

The International Convergence of Competition Laws

DANIEL STEINER*

Perhaps all people would support harmonization if they could convince the world that their model is the right model and that all harmonization should occur in their direction.

— American Bar Association, 1991¹

I. INTRODUCTION

TRADE AND BUSINESS have become increasingly international in the past few decades. In 1994, the value of world merchandise trade rose 13 percent to a record \$4.09 trillion.² This phenomenon has created many regulatory issues. One of the most pressing concerns is how to ensure that the international playing field is a level one. Competition enforcement has traditionally been limited by national boundaries and has failed to keep up with the changes in the business community which it is supposed to be regulating. Recently, the movement toward an international code of competition law has increased its momentum. In reality, however, the calls for international regulation go back at least as far as the 1948 Havana Charter which included a chapter on restrictive business practices. With the re-emergence of the debate surrounding an international code, the business community and regulators must ask themselves some fundamental questions about the desirability and feasibility of such a code.

There is little consensus in the international community about the role of competition law. This conflict is not only apparent between the developing world and the developed world, but also within the developed world itself.

The extent of this conflict explains why, in the short term, convergence will continue to take the form of bilateral cooperation efforts. However, in the future, there is good possibility that convergence will become multilateral cooperation efforts. Nevertheless, the actual harmonization of domestic competition laws and the creation of an international competition code will remain a holy grail.

* B.A., M.Sc., LL.B. (McGill).

¹ Report of the Special Committee on International Antitrust, American Bar Association, Section of Antitrust Law, Chicago, September 1991 at 289.

² "Global trade expected to increase 8% this year" *The Globe and Mail* (15 November 1995) B9.

This paper attempts to determine the most practicable and likely way states can achieve convergence in the competition field. To answer these questions and understand why the creation of a binding international code is unlikely, one must first determine whether some form of convergence is even desirable. Secondly, the theoretical underpinnings of this debate will be analyzed. Thirdly, the obstacles to convergence must be surveyed. Fourthly, different methods of convergence will be examined to identify its most preferable and likely path. The alternatives are the unilateral extraterritorial application of domestic laws, bilateral cooperation or harmonization arrangements, or a multilateral cooperation or harmonization arrangement. Each of these alternatives could be binding or non-binding. Intertwined with this problem is the question of which forum should be used to pursue convergence. The answers to these questions will be arrived at through an examination of the various past attempts at attaining convergence. These efforts have included the still-born International Trade Organization ("ITO") Havana Charter, the 1980 United Nations Conference on Trade and Development ("UNCTAD") Restrictive Business Practices Code ("RBP Code"), the Organization for Economic Cooperation and Development ("OECD"), the General Agreement on Tariffs and Trade ("GATT") and World Trade Organization ("WTO"), the European Union, the Australia-New Zealand Closer Economic Relations Trade Agreement ("CER"), and the recently proposed Draft International Antitrust Code ("DIAC").

This paper endeavours to show that the best forum for convergence is a combination of the OECD and the WTO. The OECD should continue to foster multilateral cooperation and in the future, when there is sufficient political will, it should turn its work over to the WTO so that it can be more formal and binding.

II. DEFINITION OF CONVERGENCE AND WAYS TO ACHIEVE IT

THE DEBATE ABOUT CONVERGENCE has used many different terms which can be confusing if they are not defined at the outset of a discussion of the topic. The different models of convergence are set out in Figure One. This paper will use *convergence* to mean the overarching movement towards a form of standardization of competition law, be it through *cooperation* or *harmonization*.³ Cooperation only occurs bilaterally or multilaterally, while harmonization can also occur unilaterally.

³ See A.K. Bingaman, Assistant Attorney General Antitrust Division U.S. Department of Justice, "U.S. Antitrust Policies in World Trade" (Address to the World Trade Center Chicago Seminar on GATT after Uruguay, 16 May 1994) [unpublished] [hereinafter *Bingaman (16 May 1994)*] where Bingaman uses the word "convergence" to refer to the phenomena of roughly fifty countries adopting antitrust laws along similar lines as the United States.

Unilateral harmonization takes place when a state unilaterally applies its domestic competition law in an extraterritorial manner based on the effects doctrine.⁴

Harmonization is one type of convergence. It can exist in three forms: harmonization of competition *rules*, harmonization of competition *policies*,⁵ or harmonization of competition *enforcement procedures*. The difference resides in the level of supranationalism of the harmonization.

Supranational laws and institutions are able to bind a state. Intergovernmental law, in contrast, ensures that each state either has a veto over, or is not bound by, the decisions of an international body.

TABLE I
MODELS OF COMPETITION LAW CONVERGENCE

TYPE OF RELATION	CONVERGENCE			
	HARMONIZATION			COOPERATION
	RULES	POLICIES	PROCEDURES	
Unilateral	USA (<i>Hartford Fire</i>) EU (<i>Wood Pulp</i>)	USA (<i>Hartford Fire</i>) EU (<i>Wood Pulp</i>)	USA (<i>Hartford Fire</i>) EU (<i>Wood Pulp</i>)	
Bilateral		Australia-New Zealand Agreement on Closer Economic Cooperation		Canada-US • Memorandum of Understanding • Mutual Legal Assistance Treaty • Extradition Treaty • 1995 Agreement Regarding Competition Laws

Continued on next page

⁴ S. Ostry, "Beyond the Border: The New International Policy Arena" in E. Kantzenbach *et al.*, eds., *Competition Policy in an Interdependent World Economy* (Baden Baden: Nomos Verlagsgesellschaft, 1993) 261 at 269.

⁵ A. Kaagsma, "An International Competition Policy as a Means to Create an Open Global Market Place" in C.J. Cheng *et al.*, eds., *International Harmonization of Competition Laws* (Dordrecht: Martinus Nijhoff, 1995) 409 at 424.

TABLE 1—Continued

TYPE OF RELATION	CONVERGENCE			
	HARMONIZATION			COOPERATION
	RULES	POLICIES	PROCEDURES	
Multilateral	ITO Havana Charter UNCTAD Restrictive Business Practices Code EU • Treaty of Rome Art. 85 & 86 • Merger Regulation Draft International Antitrust Code	OECD 1994 Interim Report Sir Leon Brittan's WTO proposals Draft International Draft International Antitrust Code	OECD 1994 Interim Report	OECD Recommendations NAFTA Chapter 15 • Article 1504 Working Group has yet to issue report, but it is likely to place NAFTA in this cell GATT/WTO • Does not yet deal with competition law, but if it does address competition law it will most likely be within this cell

A strategy of harmonization of competition *policies* assumes that each participating country has and retains its own domestic competition rules and system of enforcement. A harmonized policy is similar to an EU directive which states a policy goal and allows each Member to determine the best way to achieve the goal within their country. In other words, a supranational policy is achieved through national laws.

A harmonized *rule* is more like an EU regulation which is a supranational law. The policy and means of achieving the policy are identical in all member states. Harmonization of *procedure* involves attempts to lower compliance costs and adopt uniform enforcement practices.⁶ For example, procedural harmonization would allow companies proposing a merger involving two countries to submit the same information filing to both national competition authorities. Once that filing is

⁶ George Addy wrote in "International Harmonization and Enforcement Cooperation: The Canadian Experience" in Cheng *et al.*, *ibid.* at 399 [*Int'l Harmonization*] that there is wide variance in merger procedures between eleven major trading countries with respect to compulsory notification requirements, notification thresholds, types of information to be submitted by the firms, time limits for initial decisions by the reviewing agency, criteria for decision, confidentiality and penalties for failure to notify.

made, each national authority conducts its own analysis, based on its own laws, in an attempt to implement its own policy.

A more supranational version of procedural harmonization might include a system which appoints a lead jurisdiction, for a particular case, to carry out enforcement on behalf of all concerned states. Alternatively, states could adopt a jurisdictional dispute resolution system that could decide which state has the right to regulate a particular case.

Cooperation, in contrast to *harmonization*, simply means that states will work together, either bilaterally or multilaterally, to enforce their own national competition rules. Cooperation does not entail an attempt to reduce the differences between the rules or procedures in different states. Extensive cooperation already exists in the competition law enforcement community and further cooperation is the most likely route that will be taken to increase convergence in the near future.

III. WHY IS CONVERGENCE IMPORTANT?

A. Reasons for Convergence

Convergence is important for many reasons. First, a lack of convergence constitutes a trade barrier. Second, convergence reduces compliance costs for companies conducting international business. Third, convergence ends the need for states to apply their competition laws extraterritorially, and the corresponding need of target states to enact "blocking" and "claw-back" statutes.

Each of these reasons needs to be examined more carefully and the *Aerospatiale-Alenia/De Havilland*⁷ case needs to be briefly examined to demonstrate that convergence problems are real and not simply of academic interest.

1. Barriers to Trade

As tariff barriers in the GATT have been decreased over the years, the importance of non-tariff barriers has increased. Competition laws are a form of government regulation which can be used as a non-tariff barrier to foreign competition in the domestic market. Not only are competition laws potential non-tariff barriers, but non-enforcement of competition laws can also be seen as a non-tariff barrier. This is arguably the case with Japan's non-enforcement of its *Anti-Monopolies Act*.⁸

Another trade related reason for competition law convergence is the possibility of using harmonized law as a replacement for anti-dumping duties and thus remove

⁷ EC, Commission Decision No 91/619, O.J. L. 334/42 (5 December 1991) [hereinafter *De Havilland*].

⁸ See section VI(E)(8)(c), below, for a discussion of this issue.

another barrier to trade. Australia and New Zealand have pursued this idea successfully.⁹

2. System Friction and Compliance Costs

There is a “concern about the aggregate level of ‘system friction’ arising from divergent domestic policies (including competition policies) in an increasingly interdependent global economic order.”¹⁰ A converged set of rules would enable corporations to conduct transborder business with much less difficulty because system friction, in the form of compliance costs, would be reduced. For example, in the merger area if the different jurisdictions interested in an international merger have different information filing requirements, the compliance costs for the companies concerned is unnecessarily raised. This may cause an undesirable chilling effect on socially beneficial mergers.¹¹

3. Extraterritorial Application of National Laws and Blocking Statutes

Another negative result of the lack of bilateral and multilateral convergence of competition policies is the extraterritorial application of national competition laws. American authorities adopted this approach in the *Hartford Fire v. California* case and European authorities adopted it in the *Wood Pulp*¹² case. It is the most rudimentary method of dealing with transactions which affect several jurisdictions and will be examined later in this paper.

In response to the unilateral extraterritorial application of competition laws, many states such as Canada, Britain, Australia, France, the Netherlands and South Africa have implemented blocking statutes.¹³ In conjunction with blocking statutes some states have implemented “claw-back” statutes allowing foreign companies to recover, in their own courts, the damages awarded against them in American courts.¹⁴ The statutes are another obstacle to trade and demonstrate that unilateral harmonization is a poor means of achieving convergence.

⁹ See section VI(D)(4), below for a discussion of this issue.

¹⁰ N. Campbell & M.J. Trebilcock, “International Merger Review: Problems of Multi-Jurisdictional Conflict” in Kantzenbach, *supra* note 4 at 129, referring to an argument made by Ostry, *supra* note 4 at 261.

¹¹ *Ibid.* at 129.

¹² *Hartford Fire v. California* 125 L.Ed. 2d (1993) [hereinafter *Hartford Fire*] and *Ahlstrom Osakeyhtio v. Commission* [1988] ECR 5193 [hereinafter *Woodpulp*].

¹³ The Canadian *Foreign Extraterritorial Measures Act*, R.S.C. 1985, c. F-29 [hereinafter *FEMA*] is typical of these statutes.

¹⁴ M. Joelson, “Harmonization: A Doctrine for the Next Decade” (1989) 10 *Nw. J. of Int’l L. & Bus.* 133 at 135.

4. The De Havilland Case

The problems which arise from divergent domestic competition laws can be more concretely understood by examining a case which affected Canada directly and negatively.

In *De Havilland*, ATR wanted to purchase the De Havilland division of Boeing. George Addy, the Director of Investigation and Research at the Canadian Bureau of Competition Policy, has written that this was “not a case where inadequate consultation between the Bureau and the European Commission’s DGIV occurred.”¹⁵ There was extensive consultation, however the fundamental difference in substance between Canadian and European competition laws resulted in divergent conclusions about the impact of the merger. For example, the Bureau recognised that certain efficiencies would result from the merger, while DGIV does not recognise an “efficiency exception.” As well, the limited state of convergence meant that agencies were principally examining the competitive effects of the transaction on their own geographic area, despite the fact that both the Bureau and DGIV determined that the relevant market was the world. This limited geographic focus enabled the Bureau to concentrate on the fact that De Havilland was a failing firm leading to the decision that blocking the transaction would have the same competitive effect as allowing it to proceed. On the other hand, DGIV blocked the merger because of the increased market share that ATR would enjoy within the European Community.

5. Conclusion

The rationale for deepening convergence is clear. Independent national competition laws and enforcement leads to the maintenance of non-tariff barriers to international trade, system friction, increased compliance costs and the potential for contradictions between national agencies about the impact of a given transaction. Finally, if there is no further convergence, states will continue to apply their domestic competition laws extraterritorially which will lead to the adoption of more stringent blocking statutes.

The OECD’s 1994 *Interim Report on Convergence of Competition Policies* stated that:

Greater convergence in competition policy, laws, enforcement methods and analytical tools can contribute substantially to international economic efficiency notably by facilitating international flows of goods, services, capital and technology. Convergence will enable governments to resist pressures to impose impediments to trade—tariffs, non-tariff barriers, other policies—and will ensure that such impediments are not replaced by private restraints on international trade Greater convergence could facilitate competition enforcement

¹⁵ G.N. Addy, “International Coordination of Competition Policies” in Kantzenbach, *supra* note 4 291 at 298 [hereinafter *Int’l Coordination*].

internationally [and] is not only desirable but is achievable in light of the strong evidence of convergence in recent years.¹⁶

Some form of convergence is clearly needed to deal with the globalized business world. The question then becomes: what type of convergence is the most desirable and likely to be achieved? However, before turning to those questions, it is useful to consider the arguments against convergence.

B. Reasons Against Convergence

Not everyone agrees that convergence is necessary. It has been argued that there are advantages to having separate national domestic competition laws. The existence of several different laws arguably leads to innovation in the creation of new laws. A jurisdictional rivalry over competition laws may lead to an overall improvement in everyone's laws. Karl Meesen has written that:

Harmonization may be desirable, but only up to the point where flexible adjustment to changing conditions by way of a competition of competition laws still remains possible Overextending harmonization would make competition law inflexible because agreement on any change would be slow to reach and unresponsive to economic reality, and because factual conditions could not be the same throughout and extensive area.¹⁷

However, even if one accepts the suggestion that a competition of competition laws is desirable, this does not mean that arguments for convergence have become moot.

Convergence and the use of national competition laws are not mutually exclusive goals. Retention of national laws simply means that a uniform multilateral set of binding competition rules is not an acceptable means of achieving convergence. There are nevertheless, many other means to achieve convergence.

IV. THEORETICAL FRAMEWORK

AT THE OUTSET of any investigation into policy making it is useful to establish a theoretical framework of analysis. David Fidler has suggested that both realist and liberal international relations theories can be applied to the debate surrounding the convergence of competition laws.¹⁸ The current status of convergence suggests that a combination of the two theories has been at work. Realism and the focus on national sovereignty have been responsible for the hesitation most states have concerning the creation of a supranational code of competition law. However, the

¹⁶ OECD/GD/(94)64 at 4 [hereinafter *Interim Report*].

¹⁷ K.M. Meesen, "Competition of Competition Laws" (1989) 10 *Nw. J. Int'l L. & Bus.* 17 at 29 and 21.

¹⁸ D. Fidler, "Competition Law and International Relations" (1992) 41 *Int'l & Comparative L. Q.* 563.

convergence that has already been achieved is the result of liberalism and the belief that everyone benefits from free trade and competition.

V. OBSTACLES TO CONVERGENCE

MOVEMENT TOWARDS BROADER multilateral convergence is impeded by several problems. An analysis of these problems reveals that a system of convergence which can be tailored to national idiosyncrasies has the most chance of success. Therefore, future multilateral convergence is likely to take the form of cooperation, not harmonization.

The first impediment to convergence is that many states, especially in the developing world, do not have competition laws. Dianne Wood has pointed out that:

Only about a third of the nations in the world have enacted antitrust or competition laws—perhaps 53 or so. Many of that group have had only brief experience with their law, and they are still developing both the expertise necessary for sound and effective enforcement, and the political support for the sometimes harsh competitive market.¹⁹

Of the 53 states with competition laws, about 20 are OECD members. It should be noted, however, that the countries that do have competition laws represent about 75 percent of world trade.²⁰

The existence of competition law in some states and not others means that states do not share a common perspective on the convergence issue. David Gerber has argued that:

[T]hose states with no antitrust laws or weakly enforced antitrust laws fear that states with developed antitrust regimes, such as the United States, are permitted to impose their political wills and economic philosophies on the former group of states.²¹

It was largely in response to these feelings that the developing countries pushed for the adoption of the RBP Code in the UNCTAD.

Developing countries claim that they may need to “orchestrate production and distribution of their resources and manufacturers (i.e., cartelise) to promote their development interests and to protect themselves from exploitation by multination-

¹⁹ D.P. Wood, “The Internationalization of Antitrust Law: Options for the Future” (Address to the DePaul Law Review Symposium on Cultural Conceptions of Competition: Antitrust in the 1990s, 3 February 1995)[unpublished] [hereinafter *Wood (3 February 1995)*].

²⁰ *Ibid.*

²¹ D. Gerber, “International Competitive Harm and Domestic Antitrust Law: Forms of Analysis” (1989) 10 *Nw. J. Int’l L. & Bus.* 41 at 53.

als.”²² This claim not only manifested itself during the negotiation of the RBP Code, but is also reflected in its preamble.²³

A second obstacle to multilateral convergence is that states that do have competition laws often have conflicting laws based on differing assumptions and often seek to implement divergent policies. Charles Stark, the Chief of the Foreign Commerce Section of the Antitrust Division of the U.S. Department of Justice (“DOJ”), has stated that:

There remain substantial differences in the objectives and substantive provisions of the competition laws of the 55 or so countries that have adopted them. While the objectives of U.S. antitrust law are firmly rooted in protecting consumer welfare and the openness of markets, the competition laws of other countries often include such goals as preserving small businesses threatened by the greater efficiency of larger firms, promoting industrial policy, or protecting local companies by offsetting the bargaining power of multinational corporations. Even among the members of the OECD, which represents most of the world's developed countries, large gaps exist in the approaches to competition policy.²⁴

The third barrier to convergence is that states with competition laws often enforce them with differing degrees of vigour. However, this fact does not mean convergence is destined to fail. The success of the EU convergence demonstrates that Japan's failure to enforce its competition law is not necessarily an impediment to multilateral convergence. EU countries have managed to converge even though some countries did not have competition laws and those countries that did have competition laws had different enforcement standards. The vigorous activity of the German *Bundeskartellamt* contrasts with the near inactivity of the Dutch competition authorities, but this difference did not hinder the success of the Treaty of Rome's articles 85 and 86 and the Merger Regulation.²⁵

Fourth, the developed states are reluctant to give up the advantages they reap from the sanctioning of export cartels. The lack of an international code means that industrialized states can exercise their economic and political power more effectively on the world stage. “If the only game were economic, perhaps the pact could

²² E.M. Fox & L.A. Sullivan, “Antitrust and the Future: World Markets, Transitional Restraints” (1989) 10 Nw. J. Int'l L. & Bus. 140 at 142.

²³ *Ibid.*

²⁴ C.S. Stark, “Enhancing Market Access Through Trade and Antitrust Law” (Address to Section of International Law and Practice of the American Bar Association, 8 August 1995) [unpublished].

²⁵ E.A. Vermulst, “A European Practitioner's View of the GATT System: Should Competition Law Violations Distorting International Trade Be Subject to GATT Panels?” (1993) 27 J. of World Trade 55 at 60. See also Council Regulation 4064/89, O.J. L. 395/1 (30 December 1989) corrected O.J. L. 257/14 (21 September 1990) [hereinafter *Merger Regulation*]. The EU is discussed in greater detail in section VII(E)(2), below.

be enforced. But since the stakes are political and ideological, and the game affects the balance of power in the world, only rhetorical support of and selective adherence to a world anti-cartel rule is likely to evolve."²⁶

The fifth obstacle to multilateral convergence is the continued use by most states of protectionist trade strategies, such as anti-dumping duties and voluntary export restraints. These states would have to be convinced of the merits of exchanging anti-dumping rules for anti-trust rules.²⁷

A sixth hurdle concerns the need that a supranational investigation and enforcement body would have for access to confidential business information. Such access is an extremely sensitive issue, as was demonstrated by the outcry of both American and Canadian business communities in the face of amendments to domestic statutes which would have allowed sensitive business information to be shared with foreign authorities.²⁸

The final impediment to multilateral convergence is that history indicates that without the support of the United States little can be achieved. In this regard, Dianne Wood's official statement as the Deputy Assistant Attorney General of the U.S. DOJ in January 1995 is extremely important. "The type of controlled and modest inter-agency sharing arrangement we are now able to create seems greatly preferable to some kind of supranational World Competition Authority."²⁹ Wood also wrote that:

It is neither useful nor desirable to jump in feet first to a world antitrust code along the lines of the Havana Charter. [The U.S.A.] will take this step only if and when we and our trading partners believe that it is a necessary supplement to effective national enforcement and the cooperative arrangements we hope to develop.³⁰

Despite this statement, there is a scintilla of hope that American attitudes may be on the cusp of change. First, after much political wrangling, the U.S. Congress

²⁶ Fox & Sullivan, *supra* note 22 at 143.

²⁷ W. Moschel, "International Restraints of Competition: A Regulatory Outline" (1989) 10 *Nw. J. of Int'l L.* 76 at 78. For a detailed examination of this point, see P. Warner, "Canada-United States Free Trade: The Case for Replacing Antidumping with Antitrust" (1992) 23 *L. and Pol. of Int'l Bus.* 791.

²⁸ D.P. Wood, "Antitrust: a Remedy for Trade Barriers" (Address to Asian Law Program, Japan Information Access Project, 24 March 1995) [unpublished] [hereinafter *Wood (24 March 1995)*]. For a detailed discussion of the problems relating to confidentiality and international competition law enforcement cooperation, see R.W. Lusk & D.E. Steiner, "Transborder Enforcement of Competition Law: Balancing Cooperation with Confidentiality" (Address to the Canadian Bar Association 3rd Annual Competition Law Conference, 29 September 1995).

²⁹ D.P. Wood, "International Enforcement at the Antitrust Division" (Address to the Greater Cleveland International Lawyers Group, 17 January 1995) [unpublished] [hereinafter *Wood (17 January 1995)*].

³⁰ *Wood (3 February 1995)*, *supra* note 19.

adopted the Final Act of the Uruguay Round which includes a binding dispute settlement mechanism. Second, a notable *Globe and Mail* article states that "to level the playing field [of international competition] the [U.S.] administration will seek to develop global antitrust standards in conjunction with its trading partners."³¹ A third source of hope is that Dianne Wood has at least begun to discuss what the United States would require in a multilateral agreement on competition policy harmonization. She has stated that it must:

[S]et forth the basic principles to which all signatories adhere, and according to which all national laws should be construed. One such principle should condemn cartelization, defined as collective acquisition and/or exercise of market power. Another such principle would condemn what the United States calls monopolization, or what the Europeans call abuse of a dominant position within a relevant market. The list should probably be short and broad, so that it could be adapted most readily to the different particular regimes of each signatory.³²

The European Union favours multilateral convergence more than the United States. Sir Leon Brittan, while he was the EU Competition Commissioner, championed the idea of policy harmonization through a multilaterally agreed minimum set of competition rules within the GATT context.³³ Nevertheless, the current EU Competition Commissioner, Karel Van Miert, has stated that while he strongly supports the idea of creating a set of minimum international competition rules, "one should not even dream about a world-wide and independent competition agency."³⁴

While many commentators have highlighted the obstacles to multilateral harmonization, this should not foil other forms of convergence. In fact, Ostry has pointed out that:

[I]n merger law ... there does not appear to any difference in *substantive* law: the law is remarkably similar in most jurisdictions. The divergence—and conflict—arises in *application*, since the general prohibition against mergers which will "substantially lessen competition" leaves ample scope for discretion of the part of authorities. ... For corporations planning transnational mergers the degree of uncertainty created by differences in enforcement of merger law is a major impediment to rational decision-making.³⁵

³¹ "U.S. antitrust policies face review" *The Globe and Mail* (20 November 1995) B6.

³² D.P. Wood, "International Jurisdiction in National Legal Systems" (1989) 10 *Nw. J. Int'l Bus. & L.* 56 at 74.

³³ R. Rice, "Brittan Urges Basic Competition Rules" *Financial Times* (8 November 1993) 3. See also Sir Leon Brittan, "A Framework for International Competition" (Address to World Economic Forum, 3 February 1992) cited in E.A. Vermulst, *supra* note 25 at 55 and 64.

³⁴ N. Yacheistova, "The International Competition Regulation: A Short Review of a Long Evolution" (1994) 18 *World Competition: L. & Economics Review* 99 at 107.

³⁵ Ostry, *supra* note 4 at 268.

VI. DIFFERENT METHODS OF CONVERGENCE

A. Informal Mechanisms

Before discussing formal mechanisms for convergence, it must be noted that a significant amount of convergence can occur at an informal level. George Addy has emphasized that informal mechanisms are an important component of fostering inter-state understanding.³⁶ These measures include meetings of senior officials on a bilateral and multilateral basis, discussion groups at the OECD and personnel exchanges between competition agencies. The inter-agency meetings also involve consultations between countries with highly developed competition laws and those drafting new laws. As a result, the new laws in many states mirror the anti-trust laws of the United States, Canada, and the EU.³⁷ In addition to these governmental initiatives, non-governmental activities such as joint meetings of the American and Canadian Bar Associations on competition law issues and meetings of the International Chamber of Commerce's Commission on Law Practices Relating to Competition are useful tools for informal convergence.

B. Hard vs. Soft Law

The first decision to be made when searching for an optimum mode of convergence is whether the convergence mechanisms should be binding. Dianne Wood has called soft law arrangements, such as Memorandums of Understanding ("MOUs"), "first generation" agreements. Hard law arrangements, such as Mutual Legal Assistance Treaties ("MLATs") and the new agreements under the *International Antitrust Enforcement Assistance Act* ("IAEAA") agreements have been termed "second generation" agreements.³⁸

A "soft" law approach to convergence has the advantage that states are more willing to participate in the discussions and the final agreement can be more detailed. Marceau has argued that a binding convergence agreement would have to be so vague that it would be pointless.³⁹ However, Marceau's point is not well taken. A soft law is an ineffective tool of convergence if states do not abide by it. The RBP Code demonstrates that states will not follow non-binding rules even if

³⁶ *Int'l Coordination*, *supra* note 15 at 295.

³⁷ *Bingaman* (16 May 1994), *supra* note 3.

³⁸ D.P. Wood, "The 1995 Antitrust Enforcement Guidelines for International Operations: An Introduction" (Address to ABA Antitrust Section Spring Meeting, 5 April 1995) [unpublished] [hereinafter *Wood* (5 April 1995)].

³⁹ G. Marceau, *Anti-Dumping and Anti-Trust Issues in Free-Trade Areas* (Oxford: Clarendon Press, 1994) at 298.

the General Assembly approved them unanimously. The Treaty of Rome, the EC Merger Regulation, the Australia-New Zealand Closer Economic Cooperation Treaty and the various binding MLATs signed by the U.S. have yielded more tangible results than the non-binding soft law efforts of forums such as the UNC-TAD or OECD.

Despite the problems inherent with soft law, it does serve a useful purpose. Rainer Geiger, the Head of the OECD Division on Enterprise and Consumer Affairs stated that the non-binding nature of OECD documents means that more innovative approaches can be explored.⁴⁰ Additionally, during the Wilkinsen-Gillette merger, the heads of the eight concerned competition agencies were able to discuss their mutual concerns at an OECD meeting.⁴¹ While such discussions can foster comity, no state is required to yield jurisdiction to another state.

Despite the benefits of soft law, the litany of problems associated with it means that a hard law convergence model should be chosen. However, it should be noted that discussions in soft law forums should not be abandoned.

C. The Unilateral Approach⁴²

In the absence of effective convergence, many states have adopted a unilateral approach to competition law enforcement. This approach has been used primarily by the United States and the European Union. When states apply their laws extraterritorially the target country often feels that its sovereignty has been impugned and this leads to tensions in the international system. American courts have thus created the idea of a "comity" analysis which ostensibly takes into account the interests of other countries when they are deciding whether to exercise jurisdiction extraterritorially. This notion of comity has been incorporated into the U.S.-EU Memorandum of Understanding, the *International Antitrust Enforcement Assistance Act*⁴³ and possibly in the coming EU-Canada Agreement. However, the United States has vacillated between using an effects test and a comity analysis to decide whether to exercise jurisdiction over a foreign action.

1. Extraterritorial Application of American Antitrust Laws

The most celebrated example of extraterritorial application of U.S. antitrust law can be seen in the U.S. Supreme Court's decision in *Hartford Fire* which addressed

⁴⁰ R. Geiger, "Joint Ventures, Competition Policy and International Trade: Recent Developments in OECD" (1986) 7 Can. Comp. Pol. Rec. 40 at 41.

⁴¹ *Int'l Coordination*, supra note 15 at 297.

⁴² This section is largely drawn from Lusk & Steiner, supra note 28.

⁴³ Pub. L. No. 103-438, 100 Stat. 4597 [hereinafter IAEAA].

U.S. foreign import commerce. The majority held that U.S. law applied to an action taken in the United Kingdom by British citizens which was legal under British law.

The U.S. Supreme Court abandoned the traditional comity analysis found in *Timberlane Lumber v. Bank of America*,⁴⁴ which took account of foreign interests, and returned to the older *United States v. Aluminium Company of America*⁴⁵ effects test which allowed the *Sherman Act* to apply “to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.”⁴⁶ The majority also held that no comity analysis was needed because there was no true conflict between the U.S. and U.K. laws. The British companies could abide by both laws by simply following the stricter American law.⁴⁷ Whether the Court would have engaged in a comity analysis and what factors it would have weighed had there been a conflict of laws remain open questions.

The negative impact of the majority judgment on cooperation between antitrust authorities was foreseen by Justice Scalia when he wrote that the majority judgment “will bring the *Sherman Act* and other laws into sharp and unnecessary conflict with the legitimate interests of other countries—particularly our closest trading partners.”⁴⁸ In fact, Canada and the United Kingdom were so concerned about the impact of the *Hartford Fire* case that they both filed amicus briefs to the U.S. Supreme Court.

Hartford Fire demonstrates that comity and extraterritoriality are incompatible policies. However, Diane Wood claims that:

[T]here is nothing inconsistent in the commitment to comity, on the one hand, and the fact that the U.S. agencies retain the responsibility and the right to bring appropriate actions in the U.S. courts when the necessary effects are occurring in the U.S. market and U.S. enforcement action appears to be necessary, on the other.⁴⁹

The Court’s swing from unilateral enforcement to comity and back to unilateral enforcement has been followed by the U.S. Department of Justice. In 1982, the *Foreign Trade Antitrust Improvement Act* stated that the *Sherman Act* applied to conduct unrelated to import commerce but which has a “direct, substantial and

⁴⁴ 549 F.2d 597 (1976).

⁴⁵ 8 F.2d 416 (2d Cir 1945).

⁴⁶ *Hartford Fire*, *supra* note 12 at 638.

⁴⁷ *Ibid.* at 640.

⁴⁸ *Ibid.* at 654.

⁴⁹ D.P. Wood, “Effective Enforcement of Antitrust Law for International Transactions” (Address to Business Development Associates, Inc., Antitrust 1995, Washington D.C., 15 March 1995) [unpublished] [hereinafter *Wood (15 March 1995)*].

reasonably foreseeable effect” on U.S. commerce, including U.S. exports. This move was tempered by footnote 159 of the 1988 *Antitrust Enforcement Guidelines for International Operations*.⁵⁰

James Rill, the former Assistant Attorney General for the Antitrust Division of the U.S. DOJ, has commented that footnote 159 “was generally interpreted as indicating that, as a matter of enforcement policy, the DOJ would not pursue matters involving harm to exporters unless there also was a direct harm to U.S. consumers.”⁵¹

However, this enlightened view was short lived. In the 1995 *Guidelines*, footnote 159 was dropped. The 1995 *Guidelines* states that:

[T]he Agencies [DOJ and Federal Trade Commission (“FTC”)] may, in appropriate cases, take enforcement action against anticompetitive conduct, wherever occurring, that restrains U.S. exports, if (1) the conduct has a direct, substantial, and reasonably foreseeable effect on exports of goods and services from the United States, and (2) the U.S. courts can obtain jurisdiction over person or corporations engaged in such conduct.⁵²

This policy shift, which still stands, was signalled in a 1992 DOJ Press Release which stated as well that the Department of Justice will exercise jurisdiction “whether or not there is direct harm to U.S. consumers.”⁵³

2. Extraterritorial Application of European Competition Laws

The U.S. is not alone in pursuing unilateral harmonization. In the *Woodpulp* case, the ECJ applied its laws extraterritorially to Canadian, American, Swedish, and Finnish companies which were exporting wood pulp into the EU.⁵⁴ These export

⁵⁰ U.S. Department of Justice (1988) [hereinafter 1988 *Guidelines*]. While the *Guidelines* are not a binding statement of the law, they indicate how the DOJ will enforce the law. The DOJ indicated in Footnote 159 that: “[a]lthough the FTAIA extends jurisdiction under the *Sherman Act* to conduct that has a direct, substantial, and reasonably foreseeable effect on the export trade or export commerce of a person engaged in such commerce in the United States, the Department is concerned only with adverse effects on competition that would harm U.S. consumers by reducing output or raising prices [in the U.S. domestic market].”

⁵¹ J.F. Rill & V.R. Metallo, “Transborder Enforcement of Competition Law: A perspective from the United States” (Address to Canadian Bar Association 3rd Annual Competition Law Conference, 29 September 1995) at 13.

⁵² U.S. Department of Justice & Federal Trade Commission, *Antitrust Enforcement Guidelines for International Operations* (April 1995 at 16) [hereinafter 1995 *Guidelines*]. The 1995 *Guidelines* at 20 also contain a list of factors which will taken into account if there is a conflict of law and a comity analysis is necessary.

⁵³ U.S. Department of Justice, News Release, “Justice Department Will Challenge Foreign Restraints in U.S. Exports under Antitrust Laws” (3 April 1993).

⁵⁴ *Supra* note 12.

cartels were legal under the laws of the exporting countries. The ECJ held that its jurisdiction depended on the place that the agreement's effects were felt, not the place where it was made.⁵⁵

While the *Woodpulp* case is often cited as an example that the EU pursues the same approach as the U.S., the difference lies in the fact that in *Woodpulp* there was an effect on EU consumers. However, the U.S. has indicated that it is prepared to exercise jurisdiction over all activities affecting U.S. exporters even if its own consumers are not affected.

3. Extraterritorial Application of Canadian Competition Laws

Campbell and Trebilcock have pointed out that "Canada has not historically applied its competition laws in an extraterritorial manner."⁵⁶ When Lawson Hunter was the Director of Investigation and Research, he observed that "Canada has always taken a much more conservative attitude with respect to the jurisdictional reach of its own laws."⁵⁷

There are several reasons for this stance. First, Canada does not have the same strength as the United States to enforce our competition laws abroad.⁵⁸ Second, until 1986, Canadian competition law was a criminal statute and Article 6(2) of the Criminal Code⁵⁹ states that "no person shall be convicted ... of an offence committed outside of Canada."⁶⁰ In *Libman v. R.* the Supreme Court of Canada stated that Canadian courts can exercise jurisdiction over a criminal activity if there is a "real and substantial link between the offense and this country" and "a significant portion of the activities constituting the offence took place in Canada."⁶¹ Presley Warner has pointed out that there have been no reported cases in which Canadian antitrust laws have been extended to conduct outside Canada.⁶²

Third, the language of the *Competition Act* makes it very difficult to apply it abroad. For example, abuse of dominant position, as regulated by Article 79 of the *Competition Act*, only occurs when "one or more persons substantially or completely in control, throughout Canada ... a class or species of business." Therefore, "one

⁵⁵ *Ibid.* at paragraph 16 and 18.

⁵⁶ Campbell & Trebilcock, *supra* note 10 at 133.

⁵⁷ L. Hunter, "Survey of Canadian Antitrust Laws" (1981) 50 Antitrust L.J. 699 at 705.

⁵⁸ R. Davidson, "The Canadian Response to the Overseas Reach of United States Antitrust Law" (1979) 5 Can-U.S. L.J. 166 cited in G. Marceau, *supra* note 39 at 70.

⁵⁹ R.S.C. 1985, c. C-46.

⁶⁰ Marceau, *supra* note 39 at 70.

⁶¹ Warner, *supra* note 27 at 881, citing *Libman v. R.*, [1985] 2 S.C.R. 178 at 213.

⁶² Warner, *ibid.*

could not use this provision against a dominant firm in the U.S.A., using its dominance there to disrupt Canadian markets.”⁶³

It is unacceptable that Canada should be subject to the extraterritorial application of both U.S. and EU antitrust laws, especially considering the fact that Canada does not engage in similar activity. Therefore, the move toward convergence of competition law is especially important to Canada.

4. Responses to Extraterritorial Application of a Domestic Competition Law

Several countries have passed “blocking” and “claw-back” statutes. The Canadian Parliament passed the *FEMA* in 1984.⁶⁴ Section 8, dealing with the extraterritorial application of foreign antitrust judgements, has not yet been used. However, if the U.S. Courts apply their antitrust law extraterritorially to obtain information, as opposed to relying on transborder cooperation to receive shared information, then Canada may have cause to invoke the section. With the existence of the *FEMA* there is a greater possibility of true conflict the next time a case like *Hartford Fire* arises, thus a U.S. court would be compelled to undertake a comity analysis.

An additional problem is now raised by the 1995 *Guidelines* which state that “the mere existence of ... foreign statutes [which] purport to prevent persons from disclosing documents or information for use in U.S. proceedings ... does not excuse noncompliance with a request for information from one of the Agencies.”⁶⁵

Unilateral harmonization is an unsound model for convergence because it has led to friction in the international system which has manifested itself in the form of blocking and claw-back statutes. This model should be replaced by either a bilateral or multilateral approach to convergence.

D. Bilateral Approach

Currently, the bilateral approach to convergence is popular and effective. It is likely that future convergence will be based on this model. Bilateral *harmonization* was chosen for the Australia-New Zealand Agreement for Closer Economic Relations. Bilateral *cooperation*, on the other hand has lead several countries into a series of MOUs and MLATs, mainly with the U.S.A.

It is possible that once enough of these bilateral agreements are in place, they could be used as evidence of the creation of a new custom in international law

⁶³ Marceau, *supra* note 39 at 71.

⁶⁴ *Supra* note 13.

⁶⁵ 1995 *Guidelines*, *supra* note 55 at 31, citing *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958).

based on the doctrine of state of practice.⁶⁶ However, it is unlikely that a sufficient number of countries will enter into bilateral cooperation agreements.

1. Bilateral Arrangements with the United States

The United States has spearheaded the notion of bilateral antitrust cooperation agreements. Dianne Wood has declared that U.S. policy in the area of convergence is that the "cooperation model deserves to be tried seriously for antitrust enforcement, before we conclude that nothing but a multilateral code will do."⁶⁷

Three types of agreements have been entered into by the United States. First, several states have entered non-binding MOUs specifically dealing with competition law. Second, the U.S. has signed binding MLATs concerning criminal matters. Third, the IAEAA envisions the creation of binding antitrust cooperation agreements.

MOUs are typically informal and do not require amendments to domestic laws. As such, they are of limited effect. The principal problem with the cooperation procedure that currently exists is that confidentiality provisions in domestic laws prevent domestic agencies in most countries from sharing information with foreign agencies.⁶⁸

The principle of "positive comity" was introduced on the EU-U.S. MOU. This provision allows a government which feels its interests are affected by anti-competitive actions occurring on the territory of the other state to ask that state to take enforcement action under its own laws. However, once such a request is made, there is no obligation on the requested states to act.

2. Canadian-American Cooperation⁶⁹

Canada and the U.S. have an extensive history of cooperation in antitrust enforcement and the current discussions about convergence are not new. Informal cooper-

⁶⁶ H.M. Kindred *et al.*, *International Law Chiefly as Interpreted and Applied in Canada*, 5th ed. (Toronto: Emond Montgomery, 1993) at 115.

⁶⁷ Wood (24 March 1995), *supra* note 28.

⁶⁸ The Director of Investigation and Research is considering asking the Minister of Industry to ask Parliament for amendments to the Act which would permit confidential information to be shared in the course of joint investigations with foreign antitrust agencies. See Director of Investigation and Research, Bureau of Competition Policy, *Discussion Paper: Competition Act Amendments* (Hull, Que.: Industry Canada, 1995). The U.S. recently adopted the IAEAA which would permit certain confidential information to be shared with a foreign agency if an Antitrust Cooperation Agreement is in place. For a detailed discussion of the confidentiality issue in the Canadian context, see Lusk & Steiner, *supra* note 28.

⁶⁹ For a more detailed discussion of this issue, specifically as it relates to the sharing of confidential information see Lusk & Steiner, *ibid.*

ation began in 1901 when both countries cooperated in an investigation of a newsprint cartel.⁷⁰

In 1959, the United States and Canada formalized their cooperation in an MOU which has since been updated several times.⁷¹ The most recent arrangement, called the *Agreement between the Government of the Canada and the Government of the United States of America Regarding the Application of their Competition and Deceptive Marketing Practices Laws*, was signed on 3 August 1995. It is the first of these understandings to be a binding international agreement, and provides for an expanded range of notification, consultation, and cooperation. It also incorporates the principle of positive comity which first appeared in the EU-U.S. MOU.

Along with the many MOUs and the recent Agreement, the two countries signed the *Treaty between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters* in 1990. The combination of the MLAT and the 1991 amendments to Canada-U.S. Extradition Treaty⁷² has become the strongest bilateral cooperation tool in place between the two countries. It is, however, limited to the criminal law aspects of the *Competition Act*. The MLAT contemplates notifications of investigations, consultations, information sharing and information requests between the two countries. The MLAT has been successfully used to break up a trans-border cartel in the plastic dinnerware industry⁷³ and in the thermal fax paper industry.⁷⁴

Chapter 15 of the *North American Free Trade Agreement* ("NAFTA") deals specifically with competition law. The parties agreed in Article 1501(2) to cooperate on issues of competition law enforcement, however they explicitly said in Article 1501(3) that the dispute resolution procedure would not apply to competition issues. The parties also agreed in Article 1504 to create a Working Group to study and make recommendations on how competition laws could be harmonized among the three countries. While both the American and Canadian Bar Associations have released papers on their suggestions for the Working Group, the Group

⁷⁰ *Int'l Coordination*, *supra* note 15.

⁷¹ See the *Fulton-Rogers Understanding* (1959), the *Basford-Mitchell Understanding* (1969), the *Memorandum of Understanding Between the Government of Canada and the Government of the United States of America as to Notification, Consultation and Cooperation with respect to the National Application of Antitrust Laws* (9 March 1994).

⁷² Extradition Treaty between Canada and the United States of America, 1976, Can. T.S. No.3, as amended by a Protocol dated 11 January 1988, in force 22 November 1991, 1991 Can. T.S. No.37.

⁷³ 1994 W.L. 2511896, 1 (DOJ) and 1995 W.L. 112079 (DOJ).

⁷⁴ *R. v. Kanzaki Specialty Papers Inc.* (1994), 56 C.P.R. (3d) 467.

itself has yet to make a formal report.⁷⁵ Until then, the real impact of Chapter 15 will remain unknown.

3. Proposed EU-Canada Agreement

The European Community and Canada are in the midst of negotiating an agreement which will resemble the one between the EU and the United States. The negotiations were suspended as a result of litigation concerning the validity of the adoption of the EU-U.S. agreement.⁷⁶

According to Allen & Overy, a Brussels law firm, the agreement will likely include information sharing, consultation and notification procedures.⁷⁷ As well, officials from the two agencies will meet twice yearly. The agreement also incorporates the principle of positive comity. It seems that the agreement will be based on informal convergence measures as it does not call for either party to amend its domestic laws.

4. Australia-New Zealand Closer Economic Relations and Trade Agreement

The *Australia-New Zealand Closer Economic Relations and Trade Agreement* presents a novel way of balancing the desires for bilateral convergence and national sovereignty. The parties have abolished anti-dumping duties between their two countries and, in their place, harmonized their competition policy.⁷⁸

The two countries have had a common labour market since 1920, free trade since 1983 and ultimately envision the possibility of a customs union.⁷⁹ Therefore, the CER approach to convergence has arisen in the context of a larger arena of economic integration, much like the EU.

⁷⁵ *Report of the Task Force of the Antitrust Section of the American Bar Association on the Competition Dimension of the North American Free Trade Area (20 July 1994)* and *Commentary on the Competition Dimension of the North American Free Trade Area* (National Competition Law Section of the C.B.A.) (March 1995).

⁷⁶ The Council of Ministers of the EC argued that the agreement was invalid because it had been adopted by the Commission without Council approval. The ECJ annulled the Agreement in August of 1994 because the Commission lacked competence to enter into international agreements. The Council of Ministers recently decided to properly adopt the EC-U.S. Agreement. See O.J. L. (95) 1995 Council decision on EC-U.S. Cooperation Agreement.

⁷⁷ Allen & Overy (Brussels) Newsletter, "EC/Canada Antitrust Agreement Proposed" (February 1995).

⁷⁸ For a discussion of this Agreement, see Warner, *supra* note 27 at 855 and Marceau, *supra* note 39 at 209.

⁷⁹ Marceau, *ibid.* refers to article 21 of the CER which states that "[t]he Member States recognise that the objectives of this agreement may be promoted by harmonization of customs practices and procedure in particular cases. Accordingly the Member States shall consult at the written request of either to determine any harmonization which may be appropriate."

The CER's approach to convergence is novel because it creates a policy that an abuse of dominant position anywhere in the free trade area is an offence. Instead of grounding this offence in an international treaty enforced by a supranational body, the parties were simply required to amend existing sections of their domestic competition statutes. Marceau explains that:

The new section 36A of the New Zealand *Commerce Act* prohibits any person with a dominant position in a market in Australia, in New Zealand, or in New Zealand-Australia (called 'Australasia') from using that position to restrict entry into, or deter competition in, or eliminate a person from, a market in New Zealand. Section 46A of the Australia *Trade Practice Act* does the same and prohibits firms with a substantial degree of market power in a trans-Tasman market or part of it, to seek to eliminate or substantially damage a competitor, or prevent the entry of a person, or deter competition, in a market in Australia.⁸⁰

Both these sections can be invoked by firms doing business in either country. The competition authorities and courts in both countries have also been given the power to conduct investigations and render judgment in either country in relation to these provisions.

The success of the approach of the CER is encouraging. However, while this model might work in a Canada-U.S. context, it would be difficult to apply it to a more multilateral setting. It would be legal chaos if all the members of the OECD or GATT could conduct investigations in other member states, and national courts could render judgments affecting other states. It is especially unlikely that the United States would accept such a model beyond the scope of NAFTA. American businesses are present around the world and thus it is not difficult to imagine conduct by dozens of foreign antitrust agencies and courts affecting the U.S. at the same time. History demonstrates that if the U.S. refuses to participate in the model, it will fail.

E. Multilateral Approach

1. Introduction

Convergence of competition laws is more likely to be successful if it is part of a deeper scheme of economic integration. The most successful instance of binding convergence has been seen in this context. The OECD has noted that the experiences of the EU, Australia and New Zealand have demonstrated the

[M]utually supporting role of competition policy and trade and investment liberalization in creating an economic area where the issues of market access and presence can be effectively

⁸⁰ Marceau, *ibid.* at 212.

tackled, allowing for the increasingly freer movement of good, services, service providers and investment.⁸¹

However, the broader the membership of the organisation serving as a forum of convergence, the less likely a multilateral approach to convergence will work. These broader efforts have included the 1948 Havana Charter creating the still-born International Trade Organization, the 1980 UNCTAD RBP Code and the successive OECD Recommendations. Tentative movement has also been seen in Chapter 15 of the NAFTA and in GATT negotiations. Additional theoretical work has been done by the Max Planck Working Group which drafted a proposal for a GATT Plurilateral Agreement on Competition Law.

2. European Union

The European Union is farther along the convergence path than any other group of countries. They opted for competition rules which were harmonized and enforced by two supranational institutions: Directorate General IV (Competition) of the Commission of the European Communities (“DGIV”), and the European Court of Justice (“ECJ”). Their push for convergence began in 1957 with articles 85 and 86 of the Treaty of Rome which established the Communities. Article 85 prohibits horizontal and vertical agreements as well as concerted practices among competitors. Article 86 prohibits abuse of dominance. A close reading of the language in these articles reveals the irrelevance of the nationality or domicile of the corporations and the place where an agreement was made. “It is anti-competitive effect in the Community that matters. It is indeed the view most commonly expressed by learned commentators that EU competition law uses the effects doctrine in its pure form as the basis for determining its international scope.”⁸²

In 1990, these articles were supplemented by the Merger Regulation which is binding on all member states. It gives the Commission the power to approve, oppose or request modifications of proposed mergers above a certain threshold which affect Community trade. The Merger Regulation is an example of both subsidiarity and extraterritoriality. First, the Regulation only applies if the total global turnover of all the companies concerned exceeds ECU 5 billion and the EU turnover of at least two of the companies exceeds ECU 250 million.⁸³ Second, the Regulation may apply to mergers by companies that only sell or distribute their

⁸¹ A.B. Zampetti & P. Sauve, “New Dimensions of Market Access: An Overview” in OECD Report, *New Dimensions of Market Access in a Globalising World Economy* (1995), 13 at 21.

⁸² I.E. Schwartz, “The International Antitrust Law of the European Community” in Cheng, *supra* note 5, 97 at 98.

⁸³ EC, *Council Regulation No 4064/89 on the control of concentrations between undertakings*, O.J. Legislation (1990) No L257/13, article 1(2).

product in the Community even if they do not have subsidiaries in the Community.⁸⁴

It is interesting that in recent years, many Member States—such as Ireland, Spain, Greece, and Italy—have adopted their first competition laws. One could try to point to these new domestic statutes as evidence that convergence has not been achieved in the EU. However, the opposite is true. The enforcement of articles 85 and 86 and the Merger Regulation has acted as a catalyst for the Member States to adopt their own competition laws, based on EU law, in areas not covered specifically by EU law.⁸⁵ Thus, competition law in the EU is now a combination of harmonized rules (i.e., Articles 85 and 86 and the Merger Regulation) and harmonized policies (i.e., national laws based on Articles 85 and 86 and the Merger Regulation). Rules similar to articles 85 and 86 were also included in the association agreements that the EU has entered into with Poland and Hungary.⁸⁶

The creation of these supranational rules administered by the Commission and ECJ has not stopped activity by national agencies in the field. The division of labour is based on the subsidiarity principle which requires that activities be carried out at the level of government which is the most effective in dealing with a particular type of problem.⁸⁷ This principle was already evident in the competition field. First, articles 85 and 86 only apply if an agreement or abuse of dominance affects interstate trade. Second, the Merger Regulation sets a threshold below which a merger is reviewable by the national authority and above which is reviewable by DGIV. Third, national authorities can refer below the threshold mergers to DGIV.⁸⁸

A reason behind the success of convergence in Europe is that it is taking place in the context of deeper integration. Richard Whish has remarked that “EU competition law is applied by the competition authorities very much with the issue of single market integration in mind.”⁸⁹

Wernhard Moschel has pointed to three reasons why the EU has been so successful at convergence.⁹⁰ First, the economies of the Member States are relatively homogeneous. Second, disagreement was avoided in the creation of articles 85 and 86 because they are based on a range of loosely-defined legal concepts and formulas for political compromise. Third, the EU has supranational institutions such

⁸⁴ Campbell & Trebilcock, *supra* note 10 at 136. See also I.E. Schwartz, *supra* note 82 at 99.

⁸⁵ C. Bright, “Internationalisation of Anti-Trust” *Solicitor’s Journal* (9 October 1992) 990

⁸⁶ *Ibid.*

⁸⁷ Section 3(b) of the Maastricht Treaty brought the subsidiarity principle into EEC law.

⁸⁸ Article 22(3) of the *Merger Regulation*, *supra* note 27.

⁸⁹ R. Whish, *Competition Law*, 3d ed. (London: Butterworths, 1993) at 29.

⁹⁰ Moschel, *supra* note 27 at 77.

as the Commission and ECJ, which were charged with implementing Community law.

The combined result is that a structure is being created, based on common principles applicable across the larger part of continental Europe, administered by a tier of domestic and supranational authorities at a level of government appropriate to the transaction or arrangement in issue.⁹¹

The regional convergence embodied in the EU is extremely appealing. It works successfully and combines the domestic and supranational competition laws on the basis of the subsidiarity principle. But, the success in Europe does not mean such a model could be applied on a more global scale. As Sylvia Ostry points out, "there is not (yet?) apparent the strong political will at the international level to yield 'sovereignty' or share power that now exists in Europe."⁹² This argument is supported by Dianne Wood's assertion that the EU model is not helpful when considering the creation of a global set of competition rules because "no one would argue that the rest of the world is ready today for the degree of market integration and submission to central authority which the EU member states have chosen."⁹³

3. Early Efforts at Broad Multilateral Convergence

There have been many attempts at achieving broad multilateral convergence. In 1927, the League of Nations initiated discussions concerning industrial organization.⁹⁴ The disagreements manifest in those first negotiations foreshadowed the problems that continue to face negotiators working on this issue. At the time, Americans and Europeans could not agree on whether industrial agreements were good or bad. The refusal of the U.S. to agree to the final report led to the failure of these negotiations. This outcome would be repeated many times in the future. In 1944, the International Labour Organization revisited this issue, but again failed because of the same disagreement over the benefit of cartels.⁹⁵

4. The Havana Charter and the ITO

The 1948 Havana Charter creating the International Trade Organization was the first broad multilateral document dealing concretely with this area. The ITO was meant to be the third pillar of the post-WWII Bretton Woods system, which also

⁹¹ Bright, *supra* note 85 at 990.

⁹² Ostry, *supra* note 4 at 266.

⁹³ Wood (24 March 1995), *supra* note 28.

⁹⁴ Marceau, *supra* note 39 at 60.

⁹⁵ *Ibid.*

included the International Bank for Reconstruction and Development (commonly known as the World Bank) and the International Monetary Fund. While the World Bank and IMF came to fruition, the ITO was still-born after the United States Congress refused to approve it. As a result the General Agreement on Tariffs and Trade, which was originally only supposed to be a component of the ITO, was left as a weak substitute to regulate international trade.

Although the ITO never came into being, an analysis of the Havana Charter's statement on restrictive trade practices is useful because it exemplifies an attempt at multilateral harmonization of competition rules.

Chapter Five, article 46, of the Havana Charter required members to cooperate with the ITO to stop "business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control." This chapter goes well beyond the current GATT/WTO which only deals with competition issues in a tangential way.⁹⁶ Chapter Five, article 48, allowed complaints by both members and enterprises within member states to be made to the ITO on issues of discrimination, market division, price fixing, and production limitations. The ITO had a power, under article 46, to investigate such allegations and ask members to penalise offenders.

The failure of the Havana Charter did not end the attempts at convergence. In 1951, article 46 of the Havana Charter was resurrected as a draft agreement in the Economic and Social Council of the United Nations.⁹⁷ However, once again the U.S. refused to consent and the agreement died.

Dianne Wood explained that the U.S. refused to endorse these international competition rules because there was "the feeling that the antitrust rules of Chapter Five [of the Havana Charter] were not adequate for the United States, and that the rest of the world was not yet ready to embrace a serious antitrust regime."⁹⁸ It is difficult to accept that this was the true reason for rejection of the Havana Charter. If the U.S. was sincere about wanting an international regime, it would have accepted this one as a starting point. It is more likely that the U.S. saw the regime as being too strict, rather than too lax, and thus feared a negative impact on its sovereignty. If Wood's assessment is correct, then the U.S. would be pushing other states to negotiate strict international competition rules. However, the U.S. position has been the exact opposite. It has blocked all efforts at implementing binding international competition rules.

⁹⁶ G.N. Horlick & M.A. Meyer, "The International Convergence of Competition Policy" (1995) 29 *The Int'l Lawyer* 65 at 72.

⁹⁷ Marceau, *supra* note 39 at 64.

⁹⁸ Wood (3 February 1995), *supra* note 19.

The lesson to be taken from the ITO experience is that an attempt at multilateral harmonization of competition rules is likely to fail because of American disapproval.

5. United Nations Conference on Trade and Development

The *Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices* was adopted in 1980 by UNCTAD's Conference on Restrictive Business Practices.⁹⁹ The RBP Code was adopted unanimously as a Resolution by the UN General Assembly.¹⁰⁰ However, the unanimous adoption of the resolution did not mean that the principles would be effective. It should be remembered that General Assembly Resolutions are non-binding.

The RBP Code embodied a ban on restrictive business practices similar to that found in articles 85 and 86 of the Treaty of Rome. It also called on states to implement competition legislation and called for the provision of technical support for the creation and implementation of that legislation.

The General Assembly also created an "Intergovernmental Group of Experts," under the auspices of the UNCTAD, to be a forum for multilateral discussion and research. This Group was not a dispute settlement mechanism and had no way to implement its recommendations.¹⁰¹

One of the obstacles to the RBP Code's effectiveness was that it was spearheaded by developing countries which did not have competition laws of their own. Douglas Rosenthal, Former Chief of the Foreign Commerce Section of the Antitrust Division of the U.S. DOJ, maintains that "the RBP Code had a political agenda of promoting the redistribution of resources from have to have not nations, a special concern of the UNCTAD which has no necessary connection with promoting global competition and in many respects can be antithetical to it."¹⁰²

The American Bar Association has stated that the RBP Code "has not had a noticeable effect on the conduct of the signatory nations or on their national firms."¹⁰³ One commentator stated bluntly that the RBP Code failed because the difference in focus between the developed and developing nations gave rise, in the

⁹⁹ UN Doc. TD/RBP/10 (1980).

¹⁰⁰ UN GA Res. 63, 48 U.N. GAOR Supp. No.61c at 223, UN Doc A/RES/35/63 (1980) cited in K. Stockman, "The Janus-Face of Competition Policies" (1989) 10 Nw. J. of Intl L. & Bus. 31 at 37.

¹⁰¹ Yacheistova, *supra* note 34 at 103.

¹⁰² D.E. Rosenthal, "We Need More 'Old-Time Religion': A Response to Jim Rahl" (1989) 10 Nw. J. of Intl L. & Bus. 84 at 86.

¹⁰³ Marceau, *supra* note 39 at 91, citing ABA *Special Committee on International Antitrust* at 525.

context of the UNCTAD, to a manifested “schizophrenia” between competition and development policy.¹⁰⁴

Marceau has argued that the RBP Code could be viewed as a source of customary law because it was unanimously adopted by the UN General Assembly. She bases her argument on the *Texaco* arbitration¹⁰⁵ and the *Nicaragua* case¹⁰⁶ in the ICJ, in which UN Resolutions were seen as evidence of customary international law. However, this argument is problematic because customary international law is also dependent on state practice¹⁰⁷ and in this case there is no state practice of adherence to the RBP Code. Therefore, the RBP Code cannot be viewed as binding customary international law.

Kurt Stockman, as the Chair of the OECD Committee on Competition Law and Policy, argued that despite the ineffectiveness of the RBP Code in changing state behaviour, the principles and rules contained therein could be used as starting point for further discussion of this topic.¹⁰⁸ However, Stockman acknowledges that there is a lack of political will to restart such negotiations.

It is improbable that the developing countries and industrialised countries in the UNCTAD will be able to agree on a binding set of harmonized competition rules. Moreover, future work in the UNCTAD is unlikely to be successful because the body “has lost the confidence and trust of the rich countries.”¹⁰⁹

6. Organisation of Economic Cooperation and Development

a. Why the OECD is a Good Forum for Convergence

A good argument can be made that the OECD is the best forum in which to seek convergence of competition laws. First, its membership consists of the major industrialised trading nations which have an interest in some form of convergence and in general already have domestic competition laws. Therefore, the disagreements which could arise in a broader forum, such as the UNCTAD, GATT, or WTO, are less likely to be a concern. Second, Ostry has argued that “the only logical forum [for convergence] is the OECD which alone has the secretariat expertise and the mandate to cover the broad range of policies relevant to the

¹⁰⁴ Joelson, *supra* note 14 at 138.

¹⁰⁵ *Texaco v. Libya* (1978), 17 I.L.M. 1 (Int. Arb. Trib.).

¹⁰⁶ *Nicaragua v. United States of America*, [1986] I.C.J. Rep. 14.

¹⁰⁷ Kindred *et al.*, *supra* note 66 at 115.

¹⁰⁸ Stockman, *supra* note 100 at 39.

¹⁰⁹ Marceau, *supra* note 39 at 302.

exercise.”¹¹⁰ Third, Marceau has asserted that the OECD has a good track record for creating well respected non-binding harmonization of investment and taxation rules.¹¹¹

b. Why the OECD is Bad Forum for Convergence

Some commentators have argued that the OECD is the wrong forum in which to seek convergence. Christoph Bail has written that:

In view of the globalization of the market economy, the transformation of centrally planned economies and the progressive opening-up and integration of the economies of developing countries, the rules should not now be set by an exclusive club of industrialised countries ... It would seem wrong to leave aside important regions of the world and ignore markets where no effective competition policies exist.¹¹²

This argument is questionable, given that the developing countries which wish to participate in the convergence have not even deemed competition policy important enough to create their own laws.¹¹³

Another problem with using the OECD as a forum for convergence is that it lacks a dispute settlement mechanism. The OECD could be used as forum in which to set harmonization in motion. However, once general rules are in place, any dispute will have to be handed over to a GATT or WTO-type panel for resolution.¹¹⁴

c. What has the OECD Accomplished?

The OECD has already made some progress in fostering convergence. Its principal contribution to convergence has been as a mechanism for multilateral cooperation through successive OECD Recommendations, and as a think-tank and forum for discussion in the Committee on Competition law and Policy.

The *Revised Recommendation of the Council Concerning Co-Operation Between Member Countries on Anticompetitive Practices Affecting International Trade* was adopted on 28 July 1995. It was originally created in 1967 and is a non-binding multilateral cooperation instrument providing for notification, consultation, cooperation and information sharing between members.

¹¹⁰ Ostry, *supra* note 4 at 266.

¹¹¹ Marceau, *supra* note 39 at 302.

¹¹² C. Bail, “Coordination and Integration of Competition Policies: A Plea for Multilateral Rules” in Kantzenbach, *supra* note 4 at 286.

¹¹³ See section VII(E)(5), *supra*, for a discussion of this issue.

¹¹⁴ Marceau, *supra* note 39 at 302.

The central component of the 1995 Recommendation is a notification process under which states notify one another if they are conducting an investigation affecting another state's "important interest."¹¹⁵ The Recommendation also empowers those states which feel an investigation by another country is affecting their important interests to complain to that country or request consultation with them.

If the two countries cannot reach a satisfactory resolution, the 1995 Recommendation states that they "should consider having recourse to the good offices of the Competition Law and Policy Committee with a view to conciliation."¹¹⁶ Geiger argues that the fact that the conciliation process has never been used since its inception in 1973 is evidence that the Recommendation is succeeding in its goal of convergence.¹¹⁷ However, it is more likely that countries have not bothered going to conciliation because it is non-binding.¹¹⁸ Moreover, as Stockman suggests, no country wants to be the first to use it.¹¹⁹

The 1986 Recommendation added procedural guidelines which clarified the consultation and conciliation procedures and added a confidentiality provision to safeguard shared information.

The 1995 Recommendation added more procedural guidelines concerning coordination and cooperation in investigations by Member countries. Coordination occurs when two or more Members are investigating the same issue.¹²⁰ It is to be done on a case-by-case basis and does not affect the right of each Member to make an independent decision based on the investigation. Cooperation occurs when one Member asks another Member for help in an investigation.¹²¹ It encompasses the provision of information from an assisting Member's files, assistance in obtaining information on a voluntary basis from within the assisting Member's country and use by the assisting Member of its authority to compel the production of information. The confidentiality provision was also amended to emphasize the importance of national confidentiality laws.

¹¹⁵ Geiger, *supra* note 40 at 43, stated that the 1979 Recommendation led to roughly 600 notifications between 1980 and mid-1985. N. Hachigian, "Essential Mutual Assistance in International Antitrust Enforcement" (1995) 29 *Int'l Lawyer* 117 at 137 has written that under the 1986 Recommendation, there were over three hundred notifications and requests between October 1991 and March 1993.

¹¹⁶ Art. I.B.8.

¹¹⁷ Geiger, *supra* note 40 at 43.

¹¹⁸ Not only does paragraph 12 of the Appendix to the 1995 Recommendation state that conciliation findings are not binding, but the entire Recommendation is non-binding in itself.

¹¹⁹ Stockman, *supra* note 100 at 38.

¹²⁰ 1995 Recommendation, Appendix paragraph 5.

¹²¹ 1995 Recommendation, Appendix paragraphs 6-9.

While the recent amendments have clarified the OECD's role in convergence, it is important to remember that the Recommendation is still non-binding. Despite this shortcoming the 1995 Recommendation is an important tool for multilateral cooperation. It is probable that it will be amended and strengthened again in the future. The true test, however, is to see whether the political will exists in the future to transfer the principles in the Recommendation over to the more formalised and binding structure of the WTO.

Along with the Recommendation, the OECD created the Committee of Experts on Restrictive Business Practices in 1961, now known as the Committee on Competition Law and Policy. It promotes the sharing of information and experience and contributes from a competition policy perspective to the "elaboration of market-oriented economic strategies, the improvement of structural conditions and the maintenance of an open international trading system."¹²² The Committee is a form of think-tank on convergence issues. Its recommendations are not binding and are developed by consensus. Rainer Geiger, in his capacity as Head of the OECD's Division on Enterprise and Consumer Affairs, has argued that:

This manner of operation which some may consider as a drawback constitutes in reality the Committee's strength. Free from the constraints attached to the drafting of international legal instruments, it can serve as a testing ground for new ideas and creative solutions to common problems.¹²³

In the Communiqués from the 1991 and 1992 OECD Ministerial meetings, the Committee on Competition Law and Policy was given the mandate to increase its efforts at promoting convergence. The 1991 Ministerial communiqué stated that:

Ministers ask the Organisation to continue its work on the international dimension of competition policies and on their interaction with policies in other areas such as trade and industry. They note that recent work in the Organisation on competition law and policy provides the foundation for greater policy convergence and progress towards updating and strengthening the existing rules and arrangements (including both policy principles and procedures) for international co-operation in this areas.¹²⁴

The communiqué from the 1992 Ministerial meeting stated that:

OECD governments will seek to: improve consistency between [trade and competition] policies to enhance competition and market access; provide a foundation for convergence of

¹²² Geiger, *supra* note 40 at 41.

¹²³ *Ibid.* at 46.

¹²⁴ OECD, SG, Press (91) 31, at 7–8.

substantive rules and enforcement practices in competition policy [and] identify better procedures for the surveillance of trade and competition policies.¹²⁵

In 1994, the Committee issued an *Interim Report* on its work towards these mandates. The principal idea in the report is that “less emphasis should be given to strict uniformity in law and institutions and more to greater similarity in underlying principles, policy objectives and enforcement efforts.”¹²⁶ The shift away from attempts at implementing harmonized multilateral rules is wise, but the new focus on harmonization of multilateral policies is dubious due to the lack of agreement on the nature of those underlying principles and policies.

The Annex of the *Interim Report* also contains some questionable assumptions. It states that:

[T]here is a general consensus that the basic objective of competition policy is to protect and preserve competition as the most appropriate means of ensuring efficient allocation of resources—and thus efficient market outcomes—in free market economies ... there is a general agreement that [efficient market outcomes are] manifested by lower consumer prices, higher quality products and better product choice.¹²⁷

With respect, a statement as general as this is valueless. This statement says nothing about how different countries wish to achieve an efficient market. Some states may feel an efficient market is achieved with a complete *laissez-faire* economic policy devoid of competition policy, while others may feel that a vigorous and interventionist competition policy is needed to achieve the same goal.

The report then makes an understatement, maintaining that “while a certain amount of diversity is apparent in the objectives revealed in OECD countries’ competition laws, it is not clear that this diversity is a significant obstacle to the achievement of greater convergence across the major areas of competition policies.”¹²⁸

The Report does identify limited areas where convergence seems possible. Competition agencies seem to agree on the optimum enforcement posture concerning horizontal agreements despite differences in legal structures and terminology. Virtually all OECD members ban hard-core cartels or naked restraints such as price fixing, output restraints, market division, customer allocation and bid-rigging.¹²⁹

¹²⁵ OECD, SG, Press (92) 43, at 7.

¹²⁶ *Interim Report*, *supra* note 16 at 5.

¹²⁷ *Ibid.* at 9.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.* at 13.

As well, vertical price restraints are prohibited *per se* in nearly all OECD members.¹³⁰

On the topic of merger review, the Committee wisely decided that “rather than addressing the remaining difference in merger review standards—some of which could prove to be quite intractable—near term work should focus on process issues.”¹³¹ This decision is laudable because procedural harmonization is much more likely to yield success and would be a useful complement to the existing bilateral cooperation efforts which have already been discussed.

If certain countries wish to push towards deeper harmonization, then they should not be held back by other countries which are reluctant to sacrifice some sovereignty. Multi-speed convergence is like multi-speed European integration as advocated by France, Germany, and the Benelux countries which would allow them to deepen integration between themselves while allowing Britain to remain at a shallower level of integration.¹³²

On the issue of enforcement, the *Interim Report* states that there is agreement at the broad level that enforcement should be transparent, even-handed, cost effective and entail minimal compliance costs for companies.¹³³ Again, this statement is so general as to be worthless. The report goes on to state that “the actual procedures for investigating, prosecuting and sanctioning anti-competitive behaviour are widely different.”¹³⁴

Finally, the *Interim Report* refers to information sharing as an important means to achieve enforcement convergence. However, while “all countries agree on the usefulness of international cooperation in exchange of information,”¹³⁵ this consensus often breaks down in the face of domestic confidentiality laws which prohibit the exchange of information with foreign governments.¹³⁶

Despite the litany of problems with the *Interim Report*, it is a useful catalogue of work done within the OECD on the convergence issue and highlights the

¹³⁰ *Ibid.* at 14.

¹³¹ *Ibid.* at 15.

¹³² For a detailed discussion of the multi-speed integration proposals in the EU, see P. Taylor, “The New Dynamic of EC integration in the 1980s” in J. Lodge, ed., *The European Community and the Challenge of the Future* (London: Pinter, 1989) 3.

¹³³ *Interim Report*, *supra* note 16 at 16.

¹³⁴ *Ibid.*

¹³⁵ *Ibid.* at 17.

¹³⁶ Section 29 of the *Competition Act* prohibits the federal government from sharing confidential information with foreign agencies. For a full discussion of this issue, see Lusk & Steiner, *supra* note 28 at 5.

important role that it has played in fostering multilateral cooperation. The OECD has been a forum for discussion between competition authorities and has promoted the sharing of information, experiences, and analytic approaches. It has also fostered cooperation and consultation between agencies through the 1995 Recommendation and its predecessors. Additionally, it has encouraged the development of modern competition laws with minimum provision on conspiracies, bid-rigging, mergers and abuse of dominant position and monopolies.¹³⁷ The OECD has pushed for these provisions to be transparent and consistent with national treatment.

Another OECD report is more realistic in its outlook on convergence. It states that approaches based on convergence among competition regimes and cooperation between competition authorities depend on a coincidence of public policy objectives and interests as well as of assessment in the two jurisdictions.

While the OECD has been active in the convergence area, its work to date has consisted of furthering multilateral cooperation. They are now considering moving into the realm of multilateral harmonization of competition policies and of procedures. However, while the former is unlikely to succeed in the near future, the latter carries a distinct possibility of success.

7. Draft International Antitrust Code

Between 1991 and 1993, a group of academics wrote the *Draft International Antitrust Code*¹³⁸ and submitted it to the GATT for consideration as a potential GATT/WTO Multilateral or Plurilateral Agreement.¹³⁹

The DIAC began from the idea that the RBP Code "failed to provide sufficient linkage between the internationally drafted text and the national laws and their implementation through national authorities, and did not meet enough acceptance."¹⁴⁰ Therefore, the DIAC Working Group resolved not to follow the RBP Code's approach.

The DIAC is an interesting attempt to pursue a harmonization of principles while incorporating a subtle harmonization of rules.

¹³⁷ *Interim Report*, *supra* note 16 at 5.

¹³⁸ Released 10 July 1993 by the Max Planck Institute for Foreign and International Patent, Copyright and Competition Law in Munich. See International Antitrust Code Working Group, "Draft International Antitrust Code" (1993) 5 *World Trade Materials* 126 [hereinafter *DIAC*].

¹³⁹ W. Fikentscher, "Collaborative Activities Among Industrial Competitors—In German, European, and U.S. Antitrust Law, and in the Draft International Antitrust Code in the GATT/WTO System" in Cheng, *supra* note 5, 109 at 120.

¹⁴⁰ *DIAC*, *supra* note 138 at 135.

a. Principles Behind the DIAC

Wolfgang Fikentscher, a member of the Working Group, explains that the *DIAC* is based on five principles.¹⁴¹ First, the drafters suggest that national laws prevail and simply be harmonized, as opposed to calling for a uniform international law. In this way, the *DIAC* appears to harmonize policies. Second, the *DIAC* incorporates the principle of “national treatment” from the GATT, meaning that domestic competition is not treated differently from international competition. Third, the *DIAC* seeks to set minimum standards to be met by national antitrust laws. This is consistent with the harmonization of policies model. Fourth, the *DIAC* is directly applicable within the member states if the state does not implement national laws to fulfill its commitment under the *DIAC*. This principle moves the *DIAC* closer to the harmonization of rules model.

The principle of direct application, inspired by the EU, has no precedent in the GATT, so the Working Group created a new idea called the “Principle of International Procedural Initiative.”¹⁴² This means that:

Every member state applies its own national antitrust law. It has been brought up to minimum standards. It is applied, under national treatment, invariably to nationals and foreigners. In addition, there will be an international agency. This *international* agency will be entrusted to safeguard the application of the *national* law, under the mentioned conditions in cases where the member state does not take its own initiative. Some international official will knock at the door of the inactive member state and, in last consequence, will sue in the national courts in order to ensure the application of that national law.¹⁴³

Assuming the *DIAC* is adopted as a Plurilateral Code under the GATT, the Group expects the “international agency” to operate under the auspices of the GATT.¹⁴⁴ An International Antitrust Authority would be the equivalent of the Canadian Bureau of Competition Policy, and an International Antitrust Panel would be akin to the Canadian Competition Tribunal. The Panel would operate as a GATT Dispute Resolution Panel¹⁴⁵

The final principle on which the *DIAC* is based, is that it only applies to transborder cases. This is somewhat like the EU’s concept of subsidiarity which ensures that issues of a strictly national nature continue to be reviewed under national laws without regard to the *DIAC*.

¹⁴¹ Fikentscher, *supra* note 139 at 121.

¹⁴² *DIAC*, *supra* note 138, article 19.

¹⁴³ Fikentscher, *supra* note 139 at 122.

¹⁴⁴ *Ibid.*

¹⁴⁵ *DIAC*, *supra* note 138 article 20(1).

b. Contents of the DIAC

The actual provisions of the *DIAC* are as follows. Horizontal restraints of trade are dealt with in Article 4 which is a mix of both *per se* and rule of reason prohibitions. These agreements are prohibited if they either have the purpose or effect of lessening competition. Article 4 also deals with vertical restraints on trade. Producer or distributor cartels are *per se* offences. Vertical restraints, other than cartels, which improve production or distribution and allow consumers to share those benefits, are permissible.

Mergers, which the *DIAC* calls "concentrations," are also addressed. These provisions draw on the U.S. *Clayton Act* and the E.C. Merger Regulation.¹⁴⁶ They contain a threshold requirement and only apply to concentrations with an international aspect. If a transaction concerns more than one member, then the International Antitrust Authority has the right to take over the proceedings, unless there is an overwhelming public interest of one of the states and that interest does not unreasonably affect the legitimate interest of other parties.¹⁴⁷

The *DIAC*'s approach to abuse of dominant position is inspired by article 86 of the Treaty of Rome and section 22 of the German Law Against Restraints on Trade.¹⁴⁸ The *DIAC* also has a complex mechanism for dealing with the interrelation of intellectual property rights and antitrust issues in the international sphere.¹⁴⁹

The *DIAC* has made an effort to address states' concerns about supranationalism. First, the proposal that a supranational agency have standing to sue in national courts is novel. Second, the concept of binding minimum standards for national laws is similar to an EU Directive.¹⁵⁰ The difference is that, if the EU Member State fails to implement a Directive, they can be sued in national court, or the ECJ by either the Commission or a citizen on the basis that the Directive has direct effect.¹⁵¹

c. Problems with the DIAC

Ernst-Ulrich Petersmann has argued that the ostensibly general principles in the *DIAC*, are in fact too detailed and over-ambitious and will be difficult to achieve politically. As well, the *DIAC* does not consider the "interface problems of trade

¹⁴⁶ Fikentscher, *supra* note 139 at 124.

¹⁴⁷ *Ibid.* at 125 referring to *DIAC*, *supra* note 138, articles 10–12.

¹⁴⁸ Fikentscher, *supra* note 139 at 126, referring *DIAC*, *supra* note 145 to article 14.

¹⁴⁹ For a detailed discussion of the intellectual property provisions of the *DIAC*, see Fikentscher, *ibid.* at 124.

¹⁵⁰ See section II, *supra*, for an explanation of this point.

¹⁵¹ G.A. Berman *et al.*, *Cases and Material on European Community Law* (St. Paul: West, 1993) at 182.

and competition rules such as reforming the lax GATT rules on State monopolies.”¹⁵²

Additionally, despite the concerns states have about supranationalism, the DIAC gives a supranational body the standing to sue a Member State's government in its national courts and gives an International Antitrust Authority jurisdiction over proceedings if a particular case involves more than National Authority.¹⁵³ As well, the minimum standards described in the DIAC are supranational rules even if they are of a general nature.

Yun-Peng Chu, a Commissioner on the Taiwanese Fair Trade Commission, says that the combination of the International Antitrust Authority and Panel working in the context of national laws “is a reasonable and balanced way for the international code of competition to be enforced The arrangement ... strikes a balance between international cooperation and the sovereignty of individual member states.”¹⁵⁴

Despite the endorsement from Yun-eng Chu, the DIAC relies too much on supranational law, which is still seen as a bogey-man by most states. The Working Group itself acknowledged that “respect for political acceptability or feasibility played no role for any member of the Group at any time.”¹⁵⁵ Unfortunately, the lack of political will to adopt supranational rules on competition law means that it is highly unlikely that the DIAC will be adopted as a Plurilateral Code in the GATT context. Despite the likely failure of the DIAC, the ideas it contains are novel and useful.

8. The General Agreement on Tariffs and Trade & the World Trade Organisation

a. History of Convergence in the GATT

The GATT was originally intended to be one part of the ITO which had been created by the Havana Charter.¹⁵⁶ Chapter Five of that Charter contained a detailed proposal for competition convergence through harmonization of rules and policies. After the failure to adopt the Havana Charter, the antitrust issues fell to

¹⁵² E.-U. Petersmann, “International Competition Rules for the GATT - WTO World Trade and Legal System” (1995) 29 J. of World Trade 35 at 79.

¹⁵³ Fikentscher, *supra* note 139 at 125 and DIAC, *supra* note 138 at article 11(4).

¹⁵⁴ Yun-Cheng Chu, “Towards the Establishment of Order of Competition for the International Economy: With Reference to the Draft International Antitrust Code, the Parallel Import Problem, and the Experience of Taiwan, ROC” in Cheng, *supra* note 5, 453 at 467.

¹⁵⁵ DIAC Working Group, *supra* note 145 at 141.

¹⁵⁶ The Havana Charter is examined in detail in Section VII(E)(4), *supra*.

the GATT. In 1955, New Zealand failed in its attempt to add a provision to the GATT, drawing on Chapter Five of the Havana Charter, that would have required members to refrain from actions which could lead to dumping.¹⁵⁷ Three years later, the GATT members struck a committee to consider whether the GATT should deal with restrictive business practices, and if so what should be done.¹⁵⁸ The committee report was adopted in 1960. It recognized that restrictive business practices were a potential impediment to world trade, however within the GATT context little could be done about the issue. The report recommended that the GATT secretariat support bilateral or multilateral consultations which could be conducted at the request of any member state.¹⁵⁹ Despite the adoption of the report, none of its recommendations were successful.¹⁶⁰

The issue was not raised in the GATT context again until the negotiations over the agenda for the Uruguay Round. Developing nations again tried to put restrictive business practices on to the GATT agenda, but the developed world, led by the United States, would not allow it.¹⁶¹

b. GATT/WTO as the Best Forum for Convergence

There are several reasons why the GATT is the best forum in which to deal with convergence issues. First, the Uruguay Round Agreements already contain a number of competition related rules on:

[G]overnmental market distortions (e.g. subsidies, antidumping and countervailing duties, Voluntary Export Restraints (VERs), Voluntary Restraint Agreements (VRAs), State trading operations, compulsory licensing) and on private distortions (e.g. dumping, abuse of market power by preshipment inspection companies, monopolies, intellectual property rights and licensing agreements.¹⁶²

Second, Nataliya Yacheistova, the Economic Advisor to the Chief of the Russian Antimonopoly Committee, has pointed out that the General Agreement on Trade in Services ("GATS") has moved well into the field of international antitrust regulation. "For the first time in history" he writes "the obligatory rules

¹⁵⁷ Marceau, *supra* note 39 at 64 citing GATT Proposal by the New Zealand Government, UN Doc. L. 270/Add. 1 at 3. See also Petersmann, *supra* note 152.

¹⁵⁸ *Int'l Coordination*, *supra* note 16 at 292.

¹⁵⁹ Marceau, *supra* note 41 at 65.

¹⁶⁰ *Ibid.*

¹⁶¹ Petersmann, *supra* note 152 at 40.

¹⁶² *Ibid.*

for State control on the RBPs of enterprise have been established.”¹⁶³ Article VIII of the GATS deals with Monopolies and Exclusive Service Suppliers and requires participants to ensure that monopoly suppliers of a service in its territory act in accord with the principle of MFN treatment. Article IX of the GATS, on Business Practices, acknowledges “that certain business practices of service suppliers may restrain competition and thereby restrict trade in services.” Consultations will occur at the request of any Member to rectify any problematic business practices in the service sector.

Third, the GATT has successfully negotiated an agreement on Trade Related Aspects of Intellectual Property (“TRIPs”). The issues raised in the TRIPs negotiations are closely connected to international antitrust issues.

Fourth, the major trading states have recognized the common objective of both the GATT and domestic competition laws “... to enhance a more efficient use of domestic resources through open markets and competition.”¹⁶⁴ The increasing number of bilateral cooperation agreements indicates a willingness of states to work together in this field.¹⁶⁵

Fifth, the GATT contains principles—such as “national treatment” and “most favoured nation status”—which have been accepted by the members and on which an antitrust agreement could be based. Moreover, the GATT dispute settlement procedures could be used in the antitrust context.¹⁶⁶ However, if this procedure is used, it would have to be amended to deal effectively with time-sensitive transactions between private parties.¹⁶⁷

Despite these reasons, Gabrielle Marceau argues that the GATT’s membership is too wide to expect it to be an effective forum for convergence. The disagreements between the developing and developed world would hinder agreement in the GATT, as much as in the UNCTAD setting. She writes that:

Whatever moral factors might justify discussions involving all countries, restrictive business practices would be better dealt with by countries where multinationals have their head offices and countries with the biggest markets. It is understood, however, that any rule negotiated amongst a more limited group of countries would be applicable world-wide.¹⁶⁸

¹⁶³ Yacheistova, *supra* note 34 at 106.

¹⁶⁴ Petersmann, *supra* note 152 at 75.

¹⁶⁵ *Ibid.* at 40.

¹⁶⁶ *Ibid.* at 41.

¹⁶⁷ Campbell & Trebilcock, *supra* note 10 at 155.

¹⁶⁸ Marceau, *supra* note 39 at 302.

While Petersmann argues that the GATT could be an appropriate forum for convergence, he ultimately suggests that negotiations towards an international competition code would be fruitless and that “a decentralized approach ... appears economically and politically preferable.”¹⁶⁹

Dianne Wood has stated the American position on GATT’s potential role in convergence. First, Wood feels that there is nothing “inevitable” about the creation of an international set of rules.¹⁷⁰ Second, Wood argues that because:

[T]he GATT does not apply to purely private actions which are unsupported by government action, and competition policy as such is not addressed by the GATT In all but the most unusual cases, this will probably not be a promising avenue for resolving trade disputes related to private anticompetitive conduct.¹⁷¹

c. GATT Article XXIII: U.S. versus Japan

In May 1995, it appeared that the GATT might take on a more significant role in the competition field when the U.S.A. threatened to file a formal complaint with the WTO concerning Japan’s non-enforcement of its antitrust laws. The U.S.A. wanted the Japanese to break up the *keiretsu* distribution systems in their domestic auto and auto-parts market. A *keiretsu* is:

[A] succession of systematic conducts whereby manufacturers control and organise wholesalers and retailers in order to secure cooperation from them and implement his [sic] sales policy. It can also be referred to as a system which is constituted by distribution channels as a whole.¹⁷²

The American complaints are not new. In 1990, the Japanese and American governments concluded the Structural Impediments Initiative (“SII”) in which Japan committed itself to improving its enforcement record, raising the monetary penalties for violations of their Anti-Monopolies Act, and easing the restrictions on private antitrust suits.¹⁷³ However, Anne Bingaman, Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice, stated in a speech to

¹⁶⁹ Petersmann, *supra* note 152 at 78.

¹⁷⁰ Wood (24 March 1995), *supra* note 28.

¹⁷¹ *Ibid.*

¹⁷² K. Kubo, “Distribution *Keiretsu* and Competition Policy in Japan” in Cheng, *supra* note 5 at 139.

¹⁷³ J. Davidow, “International Competition Rules for the 1990s” (1991) 6 Am. U.J. Int’l L. & Policy 465 at 469 citing “Key Elements of U.S.-Japan Structural Impediments Initiative Report Released by the Office of the USTR on June 28, 1990” [July-Dec.] Antitrust & Trade Regulation Reporter (BNA) No. 1443 at 28 (5 July 1990) and “JFTC is Urged to Offer Help in Suing Antitrust Violators” [Jan-June] Antitrust & Trade Regulation Reporter (BNA) No. 1472 at 1026 (28 June 1990).

the Japan Society of New York City that Japan has failed to live up to its commitments under the SII and that "meaningful action has not always followed the verbal commitments" of the Japanese.¹⁷⁴

The U.S. complaint to the WTO alleged that:

[E]xcess regulation and collusion among big Japanese car makers leads to discrimination against the sale of foreign-made autos and auto parts ... and anti-competitive features of Japan's domestic market essentially have "nullified" the benefits of the tariff reductions Japan promised as the price of admission to the global trading body.¹⁷⁵

The complaint was prepared as counter-offensive to a potential Japanese complaint to the GATT regarding U.S. sanctions imposed on Japan in attempt to open up their auto and auto-parts market.

The U.S. complaint relied on Article XXIII of the GATT which required them to prove that the failure of Japan to enforce its Anti-Monopoly Act constituted a nullification or impairment of a benefit. While this argument was seen as a new idea,¹⁷⁶ in reality the idea was raised in the 1960 GATT Report on Restrictive Trade Practice. The Report referred to GATT Article XXIII which states:

1. If any contracting party should consider that ... any benefit accruing to it ... under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as a result of ...
 - (a) the failure of another contracting party to carry out its obligations under the Agreement, or
 - (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
 - (c) the existence of any other situationthe contracting party may ... make written representations to the other contracting party ...
2. If no satisfactory adjustment is effected between the contracting parties concerned ... the matter may be referred to the CONTRACTING PARTIES [i.e. plenary assembly]. The CONTRACTING PARTIES shall ... investigate ... and shall make appropriate recommendations ... or give a ruling on the matter If the CONTRACTING PARTIES consider that the circumstances are serious enough, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or obligations under this Agreement as they determine to be appropriate in the circumstances.¹⁷⁷

¹⁷⁴ A.K. Bingaman, "The Role of Antitrust in International Trade" (Address to the Japan Society of New York City, 3 March 1994) [unpublished].

¹⁷⁵ C. Chandler, "US Readies WTO Complaint in Trade Dispute with Japan" *The Washington Post* (9 May 1995).

¹⁷⁶ Rill & Metallo, *supra* note 54.

¹⁷⁷ GATT Article XXIII.

In the 1960 Report, the experts recommended that this Article not be used to regulate antitrust issues because of "the difficulties in determining what would constitute 'impediments to the objectives of the GATT.'" ¹⁷⁸ The Report also stated that antitrust actions based on Article XXIII:

[W]ould involve the grave risk of retaliatory measures under the provision of paragraph 2 of that article which would be taken on the basis of judgments which would have to be made without factual information about the restrictive practice in question, with consequent counter-productive effects on trade. ¹⁷⁹

John Jackson testified to the U.S. Senate Committee on Judiciary that the problem with attempting to use Article XXIII to address anticompetitive behaviour in other countries is the "vagueness or ambiguity of the concept of 'nullification or impairment.'" ¹⁸⁰

In March 1995, Dianne Wood referred to the possibility of using the "nullification or impairment" argument in a speech to an Asian business group concerned about Japan. ¹⁸¹ However she also acknowledged that since private actions were not covered by the GATT, a complaint about such actions to the GATT would probably not be successful. ¹⁸² It should be noted that the anticompetitive conduct which the U.S. was threatening to challenge was not private conduct *per se*, but was government conduct in the form of a failure to enforce a competition statute. Therefore, Wood's comment should not be interpreted as meaning that an antitrust complaint based on Article XXIII would fail.

In the end, the threat of a WTO complaint was merely posturing by the U.S.A.. The Americans never filed their complaint because the trade dispute with the Japanese was resolved at the last minute. The concessions made by the Japanese in order to resolve the dispute have been branded as inconsequential by Claude Prestowitz of the Washington based Economic Strategy Institute, ¹⁸³ however they are of great consequence for the WTO because the organization will have to wait until a later date to determine if it can enter the competition law convergence debate through the backdoor provided by Article XXIII.

¹⁷⁸ Marceau, *supra* note 41 at 65.

¹⁷⁹ J.H. Jackson, "Statement on Competition and Trade Policy before the U.S. Senate Committee on Judiciary, 18 June 1992" (1992) 26 *J. of World Trade* 111 at 114.

¹⁸⁰ *Ibid.* at 115.

¹⁸¹ Wood (24 March 1995), *supra* note 30.

¹⁸² *Ibid.*

¹⁸³ P. Blustein, "Bitter Fight Produces Little Real Change" *The Washington Post* (29 June 1995) A1.

d. Trade Policy Review Mechanism

Another way the GATT could deal with competition issues arose in 1988 when the Trade Policy Review Mechanism was created. Gabrielle Marceau notes that "this was the first step towards a deeper analysis of the relationship between domestic policies, and more particularly, competition policy and international trade."¹⁸⁴ It provides for regular reviews of members "regarding their total trade policy operation, not confining the review to specific violations of specific rules."¹⁸⁵

e. The Uruguay Round

The Uruguay Round has added a few more references to competition law, however competition as such is not directly addressed in the *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*.¹⁸⁶ In the Agreement on Trade-Related Investment Measures (TRIMs), there is a commitment by the contracting parties to review competition policy within five years. However, Dianne Wood has pointed out that it is unclear whether this review is meant to be limited to the operation of the TRIMs Agreement or whether it should be broader.¹⁸⁷ Peter Watson, the Chair of the U.S. International Trade Commission has implied that the review would not be limited to TRIMs, but would cover all competition law issues.¹⁸⁸ In addition to the TRIMs Agreement, the Agreement on Trade-Related Aspects of Intellectual Property (TRIPs) addresses some restrictive business practices.

VII. CONCLUSION

THE SURGE OF INTERNATIONAL TRADE in recent years has created a host of new antitrust problems which are beyond the scope of national agencies. In general, competition is still regulated through national agencies, laws and policies. This is an ineffective way to deal with the new world economic order. A greater convergence of competition regimes is needed.

Solutions can either be unilateral, bilateral, or multilateral, and can take the form of either harmonization or cooperation. Unilateral solutions, such as extrater-

¹⁸⁴ Marceau, *supra* note 39 at 284.

¹⁸⁵ Jackson, *supra* note 179 at 115.

¹⁸⁶ *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* (15 April 1994).

¹⁸⁷ Wood (24 March 1995), *supra* note 28.

¹⁸⁸ P.S. Watson, "False Demons and Free Trade" 43:11 *Virginia Lawyer* 27 at 30.

ritorial application of domestic laws, increase friction between states and thus most states concerned about this issue have opted for bilateral or multilateral models.

The EU has gone further than other countries and has entered the realm of multilateral harmonization of rules, policies and procedures. While many academics have argued in favour of this model, history indicates that this level of multilateral harmonization can not be applied to a broader context because too many states, especially the United States, are unwilling to yield sovereignty to supranational laws and institutions. Therefore, the future path to convergence is likely to continue in the form of bilateral cooperation agreements.

In time, however, it is possible that a multilateral harmonization agreement will be created. The WTO is the most promising forum for effective multilateral harmonization. However, it will not assume that position for some time. As long as there is insufficient political will to adopt one of the harmonization models, the OECD will remain the best forum for work towards multilateral cooperation. Members of the OECD should be encouraged to continue their work on elaborating the Guidelines attached to the 1995 Recommendation. Hopefully, the political desire will exist in the future to turn the principles and ideas developed in the OECD over to the WTO's more formal and binding framework. Only then will we have moved from multilateral cooperation to multilateral harmonization.

The timing of this move will be dictated by political sensitivities about national sovereignty. Any move which fails to realize this will be doomed to join the Havana Charter and the RBP Code in the law library's history section.