

EXCHANGE OF INFORMATION IN THE ENFORCEMENT OF ANTITRUST LAWS

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INTRODUCTION

THE 1947 GATT NEGOTIATIONS AND SUBSEQUENT TRADE rounds have significantly increased trade in goods and services among nations. Globalization and the integration of economies have resulted in interdependence among economies, exposing many domestic issues, including competition issues, to international arenas. Eliminating trade barriers has given companies an opportunity to compete internationally in an open market. Anti-competitive practices such as fixing prices, rigging bids, establishing output restrictions or quotas, sharing or dividing markets by allocating customers, suppliers, territories or lines of commerce, monopolizing the market, in addition to the merger of companies, affects several countries' markets and consumers at the same time.

In the current world trade system, there is no multilateral international agreement on anti-competitive practices, leaving the fight against them to the individual discretion of each country. Nevertheless, prosecuting anti-competitive activities that have a cross-border dimension has been addressed to some extent by bilateral treaties on competition.¹ Laws on the confidentiality of information, however, undermine the communication of information in the hands of antitrust agencies.

This paper addresses the following issue: what is the allowed degree for exchange of confidential information according to antitrust laws?

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¹ Some examples of bilateral agreements include the: U.S. – Australia cooperation agreement of 1982 and mutual antitrust enforcement assistance agreement of 1999; U.S. – Commission of the European Communities cooperation agreement of 1991 and 1998; U.S. – Canada cooperation agreement of 1995 and agreement on the application of positive comity principles to the enforcement of their competition laws of 2004. See online: USDOJ <http://www.usdoj.gov/atr/public/international/int_arrangements.htm>. See also Agreement Between The Government of Canada and the European Communities Regarding The Application of Their Competition Laws, online: Competition Bureau <<http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1593&lg=e>>.

What roles do international legal mechanisms play in addressing the issue? What are the obstacles for the formation of international agreements (bilateral or multilateral) on the exchange of information in antitrust cases?²

THE ESSENCE OF THE PROBLEM

THERE ARE MANY TYPES OF ANTI-COMPETITIVE practices with cross-border effects; these include international cartels, international mergers, domestic export cartels with impact on importing countries, import cartels, vertical market restraints (*i.e.*, excluding foreign firms from distribution networks), and abuses of dominant positions. As Frederic Jenny concluded:

Available evidence show[s] that for long periods of time in the recent past international markets for goods as diverse as steel products, industrial diamonds, heavy electrical equipment, graphite electrodes, lysine, food additives, vitamins etc . . . were subject to established quotas of production or export and/or to fix prices which meant that importing countries were rationed and paid artificially inflated prices for their imports.³

During the investigation of these types of anti-competitive activities, antitrust agencies need information from evidence and witnesses in different countries; however, laws on the confidentiality of information often can prevent information required by the antitrust agency from being communicated.

For example, in 1994, the U.S. Attorney General Antitrust Division brought criminal charges against General Electric (GE) and DeBeers Centenary Co. (DeBeers), alleging they conspired to fix the price of industrial diamonds.⁴ De Beers Centenary AG is a Swiss corporation headquartered in Lucerne, Switzerland; it has linked corporate ownership with De Beers Consolidated Mines, Ltd., a South African

² Bilateral and multilateral international agreements do not have to be exclusively on the exchange of information; they can be on competition issues generally and within these agreements there might be a clause or a chapter of articles dealing with issue of the exchange of information.

³ Frédéric Jenny, "Globalization, Competition and Trade Policy: Issues and Challenges" in Roger Zäch, ed., *Towards WTO Competition Rules: Key Issues and Comments on the WTO Report (1998) on Trade and Competition* (London: Kluwer Law International, 1999) 3 at 23.

⁴ *United States v. General Electric & DeBeers Centenary Co.*, 869 F. Supp. 1285, online: USDOJ <<http://www.usdoj.gov/atr/cases/f204500/indictment.htm>>.

corporation. General Electric is a Delaware corporation headquartered in Fairfield, Connecticut. Industrial diamonds are used to make cutting and polishing tools for manufacturing and construction equipment.⁵ The evidence of the case was largely circumstantial, due in part to the inability to obtain discovery abroad. The district court granted GE's motion for an acquittal, finding that the government failed to establish the existence of a conspiracy.

Because the laws of Switzerland and the U.S. prohibit the exchange of information in antitrust cases, such international anti-competitive activities are left undeterred. By not stopping these international anti-competitive activities, private market barriers, such as coordination of price, quantity, or consumer allocation, are allowed.

Furthermore, in *United States v. Nippon Paper Industries Co. Ltd.*, the district court dismissed the antitrust suit against Japanese companies for fixing the price of thermal fax paper imported into the United States.⁶

HISTORICAL OVERVIEW

THE INCREASED INTEGRATION OF ECONOMIES and open markets, and increases in the volume of trade between countries, have resulted in the internationalization of domestic competition issues. In cases where anti-competitive practices occur in one country and affect another country, one country can protect domestic consumers and fight anti-competitive practices by extending its jurisdictional reach into a foreign country's jurisdiction. The application of domestic laws extraterritorially, under the effects and enterprise unity doctrines, has evolved in the U.S., EC, Japan, and Canada.

The effects doctrine was developed by U.S. courts. According to this doctrine, antitrust laws (*e.g.*, the *Sherman Act*) may be applied against a foreign anti-competitive act affecting the U.S. market, even though that anti-competitive act did not occur in the U.S. This doctrine was first articulated in the *Alcoa* case in 1945.⁷

According to the "enterprise unity doctrine", a country's antitrust laws can be applied to foreign-based entities for the acts of their affiliates present in the national territory.⁸ The European Court of Justice first developed this doctrine in the *Dyestuffs* case.⁹

The primary concern of these two doctrines is the breach of sovereignty. When the laws of one country are extended to conduct

⁵ *Ibid.*

⁶ *United States v. Nippon Paper Indus. Co., Ltd.*, 62 F. Supp. 2d 173.

⁷ *United States v. Aluminium Company of America*, 148 F. 2d 416 (2d Cir. 1945).

⁸ Roland Weinrauch, *Competition Law in the WTO: The Rationale for a Framework Agreement* (Wien: NWV, 2004) at 79.

⁹ *ICI v. Commission (Dyestuffs) Case*, 48/69, [1972] ECR 619.

occurring in a foreign country or to national firms or individuals in another country, law enforcement jurisdiction is also extended.

Objections to such extraterritoriality have been raised with practical implications. The negative reaction from the international community, especially for the extension of U.S. antitrust laws (*e.g.* the *Sherman Act*) can be seen in light of the effects doctrine and the adoption of blocking statutes, claw back statutes and diplomatic notes of protest.¹⁰ For example, the British *Shipping Contracts and Commercial Documents Act* of 1964, the British *Protection of Trading Interests Act* of 1980, the Australian *Foreign Proceedings (Excess of Jurisdiction) Act* of 1984 and the Canadian *Foreign Extraterritorial Measures Act* 1984 are some of the negative responses.¹¹

These reactions prompted countries to investigate enterprises' anti-competitive activities by way of co-operation among antitrust agencies. This co-operation was pursued through bilateral agreements in antitrust actions. For example, to date Canada has concluded seven bilateral agreements with countries such as the U.S., Japan, the U.K., Chile, Mexico, and New Zealand.¹²

However, these agreements do not obligate either country to communicate information concerning the anticompetitive activities of firms, and the issue of exchange of information is subject to domestic laws regarding confidentiality of the parties. Exchange of confidentiality clauses in bilateral agreements will be covered in more detail in the third part of this paper.

LAWS ON CONFIDENTIALITY

ANTITRUST LAWS DEAL WITH TRADE-RELATED ACTIVITIES OF all forms of entrepreneurial activity in all areas of the economy. Confidential information includes: first, commercially sensitive information and business secrets; and second, all other information collected during an investigation.¹³ The former includes data on sales and production costs, information on suppliers and customers, future

¹⁰ Claw back statutes allow a foreign defendant to sue in its domestic courts to recover two-thirds damages, paid as a result of a judgment in a U.S. court. See Robert Profitsky, "Competition Policy in a Global Economy — Today and Tomorrow" (1999) 2:3 J. Int'l Econ. L. 403 at 408.

¹¹ *The Protection of Trading Interests Act* of 1980 (U.K.), 1980, c. 11; *Foreign Proceedings (Excess of Jurisdiction) Act* of 1984 (Cth.); *Foreign Extraterritorial Measures Act*, R.S., 1985, c. F-29.

¹² These bilateral agreements can be found online: Competition Bureau Canada <<http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=21&lg=e>>.

¹³ Bruno Zanettin, *Cooperation Between Antitrust Agencies at the International Level* (Oxford and Portland, Oregon: Hart Publishing, 2002) at 121.

business plans, technical characteristics of a product, *etc.*; the latter information goes beyond the scope of commercially sensitive information and includes witness testimonies, written interrogations of the parties involved in the case, and other documents and materials pertaining to the case under the investigation.

In addressing the question of international exchange of information in antitrust cases, I will look at the antitrust laws of several countries or unions, including Canada, the U.S. (the major player in international antitrust law) and the EC. The confidentiality of information, according to the laws of these countries, is the starting point in understanding the exchange of information in the process of enforcing competition laws.

Canada

In Canada, the *Competition Act* of 1985 regulates the communication of information.¹⁴ Section 29 specifically deals with issues of confidentiality of information and exchange of information. Section 29 (1) declares that no person in the enforcement of this Act shall communicate any obtained information; however, there are two exceptions. First, information can be provided to Canadian law enforcement agencies; and, second, it can also be provided for the purposes of administering or enforcing the *Competition Act*. The first exception favours domestic law enforcement agencies, but the second exception, because it is not limited only to national agencies, would allow information to be communicated in cases where the Canadian Bureau of Competition also has already started an investigation of the same case. For example, in a case where one of the members of a cartel for a certain product resides in Canada and that product affects the Canadian market, information could be communicated under the second exception.¹⁵ In response to such arguments, the Canadian Bureau of Competition issued a statement in May 1995 regarding the communication of confidential information under the *Competition Act*.¹⁶ Under “Administration or Enforcement,” the Director is allowed to communicate with foreign counterparts “for the purposes of advancing a specific investigation being carried out pursuant

¹⁴ *Competition Act*, R.S.C. 1985, c. C-34.

¹⁵ In order to prosecute an international cartel, the exchange of information between antitrust agencies is necessary otherwise the prosecution would not be possible; for example, the *Vitamins* case involved the prosecution of worldwide vitamins and food additives production cartels and involved members from Canada, the U.S., Japan, Switzerland, and Germany. This case was prosecuted jointly by EC and U.S. agencies. See *re Vitamins Antitrust Litigation*, 209 FRD 251.

¹⁶ See *Communication of Confidential Information Under the Competition Act* (May 1995), online: Competition Bureau of Canada <<http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1277&lg=e>>.

to one or more sections of the *Act*.¹⁷ Such communication should be reciprocal, *i.e.*, for the purposes of receiving the assistance of that agency regarding a Canadian investigation.¹⁸

In summary, Canadian law does not allow confidential information to be exchanged in antitrust cases unless the Canadian Bureau of Competition is also investigating the same case as the foreign counterpart requesting the information. Even then, the information can only be used for advancing its own investigation.

The U.S.

U.S. antitrust laws are well developed for prosecuting both domestic and international anti-competitive activities. There are two ways for confidential information to be exchanged during the investigatory process. The first mechanism is through the Antitrust Mutual Assistance Agreement according to the *International Antitrust Enforcement Assistance Act* of 1994 (IAEAA).¹⁹ Nevertheless, this option is only available to those countries that sign bilateral agreements on Antitrust Mutual Assistance with a U.S. antitrust agency.²⁰ The second option for information sharing is provided by the *Federal Rule of Criminal Procedure*²¹ and the *Antitrust Civil Process Act*.²² According to the latter, Rule 6(e)(2)(B) prohibits disclosure of a matter occurring before a grand jury; however, there are exceptions to this rule. According to 6(e)(3)(E)(i):

(E) The court may authorize disclosure — at a time, in a manner, and subject to any other conditions that it directs — of a grand-jury matter:

¹⁷ *Ibid.* [emphasis in original].

¹⁸ According to the *Competition Act*, the chief executive of criminal investigation division holds a position of Director of criminal investigation. See *Competition Act*, *supra* note 14.

¹⁹ *International Antitrust Enforcement Assistance Act of 1994*, 15 U.S.C. §§ 6201-6212 (1994), online: USGOV <http://www.access.gpo.gov/uscode/title15/chapter88_.html>.

²⁰ Since the adoption of the IAEAA in 1994, only Australia has concluded an agreement with the U.S. See *Agreement Between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance*, 27 April 1999, online: USDOJ <<http://www.usdoj.gov/atr/public/international/docs/usaus7.htm>>.

²¹ *Federal Rule of Criminal Procedure*, 18 U.S.C., online: Cornell Law School <<http://www.law.cornell.edu/rules/frcrmp/>>.

²² *Antitrust Civil Process Act*, 15 U.S.C. §§ 1311-1314, online: USDOJ <<http://www.usdoj.gov/atr/foia/divisionmanual/two.htm#a6>>.

- (i) preliminarily to or in connection with a judicial proceeding²³

The question of whether a foreign judicial process qualifies for this exception was addressed by Zanettin, who argues that under this exception, disclosures to foreign courts are made by courts through “DoJ letters of rogatory.”²⁴

All other exceptions under Rule 6 of the *Federal Rule of Criminal Procedure*, concerning the disclosure of information, are designated for U.S. federal and state law enforcement agencies.²⁵

According to the *Antitrust Civil Process Act*:

. . . no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, so produced shall be available for examination, without the consent of the person who produced such material, answers, or transcripts . . .²⁶

According to paragraph 57b-2(3)(C) of the *Federal Trade Commission Act*, no investigation documents will be disclosed, “including no documentary material, tangible things, reports or answers to questions, and transcripts of oral testimony . . . without the consent of the person who produced the material, things or transcripts . . . [except] to either House of the Congress or to any committee or subcommittee of the Congress.”²⁷

Paragraph 46(f) of the *Act* states:

. . . [T]he Commission shall not have any authority to make public any trade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential, except that the Commission may disclose such information to officers and employees of appropriate Federal law enforcement agencies or to any officer or employee of any State law

²³ *Supra* note 21, Rule 6, online: Cornell Law School <http://www4.law.cornell.edu/uscode/search/display.html?terms=Federal%20Rules%20of%20Criminal%20Procedure&url=/uscode/html/uscode18a/usc_sec_18a_03000006----000-.html>. See *supra* note 13 at 122.

²⁴ *Supra* note 13 at 122.

²⁵ See Rule 6(e)(3), *supra* note 21, online: Cornell Law School <<http://www.law.cornell.edu/rules/frcmp/Rule6.htm>>.

²⁶ 15 U.S.C. § 1313(c)(3) (1994).

²⁷ *Ibid.*, c. 2, subchapter 1, § 57b-2 3(C).

enforcement agency upon the prior certification of an officer of any such Federal or State law enforcement agency that such information will be maintained in confidence and will be used only for official law enforcement purposes.²⁸

In addition, Section 7A(h) of the *Clayton Act*²⁹ prohibits the DoJ and FTC from disclosing any information under the pre-notification procedure set by the *Hart-Scott-Rodino Antitrust Improvement Act*.³⁰

The disclosure of information by U.S. antitrust agencies is restricted to law enforcement agencies and the Congress, rather than the antitrust agency of another country for the purpose of fighting against anti-competitive activities of firms. The exception is the Antitrust Mutual Assistance Agreement according to the *International Antitrust Enforcement Assistance Act* of 1994 (IAEAA), which has only been signed with Australia.³¹

The EC

EC antitrust laws are distinct from North American antitrust laws because EC competition laws are more concerned with opening markets among member countries.

Disclosure of any information covered by the obligation of professional secrecy is prohibited to all officials and servants of the institutions of the community, according to the Article 287 (ex. Article 214) of the *Treaty of Rome*.³²

The Council of the European Union adopted *Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*.³³ This regulation came into force on 1 May 2004 and replaced Regulation

²⁸ *Ibid.* at c. 2, subchapter 1, § 46 (f).

²⁹ *Clayton Act*, 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53, online: USDOJ <<http://www.usdoj.gov/atr/foia/divisionmanual/two.htm#a3>>.

³⁰ *Hart-Scott-Rodino Antitrust Improvement Act*, 15 U.S.C. (1976).

³¹ *Agreement Between the Government of the United States of America and the Government of Australia on Mutual Antitrust. Enforcement Assistance*, 27 April 1999, online: USDOJ <<http://www.usdoj.gov/atr/public/international/docs/usaus7.htm>>.

³² *Treaty of Rome*, 25 March 1957, art. 287, online: europa.eu.int <<http://www.europa.eu.int/eur-lex/lex/en/treaties/dat/11997E/htm/11997E.html#0173010078>>.

³³ EC, *Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*, [2003], O.J.L. 46/1, online: EUROPA <http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_001/l_00120030104en00010025.pdf>.

17/62. According to Article 28 of this Regulation, information collected pursuant to an investigation of anti-competitive activity should be used only for this purpose. This Regulation also prohibits the disclosure of any information pursuant to the case because officials are under an obligation of professional secrecy.

According to Article 12 of the Regulation, the Commission and the competition authorities of member states have the power to provide one another with confidential information. But this fails to address the issue of international exchange of information between antitrust agencies of different countries when cases have an international dimension.

The same rules of professional secrecy are imposed on antitrust agency officials, according to Article 17 of the EC Merger Regulation 139/2004.³⁴

INTERNATIONAL NON-ANTITRUST LEGAL MECHANISMS: THE HAGUE EVIDENCE CONVENTION OF 1970

A REVIEW OF THE ANTITRUST LAWS OF SEVERAL countries, above, demonstrates that the international exchange of confidential information is in its lowest point or prohibited. Even though every antitrust agency must obey the confidentiality of information communicated between enterprises and itself, it would be wrong to conclude that the exchange of confidential information is not taking place.

For example, one way to exchange information is through the *Hague Evidence Convention*,³⁵ and another way is through Mutual Legal Assistance Treaties. However, due to the fact that these options were not specifically designed to meet the specific needs of antitrust issues, the usefulness of these options is limited.

Under Article 1 of the *Hague Evidence Convention*, a judicial authority of the signatory countries is entitled to request evidence or perform other judicial acts abroad in civil and commercial matters.³⁶ However, due to the criminal nature of antitrust laws in countries such as the U.S. and Canada, countries are prevented from taking full

³⁴ EC, *Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)*, [2004] O.J.L. 47/24, online: EUROPA

<http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_024/l_02420040129en00010022.pdf>.

³⁵ *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, 18 March 1970, 23 UST 2555, online: University of California, Berkeley <<http://www.law.berkeley.edu/faculty/ddcaron/Documents/RPIDDocuments/rp04004.html>>.

³⁶ *Ibid.*, art. 1.

advantage of this Convention. Furthermore, a letter of request from the antitrust agency is unacceptable under the *Hague Convention* because Article 1 clearly states that only judicial authorities are entitled to make requests.³⁷ This does not mean that antitrust cases cannot use the mechanism established by this Convention in obtaining evidence from abroad; however, only when an antitrust agency brings the case before a court, is it possible to make requests according to this Convention.

An evaluation of the usefulness of the *Hague Convention* in antitrust cases reveals the following concerns. The Convention is limited to civil and commercial matters. The types of anti-competitive activities with international dimensions primarily include international cartelization which is punishable under the antitrust laws of a number of countries.³⁸ The serious nature of international cartels has been accepted by most countries. From this perspective, the *Hague Convention* would be irrelevant in such criminal cases because of the civil and commercial matters that the Convention deals with.

Another concern related to matters civil or commercial under the *Hague Convention* is the antitrust laws of countries like the U.S. and Canada, where many anti-competitive acts prescribe criminal punishment.³⁹ Since the U.S., with its thousands of multinational companies, is a major player in international trade, it must be considered in order to fight international anti-competitive activities.

Moreover, an additional concern regarding the usefulness of the *Hague Convention* is that only judicial authorities may make requests. In antitrust cases, antitrust agencies are the main bodies investigating each case. If only a court may make requests, then an antitrust agency, which is in the process of investigation, needs help from the judicial authority. This process prolongs the investigatory process and puts an extra barrier before the antitrust agency. Furthermore, under Article 23 of the *Hague Convention*, the execution of letters of request issued for the purpose of obtaining pre-trial discovery of documents can be refused.⁴⁰ Therefore, letters of request to obtain evidence for successful prosecution of an international anti-competitive act are limited to the period of actual trial process of the court.

³⁷ *Ibid.*, art. 1.

³⁸ OECD, Competition Committee, *Report on the Nature and Impact of Hard Core Cartels and Sanctions against Cartels under National Competition Laws*, Doc. No. DAFFE/COMP(2002)7 (9 April 2002) at 10, online: OECD <<http://www.oecd.org/dataoecd/16/20/2081831.pdf>>.

³⁹ *Ibid.* at 10.

⁴⁰ States must declare this at the time of signature, ratification or accession to the convention.

These concerns reveal the inadequacies of the *Hague Evidence Convention* in most antitrust cases. None of the U.S. or EC antitrust agencies have ever used this Convention.⁴¹

THE USE OF MLATS IN CASES OF INTERNATIONAL ANTI-COMPETITIVE ACTS

ANTITRUST ENFORCEMENT IS FACILITATED, ALTHOUGH to a limited degree, through Mutual Legal Assistance Treaties (MLATs) which exist in the area of criminal law. According to MLATs, the request for assistance is made by one government's central enforcement authority to their counterpart in another country; usually it is through a ministry of justice. Under MLATs, any state enforcement agency may make its request through the central authority.

The fact that MLATs only cover criminal matters prevents civil antitrust cases from being successfully prosecuted. According to the antitrust laws of most European countries, anti-competitive acts in antitrust laws are not criminal offences. Therefore, for example, France cannot use its MLATs with other countries to obtain evidence or other information to enforce its antitrust laws.

Furthermore, MLATs operate through courts; therefore, interviewing witnesses and analyzing documents can only "take place because these testimonies and documents are ordered by subpoenas."⁴² In this way the process of obtaining useful information regarding international anti-competitive act becomes very complicated.

However, it should be noted that MLATs were not specifically designed for international antitrust cases. New developments in international anti-competitive practices require a distinct approach. For example, if MLATs are not suitable for antitrust cases, then what about bilateral agreements on cooperation in antitrust cases? Why don't countries use their bilateral agreements that are specifically designed for such cooperation?

BILATERAL ANTITRUST COOPERATION AGREEMENTS

BILATERAL AGREEMENTS ON COOPERATION IN the antitrust area do not resolve the issue of exchange of information between antitrust agencies. The exchange of confidential information requires a further and more fundamental step in the commitment to international antitrust cooperation.⁴³

⁴¹ *Supra* note 13 at 148.

⁴² *Ibid.* at 154.

⁴³ *Ibid.* at 119.

The answer requires an analysis of the information sharing clause of some of these agreements.

Article 7 of the 1991 bilateral agreement on cooperation in antitrust areas between the U.S. and the EC provides:

The competition authorities of each Party will render assistance to the competition authorities of the other Party in their enforcement activities, to the extent compatible with the assisting Party's laws and important interests, and within its reasonably available resources.⁴⁴

This means that if there is a law in the U.S. generally prohibiting an exchange of information, then any bilateral agreement is subordinate and cannot change the existing law.

Because bilateral antitrust agreements are similar to each other in terms of regulating the exchange of information, it is not necessary to examine all of them. Current bilateral agreements allow information to be exchanged to the degree that domestic laws regarding the confidentiality of information permit; however, as examined in chapter two, domestic laws generally prohibit information to be exchanged with foreign antitrust authorities.

THE U.S. ANTITRUST MUTUAL ASSISTANCE AGREEMENT AND THE INTERNATIONAL ANTITRUST ENFORCEMENT ASSISTANCE ACT

IN 1994, THE U.S. ADOPTED ITS *INTERNATIONAL Antitrust Assistance Act* to facilitate the work of its antitrust agencies — Antitrust Division of the Department of Justice and the Federal Trade Commission — in prosecuting anti-competitive activities with an international dimension.⁴⁵ In accordance with this Act, under an antitrust mutual assistance agreement (AMAA), the exchange of information is allowed between antitrust agencies to assist foreign antitrust authorities.⁴⁶

One important feature of the Act is that U.S. antitrust authorities, in accordance with AMAA, are entitled to use their power to obtain evidence and to hand it over to foreign antitrust agencies regardless of whether

⁴⁴ *Agreement between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws*, 23 September 1991, online: United States Department of Justice <<http://www.usdoj.gov/atr/public/international/docs/0525.htm>>.

⁴⁵ *Supra* note 19.

⁴⁶ *Ibid.*, § 6201.

the conduct violates any federal antitrust laws.⁴⁷ Section 3 of the Act describes the procedure that must be followed in order to get a testimony, statement or other related document; this process is conducted through a district court where the person resides, and if an order to obtain evidence does not claim otherwise, the evidence must be obtained according to the *Federal Rules of Civil Procedure*.⁴⁸ Previously, under s. 6(f) of the *Antitrust Civil Procedure Act*, U.S. antitrust agencies were prohibited from communicating antitrust information to any other agency, except U.S. federal or state agencies. This is one important advantage of the AMAA that was not possible before.

However, according to Section 12 of the Act, U.S. antitrust agencies are authorized to receive a reimbursement from a foreign antitrust agency for the costs incurred by U.S. agencies in conducting an investigation requested by the foreign antitrust authority.⁴⁹

Nevertheless, there are limitations to the exchange of information pursuant to this Act. For example, it does not provide clear criteria on search and seizure warrants, even though these two tools are important in international cartel investigations.⁵⁰ Furthermore, according to Section 7, the U.S. antitrust authorities are prohibited from transferring evidence or other information to a foreign antitrust authority if doing so is inconsistent with the public interest of the U.S. This provision seems broad and unclear. In order to be consistent with the public interest of the U.S., antitrust authorities should consider:

. . . among other factors, whether . . . the foreign antitrust authority holds any proprietary interest that could benefit or otherwise be affected by such investigation, by the granting of such order, or by the provision of such antitrust evidence.⁵¹

Zanettin suggests, “[T]his provision is certainly related to the concern expressed by the US business community that information transmitted to foreign competition agencies might be used to favour a foreign state-owned competitor.”⁵² This is a reasonable concern that the business community may have. In any case, international treaties often contain provisions about conformity with public interests out of concern for the sovereignty and security of the

⁴⁷ *Ibid.*, § 6202(c).

⁴⁸ *Ibid.*, § 6203, online: USGOV <http://www.access.gpo.gov/uscode/title15/chapter88_.html>.

⁴⁹ *Ibid.*, § 6212.

⁵⁰ *Supra* note 13 at 160.

⁵¹ 15 U.S.C § 6207(a)(3) (1994).

⁵² *Supra* note 13 at 161.

country; therefore, it is not unnatural that this rule exists in U.S. bilateral agreements too.

Furthermore, Section 4 of the Act prohibits disclosure of two types of information: information obtained under the pre-merger notification procedure, and antitrust evidence concerning a case before a grand jury.⁵³ However, the second type of evidence is not wholly prohibited, but allowed in limited occasions when a foreign antitrust authority shows a “particularized need for such antitrust evidence.”⁵⁴ Furthermore, according to Section 4(3), a third type of information that is prohibited from disclosure is that which is to be kept secret in the interest of national defense.⁵⁵ This Act addresses concerns about the use of obtained information strictly for those purposes for which it was obtained, not for other cases or any other purpose.⁵⁶

SOFT COOPERATION IN ANTITRUST: OECD AND UNCTAD

ANTICOMPETITIVE ACTIVITIES AFFECTING INTERNATIONAL trade have been actively addressed by such international organizations as the Organization for Economic Cooperation and Development (OECD) as well as the United Nations Conference on Trade and Development (UNCTAD). However, these organizations’ documents are not binding; therefore, their cooperation efforts are regarded as “soft.” Even though documents adopted by them are not binding in nature, they have played an important role in providing countries with technical assistance in the formulation of antitrust laws, in the convergence of differing national antitrust laws, in serving as a forum for consultations, recommendations and best practices relating to the exchange of information, notification and other forms of cooperation.

The OECD

The OECD has adopted several recommendations of its member countries, including the 1967, 1973, 1979, 1986 and 1995 recommendations concerning cooperation between member countries on anticompetitive practices affecting international trade. The 1998 recommendations concern effective actions against hard core cartels. In

⁵³ *Supra* note 19, § 6204.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, § 6204(3).

2005, best practices for the formal exchange of information between competition authorities in hard core cartel investigations was adopted. In 2005, recommendations concerning merger review were also adopted.⁵⁷

The 1995 recommendations concerning anticompetitive practices affecting international trade call for member countries to co-operate in international antitrust cases; in particular, Section A(3) specifies that members should supply each other with relevant information on the following three conditions:

[T]hey should supply each other with such relevant information on anticompetitive practices as their legitimate interests permit them to disclose; and should allow, subject to appropriate safeguards, including those relating to confidentiality, the disclosure of information to the competent authorities of Member countries by the other parties concerned, whether accomplished unilaterally or in the context of bilateral or multilateral understandings, unless such co-operation or disclosure would be contrary to significant national interests.⁵⁸

According to Section 10 of the guiding principles for exchange of information in the 1995 recommendations, member countries are subject to laws on confidentiality with respect to sharing factual and analytical information and material.⁵⁹ Furthermore, a requested state may specify protection and put limitations on the use of provided information; this limits the use of communicated information to that specified purpose, and it cannot be disclosed to any other agency or used in another case, if revealed. Section 10 of the Recommendations also gives a right to decline a request in cases when the requesting country is unable to observe those protections and limitations on the use of requested information.

Section B of the 1998 Recommendations of the Council concerning Effective Action Against Hard Core Cartels encourages cooperation among member countries; specifically, it encourages sharing and

⁵⁷ For the list of Recommendations and Best Practices see online: OECD <http://www.oecd.org/document/59/0,2340,en_2649_37463_4599739_1_1_1_37463,00.html>.

⁵⁸ OECD, The Council, *Recommendations of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade*, Doc. No. C(95)130/FINAL (27 July 1995), s. A(3), online: OECD <[http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C\(95\)130](http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C(95)130)>.

⁵⁹ OECD, The Council, Appendix to the *Recommendations of the Council concerning Cooperation between Member Countries on Anticompetitive Practices affecting International Trade*, Doc. No. C(95)130/FINAL (1995), s. 10, online: OECD <[http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C\(95\)130](http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C(95)130)>.

gathering documents and information on behalf of foreign competition authorities to the extent consistent with their laws, important interests, and subject to effective safeguards to protect commercially sensitive and other confidential information.⁶⁰ These recommendations give even more ground to decline a request for information sharing than did the 1995 Recommendations regarding anticompetitive practices affecting international trade, “including its competition authority’s resource constraints or the absence of a mutual interest in the investigation.”⁶¹

Overall, the OECD recommendations encourage member countries to enter into bilateral or multilateral agreements in order to fight effectively against anticompetitive activities with an international dimension.⁶²

The OECD *Best Practices for the Exchange of Information* (2005) identifies its jurisdiction and excludes from it the following three:

(i) Exchanges of information not subject to domestic law restrictions and which competition authorities therefore are free to exchange without authorisation by international agreement or domestic law;

(ii) Information exchanges among members of a regional organisation or parties to a regional agreement that have adopted specific rules governing information exchanges among competition authorities, unless such exchanges involve information originating from a jurisdiction that is outside the regional organisation or not party to the regional agreement; and

(iii) Information exchanges in the context of private litigation.⁶³

These *Best Practices* are more detailed to include certain safeguards for the exchange of information, under which Section A provides reasons for declining to provide information (these *Best Practices* are also subject

⁶⁰ OECD, The Council, *Recommendation of the Council concerning Effective Action Against Hard Core Cartels*, Doc. No. C(98)35/FINAL (1998), Section B, online: OECD <[http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C\(98\)35](http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C(98)35)>.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ OECD, Competition Committee, *Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations*, (October 2005), Section I (C), online: OECD <<http://www.oecd.org/dataoecd/1/33/35590548.pdf>>.

to laws on confidentiality).⁶⁴ Section B provides rules on maintaining confidentiality and non-disclosure of this information to third parties, unless the requested country agrees to it. Section C provides protection for legal profession privilege, meaning that the requesting country should not require and the requested country should not obtain information that is under the protection of laws governing legal profession privilege. Section II(D)(1) provides that a requested country “should not give prior notice of the exchange to the source of the information, unless such notice is required under its domestic laws or an international agreement.”⁶⁵ Section III notes: “To the extent possible without compromising legitimate enforcement objectives, jurisdictions should ensure that their relevant laws and regulations concerning information exchanges covered by these Best Practices are publicly available.”⁶⁶ This indicates that competition laws regulating international anticompetitive activities are becoming more transparent.

UNCTAD

UNCTAD developed Resolution 35/63 on Restrictive Business Practices, adopted by the UN General Assembly in 1980.⁶⁷ UNCTAD holds sessions of the Intergovernmental Group of Experts on Competition Law and Policy annually, and a Review Conference at ministerial levels every five years. The last Review Conference was held in Antalya, Turkey in 2005.

The Code on Restrictive Business Practices clearly states in Part IV Section B that it “applies to restrictive business practices, including those of transnational corporations adversely affecting international trade, particularly that of developing countries and the economic

⁶⁴ “Reasons for declining to provide the requested information might include, but are not limited to: (i) the requesting jurisdiction’s investigation relates to conduct that would not be deemed hard core cartel conduct by the requested jurisdiction; (ii) honouring the request would be unduly burdensome for the requested jurisdiction or might undermine an ongoing investigation; (iii) the requested jurisdiction believes that confidential information may not be sufficiently safeguarded in the requesting jurisdiction; (iv) the execution of the request would not be authorised by the domestic law of the requested jurisdiction; or (v) honouring the request would be contrary to the public interest of the requested jurisdiction.” See *ibid.*

⁶⁵ *Supra* note 63, s. II(D)(1).

⁶⁶ *Ibid.*, s. III.

⁶⁷ *The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, GA Res. 35/63, UNCTAD, 2000, UN Doc. TD/RBP/CONF/10/Rev.2 (5 December 1980), online: UNCTAD <<http://r0.unctad.org/en/subsites/cpolicy/docs/CPSet/cpset.htm>>.

development of these countries.”⁶⁸ This Code was more designed to prevent anticompetitive activities of transnational companies and their impact on developing countries.

The Code’s confidentiality clause is simple and follows the same ideas as OECD Recommendations to its member states. According to paragraph 7, Section E, the Code calls upon states to institute or improve procedures for obtaining information from enterprises, necessary for their effective control or restrictive practices; paragraph 8 calls upon states to establish appropriate mechanisms at the regional and sub-regional levels to promote the exchange of information on restrictive business practices.⁶⁹ The Code also addresses the issue of exchange of information, but it is subjected to national laws on confidentiality, according to Section E, paragraph 9.

Even though U.N. General Assembly resolutions are non-binding, the Code has played an important role in developing competition regimes among developing countries, with an emphasis on converging antitrust laws and policies; in turn, this will make it possible to negotiate an international agreement on antitrust issues without obstacles and friction between the antitrust policies of different countries.

DID THE SINGAPORE AND DOHA MINISTERIAL MEETINGS ADDRESS THE PROBLEM?

INTERNATIONAL COMPETITION LAW HAS ALREADY become an important political issue on the WTO’s agenda since its first ministerial meeting in Singapore in 1996, where participants decided to establish a working group to study the interaction between trade and competition policies.⁷⁰

Nevertheless, the Singapore Ministerial Declaration made clear that future negotiations in this area “will take place only after an explicit consensus decision is taken among WTO Members regarding such negotiations.”⁷¹ Different countries have divergent competition laws based on different approaches to competition policy; for example, EC laws are more oriented to opening up markets, while U.S. laws have as their objective efficiency and consumer protection. Furthermore, there

⁶⁸ *Ibid.*, Part IV, s. B at para. 4.

⁶⁹ *Ibid.*, Part IV, s. E at para. 8.

⁷⁰ This Working Group had started to report its conducted research each year beginning 1997 to 2003. See online: WTO <http://www.wto.org/english/tratop_e/comp_e/comp_e.htm>.

⁷¹ WTO, Press Release, WT/MIN(96)/DEC, “Singapore Ministerial Declaration: Adopted on 13 December 1996” (18 December 1996) at para. 20, online: WTO <http://www.wto.org/english/news_e/pres96_e/wtodec.htm>.

are gaps in competition laws and in their enforcement between developed and developing countries.

International competition law has gained recognition because of its importance during the 2001 Doha Ministerial Conference. Participants of the Doha Ministerial Meeting showed their readiness for commitments leading to an international agreement. The Declaration states:

Recognizing the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 24, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations.⁷²

Furthermore, in accord with paragraph 24 of the Declaration, member countries recognize the needs of developing and least-developed countries for support for technical assistance and capacity building in this area. They decided to cooperate with international organizations and other regional organizations to address the problem.

An analysis of the Singapore and Doha Declarations on competition policies reveals that member countries are interested in regulating the issue at the WTO level. As we saw above, participants at the Singapore Meeting only decided to launch a working group to study the interaction between trade and competition policies after members of the WTO reached an explicit consensus regarding such negotiations. At the Doha meeting, participants recognized that a multilateral framework would enhance the contribution of competition policy to international trade and development. Policy ministers thus decided on further steps in this area.

Participants agreed that negotiation commitments would take place after the Fifth Session of the Ministerial Conference (2003), on the basis of an explicit consensus on modalities for negotiations, according to the Doha Declaration. However, the 2003 Ministerial Conference, held in Cancun, did not result in consensus; the General Council participated in a post-Cancun meeting on 1 August 2004 where they concluded that competition policy issues would not form part of the work program of the Doha Round and no negotiations would take place during this round.⁷³

⁷² *Doha WTO Ministerial 2001: Ministerial Declaration*, WTO Doc. WT/MIN(01)/DEC/1 (20 November 2001) at para. 23, online: WTO <http://www.wto.org/English/thewto_e/minist_e/min01_e/mindecl_e.htm>.

⁷³ *Doha Work Programme: Decision Adopted by the General Council on 1 August 2004*, WTO Doc. WT/L/579, (2 August 2004), online: WTO

On 1 August 2004, the General Council decided on competition issues, concluding that it was too early to talk about the problem of the exchange of information in international antitrust cases within the framework of WTO. However, this does not mean that the issue antitrust agencies exchanging information has become less important for international trade after so many years of discussions and research on the issue.

It is important for the sovereign members of the WTO to come to a consensus in order to facilitate negotiations, however, without filling the existing gaps in competition laws and enforcement mechanisms, it is difficult to move forward. Making the competition policies of developed countries more similar to each other is an important step in starting to negotiate the modalities of global competition policy.

Although, consensus has not been reached initially, according to paragraph 25 of the Doha Declaration, the following issues were clarified for the Working Group: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. Including hard core cartels as one area of further clarification will more likely raise the issue of the exchange of information in order to restrict international cartels successfully in future negotiations.

The reason no consensus was reached is cause for many concerns, most of which belong to developing countries. These concerns should be paid relevant attention, given the huge number of developing countries among the members of the WTO. If an international agreement in the area of antitrust law is to be reached, it will have to be binding on all members. Other issues include:

[T]he concern of many developing countries that negotiating a multilateral competition framework at the WTO, at a time when many did not feel sufficiently prepared to enter into negotiations with highly expert counterparts, and the wish to maintain sufficient “policy space” in order to exempt certain industries from powerful and large external competitors, were undoubtedly the major sources of reluctance to launch negotiations on this and other Singapore issues in Cancun.⁷⁴

<http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm>.

⁷⁴ Commission on Investment, Technology and Related Financial Issues, *United Nations Conference on Trade and Development: Preliminary Assessment of the Set,*

Scarcity of resources and inexperienced personnel in least developed countries who understand competition policy issues are some of the technical issues being addressed in developing countries.

OBSTACLES TO THE EXCHANGE OF INFORMATION AND INTERNATIONAL AGREEMENTS

THE EXCHANGE OF INFORMATION IS CRUCIAL FOR the finalization of cases with international dimensions, and for the establishment of criminal or civil responsibility. There are several obstacles hampering the exchange of information between competition agencies of different countries.

One concern about the communication of confidential information, whether through bilateral or multilateral agreements, is that the interests of smaller and developing countries will be imbalanced in favour of developed countries.⁷⁵ These developed countries include the U.S. and members of the European Community with strict antitrust laws, experience, and sufficient financial and (expert) staff resources. These developed countries are more likely to make more requests than smaller or developing countries. In my opinion, the concerns of smaller and developing countries depend on the size of their economies, and whether they are open or closed. A country like the U.S., for example, with one of the biggest economies, a great number of production enterprises, and large distribution and sales, naturally gives rise to multiple incidents of anti-competitive practices among participants in the world market. This is the effect of an open and free market economy.

However, Zanettin, argues that the imbalanced advantage of the most developed countries like the U.S. will disappear in the long term as countries sign international treaties on information exchange, providing these agreements foster the international enforcement of their signatories' antitrust laws.⁷⁶ Still, if smaller countries with smaller economies have fewer incidents of anti-competitive practices, such as cartelization, price fixing regimes, monopolization, the creation of private barriers to market entry, allocation of customers, and tying sales with a limited number of distributors, then it is clearly understandable that countries with big economies would make more requests for exchanges of information.

UNCTAD, 6th Sess., UN Doc. TD/B/COM.2/CLP/45 (2004) at para. 35, online: UNCTAD <http://www.unctad.org/en/docs/c2clpd45_en.pdf>.

⁷⁵ *Supra* note 13 at 131.

⁷⁶ *Ibid.* at 132.

Another objection to the formation of international agreements for the exchange of information is the adversarial and litigious nature of antitrust laws in a number of countries.⁷⁷ These countries have advanced antitrust laws, sufficient experience and resources, especially in the U.S., where the prosecution of antitrust cases is characterized by confrontation rather than cooperation between antitrust agencies and firms. For example, Section 1 of the *Sherman Act* expresses the illegality of conspiracy in restraint of commerce and as a punishment, sets a fine and imprisonment.⁷⁸ Furthermore, a private suit can result in treble damages to be paid to the suing party.⁷⁹ Such penalties are not relevant to European countries and developing countries where antitrust laws have been adopted and enforced. In my opinion, such different approaches to punishing anti-competitive practices by firms also depend on the culture of interaction between law enforcement agencies and private business companies. Countries have different political, cultural, and historical backgrounds, which results in divergent attitudes towards economic power, freedom of contract, freedom of trade, efficiency, fairness, equity and welfare. For example:

. . . [C]ultural differences, such as the common law system and the abstract codification in the West, U.S. extraterritorial jurisdiction, Japanese extra-legal measures, Chinese “ritus-prudence” within a “spiritual civilization”, Islamic principles of social justice, equality and modesty or the economies in transitions’ loss of social security are highly relevant to any initiative for the negotiation of an international competition law agreement.⁸⁰

Most western European countries prosecute businesses’ anti-competitive practices as civil and administrative liabilities, whereas the U.S. and Canada have criminal sanctions.⁸¹

⁷⁷ *Ibid.* at 134.

⁷⁸ *Sherman Act*, 15 U.S.C., § 1: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.”

⁷⁹ *Supra* note 38 at 15.

⁸⁰ *Supra* note 8 at 46.

⁸¹ *Ibid.* at 47.

Another concern is the use of the communicated information for other purposes; it can get into the hands of other law enforcement agencies or to other private, treble damage litigants.⁸² In fact, transferred information could be used in other cases or could reveal new infringements that result in criminal indictments.⁸³ This has not produced a case in practice yet, according to the Antitrust Division of the U.S. Department of Justice.⁸⁴ The fear that transferred confidential information containing trade secrets may leak into the hands of state-owned companies also falls under these concerns.

OPTIONS FOR THE COMMUNICATION OF INFORMATION: ONE INTERNATIONAL AGREEMENT VS. MULTIPLE BILATERAL AND REGIONAL AGREEMENTS

CURRENTLY, INFORMATION EXCHANGE IS GENERALLY a low priority. Although addressed at regional and bilateral levels by means of cooperation agreements in antitrust matters, an exchange of information clause in such agreements is subject to national laws on confidentiality of information. This means that sharing investigation documents, witness testimonies, and other kinds of evidences between antitrust agencies is not allowed. As mentioned earlier, this is because of the obligation of professional secrecy and prohibitions to communicate information under the laws of the U.S. and Canada, except their domestic agencies.

This requires better solutions to address the problem effectively. There are three possible options: bilateral agreements, regional agreements, and multilateral agreements.

Bilateral agreements have several limitations. First, bilateral agreements on antitrust actions make the exchange of information subject to national laws on confidentiality. For example, the U.S.-EC antitrust cooperation agreement of 1998 states, in Article 7, that nothing in the agreement shall be interpreted “as requiring any change in the laws” of both parties.⁸⁵

Another example is Article X(1) of the agreement between Canada and Mexico:

⁸² U.S., Department of Justice, International Competition Policy Advisory Committee, *Minutes of Meeting* (held on 11 September 1998), online: USDOJ <<http://www.usdoj.gov/atricpac/2046.htm>> at 65.

⁸³ *Supra* note 13 at 137.

⁸⁴ *Supra* note 8 at 79.

⁸⁵ *Agreement Between the Government of the United States of America and the European Communities on the Application of the Positive Comity Principles in the Enforcement of Their Competition Laws*, June 1998, online: USDOJ <<http://www.usdoj.gov/atricpublic/international/docs/1781.htm>>.

Notwithstanding any other provision of this Agreement, neither Party is required to communicate information to the other Party if such communication is prohibited by the laws of the Party possessing the information or would be incompatible with that Party's important interests.⁸⁶

The laws on confidentiality in different countries indicate that domestic laws prohibit disclosure of information by antitrust agencies to any other foreign agencies.

Bilateral agreements are available only to the countries which have such agreements; therefore, in order to address the worldwide problem sufficiently, all other countries must conclude such agreements with each other, which is difficult. However, even countries with the most advanced antitrust laws, practices, and resources, like Canada and the U.S., have few bilateral agreements. For example, Canada has seven and the U.S. has eight.⁸⁷

Considering the fact that most developing countries do not have such bilateral agreements, almost all prosecuted cases of international anticompetitive conduct involve developed countries, even though the exchange of information is not allowed among such countries. In addition, multinational companies, with the goal of profit maximization, tend to operate their businesses in countries where there are no antitrust laws or enforcement is weak due to a lack of trained personnel, scarcity of financial resources, lack of experience and government corruption. Furthermore, according to reports made in the 2004 OECD conference, the public and policymakers in some developing countries think that merger control may harm investment; however, in the long run, not preventing anti-competitive mergers is more likely to inhibit new investment.⁸⁸

⁸⁶ *Agreement between the Government of Canada and the Government of the United Mexican States Regarding the Application of their Competition Laws*, Canada and Mexico, 2001, online: Competition Bureau Canada <<http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1594&lg=e-X>>.

⁸⁷ For a list of Canada's bilateral agreements, see "International Agreements," online: Competition Bureau of Canada <<http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=141&lg=e>>. For a list of U.S. bilateral agreements, see "Antitrust Cooperation Agreements," online: US Department of Justice <http://www.usdoj.gov/atr/public/international/int_arrangements.htm>.

⁸⁸ OECD, Global Forum on Competition, *Preventing Market Abuses and Promoting Economic Efficiency, Growth and Opportunity*, 12-13 February 2004 at 72, online: OECD <<http://www.oecd.org/dataoecd/13/42/27892500.pdf>>.

Despite these limitations, cooperation through bilateral agreements is still the most effective way to address the problem, when anticompetitive activity occurs only within these two parties of the bilateral agreement. This is because countries with intense and regular relations with each other in business, legal and social issues, are more likely to be reliable partners. This can lead to reducing the obstacles usually found in international relations, such as contradictions in public policy, security and national interests. As a result, countries can cooperate in prosecuting international anticompetitive activities more willingly because it is in the mutual interests of both parties. From that point of view, multilateral agreements with binding rules cannot be based on common confidence; and a requested country may rely less on a requesting country to transmit confidential information, by using the excuse for not communicating that information under the cover of “inconsistency with its public order.” This is especially the case between antitrust agencies of, for example, China and the U.S. or Russia and the U.S.

Regional agreements are another option when addressing the problem of the exchange of information in antitrust cases. Initially, it might seem that international cartelization and mergers that monopolize markets tend to occur more often within a region, and that negotiation of an agreement that allows exchange of information is easier than that of the multilateral level, for example within the framework of the WTO.

However, this is not always the case. For example, in research prepared by the World Bank, international cartelization cases within NAFTA show that among 39 international cartel cases prosecuted by the U.S., only seven involved Canadian and Mexican companies.⁸⁹ This undermines the assumption that international cartelization tends to occur more within a region than globally.

Paragraph one of Article 1501 of NAFTA imposes an obligation on parties to take appropriate action to fight against anti-competitive business conduct within their jurisdictions; paragraph two states that parties shall cooperate on issues of competition law enforcement policy, including the exchange of information.⁹⁰ However, this vague statement

⁸⁹ Margaret Levenstein and Valerie Suslow, “Private International Cartels and Their Effect on Developing Countries” (Background paper for the World Bank’s *World Development Report 2001*, January 2001) at 6-7 & Table 1 at 63-65, online: World Bank

<<http://www.worldbank.org/wdr/2001/bkgroundpapers/levenstein.pdf>>.

⁹⁰ *North American Free Trade Agreement Between the Government of Canada, Government of the Mexico and the Government of the United States*, 17 December 1992, Can. T.S. 1994 No.2, art. 1501, online: Foreign Affairs and International Trade Canada

<http://www.dfait-maeci.gc.ca/nafta-alena/chap15-en.asp?#article_1501>.

neither clarifies how to deal with domestic confidentiality laws nor indicates the procedure for such exchange of information. As a result, no international antitrust enforcement cases, based on the rules of NAFTA, have been reported. All member countries use their bilateral agreements in antitrust and in criminal matters to the extent that is permitted for the exchange of information, which means the exchange of non-confidential or publicly available information. The only regional agreement which permits the exchange of confidential information in the area of antitrust law is the European Community agreement.⁹¹

Regulation (EC) No 1/2003 on the implementation of rules on competition laid down in Articles 81 and 82 of the Treaty of Rome was adopted on 16 December 2002.⁹² According to Article 12 of that Regulation, the Commission and competition authorities of member states have the power to provide one another with confidential information. This is an exceptional agreement, based on their level of integration.

Before assessing the advantages and disadvantages of an international (multilateral) agreement, especially for information sharing between antitrust agencies, brief background information is necessary. There have been several attempts to negotiate an international agreement on antitrust issues.

One of the first attempts was initiated within the International Trade Organization (ITO). A whole chapter (V) was devoted to the issue of international competition rules, according to the 1948 *Havana Charter*.⁹³ Article 46 obliges Members to “. . . [t]ake appropriate measures against business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control . . . ”⁹⁴

Article 48 regulates the investigation procedure. It states that the ITO will serve as a supranational dispute settlement body, where cases affecting international trade are heard based on the information obligatorily provided by parties to the dispute. Once the case is decided, the ITO can request that concerned members take appropriate remedial action, and may also recommend remedial measures to be carried out according to the laws of concerned member countries.

⁹¹ *Supra* note 32.

⁹² EC, *Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*, [2003] O.J.L. 46/1, online: EUROPA <http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/1_001/1_00120030104en00010025.pdf>.

⁹³ *Havana Charter for International Trade Organization*, online: WTO <http://www.wto.org/English/docs_e/legal_e/havana_e.pdf>.

⁹⁴ *Ibid.*, art. 46.

In 1993, the *Draft International Antitrust Code*, known as the *Munich Code*, was proposed by antitrust scholars.⁹⁵ It recommended that certain antitrust law rules be implemented. The task of supervising its implementation falls under the International Antitrust Authority, which “can sue national authorities before national courts, or before an International Antitrust Panel” if members violate obligations under the agreement.⁹⁶

Several other members of academia have proposed an international agreement under the aegis of the WTO. For example, Professor F.M. Scherer has proposed establishing an international agreement under the guidance of the WTO.⁹⁷ He also proposed a dispute settlement body, which would be empowered to prosecute international cartels, international anti-competitive mergers, and other anti-competitive activities with cross-border effects. There is another group of academics that propose the use of existing WTO agreements to address the issue of international competition. Supporters of this initiative are Robert E. Hudec, Spencer Weber Waller, and others.⁹⁸ For example, Hudec argues that the WTO is capable of dealing with competition issues; a recent Reference Paper in the Telecommunication Agreement proves this. Hudec also argues that the WTO needs to continue its efforts towards international competition rules patiently, for even the WTO’s best remedies raise serious problems.⁹⁹ Existing non-discrimination principles could be applied to anticompetitive activities. For example, exclusive distribution agreements could be challenged under the national treatment principle since they are foreclosing domestic markets for foreign enterprises. Supporters of the WTO approach also propose to reform certain existing WTO agreements to make them more applicable to competition issues, along with trade issues.

There is an important initiative on international agreements by the EC. The importance of this initiative is such that the international community proceeded with actual steps on this proposal. These steps started after and in accordance with the 1995 Report of the Group of Experts. The report proposes the reinforcement of existing bilateral antitrust cooperation, the necessity of the adoption of a multilateral

⁹⁵ Roger Zäch, ed. *Towards WTO Competition Rules: Key Issues and Comments on the WTO Report (1998) on Trade and Competition*, (London: Kluwer Law International, 1999) at V.

⁹⁶ *Supra* note 13 at 234.

⁹⁷ *Ibid.* at 235.

⁹⁸ Robert E. Hudec, “A WTO Perspective on Private Anti-Competitive Behavior in World Markets” (2000) 34 *New England Law Review* 1, online: NESL <<http://www.nesl.edu/lawrev/vol34/1/HUDEDEC.PDF>>. See also Weinrauch, *supra* note 8 at 127-28.

⁹⁹ Robert E. Hudec, *ibid.* at 100.

agreement (possibly within the framework of the WTO), rules of which would have to be implemented into the national legislations, and a proposal for a dispute settlement mechanism.¹⁰⁰

With the call of the EC, a working group on the interaction between trade and competition policies was launched at the WTO Singapore Ministerial Conference.¹⁰¹ Based on the recommendations of the Group of Experts, the EC made its first proposal to the members of the WTO in 1999, which was unsuccessful. Later on, the EC offered a more modest second proposal. According to this proposal the scope of the WTO negotiations should be confined to three issues at this stage:

[F]irstly, agreement on core principles of domestic competition law and policy (transparency of rules and regulations; the removal of nationality-based discrimination between firms based on their nationality; provision of due process and recourse to judicial procedures; prohibition of hard core cartels, bid-rigging etc...); secondly, basic cooperation modalities should be put in place and; thirdly, close attention should be paid to ensuring that a development dimension is an integral part of any multilateral framework on competition. On this last point, the introduction of competition law regimes in the least-developed countries would have to be of a progressive and flexible nature.¹⁰²

It proposed to establish a standing WTO Commission on Competition Law Policy to carry on with “educational and analytical work on more complex competition issues . . . build consensus for further progress and those encourage countries which have yet to introduce competition policies to do so.”¹⁰³

This section is limited to assessing generally the advantages and disadvantages of international agreements, in comparison to bilateral and regional agreements. Approaches based on the modalities and

¹⁰⁰ Mario Monti, “Cooperation Between Competition Authorities – a Vision for the Future” (Speech delivered at The Japan Foundation Conference, Washington DC, 23 June 2000), online: EU

<<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/00/234&format=HTML&aged=0&language=EN&guiLanguage=en>>.

¹⁰¹ WTO, Press Release, WTO Doc. WT/MIN(96)/DEC, “World Trade Organization: Ministerial Conference, Singapore, 9-13 December 1996” (13 December 1996) at para. 20, online: WTO

<http://www.wto.org/english/news_e/pres96_e/wtodec.htm>.

¹⁰² *Supra* note 100.

¹⁰³ *Ibid.*

nature of such agreements, for example, a minimum rules option, the TRIPS approach option, and a plurilateral agreement option are beyond the scope of this chapter.

Negotiating an international antitrust agreement has a number of advantages over bilateral and regional agreements. Such negotiation would most likely take place within the WTO framework, which “provides a well-established institutional framework, with almost universal membership.”¹⁰⁴ The problem for most developing countries is that they do not have bilateral agreements in antitrust matters. This can be resolved by the WTO agreement. Most developing countries are familiar with the WTO and have permanent delegations in Geneva, which may contribute to making the WTO option more acceptable and less costly for them.¹⁰⁵

Furthermore, many concerns related to the confidentiality of information find their best solution within the international agreement option. The dispute settlement body of the WTO antitrust agreement can ensure neutrality of the investigation body and its investigation procedure; it can also ensure confidential information would be kept in the hands of an independent body.

An international agreement is binding, unlike existing ‘soft’ cooperation options. It can be argued that, in the current situation where many developing and least developed countries do not have antitrust laws, adopting an agreement would cause frictions related to fulfillment of obligations under the new agreement. Furthermore, it seems logical to proceed first with national legislation, then regional arrangements, and finally with a multilateral agreement. However, law enactment and effective enforcement are slow processes; some experts have suggested “that adopting a MCF [multilateral competition framework] would induce many countries to give the competition issue higher domestic priority, which might accelerate the adoption of domestic legislation and effectively control anti-competitive practices.”¹⁰⁶ Furthermore, “the urgency of the matter is shown by a study . . . which estimates the annual loss for developing countries from a few known international cartels to be about 1.7 per cent of these countries’ GDP, and, as the author indicates, this estimate is probably conservative, given that it covers data from only 14 of 39 known international cartels.”¹⁰⁷

¹⁰⁴ *Supra* note 13 at 240.

¹⁰⁵ *Ibid.* at 240.

¹⁰⁶ UNCTAD, *Closer Multilateral Cooperation on Competition Policy: The Development Dimension Consolidated Report on issues discussed during the Panama, Tunis, Hong Kong and Odessa Regional Post-Doha Seminars on Competition Policy held from 21 March to 26 April 2002* at 17, online: UNCTAD <<http://r0.unctad.org/en/subsites/cpolicy/gvaJuly/docs/DohaFinal-en.pdf>>.

¹⁰⁷ *Ibid.* at 16.

Furthermore, according to paragraph 24 of the Doha Declaration, ministers recognized the needs of developing and least-developed countries for enhanced support for technical assistance. They decided to address the problem with intergovernmental organizations, including UNCTAD (*i.e.*, one of its activities is to help draft competition laws), and through regional and bilateral channels. Therefore, binding international agreements can contribute to the enactment and maintenance of sound competition policy for developing countries.

However, there are several disadvantages to adopting international antitrust agreement in this area. First, existing substantive differences in competition laws make it difficult to negotiate an international agreement. For example, U.S. and Canadian antitrust laws impose imprisonment as a punishment for cartelization, whereas almost all European countries' antitrust laws are limited to civil and administrative liabilities. Furthermore, U.S. antitrust laws are more "efficiency" oriented, while EC laws are more concerned with market integration, for example, in the *General Electric/Honeywell* merger case, the U.S. had cleared the merger but the EC blocked it.¹⁰⁸ The U.S. defended this approach because they preferred case-by-case analysis and bilateral cooperation in antitrust law.¹⁰⁹ Furthermore, they did not want to transfer dispute settlement power to any other organization or third party. There are many differences in countries' antitrust laws because of political, economic, social and cultural policies; however, most countries' antitrust laws generally prohibit anti-competitive horizontal and vertical agreements and abuses of dominant positions. Furthermore, this paper suggests that the enforcement of these laws is an issue which suggests that countries have totally divergent laws even though they prohibit the same kinds of anti-competitive activities. For example, the U.S. enforces their antitrust laws vigorously, and to do so, they adopted many guidelines to investigate successfully anti-competitive activities, including international anti-competitive practices, merger reviews, and price discrimination. Assuming that national laws are divergent may be a wrong assumption because antitrust laws of many countries contain the same rules against certain anticompetitive acts. Thus, national antitrust laws are not totally different from each other.

For some developing countries, adopting an international antitrust agreement may put them at a disadvantage because they are concerned

¹⁰⁸ *General Electric/Honeywell*, Case No. COMP/M.2220, Commission decision of 3 July 2001. See also Thomas B. Leary, "A Comment on Merger Enforcement in the United States and in the European Union," Comment before the Transatlantic Business Dialogue Principals Meeting (11 October 2001), online: FTC <<http://www.ftc.gov/speeches/leary/tabd010111.htm>>.

¹⁰⁹ *Supra* note 8 at 152.

about keeping their “policy space”¹¹⁰ in the area of antitrust law. For example, countries want to exclude national export cartels from competition laws in order to develop their own export potential and protect themselves from foreign multinationals. By giving exclusive rights to some domestic monopolies and closing markets in order to protect their own economy from foreign competition, these countries may suffer both in the long and short term. In the long term, for example, not preventing anti-competitive mergers will inhibit new investments. In the short term, countries in transition and developing countries do not have access to finance for investment, and financial institutions in these countries have limited resources to finance businesses. Furthermore, they do not have relevant skills for a market economy, and they need new technology, skills, and practice in order to allocate resources properly and work efficiently.

This is what is happening, for example, in Uzbekistan. It is a former Soviet Union country and now, after independence, it is in transition from a government-planned economy into a free market economy. It is a closed economy with an average 70 percent tariff on imports, which means that there is limited foreign trade. At the same time, its financial institutions are limited, and its business members do not have relevant skills or experience implementing new free market principles.

Although it is difficult to predict the effects of any international agreement, what is obvious is that its advantages may outweigh its disadvantages. Moreover, international agreements are more beneficial than current bilateral and regional agreements, in terms of the number of participants and anti-competitive activity that is international in its scope, both in developing and developed countries.

CONCLUSION

THE MATERIAL ON THIS TOPIC IS LIMITED, both from primary and secondary sources. The issue of the exchange of information to prosecute international anti-competitive activities is one that is gaining more importance as international cartelization, monopolization, mergers, exclusive dealing arrangements, and other international anti-competitive practices are increasing in number.

The need for evidence and other information in order to prosecute international cartels, mergers, monopolies, domestic export cartels, and exclusive distribution agreements (called vertical market restraints) is essential to put an end to anti-competitive activities. Putting an end to them will result in several benefits: opening up markets to international

¹¹⁰ UNCTAD TBD, 6th Sess., UN Doc. TD/B/COM.2/CLP/45 (2004) at para. 35, online: UNCTAD <http://www.unctad.org/en/docs/c2clpd45_en.pdf>.

trade which were blocked by private barriers; allocating resources for production; cheaper prices and more choices for consumers; more opportunities for medium and small size businesses to compete and develop; and overall development of the economy of a given country.

The problem of the exchange of information has been successfully overcome in other areas such as securities and tax control; for example, in the U.S., after the *Securities Exchange Act*¹¹¹ was reformed in 1995, 17 bilateral agreements had been concluded under it, allowing for the exchange of information.¹¹² The exchange of information in antitrust law is also approaching that stage of development in the U.S., based on its *International Antitrust Enforcement Assistance Act*,¹¹³ which allows the exchange of information with foreign authorities. However, it is too early to assess its results because the U.S. has only concluded a bilateral agreement with Australia.

Both bilateral and regional agreements are hampered by domestic confidentiality of information laws. International cartels, *i.e.*, several producers combining large market shares globally to raise prices and limit output, are one of the most harmful and dangerous anti-competitive practices. According to one OECD study, much of the evidence needed to prove conspiracy (*e.g.*, travel and telephone records) is not commercially sensitive in the way that trade secrets, business plans, and other documents are in merger cases.¹¹⁴ In countries where fighting international anti-competitive activities of businesses has not become one of the important policy issues, the issue was neglected. The situation is different, though, in the EC, the U.S., and Australia. These countries have understood the importance of the issue and are raising it to the agenda of international organizations, in order to address this problem globally.

Most concerns about negotiating a multilateral agreement are not based on any thorough study of the issue. A concern in smaller and developing countries, that developed countries will request information more than they do, causes an imbalance for advantages from the international agreement; as a matter of fact, international anticompetitive conduct affects developing countries significantly. The annual loss for developing countries from a few known international cartels is about 1.7 percent of their GDPs; "this estimate is probably conservative, given that it covers data from only 14 of 39 known international cartels."¹¹⁵ Therefore, it would be in the interests of

¹¹¹ *Securities Exchange Act* of 1934 (48 Stat. 881, 15 U.S.C. 78a-78kk).

¹¹² *Supra* note 13 at 130.

¹¹³ *Supra* note 19.

¹¹⁴ *Supra* note 88 at 68.

¹¹⁵ *Supra* note 106 at 16.

developing countries to address the problem by signing international agreements on antitrust law.

If a dispute settlement body (DSB) is independent from the parties — for example, DSB within some international organizations — this would offer a better solution among existing ones. Without independent DSBs, many concerns (including using transferred information for other cases, or to transfer to another agency, or to make available to private civil litigants) are likely to be obstacle joint investigations.

The issue of international anti-competitive activities was raised in 1949 by Clair Wilcox, one drafter of the Havana Charter (International Trade Organization). She stated, “The efforts to expand trade by reducing tariffs and eliminating quotas might well be defeated if no actions were taken to prevent the erection of private tariffs and quota systems by international cartels.”¹¹⁶ It has been recognized by best practices and recommendations of the OECD, UNCTAD and other organizations that “effective application of competition policy plays a vital role in promoting world trade by ensuring dynamic national markets and encouraging the lowering or reducing of entry barriers to imports.”¹¹⁷ It was also recognized that the continued growth of international business activities results in a corresponding increase in anti-competitive practices in one or more countries, which may adversely affect the markets and customers in other countries. Therefore, more active cooperation in the area of antitrust law, especially multilateral cooperation, is needed to address effectively the problem of the exchange of information.

¹¹⁶ *Supra* note 8 at 15.

¹¹⁷ *Supra* note 60.