U.S. Assertions of Extraterritorial Jurisdiction*, 6 GEO. MASON L. REV. 505, 522 (1998) (contending that the Supreme Court's decision in *Hartford Fire* has been widely criticized outside of the United States and the decision provided an incentive for foreign nations to invoke blocking statutes).

525. See Himmelfarb, *supra* note 523, at 921 (suggesting that the United States has also entered into international antitrust agreements that codify a bilateral acceptance of its extraterritorial policy).

526. See *supra* notes 241-246 and accompanying text (discussing how the relative power of a country to enforce its laws extraterritorially on foreign businesses is linked to the degree to which the businesses conduct transactions in that country).

527. See Spencer Weber Waller, *The Twilight of Comity*, 38 COLUM. J. TRANSNAT'L L. 563, 574 (2000) (maintaining that many other nations apply their

competition law systems in the United States and European Community closely follow the same path with strict territoriality as the main principal in the beginning followed by extraterritoriality when the economies strengthened to the capacity necessary for developing to the current stage of lessening the role of comity.<sup>528</sup> Given the growth of competition law regimes around the world in recent years and the inclination of states to transplant the U.S. or E.C. system to their own state, it is possible to conclude that these states will develop their regimes in a similar fashion to the ones instituted by the United States and European Community.<sup>529</sup> Extraterritoriality may not be an option at the early stage, but as globalization continues to spread and foreign markets begin to attract more and more business activity, the capacity itself will also develop. The development of extraterritoriality in this manner would be only slightly different than if a formal competition law regime were instituted today, as the system would be substantially formed out of U.S. and E.C. influence and would impose the policies of these two competition law leaders on the state parties signing on to such a regime. This is quite the case with trade agreements and institutions like the WTO.

The fact remains that extraterritoriality undoubtedly plays a catalyst role by encouraging cooperation and convergence while constructing an informal global competition law system through U.S. and E.C. leadership. States look to these two jurisdictions for direction in this area and for transplanting aspects of the U.S. and E.C. regimes to their own.<sup>530</sup> Extraterritoriality forms an important foundational principle for the United States and European Community, a tried and tested method that presents the most effective and useful path for converging systems of competition

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competition laws extraterritorially regardless of their view when the United States applies its laws to their citizens).

528. See *supra* Part II.D.1-2 (highlighting the development of extraterritoriality in the U.S. and E.U. systems).

529. See David J. Gerber, *Competition Law*, 50 AM. J. COMP. L. 263, 269-70 (2002) (contending that U.S. antitrust law has influenced other systems of competition law).

530. See *id.* at 269-70 (maintaining that U.S. antitrust is at the center of the competition law universe and has frequently played a "model" role for decision-makers in other systems).

law.<sup>531</sup> Coupled with constructing and strengthening informal regulatory networks and continued cooperation efforts for competition law enforcement, competition law convergence can be achieved through extraterritoriality in an effective manner conducive to the needs and idiosyncrasies of competition law itself.

## CONCLUSION

As the dilemma described at the beginning of this article demonstrates, states face important questions over how to effectuate domestic regulatory policies in a global marketplace.<sup>532</sup> Drawing from competition law, this thesis argues for future transnational responses to the demands of globalization to follow the U.S. – E.C. approach towards bilateral cooperation supplemented with extraterritorial competition law enforcement.<sup>533</sup> As the analysis of the relative similarities and differences in the respective U.S. and E.C. competition regulation systems reveals, limits remain to the attainable level of competition law harmonization between two of the world's most similar economic and legal systems, underscoring even greater difficulty in obtaining multilateral consensus from a ranging diversity of politically and legally divergent states.<sup>534</sup> Coupled with the economic model, insurmountable obstacles exist for the realization of a global competition law system. Rather, cooperation limited to bilateral relationships offering flexibility and an avenue for convergence through regulatory interaction supplemented with extraterritoriality represent the most effective and realistic option to maintaining domestic competition policies in the global marketplace.

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531. See *id.* 273-74 (noting that the extraterritorial application of U.S. antitrust law has played an important role in the harmonization of competition law since after the Second World War and many see U.S. antitrust as an effective focal point for harmonization efforts).

532. See Kauper, *supra* note 474, at 766 (stating that as markets become increasingly global, the costs of complying with different standards around the world will increase the pressure for harmonization of standards of competition law).

533. See *supra* Part III.A-B (highlighting the advantages and disadvantage of bilateral cooperation and extraterritorial competition law enforcement).

534. See Kauper, *supra* note 474, at 762 (contending that most developed and some transitional countries have antitrust legislation but levels of enforcement and effectiveness of remedies varies greatly).

U.S. – E.C. cooperation on competition law has broader implications for future state responses to the demands of globalization. While demonstrating the growing difficulty and even futility in responding to the demands of the global market through traditional, territorially bound responses, U.S. – E.C. cooperation efforts also illuminate the possibilities for international efforts between states to address and rectify the limits of state-centered solutions. Flexible, non-institutionally bound agreements like the 1991 and 1998 Agreements promote networking and soft harmonization through non-legal mediums, allowing for changes and developments to progress at the pace of officials charged with administering the regulatory policies of the state. Globalization has diminished the comparative advantage of nations that once inherently constrained business activities to the territorial jurisdiction of the state, replacing this principle with the concept of the competitive advantage of enterprises. The non-location bound nature of participants in the global market demands adaptive regulatory solutions from states in order to subject the competitive advantage of enterprises to regulation in the interest of consumers and free market competition.