



FACULTY OF LAW
University of Lund

Daniel Nilsson

The Extraterritorial Application
of EU and US Competition Laws:
Conflicts and Solutions

Master thesis
20 points

Advisor: Katarina Olsson

Competition Law

Fall 2002

Contents

SUMMARY	1
ABBREVIATIONS	3
1 INTRODUCTION	4
1.1 Subject and Purpose	4
1.2 Method	5
1.3 Outline	5
2 COMPETITION LAW	7
2.1 Introduction	7
2.2 The Economic Objectives of Extraterritorial Competition Law	7
2.2.1 The Economic Objective of Competition Laws	7
2.2.2 The Economic Objective of Extraterritorial Jurisdiction	8
2.3 Extraterritorial Jurisdiction	8
2.3.1 Introduction	8
2.3.2 Extraterritorial Jurisdiction in Competition Law Issues	9
2.3.3 Public International Law: Legislative Jurisdiction	10
2.3.3.1 General	10
2.3.3.2 The European Perspective	11
2.3.3.3 The American Perspective	11
2.3.4 Public International Law: Enforcement Jurisdiction	12
2.4 Extraterritoriality in EU Competition Law	12
2.4.1 Introduction	12
2.4.2 Conduct by Foreign Firms Affecting EU Domestic Markets	13
2.4.3 Conduct by Foreign Firms Affecting EU Export Markets	15
2.4.4 The European Perspective of Enforcement Jurisdiction with Respect to Competition Law	15
2.4.5 Summary of EU Extraterritorial Application of Competition Regulations	16
2.5 Extraterritoriality in US Antitrust Law	16
2.5.1 Introduction	16
2.5.2 Conduct by Foreign Firms Affecting US Domestic Markets	17
2.5.2.1 Before the Hartford Fire Case	17
2.5.2.2 The Hartford Fire Case	18
2.5.3 Conduct by Foreign Firms Affecting US Export Markets	18
2.5.4 The American Perspective of Enforcement Jurisdiction with Respect to Competition Law	19
2.5.5 Summary of US Extraterritorial Antitrust Application	20
2.6 Comparative Analysis of the Extraterritorial Application of Competition Laws in the EU and the US	21

3	THE WORLD TRADE ORGANIZATION	22
3.1	Introduction and Historical Overview	22
3.2	The objective of the WTO	22
3.3	Market Access Through the WTO	23
3.3.1	General	23
3.3.2	GATT Obligations	23
3.3.3	Dispute Settlement	24
3.3.4	The Kodak-Fuji case	25
3.4	The Situations Where the WTO is an Option for Competition Issues	27
4	ANALYSIS OF THE INTERNATIONAL COMPETITION REGULATORY STRUCTURE	29
4.1	Introduction	29
4.2	Efficiency of the Present Regulation Structure	29
4.2.1	Definitions and Problems	29
4.2.2	International Conflict of Competition Laws	30
4.2.3	Are Conflicts Inefficient?	32
4.3	How to Make the Regulation Structure More Efficient	32
4.3.1	General	32
4.3.2	Competition Regulations' Conformity with Public International Law	33
4.3.3	Conflicts Within the Boundaries of Public International Law	34
4.3.4	Cooperation Agreements	34
4.3.4.1	General	34
4.3.4.2	Bilateral Agreement Between EU and the US	35
4.3.4.3	Multilateral Agreements	35
4.4	Competition Regulations Within the WTO Framework	36
4.4.1	General	36
4.4.2	Effectiveness of a WTO Competition Regulation	36
4.5	Concluding Analysis	37
5	CONCLUSION	40
	BIBLIOGRAPHY	41
	TABLE OF CASES	46

Summary

Because corporations trade on the international markets and the governments regulate on domestic markets, conflicts between government regulations are difficult to avoid. Several authors have introduced different ways to avoid this type of conflict. One alternative, which is also proposed by the EU Commissioner Monti, is the inclusion of minimum regulation in the World Trade Organization, by which all member nations are required to implement this minimum standard of competition regulations. This is a proposition that I, in this paper, do not favor. In this paper I define the problems associated with these conflicts. I will also bring forth a possible solution, which would be more effective and less intrusive on the members' sovereignty than the one proposed by the EU.

Extraterritorial jurisdiction can be divided into legislative and enforcement jurisdiction. The former deals with the extent the legislator claims jurisdiction with the specific law and the latter deals with the extent the government can enforce its decisions concerning investigations and other decisions. This paper focuses on legislative jurisdiction.

The EU competition regulations are sometimes applied extraterritorially. There are two methods for doing so: the *group economic unit doctrine* and the *effects doctrine*. The *group economic unit doctrine* is a method for piercing through the corporate veil by attributing the actions of a subsidiary in the EU to the non-EU controlling corporation. The *effects doctrine* is a method for applying jurisdiction on conduct abroad, affecting the common market. The limits to the *effects doctrine* as used in the EU, is at present unclear. The limits depend on whether the *Woodpulp* case or the *Gencor* case has precedent.

The US antitrust regulations base the extraterritorial application on the *effects doctrine*. This is limited to when the effect is intended, substantial and foreseeable. It is however, unclear to what extent comity considerations should be practiced by the courts when determining the extraterritorial reach of the regulations.

The GATT does not have any express competition regulations. The principle of national treatment applies to competition regulations. The national treatment principle means that the regulations in a country should be the same for foreign products that have cleared customs as for domestic products. The *Kodak-Fuji* case dealt with anti-competitive conduct and the GATT. However the opinion is not conclusive. For example it is unclear whether it is a GATT violation in a situation where the government tolerate anti-competitive behavior by domestic firms in violation of the domestic competition regulation.

When two or more countries exercise jurisdiction on the same company for the same conduct, conflicting remedies might be demanded. This is a conflict of competition regulations and has occurred in among others the Boeing- McDonnell-Douglas merger. It could be, as in that case, one country clearing the merger and the other demanding concessions and this leads to conflicts.

A solution to the problem is proposed in this paper. If extraterritorial jurisdiction would only be claimed when there is an economic efficiency goal behind the regulation, it will not lead to conflicts, since the economic efficiency goal is common to most nations' competition laws. A problem occurs when the meaning of economic efficiency is unclear. The World Trade Organization (WTO) would be a possible forum for nations to agree upon principles which should be regarded as "economic efficient", and these should be the fundamental principles of all competition regulations.

Another problem that still could occur is when one jurisdiction is claiming economic efficiency goals and the other is claiming non-economic efficiency goals. This problem will be solved if countries claim extraterritorial jurisdiction for non-economic efficiency goals only within the boundaries of the public international law. This way conflicts are minimized. Above this, when there is a situation, where one nation has territorially claimed non-economic efficiency regulation, which is in conflict with an extraterritorially claimed economic efficiency claim, the latter shall prevail above the former.

In essence my proposition will be a way for countries to indirectly harmonize its competition regulations, without transferring its sovereignty. The most difficult thing that the nations will have to accept is the economic efficiency goal's dominance over non-economic efficiency goals.

Abbreviations

CFI	Court of First Instance of European Communities
DSU	The Dispute Settlement Understanding of the World Trade Organization
DOJ	United States Department of Justice
EC	The Treaty Establishing the European Community
EU	The European Union
ECJ	The Court of Justice of the European Communities
FTC	United States Federal Trade Commission
GATT	General Agreement on Tariffs and Trade
NAFTA	North American Free Trade Agreement
USTR	United States Trade Representative
WTO	World Trade Organization

1 Introduction

1.1 Subject and Purpose

We all constantly hear about globalization and internationalization. The world is becoming more integrated and countries depend on each other and on international organizations to watch over different interests. Corporations are also becoming larger and multinational, 50% of all US regulated mergers have an impact on another country.¹ The GATT² is established and is reducing tariffs and other public trade barriers or regulations blocking market access. Private trade barriers have to a large degree been left outside of the GATT and among these are competition regulations. EU Commissioner Monti suggests that competition regulations be agreed upon on a multilateral level and this would most likely be within the WTO framework.³ This agreement should according to the wishes of the EU contain provisions of minimum standard of regulation for all WTO countries.⁴ A substantial discussion about this has taken place in legal and economic literature for many years and even within the WTO organization.⁵ The US Department of Justice is not in favor of a multilateral agreement on competition law because it would be impossible for all involved nations to agree on such an agreement. The US prefers bilateral agreements.⁶ There is no doubt that anti-competitive conduct can affect several nations and the cures could be different in all the effected countries. A controversial issue is deciding which is the best way to regulate anti-competitive conduct affecting several countries.

In this essay I will try to shed some light on the convergence and divergence of competition law and international trade law. The WTO/GATT focus on trade liberalization through market access and competition law protects the interests of consumers and competitors. Can these regulations exist without conflicting each other, or are they actually stepping in the same direction? I will focus on the extraterritorial jurisdiction of competition law in the EU

¹ Final Report of the International Competition Advisory Committee (2000), at 47; the report also shows that 1/5 of all mergers involved an acquisition of a foreign corporation of a foreign corporation acquiring a US corporation, at 47.

² General Agreement on Tariffs and Trade , opened for signature Oct. 30 1947, 55 U.N.T.S. 187.

³ Mario Monti European Commissioner for Competition Policy, "A Global Competition Policy ?" European Competition Day Copenhagen, 17 September 2002.

⁴ The Economist, July 4, 1998, "The Borders of Competition".

⁵ Several studies produced by the WTO exist, the most recent is: Working Group on the Interaction between Trade and Competition Policy, "Core Principles, Including Transparency, Non-discrimination and Procedural Fairness", Sept. 19, 2002, WT/WGTCP/W209.

⁶ The Economist, July 4, 1998, "The Borders of Competition".

and the US and examine how and where these regulations fit in the international trading systems. I will focus on four questions:

- (1) To what degree do the US and the EU apply competition regulations extraterritorially?
- (2) To what extent is it possible to find relief for competition related barriers in the current structure of the WTO?
- (3) Does the extraterritorial application of the EU and the US competition regulations create conflicts and are the regulations therefore ineffective?
- (4) Is there a better way to combat international anti-competitive conduct?

1.2 Method

To conclude to what extent extraterritorial application of competition laws is exercised I will first look at US and EU cases and evaluate the practices. Furthermore, I will compare the EU and US practice to public international law. The legal method of examining cases is always unsatisfactory when not all cases can be examined. Someone disputing the findings can always claim that the sample of cases is atypical. But, in my opinion, most of the cases that I will discuss are not extraordinary but are evidence of what is commonly practiced within respective jurisdiction. Concerning the WTO, I will focus on the objectives of the regulations, i.e. the economics behind the regulations. In the final analysis I will define what is efficient in this context and I will evaluate the current and a potential future situation with regard to the efficiency criteria.

The suggestions or proposals presented in this paper will be concerning extraterritorial *legislative* jurisdiction. The problems with extraterritorial *enforcement* jurisdiction will be discussed but a solution to the problem will not be presented.

1.3 Outline

In chapter 2 I will look at what public international law prescribe about jurisdiction. This will be done by examining both the American and the European view of international law. After this follows an overview of the EU and the US competition regulations and cases involving extraterritorial jurisdiction. The chapter will be concluded by a comparative analysis of the EU and US case law. Chapter 3 will provide an overview of the WTO and its regulation structure. An examination of the case of *Kodak-Fuji*, involving the USA and Japan, will follow after that. The chapter will be concluded by an analysis of when the WTO can be used for competition issues. Chapter 4 will analyze to what extent conflicts of competition laws exist. This will be followed by a few proposals on how to make the regulation structures of international competition laws more efficient. After

that there will be a discussion concerning the possibilities of including competition regulations within the WTO framework, as has been proposed by several authors. This section will be concluded by an analysis of the proposals and some alternations to them. The paper will be concluded by a short wrap-up conclusion.

2 Competition Law

2.1 Introduction

Before examining the EU and US cases involving extraterritorial jurisdiction in competition issues, there will be a more general review of the public international law concerning jurisdiction. First it will be necessary to look behind regulations and discuss why competition regulations exist and how the goals of the EU and US differ. The chapter will be concluded by a comparative analysis of the EU and US approaches to the extraterritorial competition regulations.

2.2 The Economic Objectives of Extraterritorial Competition Law

2.2.1 The Economic Objective of Competition Laws

Competition law exists to protect consumers, competitors and potential competitors from firms gaining monopoly, or monopoly-like, positions in the marketplace. The common ground for most competition laws is the economic efficiency arguments.⁷ The EU also has *non-economic efficiency* goals of the competition regulation, such as the political and economic integration of the common market.⁸ In the same manner the US have *non-economic efficiency* regulations, for example regulations protecting small retailers against chain stores.⁹ Protecting consumers means to ensure that no company can take out a monopoly price. Protecting the competitors means, among other things, to ensure that a dominant firm does not use predatory pricing to drive out competition. Minimizing private barriers to market entry protects potential competitors. In *most* instances a monopoly is an inefficient actor in the market. The inefficiencies, which are common to monopoly firms, include the *dead-weight-loss* and the *lack of incentives and productivity*. The former is the effect of price above market price and the corresponding decrease in consumption, a shift of the supply curve. The latter is a change in the firm's incentive to produce efficiently and to develop new products. Incentive decreases, as the firm does not have anyone to compete against. This represents a shift in the supply curve.¹⁰ Economic efficiency also includes *allocative efficiency*, which means that all resources should be used in the way in which the resource is valued the most.

⁷ Gifford and Sullivan at 67.

⁸ Article 82 EC explicitly states non-efficiency goals, such as "unfair purchase or selling price", or placing trading parties at a "competitive disadvantage".

⁹ The Robinson-Patman Act, 15 USC. §13 (1997).

¹⁰ It could also lead to a different slope of the supply curve.

2.2.2 The Economic Objective of Extraterritorial Jurisdiction

If a state exercises jurisdiction on companies located outside its territory, what the state is trying to do, in economical terms, is to internalize externalities. Externalities can be defined as a situation when the possibilities for one person are affected by the actions of another person.¹¹ A common example is the producer of steel (the producer), that at the same time producer of pollution, which is dumped into the river. The fishery, located downstream on the river, is negatively affected by the producer's pollution. The producer thus creates a negative externality on the fishery. The cost of the pollution is levied on the fishery. To internalize the externalities means in this respect to transfer the costs related to the pollution to the producer. The producer will then also be more inclined to minimize the pollution. This reasoning will now be transferred to the case of extraterritorial application of competition law through an example. Suppose firm A and B, both located within country C, concluded an agreement to keep price above market price in country D. Firm A and B are through their exports, the only players on the specific market in country D. The monopoly price and the dead-weight-loss related to the consumers will be levied solely on the consumers of country D. Thus, the actions of the firms in country C create an externality on the consumers of country D. The monopoly profit will all fall within country C. If country D applies its competition law with respect to collusive agreements on firm A and B it will have two effects. *First*, it will force the firms to abandon their agreement; *secondly*, country D will impose fines or damages to transfer the costs levied on the consumers from country D to the firms in country C. In essence it will force firm A and B to internalize the negative externalities.

2.3 Extraterritorial Jurisdiction

2.3.1 Introduction

Jurisdiction is an extremely complex notion, which I do not intend to fully analyze here, rather I will comment on the major concepts and problems of jurisdiction. The analysis of jurisdiction becomes more complex due to the fact that the borders between public law, public international law and conflict of laws¹² are becoming more vague. The most common held view is that public international law limits the scope of the jurisdiction and in some cases conflict of laws or other domestic legislation limits the jurisdiction

¹¹ See Varian at 557-577.

¹² *Conflict of laws* is the US equivalent of private international law.

further. In most European countries the distinction between private and public international law is sharp and to cross over the boundary between the two fields is a “tabu”.¹³ In the US, however, the distinction between public international law and conflict of laws is not so strict, or rather, public international law, as viewed in the US, has recently been greatly influenced by concepts traditionally belonging to conflict of laws. In public international law it is often difficult to clearly define customary rules and the definitions are different in different countries. To clarify how different countries view the jurisdiction issues I have divided some sections into American and European perspectives. In some of the cases studied below it is sometimes not clear if the decision refers to public international law or to the domestic conflict of laws. I will further divide the definition of public international law jurisdiction into *legislative* (or subject-matter) jurisdiction and *enforcement* jurisdiction, in which I include the US notion of personal jurisdiction.¹⁴

2.3.2 Extraterritorial Jurisdiction in Competition Law Issues

Introduction

In this subsection I will identify some problem-situations in order to clarify what kind of extraterritorial issues that can arise in respect to competition law. In the following chapters I will try to solve most of them.

Non-Extraterritorial

The situations, which are obviously territorially determined, will not be discussed in this paper. For example, in cases involving mergers of a domestic company with a foreign company, the substantive regulations will in fact reach outside of the regulating states territory and effect a foreign company but are not classified as extraterritorial.

Direct Extraterritoriality

If a company in country A is in collusion with another company in country A to the effect of increased prices on their exports to country B, does country B have legislative and/or enforcement jurisdiction? Does it matter whether country A permits this conduct (or if it compel the companies to work in collusion)? If two companies in country A collude in order to keep exporters from country B out (or depress the prices of those exports), no doubt does country A have legislative and enforcement jurisdiction but does country B have legislative and/or enforcement jurisdiction?

Looking at the extraterritorial situation for mergers: If a company in country A plan to merge with (or acquire) another company also in country A and suppose the transaction will lead to a dominant position in country B. Does

¹³ Lowenfeld at 324.

¹⁴ For further details see Weintraub.

country B have legislative and/or enforcement jurisdiction over the merger? Does it matter if there is only a potential effect? Does country B have legislative jurisdiction if the market domination occurs in country C, and therefore affect country B's exporters in that industry to country C?

Indirect Extraterritoriality

One can imagine a situation where a company's head office is located in country A and the company has a subsidiary (or branch) in country B. Certainly there is no controversy about country A exercising both legislative and enforcement jurisdiction over the head office, but does country A also have legislative and enforcement jurisdiction over the subsidiary (or branch)? There are numerous of questions that follow from this: Does the subsidiary need to be fully owned? What if country A's regulation conflict with a regulation from country B? Furthermore, country B undoubtedly has legislative and enforcement jurisdiction over the subsidiary (or branch) but does country B have legislative and enforcement jurisdiction over the head office?

2.3.3 Public International Law: Legislative Jurisdiction

2.3.3.1 General

F.A. Mann eloquently states in relation to *legislative* jurisdiction¹⁵ that:

“International Jurisdiction is an aspect or an ingredient or a consequence of sovereignty (or of territoriality or of the principle of non-intervention, - the difference is merely terminological): laws extend so far as, but no further than the sovereignty of the State which puts them into force nor does any legislator normally intend to enact laws which apply to or cover persons, facts, events or conduct outside the limits of his State's sovereignty.”¹⁶

Mann further explains that: “jurisdiction involves both the right to exercise jurisdiction within the limits of the State's sovereignty and the duty to recognize the same right to other States”.¹⁷ These notions are well accepted and not controversial. The difference in views on legislative jurisdictions is rather how to go about when determining the jurisdiction on a specific issue. I will divide these views into the European perspective and the American perspective.

¹⁵ In the US often referred to as subject-matter jurisdiction or jurisdiction to prescribe.

¹⁶ Mann at 20; Mann is doctrinal authority with respect to public international law and jurisdiction, this is evident through the comments of many authors see e.g. Meessen, Malanczuk, Bianchi and Maier.

¹⁷ Mann at 20.

2.3.3.2 The European Perspective

The starting point, according to Mann and most European scholars, for determining the reach of the jurisdiction is the state's territory, i.e. persons within the territory of that state and nationals of that state. Mann means that determining legislative jurisdiction involves determining a set of facts' closeness to a legal system.¹⁸ When determining legislative jurisdiction one should ask whether there exists a reasonable relation, such as "a State has legislative jurisdiction if its contact with a given set of facts is so close, so substantial, so direct, so weighty that legislation in respect of them is in harmony with international law and its various aspects (including the practice of States, the principles of non-interference and reciprocity and the demand of inter-dependence). A merely political, economic, commercial or social interest does not in itself constitute a sufficient connection".¹⁹ Mann has led the move away from the strict territoriality approach but with the theory of reasonable contact, but Mann concludes that only territoriality is reasonable contact.²⁰

2.3.3.3 The American Perspective

American international law scholars²¹ however, use a state's *interest* as the starting point for the determination of jurisdiction. This has evolved through the influence of the discipline of conflicts of law, where interest weighting is a major factor in determining jurisdiction in civil cases.²² (Antitrust cases can also be civil cases, when the harmed company sues for damages.) Some principles from conflict of laws have been incorporated in the American Bar Association's Restatement (third) of International law §403(1), which clarifies the United States' view on international law. A US court cannot attain jurisdiction if it is unreasonable. The Restatement contains a non-exhaustive list of factors to apply when deciding whether the extraterritorial jurisdictional claim is unreasonable. They include considerations on the extent the conduct took place in another state, the nationality of the persons, to what extent either state can reasonably be expected to achieve compliance with the rules, and vital interests of each of the states.

According to Mann one can differentiate the problems for conflict of laws and public international law. Conflict of laws governs the question whether "there exist a sufficiently close connection between a given set of facts and,..., a particular legal system called upon to govern it [?]"²³ Public international law on the other hand concerns whether there exists a sufficiently close connection between a given set of facts and "a particular legislator qualified to regulate it [?]"²⁴

¹⁸ Mann 1964 at 49-50.

¹⁹ Mann 1964 at 45- 46.

²⁰ Meessen at 800.

²¹ E.g. Lowenfeld.

²² See American Bar Association Restatement of Conflict of Laws.

²³ Mann at 28.

²⁴ Mann at 28.

In many of the cases concerning antitrust jurisdiction it is unclear whether the judge makes a distinction between considerations under conflict of laws and public international law. Seemingly in a number of cases the judge treats the antitrust jurisdictional issues under conflict of laws and public international law as the same problem.

2.3.4 Public International Law: Enforcement Jurisdiction

Enforcement jurisdiction refers to a state's acts to give effect to regulations that a State prescribes under the legislative jurisdiction.²⁵ The problem with enforcement jurisdiction is defining the limits on states' actions within a foreign state. The situations in which enforcement jurisdiction needs to be considered for the purpose of this paper is *first* when a state uses its sovereign authority in a foreign state without the use of force, e.g. sending a subpoena to a foreign country; *secondly*, investigations by a state within a foreign state.

Mann brings forth three propositions, which should be generally accepted. (1) A state may not exercise enforcement jurisdiction outside its territory unless its legislative jurisdiction permit it to do so; (2) The existence of legislative jurisdiction is not enough for a state to exercise enforcement jurisdiction; and (3) a state does not have legislative jurisdiction only because a state can enforce its regulation within its territory and thus have enforcement jurisdiction.²⁶ I have no reason to object to these propositions.²⁷

2.4 Extraterritoriality in EU Competition Law

2.4.1 Introduction

The EU competition regulations, which will be discussed in this paper, are article 81 and 82 of the EC Treaty²⁸ and the Merger Regulation²⁹. The focus of this orientation is to clarify to what extent the EU competition regulations can be extended to apply on conduct abroad. There have been a few cases

²⁵ Mann at 34.

²⁶ For a detailed motivation see Mann at 34-37.

²⁷ The conflicts that arises from enforcement jurisdiction is more often "real" than those arising out of legislative jurisdiction. I will discuss this further in the EU and the US sections as well as in section 4.2.2.

²⁸ The Treaty establishing the European Community.

²⁹ Council Regulation 4064/89 of Dec. 21, 1989, 1990 O.J. L/257, amended by Council Regulation 1310/97, 1997 O.J. L/180.

concerning this, I will refer to a few and outline some general principles about when foreign conduct can be of concern to the EU.

2.4.2 Conduct by Foreign Firms Affecting EU Domestic Markets

As explained above, international law limits the scope of national jurisdiction. A state does not need to exercise the entire jurisdiction permitted under international law, instead a state may further limit the extent of its jurisdiction with respect to specific regulations. The ECJ and the Commission have used different methods over the years to exercise extraterritorial jurisdiction.

The *first* method used is the so called *group economic unit doctrine*, where jurisdiction is asserted over a parent company located outside the EU based on its control over a subsidiary within the EU. The parent company and the subsidiary are viewed as an economic unit when the parent company can exercise control over the subsidiary. If the parent company exercises sufficient control over the subsidiary the court could break through the corporate veil and attribute the subsidiary's conduct to the parent company.³⁰ It is a difficult task to decide whether or not the *de facto* control exist through the *de jure* control. The ECJ's decision in *Metro/Saba*³¹, concerning article 81, support the idea that there is a case-by-case approach to solving the problem of *de facto* versus *in jure* control.³² In the case of *Continental Can*³³, Continental, a US corporation, owned 85 % of the shares in a German subsidiary. The ECJ concluded that the *de facto* control by Continental was sufficient to determine that Continental was participating in the commerce of the common market.³⁴

The *second* method used is usually called the *effects doctrine* or effects test, by which the EU exercise jurisdiction over any company regardless of location, as long as the conduct violates Articles 85, 86 or the Merger Regulation and satisfy the effects on the common market required by those articles.³⁵ In the *Woodpulp case*³⁶ several producers of bleached sulphate pulp were accused of price fixing. All the companies were registered outside the EU but selling into the common market through agents, branches and subsidiaries located within the EU. The Commission argued that when the effect within the common market was both substantial and intended the Commission could exercise jurisdiction. In the judgment the ECJ avoided

³⁰ *Imperial Chemical Industries Ltd. v. Commission*, C-48/69, [1972] E.C.R. 619, § 133.

³¹ *Metro SB-Grossmärkte GmbH & Co. KG v. Commission*, C-75/84 [1986] E.C.R. 3021.

³² Goyder at 546-547.

³³ *Europemballage Corporation and Continental Can Company Inc. v. Commission*, C-6/72, [1973] E.C.R. 215.

³⁴ Goyder at 547.

³⁵ Goyder at 547.

³⁶ *A. Ahlström Osakeyhtiö and others v. Commission*, C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85--C-129/85, [1993] E.C.R. 1307, hereinafter *Woodpulp*.

the term effects doctrine. The ECJ divided an agreement concerning restricting competition, within the meaning of article 85, into (1) the formation of an agreement and (2) the implementation of the agreement.³⁷ The formation of the agreement, in the *Woodpulp case*, took place outside of the EU. The sales took place within the common market and the agreement was therefore implemented within the EU, regardless whether the sales were made directly or through agents, branches or subsidiaries.³⁸ A question that arises from this judgment is whether the ECJ expanded the territorial jurisdiction to an unprecedented degree or if the ECJ has *de facto* adopted the effects doctrine with the slight modification of implementation requirement. This question has been in depth discussed by scholars³⁹, but an agreement has not been reached. However, regardless of what we call the jurisdictional basis we now know in which situations the court will assert jurisdiction.

In the proposed merger between two South African subsidiaries of *Gencor* and *Lonrho*, both producers of platinum, the Commission intervened and objected to the merger. The South African authorities had cleared the merger. The CFI upheld the Commission's decision.⁴⁰ The CFI held that the Merger Regulation applied on this situation and the CFI did not stress that the companies were selling through brokers located within the common market. The CFI asserted that to claim jurisdiction, when there exist reasonably foreseeable substantial and immediate effects, was in the realm of public international law. Above this, according to the CFI, since the South African authorities only approved the merger and did not compel them to merge no conflict with South African law existed. The *Gencor case* differ from the *Woodpulp case* in two respects, (1) in the *Gencor case* the effect doctrine was expressly used, (2) the *Gencor case* limited the application to the effects that were substantial and immediate and reasonably foreseeable. It remains to see if this jurisdictional claim will be affirmed by the ECJ in the future.⁴¹

In 1997 the Commission approved the merger of *Boeing and McDonnell Douglas*⁴² provided certain concessions. The US authorities approved the merger. Neither Boeing nor McDonnell Douglas had any assets or subsidiaries within the EU; the jurisdiction of this case was based solely on the direct sales to the common market.⁴³ Concerning public international law the US did not object to the claim of jurisdiction by the Commission and therefore accepted the effects doctrine approach used by the Commission. The Merger Regulation does not have a provision limiting the

³⁷ Goyder at 550; See *Woodpulp case*.

³⁸ Goyder at 550.

³⁹ See e.g. Goyder and Whish.

⁴⁰ T- 102/96, [1999] ECR II-753.

⁴¹ Korah at 28.

⁴² Commission Decision, July 30, 1997, O.J. (336) 0016.

⁴³ Fiebig at 328.

extraterritorial jurisdiction of the regulation; the turnover requirement is the only specified limitation.⁴⁴

2.4.3 Conduct by Foreign Firms Affecting EU Export Markets

The EU does not use its competition regulations to assert jurisdiction over conduct affecting the EU export market. There are no cases at the ECJ that have used competition law to open up foreign markets. It has been argued that the interference by the Commission in the Boeing and McDonnell-Douglas merger was done to protect the EU's (Airbus) export possibilities. But the Boeing/McDonnell-Douglas merger undoubtedly also had effects within the common market and is therefore not a good example of competition regulations protecting export markets.

Export cartels are also excluded from the application of competition regulations. This is through the express wording of Article 81 and 82. In this respect the EU competition regulation does not take foreign consumers (or competitors) welfare into account when applying the competition regulations.

2.4.4 The European Perspective of Enforcement Jurisdiction with Respect to Competition Law

The Commission has been granted extensive powers to investigate anti-competitive behavior. These powers include investigative “dawn-raids” and issuing “notices of objections”. The issues discussed in this section refer to when the Commission can exercise such rights within a non-EU country. A 1972 decision from the ECJ deals with this issue.⁴⁵ In this case the Commission served a Swiss Company a notice of objection, related to the competition regulations, to the company's head office in Switzerland. This was argued to be in conflict with both Swiss domestic law and public international law. The ECJ however, dismissed these arguments in a way not understandable to most commentators.⁴⁶ One should notice that the “notice of objection” which was served to the Swiss company was a compulsory process and not a mere informational notice. This, as I also will comment on later, violates public international law and was a serious blunder by the ECJ.⁴⁷

⁴⁴ see Article 1 in the Merger Regulation; Fiebig at 328.

⁴⁵ *J.R. Geigy v. E.E.C. Commission*, C-52/69, [1972] ECR II, 787 (one of the Dyestuffs cases).

⁴⁶ Mann at 40; see also Maier.

⁴⁷ Mann at 40.

The Commission has in a case, involving a non-EU corporation, demanded that documents located in Switzerland should be turned over to the Commission, even though it would be in violation of the Swiss criminal code. Thus, the Commission does not view foreign compulsion as a relief from the EU obligations.⁴⁸

2.4.5 Summary of EU Extraterritorial Application of Competition Regulations

The extraterritorial application of EU competition regulations is based on two different approaches. The *group economic unit doctrine* is a method to pierce through the corporate veil. The foreign corporation, which controls a subsidiary within the EU, will be responsible for the subsidiary's action concerning anti-competitive conduct. The other method is the *effects doctrine*, by which the EU claims jurisdiction on foreign conduct affecting the common market. The limitations to this jurisdictional claim vary depending on whether the ECJ or the CFI decision has precedent.

2.5 Extraterritoriality in US Antitrust Law

2.5.1 Introduction

US Antitrust regulations consist of several different acts. The Sherman Act⁴⁹ is the main act with regulations comparable to Articles 81 and 82 EC. Several acts exclusively or partially regulate competition, such as the Clayton Act⁵⁰ and the Robinson-Patman Act, but also the Trade Act has a few antitrust provisions, which I will return to later. I will, however, in this presentation focus on the Sherman Act.

The Sherman Act Sections 1 and 2 use the phrase “trade or commerce with foreign nations”. These actions consist of both US export and US imports.⁵¹ Over the years, the law concerning the jurisdictional reach of the Sherman Act has changed. There is a difference of opinion whether the 1993 Supreme Court decision in the *Hartford Fire case*⁵² finally defined the jurisdictional reach of the Sherman Act or not. For this reason I will first discuss the jurisdictional reach before the *Hartford Fire case* decision and then the *Hartford Fire case* decision.

⁴⁸ *Centraal Stikstof Verkoopkantoor*, Commission Decision, June 25, 1976, O.J. [1976] L 192/27.

⁴⁹ The Sherman Act of 1890, 15 USC. §§ 1 *et seq.*

⁵⁰ 15 USC. § 18.

⁵¹ Joelson at 37.

⁵² *Hartford Fire Ins. Co. v. California*, 509 US 764 (1993).

2.5.2 Conduct by Foreign Firms Affecting US Domestic Markets

2.5.2.1 Before the Hartford Fire Case

The development of extraterritorial jurisdiction in antitrust can be traced back until 1909 and the Supreme Court decision in the *American Bananas* case⁵³, but for the purposes of this paper I will start in 1945 with the Federal Court of Appeals (2nd circuit) decision in the *Alcoa* case.⁵⁴ Judge Learned Hand, in the *Alcoa* decision, diverged from the traditional territorial jurisdictional application of the Sherman Act when he stated that a “state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends,” when there is an intention to cause these effects within its border.⁵⁵ This established the practice of the (*purpose and*) *effects test*, i.e. jurisdiction exists if there is an effect on the domestic market that is foreseeable and substantial, and if there is intent to affect the US market. The question whether international comity⁵⁶ limited the effects test was left unsaid in the *Alcoa* case.

The *Timberlane* case⁵⁷ limited the extent of the effects test by stating that the effects (actual or intended) are enough to determine jurisdiction, but the court can refrain from exercising its jurisdiction if the effects on the US commerce are not sufficiently strong in relation to several factors, related to international comity: (1) the parties nationality of principal location, (2) the relative relation of foreign and domestic conduct of the violation, (3) the effects on the countries involved, (4) the foreseeability of the purpose to affect or harm the US commerce, (5) foreign law and the degree it conflicts with the US law, and (6) compliance problems.⁵⁸ This approach has been adopted in several other cases following the *Timberlane* case, with small variances. The process can be summed up, as “the proper standard is a balancing test that weighs the impact of the foreign conduct on United State commerce against potential international repercussions of asserting jurisdiction”.⁵⁹ The process of determining the jurisdictional reach has thus become a balancing of different states interest, which might be a task more

⁵³ *American Banana Co. v. United Fruit Co.* 213 US 247 (1909).

⁵⁴ *United States v. Aluminum Co.*, 148 F.2d 416, (2d Cir. 1945), cited the *Alcoa Case*.

⁵⁵ *Alcoa Case* at 443.

⁵⁶ To what degree a country should refrain from applying antitrust law to activities abroad that are legal where the action occurs; Weintraub at 712.

⁵⁷ *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, (9th Cir. 1977) cited *Timberlane case*.

⁵⁸ *Timberlane case*; Areeda at 143; compare to ABA Restatement (third) of Foreign Relations §403(1).

⁵⁹ *Dominicus Americana Bohio v. Gulf & Western Indus.*, 473 F.Supp. 680 (S.D.N.Y. 1979).

suitable for a diplomat than a judge.⁶⁰ This method is commonly referred to as a jurisdictional rule of reason.

2.5.2.2 The Hartford Fire Case

In the (majority) opinion composed by Justice Souter it was held that conduct in a foreign country by a foreign party violates the Sherman Act, if the same conduct, taken place within the US territory, would have constituted a violation, and if there was an intention and an actual effect on the US market. The court further held that a foreign law conflicting with the US law even if the foreign law encouraged the conduct was not a possible defense. The only possible defense would be a foreign law compulsion to act in the manner that would be a violation. There was not a comity consideration in the opinion. The effect of the Hartford Fire opinion is not that international comity disappear altogether but rather transfer the balancing to the Department of Justice and the Federal Trade Commission.⁶¹ However, some commentaries argue that what the majority opinion actually tries to articulate is that in this specific case, the comity issues are irrelevant, but that comity should still be applied.⁶²

2.5.3 Conduct by Foreign Firms Affecting US Export Markets

Similarly to the EU, the US does not use antitrust enforcement towards export cartels originating in the US as long as it does not affect the US domestic markets. The US does however exercise jurisdiction against import cartels of the importing country if they affect US's export markets.⁶³ Both the Sherman Act and the Trade Act are possible to utilize for exercising jurisdiction over foreign conduct affecting US's exports. What nonetheless is needed is, except legislative jurisdiction, which expressly exists, personal jurisdiction over the foreign actors and also access to discovery or other means of proof and the possibility of obtaining an enforceable effective remedy.⁶⁴

Reading the Antitrust Enforcement Guidelines for International Operations, the illustrative examples D and E describes situations where the FTC and DOJ will enforce the Sherman Act to foreign conduct affecting US export.

⁶⁰ Also Sullivan brings forth the issue whether the court is the best forum to handle the jurisdictional rule of reason, and further argues that it leads to unpredictability. Sullivan at 979.

⁶¹ Sullivan at 980; in civil actions the comity considerations cannot be done by the FTC or DOJ.

⁶² Weintraub at 713-714.

⁶³ Waller, Spencer and Webber at 213.

⁶⁴ Waller, Spencer and Webber at 212; see also The Foreign Trade Antitrust Improvements Act of 1982.

Although, there has only been one case of export oriented antitrust violation in the US since 1992.

Another available option for the US when asserting jurisdiction of foreign conduct affecting US exports, is Section 301 of the Trade Act of 1974⁶⁵. This is not a true antitrust option but rather a trade option, which is why the petitions are handled by the United States Trade Representative (USTR), instead of the usual DOJ or FTC. The USTR is authorized to take all “appropriate and feasible actions” to obtain “the elimination of the act, policy or practice” that is “unreasonable or discriminatory and burdens or restricts United State commerce.”⁶⁶

What always needs to be considered in cases involving the effects on export markets is that the claim must survive a *forum non-conveniens* objection. If there exists a better forum in the country where the cause of effect originates the US court is not the right forum.

Using domestic antitrust to open export markets can create hostilities or unnecessary conflicts most likely due to that the practice is not accepted elsewhere in the world. Also it might not benefit the US, as can be illustrated by an example borrowed from Weintraub. The US threatened to use unilateral sanctions against Japan to get Motorola (a US company) to export to Japan, which previously was not possible. This action benefited the workers at Motorola’s Malaysian factory and the stockholders of Motorola.⁶⁷

The US is alone in using effects on export as a reason for applying extraterritorial jurisdiction in antitrust situations. Most countries do not look favorable on the US practice and question its foundation in international law. Furthermore one can claim that the US through these actions is not respecting the sovereignty of other countries.

2.5.4 The American Perspective of Enforcement Jurisdiction with Respect to Competition Law

In a case in the Federal Court of Appeals, District of Columbia Circuit, in 1980 the court concluded that sending a subpoena to a French national in France was not within the boundaries of public international law.⁶⁸ In the decision the court makes a clear distinction between compulsory processes and informational notices. The case was in relation to a compulsory process.

⁶⁵ 19 USC. § 2311.

⁶⁶ 19 USC. § 2411(b).

⁶⁷ Weintraub at 716-717.

⁶⁸ *Federal Trade Commission v. Compagnie de Saint-Gobain-Pont-à Mousson*, 636 F.2d 1300 (1980).

This decision was the opposite of the ECJ decision⁶⁹, which was a similar situation, and the US decision is thus more in tune with public international law. A more common scenario that causes problems is the problems related to the production of documents located outside of the US. Specifically when the head office, located outside the US, is in possession of documents that the US needs for an investigation concerning the branch within the US. The US Supreme Court in the case *United States v. First National City Bank*⁷⁰, asserted jurisdiction in a case concerning the freeze of assets of a Uruguayan company banking at City Bank's branch in Montevideo. This was motivated by the claim of personal jurisdiction by the court.⁷¹ In regard to antitrust law a case decided by the District Court of Western Michigan shows the US practice with regard to enforcement jurisdiction.⁷² The United States investigated the German company Krupp for a possible antitrust violation. Krupp was a customer at Deutsche Bank's head office in Germany. Krupp was present in the US market and Deutsche Bank held a branch in New York. The District Court of Western Michigan demanded that Deutsche Bank produced documents located at the head office in Germany concerning Krupp's activities. The release of the demanded documents would be a criminal act in Germany. The jurisdictional claim was based on the personal jurisdiction on Deutsche Bank, i.e. the existence of a branch in the US. This judgment is from a District court and is therefore of limited guidance. It is not clear that the judgment would be upheld in an appellate review, but it is not unlikely that it would. The conclusion drawn after these two cases and several more is that the US courts focus on obtaining personal jurisdiction, i.e. that the person is on US soil or a judgment could be enforced against the person.⁷³ After obtaining personal jurisdiction, a court claims jurisdiction with regard to all actions of that person.

2.5.5 Summary of US Extraterritorial Antitrust Application

The US has a long history of extraterritorial application of its competition laws. If a substantial and foreseeable effect on the US market exist, the US have jurisdiction regardless where the conduct took place. What is unclear, at present, is to what extent the courts should do comity considerations. There is no conclusive precedent.

⁶⁹ *J.R. Geigy v. E.E.C. Commission*, C-52/69, [1972] ECR II, 787.

⁷⁰ *United States v. First National City Bank*, 379 US 278 (1965), The case deals with the Internal Revenue Service collection of tax.

⁷¹ Mann at 53.

⁷² International Legal Materials (1983) at 742; Mann p. 52; See also *United States v. Bank of Nova Scotia*, 691 F.2d 1384 (1982).

⁷³ The concept of personal jurisdiction is of course much more complex than this, but for the purpose of this paper the exact meaning is perhaps relevant but not necessary.

2.6 Comparative Analysis of the Extraterritorial Application of Competition Laws in the EU and the US

On the surface the EU and the US competitions regulations are quite similar. Both the substantial regulations and the jurisdictional concerns for competition laws are based on the same fundamental principles, but they still differ slightly.

The objective of the competition regulations in the EU and the US are economic efficiency. There are, however, other goals, which are non-economic efficiency goals. The EU has non-economic goals to a larger extent than the US.

As for effects on the domestic markets, one can in short say that both the EU and the US focus on the effects of the agreement within the domestic market.

Concerning collusive agreements the EU has, through the *Woodpulp* case, the additional requirement that the agreement has to be implemented within the common market. What this really means is somewhat unclear. Can collusive agreements where companies agree not to act within the common market escape EU jurisdiction? Well, probably not, but there is no clear answer to the question. The *Woodpulp* case does not limit the effects test to the same degree as the *Hartford fire* case does. The *Woodpulp* decision does not require that the effects are reasonably foreseeable. However, the *Gencor* decision of the CFI has voiced the same limitations as in the *Hartford Fire* case.

Within the EU comity considerations have never been done by the ECJ or CFI. Instead the Commission does these considerations. The US courts have, both before and after the *Hartford Fire* opinion, used comity considerations when determining extraterritorial jurisdiction.

The largest difference in jurisdiction is the fact that the US asserts jurisdiction to protect its exports. Looking at the objectives of competition law, protecting consumers, competitors and potential competitors, it is difficult to validate the claim of jurisdiction on foreign markets. This assertion of jurisdiction undoubtedly interferes with the sovereign rights of a state and is incompatible with international law.

Another common feature of the EU and the US regulation structures is the lack of regulation of export cartels. This, of course, is natural. Looking at the objectives of competition law a state is concerned with an action's effect on the domestic consumers. Both the US and the EU assert jurisdiction over import cartels and in the name of reciprocity accept that the other part assert jurisdiction on export cartels effecting its territory.

3 The World Trade Organization

3.1 Introduction and Historical Overview

The WTO, established in 1994, involves not only goods through GATT 1994⁷⁴ but also several other areas such as, services through the GATS⁷⁵, foreign investment through TRIM⁷⁶ and intellectual property through TRIP⁷⁷. I will in this paper focus on goods and therefore mainly the GATT. I will also briefly discuss the Subsidy agreement⁷⁸ and the Anti-dumping agreement.⁷⁹ The GATT is based on nations giving concessions concerning the accessibility to their markets. These concessions include tariffs rates and other internal practices. The concessions are usually used when a perspective member nation is negotiating to become a member of the WTO. The nation offering the concession is legally obliged to abide by their concessions as well as to abide to the substantive rules of the GATT.

3.2 The objective of the WTO

The Preamble to the GATT says:

“Recognizing that their relation in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of resources of the world and expanding the production and exchange of goods.”⁸⁰

It is clear that economic efficiency is a major goal of the GATT, this since GATT aims to achieve “the full use of resources of the world”. This means that the GATT objective is to put all resources in its highest valued uses, i.e. *allocative efficiency*.

⁷⁴ General Agreement on Tariffs and Trade, opened for signature Oct. 30 1947, 55 U.N.T.S. 187, amended at the Uruguay Round of Multilateral Trade Negotiations.

⁷⁵ General Agreement on Trade in Services, Uruguay Round of Multilateral Trade Negotiations.

⁷⁶ Trade Related Investments Measures, Uruguay Round of Multilateral Trade Negotiations, April 15, 1994.

⁷⁷ Trade Related Agreement on Intellectual Property, Uruguay Round of Multilateral Trade Negotiations, April 15, 1994.

⁷⁸ Agreement on Subsidies and Countervailing Measures, Uruguay Round of Multilateral Trade Negotiations, April 15, 1994.

⁷⁹ Agreement on Implementation of Article VI of the General Agreement of Tariffs and Trade 1994, Uruguay Round of Multilateral Trade Negotiations, April 15, 1994.

⁸⁰ Preamble to GATT 1947.

Looking at trade theory one could summarize that all countries have different resources (natural, capital or human). Each country should focus on what they relatively, comparing their effectiveness of producing different products, do the best. Trading these products with other countries creates a gain for both countries. One could say that countries' differences create the incentive to trade. This theory is called *comparative advantage*.⁸¹ Obviously if there is a high cost transferring products from one country to another the gains from trade will be less. Therefore there is a need to get rid of barriers to market entry, this is usually called trade liberalization.

The GATT and related agreements also have the objective of creating a level playing field. This is done through the ban on subsidies and dumping.⁸² The main goal of these regulations is not economic efficiency. Viewing from the point of the effected country, which's competition balance is claimed to be hurt through a subsidy or dumping, they should actually just say, "thank you".⁸³ What in economical terms is happening is that the subsidizing (or dumping origin) country is paying for the lower price the effected country's customers are paying. However, if it is a level playing field that is the goal of the subsidy regulation and the anti-dumping regulation, could that be achieved without uniform policies in all nations? Then the question is what is the point of trading if there is no difference between the countries?⁸⁴

3.3 Market Access Through the WTO

3.3.1 General

The main reasoning behind the GATT, as explained above, is to facilitate market access through economic efficiency arguments. In the beginning of the GATT history the focus was on tariffs and quotas as trade barriers. Nowadays the more frequent problems of international trade are technical trade barriers, subsidies and dumping. There are a few general principles, which are central to the GATT. I will in the following section briefly discuss the *Most-Favored-Nation Policy* and the *National Treatment Obligation*, before continuing on to the *Dispute Settlement Understanding* and the *Kodak-Fuji case*.

3.3.2 GATT Obligations

The Most-Favored Nation Policy requires a country to extend the same treatment to all countries as to the country that is treated most favorably. An

⁸¹ Jackson at 14-18; See any standard International Economics textbook.

⁸² There are exceptions to these rules such as national security.

⁸³ Jackson at 253.

⁸⁴ Jackson at 248.

exception to this is, among others, free trade areas, the category into which the EU and NAFTA falls.

The National Treatment Obligation constitutes an obligation to member states not to treat a foreign product, once it clears customs, any different than a domestic product.⁸⁵ This principle is applicable to any law; regardless whether or not it is concerning an area, which is not covered by the GATT.⁸⁶

3.3.3 Dispute Settlement

The Dispute Settlement Understanding (DSU)⁸⁷ was set up through the conclusion of the Uruguay Round of trade negotiations and developed the already existing dispute settlement function in the GATT. Nations have the right to get a panel set up to try a case concerning violation. The parties are obliged to follow the panel ruling.⁸⁸ A panel decision can be appealed to the WTO appellate body, this has, since the introduction in 1995, been used frequently. Only governments can be part in a panel hearing, the EU is an exception to this rule since, not only the EU members but also the EU by itself is part to the WTO. Private parties cannot be a part to a complaint. However, large corporations have been able, through its actions, to persuade its government to put forth the complaint, e.g. Kodak in the *Kodak-Fuji case*.

To bring a complaint to the DSU panel the situation complained about has to cause a WTO member's benefit, accruing from the agreements, to have been nullified or impaired. The situation may also have impeded the attainment of an objective of the agreement.⁸⁹ The objectives of the agreement are explained in the Preamble, and reading the preamble "the full use of resources of the world" one easily gets the impression that it is possible to expand the applicable areas to other areas such as competition issues. This is not the case, as Mavroidis and Van Siclen point out. Mainly for two reasons, (1) the agreement Preamble is of limited legal value and also because the phrase "the full use of resources of the world" is not a clear obligation where efficiency arguments are possible; (2) looking at GATT practice there are no panel examinations that found their legal base on the objective argument. EU and Australia have brought claims under this legal base, but did not pursue them after reactions from the WTO council.⁹⁰

⁸⁵ Article III GATT; Jackson at 213-228.

⁸⁶ Jackson at 213.

⁸⁷ Understanding on Rules and Procedures Governing the Settlement of Disputes, annex 2 to the Uruguay Round Final Act.

⁸⁸ If a panel decision is to be terminated the DSU requires a unanimous council vote against the adoption of a panel decision.

⁸⁹ Mavroidis and Van Siclen at 11.

⁹⁰ Analytical Index at 607-608; Mavroidis and Van Siclen at 10.

There are three different kinds of complaints: Violations complaints, Non-violation complaint and Situation complaints. The *violation complaints* are cases where a WTO member is claimed to be acting in violation of a specific obligation. A *non-violation complaint* is a case where a WTO member is not in breach of a specific obligation but the WTO member's measures nullify or impair benefits or impede the attainment of an objective specified in the agreements. The *situation complaint* can be used in cases where any other situation results in a benefit being nullified or impaired or the attainment of an objective in the agreements is being impeded.⁹¹

3.3.4 The Kodak-Fuji case

Eastman Kodak Company (Kodak) argued in the complaint to the USTR that Fuji Photo Film's (Fuji) anticompetitive behavior amounted to unfair trade practice under the Japanese Antimonopoly Act. The Japanese Government's tolerance of the anticompetitive practices deprived Kodak of large revenues in the Japanese market and gave Fuji a safe haven of profits. This favorable situation for Fuji disturbed the global competition balance between Kodak and Fuji and could easily lead to dumping by Fuji in the world market and in the US market.⁹² Instead of using unilateral actions through section 301 of the Trade Act, the USTR choose to bring the case before a DSU Panel review⁹³.

In the DSU Panel there were four distinct claims:

(1) The US claimed that, in violation of Article XXIII:1(b) GATT, Japan had replaced the traditional tariff measures with other measures aiming to restrict imports to Japan. Through this, Japan had nullified or impaired benefits accruing from the WTO agreement to the US. Japan responded to the US arguments by arguing that for Article XXIII:1(b) to be applicable to specific measures, the measures would have to be reasonably anticipated at the time of the concession, and this was not the case in this situation. Further the measures the US claimed violated the agreement occurred prior to the most recent tariff concession, and the effect of the measures could have been reasonably anticipated. Japan further argued that the undertaken measures were solely private and not government measures. The DSU Panel should only look on the measure's face when deciding whether a tariff concession is being nullified or impaired. The US argued that the DSU Panel need to look at all relevant facts when determining if a nullification has taken place.⁹⁴ The DSU Panel rejected the US claim because the "measures" taken by the Japanese government did not amount to *government measures* in respect to nullification and impairment. Furthermore the US had reasonable

⁹¹ Mavroidis and Van Sclen, at 11-12.

⁹² Goldman at 418-419.

⁹³ Japan – Measures Affecting Consumer Photographic Film and Paper Mar. 31, 1998, WT/DS44/R.

⁹⁴ Goldman at 421.

expectation that the “measures” should interfere with the tariff benefits in place before the relevant tariff negotiations.⁹⁵

(2) In relation to Article III:1 GATT the US claimed, *first* that Japan used the distribution countermeasure to limit imports and protect domestic firms (article III:1). *Secondly*, the US claimed, that Japan violated article III:4 GATT by treating imported goods less favorable than domestic goods. Japan argued in return that there was no fiscal discrimination and above this, the measures were no longer in force. What was left was the market structure and that was not a law, regulation or requirement in the meaning of article III GATT.⁹⁶ The DSU Panel came to the decision that there was no evidence that the Japanese government administrative guidance intentionally favored Fuji over Kodak.⁹⁷

(3) The US claimed a violation of article X GATT because the Japanese government had resorted to non-transparent form of actions. This was, argued the US, achieved by a private and public network used to implement the government measures, and above this, the government measures were not published. Japan responded by arguing that the specific measures were not the type of measures of general application to which article X GATT applied.⁹⁸ The DSU Panel concluded that article X applied to administrative rulings, but there were neither enough evidence to show that the “guidance” measures amounted to administrative rulings nor that these measures were rulings of general application. Thus, article X was not applicable.⁹⁹

(4) The final claim by the US was all of the above arguments, taken together, would amount to a disadvantage for imports and thus alter the terms of the competition. The DSU Panel dismissed the argument of the combined effect of the different measures. Furthermore they did not find any relation between the government measures and the effect on foreign participation in the Japanese market.¹⁰⁰

The Kodak-Fuji case was unsuccessful because of lack of facts. The DSU Panel did not reject the claims on the law but on the facts and the lack of causation.¹⁰¹ This means that the case might have been successful if there where more facts to support the claim. Will this lead to more claims of the same sort or will the member nations discuss this in a summit to clarify the meaning of the GATT regulations? The big question is whether a government’s tolerance of anti-competitive behavior is included in the non-violation remedy?¹⁰² At the moment given that the Kodak-Fuji case was

⁹⁵ Goldman at 427.

⁹⁶ Goldman at 422-423.

⁹⁷ Goldman at 427.

⁹⁸ Goldman at 423-424.

⁹⁹ Goldman at 428.

¹⁰⁰ Goldman at 428.

¹⁰¹ Goldman at 429-431.

¹⁰² Komuro at 216-217.

rejected on factual grounds and not legal grounds, it seems likely that government tolerance of anti-competitive behavior could be attacked through the GATT.

3.4 The Situations Where the WTO is an Option for Competition Issues

After reading the Preamble to the GATT agreement, see section 3.1, it is difficult to imagine how the objective of the GATT would be achieved without the inclusion of a competition competence of the GATT.¹⁰³ However, the GATT does not include any anti-competitive regulations. The newly adopted treaties on services and intellectual property include provisions regulating anti-competitive actions.

If there exist a competition law, it has to be applied in the same manner both to domestic companies and foreign companies, this follow from the National Treatment Obligation. The regulation is aimed to create a national/international market not favoring domestic interests. An example of a regulation that favors domestic interests, though atypical, is Section 301 of the US Trade Act as described above, in section 2.5.3. Section 301 focuses on US businesses trying to access foreign markets, which cannot be entered because of anti-competitive behavior in the importing state. The US producers are, in Section 301, given a more favorable procedural possibility than exists for foreign companies. A case in which the DSU Panel applied the National Treatment Obligation for competition law is the *Canada – Beer case* of 1992¹⁰⁴, where Canada allowed domestic beer access to places of sale not available to imported beer. The DSU Panel concluded that Canada gave domestic beer a competitive advantage over imported beer.

The National Treatment Obligation does not compel any country to implement a specific regulation, thus it is still up to each country to decide what competition regulations they want to implement. But once implemented the regulations need to treat domestic and foreign firms in the same manner.

To what extent government measures, regarding competition, can be attacked through the WTO is unclear. Is it a government measure to allow national competitors to act anti-competitively? Is it a government measure to not enforce an existing competition regulation against a domestic

¹⁰³ In the agreement of the International Trade Organization (ITO), which was negotiated by the same parties, and at the same time as the GATT, competition standards were included. The ITO never entered into force since the US Congress did not ratify the treaty.

¹⁰⁴ GATT Dispute Panel Report, *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, Feb. 18, 1992, GATT B.I.S.D. (38th Supp.), 27 (1992).

corporation, even though the law does not discriminate? The Kodak-Fuji case, which is our only guidance, does not provide the answers.

I would like to point out that the WTO Subsidy Regulation cannot be used to compel a state to implement competition regulations. One could think that the lack of a national competition law would qualify as a government subsidy and thus violate the WTO, but it does not. How wide is the definition of subsidy when it comes to the WTO? If the definition of subsidy would be any action of the government creating a benefit to a firm, then competition regulations, or lack thereof, would qualify as a subsidy but so would any infrastructure measure or social welfare measure. According to the Uruguay Round subsidy regulation text, article 1, there needs to be a financial contribution by the government. Therefore, competition law and all other regulatory practices are excluded from application.¹⁰⁵

Presently the extent of GATT regulations applicable on anti-competitive conduct is small. However, the discussion within the WTO is increasing and working groups are set up to analyze the interaction between WTO and competition regulations. Commissioner Monti intends to begin formal negotiations concerning a multi-lateral agreement in the competition area after the 5th WTO Ministerial conference in 2003 in Cancun.¹⁰⁶ It will be interesting to see how this will develop.

¹⁰⁵ Jackson at 296.

¹⁰⁶ Mario Monti European Commissioner for Competition Policy, "A Global Competition Policy?", European Competition Day Copenhagen, 17 September 2002.

4 Analysis of the International Competition Regulatory Structure

4.1 Introduction

In this chapter I will analyze the present regulation structure and see if there are any shortcomings. After that the extent of legal conflict between the EU and the US will be examined. This is followed by a proposition on how conflicts could be minimized. A discussion concerning the inclusion of competition regulation within the WTO framework will also be done. The inclusion of competition regulations have been suggested by several authors and is therefore worth commenting on. Finally there will be an analysis of the proposition and some questions, problems and extensions to the propositions.

4.2 Efficiency of the Present Regulation Structure

4.2.1 Definitions and Problems

When analyzing whether or not a regulation structure is efficient one needs to specify what constitutes an efficient regulation structure. For the purpose of this analysis an efficient structure should minimize conflicts and still serve the objectives of the laws concerned.

Using extraterritorial application of competition law collusive agreements and abuse of dominant position could be challenged in any state in which there would be sufficient contact. Each state would protect its consumers and make sure that the objects of its competition regulations are satisfied. Concurrent suits in several states would be possible and the offender might be subject to different standards in different countries. True it is, that this would cause extra costs for companies, since they would have to adapt strategies to cope with different countries' competition regulations.

It will be difficult for small states to enforce regulations since it might lead to the corporations withdrawing from the market, which also will be inefficient. On the other hand, states can enforce the conduct that harm their interests and can choose not to enforce if the conduct does not harm the domestic interests. The EU and US do not enforce against anti-competitive behavior within its own country, which only causes an effect in another

state. This is not a problem since the effected states, can choose to enforce against the conduct which effect the domestic market.

For merger control the evolving customary conflict of law rule seems to be that any nation that objects to a merger can impose its own competition law on the mergering firms, as long as the sanctions imposed are reasonably related to the anti-competitive harm from the merger and within the power of the nation to impose.¹⁰⁷ What is objectionable for solving the merger issues like this is that it might force companies to file pre-merger notifications in all possible jurisdictions. The mergering firms might also be faced with confliction requirement (or exceedingly many requirement) from different states enforcement agencies.

4.2.2 International Conflict of Competition Laws

Several authors discuss extraterritorial application of competition law and conflicting jurisdiction.¹⁰⁸ What some authors argue is that the cause of problem is the overlapping of jurisdiction. However, I would like to view the problem from a different angle, though it might be primarily a terminological difference it is still important to avoid confusion. Suppose a Danish citizen shoots from Swedish territory and kills a Finnish citizen on the territory of Finland. All three countries will have jurisdiction, but they are not in conflict, they coexist. What makes competition law a little different is that jurisdiction can be applied concurrently. If concurrent jurisdiction is applied, each jurisdiction can apply its competition regulatory goals on the conduct and thus protect its consumers and competitors on the domestic market. Thus, the notion of concurrent jurisdiction needs to be kept separate from conflicting jurisdictions.

Conflicts related to competition law can be divided into two different categories, conflicts of competition laws and political conflicts. Political conflicts are usually started when a competition law issue suddenly becomes a trade issue. Government's inability to separate competition issues from trade issues is the cause of many political conflicts.

Prima facie conflicts of competition laws are not always real. A *prima facie* conflict could exist when two jurisdictions both claim exclusive jurisdiction over a specific case, but if the application of the two jurisdictions' substantive competition laws lead to the same result the conflict is not real.¹⁰⁹ An example of a real conflict is when country A requires a

¹⁰⁷ Sullivan at 1021.

¹⁰⁸ See e.g. Meessen at 791-792 and Malanczuk at 116.

¹⁰⁹ The notion of real conflicts is borrowed from Conflict of Law's true and false conflicts. Since it would be impossible to totally apply these analytical tools to the application of competition law I have revised the meanings to fit in to the competition law context and called it real conflicts to avoid confusion; Cramton, Curries and Kay at 17.

company's head office within country A to produce documents located at a subsidiary located in country B. If it is illegal to give out the document in country B a real conflict exists. Most conflicts in international competition laws, especially those based on economic efficiency aims, are not real.

In cases carrying only economic efficiency arguments conflicts are less likely. As explained before, a common objective of most states' competition regulations is to achieve economic efficiency.¹¹⁰ If states claim jurisdiction in a specific case concerning an economic efficiency argument, the substantive competition regulation is more likely to be similar or identical.¹¹¹ One could say that harmonization of the competition regulations have been partly achieved by the strive for economic efficiency. If two jurisdictions' substantive law leads to the same result the conflict is not real.

However, the *Boeing/McDonnell-Douglas merger* was based on economic efficiency arguments from both the FTC and the Commission and it still led to a conflict. Interestingly enough is that the FTC did not object to the jurisdictional claim by the Commission, it was rather a conflict in the substantive regulations. The FTC view can be supported with the argument that the airline industry actually is a natural monopoly. In this context that would mean that the market for commercial aircrafts is not large enough to get a non-negative average cost curve. It would in such cases be efficient to only have one producer.¹¹² A likely consequence to one firm becoming a monopoly is that it would be possible to charge a monopoly price, which is inefficient. The latter argument can support the Commission's point of view when conditioning the merger with the abandoning of exclusive supply contracts.¹¹³ The reason for the major political conflict almost escalating into a trade war between the US and EU was most likely due to the quick shift from competition law to trade politics. Trade officials of the EU and the French President Chirac supporting Airbus and the US trade officials and President Clinton championing Boeing.¹¹⁴

The *Hartford fire case* is a little trickier. The UK reinsurers regulated themselves under British law. However, there was no compulsion to stop selling the specific policies on the US market. Refusing to sell the specific insurance policies (in co-operation with US suppliers) on the US market effected the competition on the US market. The US authorities asserted jurisdiction and applied the US competition law, while the UK voiced objections specifically against the jurisdictional claim. The UK firms refused, in conspiracy with other actors, to sell a specific product on the US market in order to sell another less favorable product. This is not a real conflict. A real conflict would be if the UK law compelled the corporations

¹¹⁰ See section 2.1.

¹¹¹ Gifford and Sullivan at 67.

¹¹² Gifford and Sullivan at 81-82.

¹¹³ Gifford and Sullivan at 84-85.

¹¹⁴ Sullivan at 1012.

not to sell the product on the US market. There are efficiency arguments behind the application of the jurisdiction in the sense that actors in the insurance market that are supposed to compete against each other, instead act in unison, as a monopoly. There is a clear economic efficiency argument behind the jurisdictional application and thus the likelihood of a competition law conflict is small.

4.2.3 Are Conflicts Inefficient?

An interesting question is whether or not conflict cause economic inefficiency in the regulation structure. Conflicts are undoubtedly economically inefficient since they will lead to efficient trades not taking place or being blocked by the authorities. However, in the context of this analysis, efficiency means minimizing conflicts but still achieving the objectives of the competition regulation. States sometimes have different underlying interests when regulating competition. A merger might cause different effects in several jurisdictions. Is it better that only one jurisdiction regulates the whole merger or should each jurisdiction be able to apply competition law to satisfy its own interest? One could argue that when it comes to economic efficiency related regulations all states will have the same interests, but as showed in the Boeing-case, that is not always the case. When the aim of a regulation is a *non-economic efficiency* goal, such as the common market integration, an extraterritorial jurisdictional claim, which likely would cause a conflict, might be the only way to satisfy the aim of the regulation. This course of action could also be in accordance with an efficient regulation structure. Seemingly there is a tradeoff between conflicts and satisfying the aims of the regulations. Minimizing both seems to be impossible, unless at total harmonization, otherwise what is achievable is a reasonable balance between conflicts and satisfying the competition regulation's aim.

4.3 How to Make the Regulation Structure More Efficient

4.3.1 General

Several proposed solutions to the problem of conflicts of competition laws exist.¹¹⁵ Most proposals suggest some sort of multilateral agreement on either harmonization of competition law, minimum standards or cooperation agreements. In the following sub-sections I will examine the possibility of just abiding the public international law, and through that minimize conflicts. The only way to eliminate legal conflicts is to harmonize the

¹¹⁵ See e.g. Fox or Mitchell.

substantive competition regulations in all regulations. This proposition will never eliminate conflicts but would reduce them.

4.3.2 Competition Regulations' Conformity with Public International Law

It is a difficult task to define exactly when a customary international rule exists and perhaps even harder to clarify what customary international rule actually means.¹¹⁶ What nonetheless should be agreeable to most nations is that asserting jurisdiction on practices in a foreign country not affecting the domestic market is not in conformity with international law. This is only relevant for the US, since certain US regulations do just that, e.g. Section 301 of the Trade Act and the Sherman Act.

The US has claimed jurisdiction on foreign conduct, merely effecting domestic markets, since the *Alcoa case*, but until the *Hartford Fire case* comity considerations were done by the court. This has been done with protests from many nations, e.g. United Kingdom.¹¹⁷ The EU has also since the *Woodpulp case* used a form of effects test on domestic markets. However, the ECJ added the requirement that the agreement needs to be implemented within the EU, which is a difficult concept to practice by. Nonetheless it is an effect test. The Commission went further and asserted jurisdiction on the Boeing/McDonnell-Douglas merger only by the effects the merger would have on the common market. This case is often cited to show the failure of the extraterritorial reach of competition regulations, but what is interesting, is that what the US objected to was not the claim of jurisdiction by the Commission but to the specific concessions the Commission required of Boeing/McDonnell-Douglas. Jurisdiction based on the effects doctrine fall within the public international law. However, it is unclear how substantial the effect on the market needs to be.¹¹⁸

When it comes to the public international law on enforcement jurisdiction it is clear that the EU practice of sending notices to corporations outside the EU, concerning compulsory procedures is outside the limits of public international law.¹¹⁹ The same is true for the US practice of asserting enforcement jurisdiction merely on the existence of personal jurisdiction. Concerning the claim of jurisdiction in an investigation over the head office due to the existence of a branch within the country is according to Mann within the limits of public international law, with two exceptions. *First*, when the investigation is not to the company's own affairs but that of a third

¹¹⁶ See Meessen for a thorough analysis customary international law and extraterritorial jurisdiction, this however includes only until 1984 and the move away from comity considerations through the *Hartford Fire* case is not included.

¹¹⁷ Meessen at 798-808.

¹¹⁸ Meessen at 799.

¹¹⁹ Mann at 40.

party. *Second*, when the demanded action is in conflict with the laws of the foreign country where the head office is located.¹²⁰

4.3.3 Conflicts Within the Boundaries of Public International Law

If a state exercise jurisdiction within the boundaries of public international law, higher level of efficiency in the regulation structure could be achieved. Each state could exercise jurisdiction when a substantial effect is noticeable on the domestic market. If the harm on the domestic market were a cause for economic inefficiency the application of the domestic law would most likely not lead to a conflict since the regulations of the different states are similar or identical. The country not using the extraterritorial application cannot object to the jurisdiction since it is within the public international law, and it could most likely not object to the substantive regulation since it is a recognized argument in the domestic regulations. Also if the jurisdiction were applied concurrently by the two jurisdictions it would most likely not cause a conflict since the objectives are similar or the same. Thus, the objective would be achieved without a conflict. However, if the situation deals with a *non-economic efficiency* argument the situation might radically differ. The jurisdictional question might not be affected but since there is no common ground in the substantive regulations the other state is more likely to object to such application and this conduct is also more likely to cause a conflict with the other state's interests.¹²¹

4.3.4 Cooperation Agreements

4.3.4.1 General

Cooperation agreements are the instruments that several states have turned to in order to solve the rising issues of conflicts in competition law. The bilateral agreements have a tendency to be more binding than the multilateral agreements. The US has developed several bilateral agreements with e.g. Australia, Canada and the EU. The EU on the other hand have only developed two bilateral agreement, with the US and Canada.

¹²⁰ Mann at 49-51.

¹²¹ Gifford and Sullivan at 95.

4.3.4.2 Bilateral Agreement Between EU and the US

The bilateral agreement¹²² between the US and the EU has a wide scope of application. This includes notification of any enforcement action, which might affect the interests of the other jurisdiction, consultations regarding notified actions, information sharing and mutual assistance within the boundaries of each jurisdiction's laws. The goal is basically to promote communication between the jurisdictions in hope of achieving cooperation and thus avoiding conflicts.¹²³

The EU-US agreement also includes positive comity provisions. This means that when one jurisdiction feels that a vital interest is harmed by anticompetitive conduct in the other jurisdiction the harmed jurisdiction may request that the jurisdiction, where the anticompetitive conduct occurs, take enforcement actions against the conduct. The jurisdiction, where the conduct takes place, is not required to take enforcement actions but rather to carefully consider the request. In the amended agreement of 1998¹²⁴, which does not apply to mergers, the following is also applicable.¹²⁵ If the jurisdiction, where the conduct takes place, takes actions against the conduct, the jurisdiction that made the request will suspend its own enforcement actions if (1) the conduct mainly hurts the requesting jurisdiction's exporters and not its consumers, and (2) if the conduct is principally aimed at the jurisdiction where it takes place. This is however just a presumption and not a binding rule.¹²⁶

4.3.4.3 Multilateral Agreements

At present two multilateral agreements or declarations to which both the EU and the US are parties are in force. One declaration through the United Nations (U.N.) and the other through the Organization for Economic Cooperation and Development (OECD). Neither have contributed to any substantial changes.

The U.N. General Assembly adopted U. N. Conference on Trade and Development's (UNCTAD) Set of multilaterally agreed equitable principles and rules for the control of restrictive business practices.¹²⁷ The resolution is

¹²² Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws, O.J. L 132, 15.06.1995.

¹²³ Fullerton and Mazard at 413.

¹²⁴ Agreement between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of their Competition Laws, O.J. L 173, 18.06.1998, (hereinafter EU-US Comity Agreement).

¹²⁵ Fullerton and Mazard at 414.

¹²⁶ Fullerton and Mazard at 413-414; EU- US Comity Agreement Article IV.

¹²⁷ The set of multilaterally agreed equitable principles and rules for the control of restrictive business practices, adopted by the United Nations Conference on Restrictive Business Practices as an annex to the United Nation General Assembly Resolution of April 22, 1980.

non-binding and has not gained status as a source of international law. However, an interesting point in conjunction to the extraterritorial application is that the resolution accepts the effects test and goes even further accepting also application jurisdiction without domestic effects.¹²⁸

The OECD also has recommendations concerning the member nations cooperation concerning competition law enforcement.¹²⁹ These recommendations are also non-binding and have had no practical effect on the cooperation between member nations.¹³⁰

4.4 Competition Regulations Within the WTO Framework

4.4.1 General

Since the above argument leads only to a decrease in conflicts, I will in these sub-sections focus on the possibility of including competition law within the WTO framework. I will bring forth the conflicting interests that are created by including competition law in the WTO. I will further put forth arguments for keeping the applicability of the WTO on competition issues at the current level.

4.4.2 Effectiveness of a WTO Competition Regulation

There are several problems with incorporating competition regulations into the WTO framework. Since all countries have to agree on e.g. minimum rules the rules will become meaningless for most situations. Even though most countries have competition regulations, it is not desirable to force regulations concerning *private* import restraints on all countries. Furthermore, there is a conflict of objectives between competition law and the WTO, at least in part.

The proposed inclusion of competition regulations within the WTO framework will start with a minimum requirement agreement.¹³¹ Because the WTO include nations with a wide variety of interests and objectives of competition regulations, a negotiation on minimum requirement will most

¹²⁸ Meessen at 799.

¹²⁹ see Revised recommendation of the Council concerning cooperation between member countries on anticompetitive practices affecting international trade, July 27 and 28, 1995, OECD C(95) 130 final.

¹³⁰ Fullerton and Mazard at 415.

¹³¹ Mario Monti European Commissioner for Competition Policy, "A Global Competition Policy?" European Competition Day Copenhagen, 17 September 2002.

likely result in rather useless and watered down regulations. To reach an agreement the minimum standard will have to be set very low and does therefore not achieve much. Concerning merger regulation, propositions have been voiced that the WTO should create a merger regulation for international mergers with its own authority. This scenario is unlikely due to the fact that several nations are not keen on transferring authority from its sovereign to an international organization. Additionally, evaluating mergers involve valuing the effects on different countries, it will therefore inevitably arise situations where one country receives positive effects and another negative effects, which will lead to that one country is going to have to take a loss for the improvements in another country.

Including competition law within the WTO will also force countries to adopt competition regulations. This might not sound like a problem, since competition regulations promote efficiency. However, not all countries are alike and certain countries might want to use its resources in a different way. Competition regulation's objectives are, as explained earlier, to promote economic efficiency. A country should implement competition regulations in order to gain this economic efficiency and not because other countries would like to gain access to their market. The argument that countries without competition regulations could hurt other countries through dumping or predatory pricing is weak. First of all, the antidumping regulations still would apply, but foremost, as discussed earlier, if a company wants to sell products to another country to a lower price that is a benefit, unless it is an industry with high barriers to entry in which the competitors are forced out of business.

Concerning the objectives of the WTO and competition regulations one objective, namely economic efficiency, does coincide. Both the WTO and the competition regulations try to achieve *allocative efficiency*, i.e. that a product is put into the highest valued uses.¹³² There could still exist some problems since economic efficiency is not something, which is carved in stone, opinions vary over time. Also, two conflicting solutions could both be economic effective in theory, as in the Boeing case, but only one is efficient and it is impossible to predict which. In such cases difficult negotiations would arise. But is it possible to transfer authority to the WTO in just competition regulations concerning economic efficiency and members keeping their non-economic efficiency objectives?

4.5 Concluding Analysis

Legal and political conflicts basically occur when two states or territories have different interests. The only way to completely avoid legal and political conflicts is through harmonizing the interests of the different states. An

¹³² Gifford and Sullivan, at 68.

example of a conflict: one territory would like an industry to survive and prosper because it employs many people and therefore clears a merger between the two major producers in its country. Another country to which the merging companies export, another company is located that also employs many people. This company will now have a difficult time selling its products, and the government of that country wants to protect its workers and do not clear the merger. This is a typical political conflict, although the competition authorities' arguments might be of more nuances. The question we should ask here is: Is this conflict necessary? If competition authorities apply competition regulations for protectionist purposes then the conflict is necessary to achieve its goals. However, if the goal is economic efficiency there is no need for a conflict. Since, economic efficiency is a global notion, even if a state wants to create gains for its own country, these gains will be achieved through acting economically efficient. Thus all states will strive for the same results and a conflict of interest could not occur.

The problem with this is that economic efficiency is a theoretic notion. The task for a legislator of competition regulation should be to create rules, which to the largest extent materialize economic efficiency.¹³³ This not only for economic prosperity but also for the minimization of legal (and political) conflicts. However, countries might have different views on what is economically efficient and might in certain cases prefer economic efficiency arguments that favor the protectionist interests of their country and that will still cause conflicts. A possible way to solve this problem is for the WTO to define what should be viewed as "economic efficient" and countries that have competition regulations should use the agreed upon definitions of economic efficiency as the efficiency goals of their competition regulations. As long as all involved countries have the same view on what is economically efficient legal conflicts will be avoided. The backside of this would be that it might not result in the highest possible growth since it would be impossible to create a truly economic efficient definition, but this is not the concern for this examination. A consequence thereof would be, since the result of regulating in several jurisdictions will be the same, that it will be possible to a larger extent to defer competition regulation to another jurisdiction. Since the substantive regulations in the competition laws will in essence be the same, claiming extraterritorial jurisdiction on these grounds would most likely not cause any objections or conflicts since the other country would have acted in the same manner if it were faced with the same situation.

The solution above will not solve the problem of legal conflicts as a result of non-economic efficiency regulations. The easiest way to avoid this type of conflict is through not applying these regulations extraterritorially. Another way is to keep within the boundaries of international law. Using extraterritorial application of competition law within the boundaries of

¹³³ The proposition presented here is inspired by the Gifford and Sullivan article, however, the propositions substantially differ.

international law rarely causes legal conflicts. This is not a way to totally avoid conflicts but the risk will be minimized.

A conflict that still cannot be avoided is if one state claims jurisdiction on territorial grounds on a non-economic efficiency regulation and another state claim jurisdiction on extraterritorial grounds on an economic efficiency regulation. This type of conflict would also occur even if competition regulations were incorporated within the WTO framework. Presently, different interests for the members of the WTO cause conflicts in other areas of the WTO framework. The conflicts between the US and EU regarding hormone treated beef or the import regime of bananas to the EU are examples thereof.¹³⁴ Political conflicts can occur in any situation where a state by itself or through an organization exercises jurisdiction that affects the interests of other countries. However, if the member nations could accept the dominance of the economic efficiency goal over the non-economic efficiency goals, also these conflicts could be avoided. This might be an unrealistic suggestion.

One could argue that *political conflicts* should not happen, at all, because of the reciprocal nature of international law. One state accepts the other states claims since it would act in the same way if the same thing had happened to them. Because the more powerful state could dictate the contents of the legal rule, large jurisdictions (the US or the EU) would in essence export its legal rules to foreign states. The likelihood of this ever occurring is very slim since countries view themselves as independent and sovereign, and are therefore not keen on adopting legal rules from larger states. The substantial law of different countries will therefore not in the foreseeable future be completely harmonized. As for now the nature of international law is not reciprocal.

The co-operation agreements and comity agreements are different ways of approaching the problems. These systems are good and can reduce the number of conflicts but will never be as effective as the systems suggested above, since when the protectionist interests are getting greater the conflict cannot be avoided. Using these types of agreements in conjunction with the above suggestions could lead to more efficient competition enforcement. Countries will defer enforcement more often if concurrent jurisdiction exists, since the regulation structure would be more similar. The co-operation and comity agreements could therefore serve as guides when to defer the enforcement.

¹³⁴ WTO Appellate Body Report, European Community – Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998); WTO Appellate Body Report, European Community – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R (Sept. 9, 1997).

5 Conclusion

The US antitrust regulations with a few exceptions focus only on economic efficiency. The EU has a larger amount of *non-economic efficiency* goals in its regulations. Considering that, it is difficult to understand why it is the EU and not the US who is the proponent of a WTO competition regulation. Economic efficiency regulations are *first* of all less likely to cause conflicts and *secondly* multilaterally agreed upon principles on what is “economic efficient” would eliminate any conflicts concerning the regulations with efficiency goals. However, transferring non-economic efficiency goal to the WTO would be an extremely difficult negotiation and would most likely cause political conflicts when practiced. Non-economic efficiency goals for competition regulations should, in my opinion, not be applied extraterritorially.

My suggestions and proposals in this paper concerning minimization of conflicts are only applicable to extraterritorial *legislative* jurisdiction. The problems related to enforcement jurisdiction has been discussed but the solution to the problems is not in the suggestions presented in this paper. Merely following public international law will not eliminate conflicts since an extraterritorial application will still conflict with the interests and sovereignty of the other country.

The interaction between trade and competition law is a relatively new subject and therefore the research in the field is only just starting. Although I have tried to get some answers and solve some of the problems in this field, I hope that I have raised even more questions and brought forth more problems related to this field. There is an endless amount of problems to discuss regarding the relationship between competition and trade, and I hope that this paper shed some light on some of the problems we are facing.

Bibliography

EU Official Documents

Mario Monti European Commissioner for Competition, “A Global Competition Policy?”, European Competition Day Copenhagen, 17 September 2002, available at: http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/02/399|0|RAPID&lg=EN&display= (visited Dec.7, 2002)

Agreement between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of their Competition Laws, O.J. L 173, 18.06.1998

Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws, O.J. L 132, 15.06.1995

The EU Commission Decisions

Boeing/McDonnell-Douglas, Commission Decision, July 30, 1997, O.J. (336) 0016

Centraal Stikstof Verkoopkantoor, Commission Decision, June 25, 1976, O.J. [1976] L 192/27

EU Legislation

Control of Concentration, Council Regulation 4064/89 of Dec. 21, 1989, 1990 O.J. L/257, amended by Council Regulation 1310/97, 1997 O.J. L/180

US Government Documents

Final Report of the International Competition Advisory Committee (2000) available at: <http://www.usdoj.gov/atr/icpac/finalreport.htm> (visited Dec. 14, 2002)

United States Department of Justice and Federal Trade Commission, “Antitrust Enforcement Guidelines for International Operations, April 1995, available at: <http://www.usdoj.gov/atr/public/guidelines/internat.htm> (visited Dec. 7, 2002)

US Legislation

The Robinson-Patman Act, 15 U.S.C. §13

The Foreign Trade Antitrust Improvements Act of 1982

The Trade Act, 19 U.S.C. § 2411
The Sherman Act, 15 U.S.C. §§ 1 *et seq.*
The Clayton Act 15 U.S.C. § 18

WTO Treaties

General Agreement on Tariffs and Trade, opened for signature Oct. 30 1947, 55 U.N.T.S. 187, amended at the Uruguay Round of Multilateral Trade Negotiations

General Agreement on Trade in Services, Uruguay Round of Multilateral Trade Negotiations

Trade Related Investments Measures, Uruguay Round of Multilateral Trade Negotiations, April 15, 1994

Trade Related Agreement on Intellectual Property, Uruguay Round of Multilateral Trade Negotiations, April 15, 1994

Agreement on Subsidies and Countervailing Measures, Uruguay Round of Multilateral Trade Negotiations, April 15, 1994

Agreement on Implementation of Article VI of the General Agreement of Tariffs and Trade 1994, Uruguay Round of Multilateral Trade Negotiations, April 15, 1994

WTO Documents

Working Group on the Interaction between Trade and Competition Policy, "Core Principles, Including Transparency, Non-discrimination and Procedural Fairness", Sept. 19, 2002, WT/WGTCP/W209

Understanding on Rules and Procedures Governing the Settlement of Disputes, annex 2 to the Uruguay Round Final Act

Analytical Index: Guide to GATT Law and Practice, 6th ed., 1994

Other Documents

(available at the Commission's competition directorate's web page)

Revised recommendation of the Council concerning cooperation between member countries on anticompetitive practices affecting international trade, July 27 and 28, 1995, OECD C(95) 130 final

The set of multilaterally agreed equitable principles and rules for the control of restrictive business practices, adopted by the United Nations Conference

on Restrictive Business Practices as an annex to the United Nation General Assembly Resolution of April 22, 1980

Literature

Areeda, Phillip, "Antitrust Analysis: Problems, Text, Cases" 3rd ed., Boston, 1981

Cramton, Roger C, David P. Currie and Herma Hill Kay, "Conflict of laws: cases, comments, questions", 3rd ed. St. Paul, Minn, 1981

Goyder, D. G., "EC competition law", 3rd ed., Oxford, 1998

Jackson, John H., "The World Trading System: Law and Policy of International Economic Relations", 2nd ed, London, 1997

Joelson, Mark R., "An International Antitrust Primer: A Guide to the Operation of United States, European Union and other Key Competition Laws in the Global Economy", 2nd ed., The Hague, 2001

Korah, Valentine, "An introductory Guide to EC Competition Law and Practice", 7th ed., Oxford, 2000

Malanczuk, Peter, "Akehurst's Modern Introduction to International Law", 7th revised ed., London, 1997

Sullivan, Lawrence A and Warren S. Grimes, "The Law of Antitrust: An Integrated Handbook", St. Paul, Minn, 2000

Trebilcock, Michael J., and Robert Howse, "The Regulation of International Trade", 2nd ed., London, 1999

Varian, Hal R., "Intermediate Microeconomics: A Modern Approach", 4th ed., London, 1996

Weintraub, Russell J., "Commentary on the Conflicts of Laws", 4th ed., New York, NY, 2001

Whish, Richard, "Competition Law", 2nd ed., London, 1989

Articles

Bianchi, Andrea, "Extraterritoriality and Export Controls: Some Remarks on the Alleged Antinomy Between European and U.S. Approaches", 24 GYIL vol. 35, 1992, at 366-434

Fiebig, Andre R., "International Law Limits on the Extraterritorial Application of the European Merger Control Regulation and Suggestions for Reform", 1998, E.C.L.R. Issue 6, at 323-331

Fox, Eleanor M, "Towards World Antitrust and Market Access", 91 American Journal of International Law, 1997 at 1

Fullerton, Larry and Camelia C. Mazard, "International Antitrust Cooperation Agreements", 2001, World Competition 24(3), at 405-423

Gifford, Daniel J. and E. Thomas Sullivan, "Can international antitrust be saved for the post-Boeing merger world? A proposal to minimize international conflict to rescue antitrust from misuse", The Antitrust Bulletin, Spring 2000, at 55-118

Goldman, Julie, "Bad Lawyering or Ulterior Motive? Why the United States Lost the Film Case Before the WTO Dispute Settlement Panel", Law and Policy in International Business, Vol. 30, 1999, at 417-434

Komuro, Norio, "Kodak-Fuji Film Dispute and the WTO Panel Ruling" Journal of World Trade 32(5) 1998, at 161-217

Lowenfeld, Andreas, "Public Law in the International Arena: Conflict of Laws, International Law and Some Suggestions for their Interaction", Recueil des Cours, vol. 163 II, 1979, at 315-445

Maier, Harold, "Extraterritorial Jurisdiction at a Crossroads: An Interaction Between Public and Private International Law", AJIL, vol. 76, 1982, p. 280-320

Mann, F.A., "The Doctrine of Jurisdiction in International Law", Recueil des Cours, 1964, vol 111 I, (cited Mann 1964)

Mann, F.A., "The Doctrine of International Jurisdiction Revised after 20 years", Recueil des Cours, 1984, vol. 186 III, at 9-98

Mavroidis, Petros, and Sally Van Siclen, "The Application of the GATT/WTO Dispute Resolution System to Competitions issues", 1997, 31 Journal of World Trade, at 5-40

Meessen, Karl M., "Antitrust Jurisdiction under Customary International Law", American Journal of International Law, Vol. 78, 1984, at 783-810

Mitchell, Andrew, D., "Broadening the Vision of Trade Liberalization: International Competition Law and the WTO", 2001, World Competition 24(3), at 343-365

Waller, Spencer and Webber, “Can US Antitrust Laws Open International Markets?” *Northwestern Journal of International Law and Business*, vol. 20, winter 2000, at 207-231

Newspaper articles

The Economist, July 4, 1998, “The Borders of Competition”

Table of Cases

EU Cases

The Court of Justice of the European Communities

A. Ahlström Osakeyhtiö and others v. Commission, C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85--C-129/85, 1993 E.C.R. 1307

Metro SB-Grossmärkte GmbH & Co. KG v. Commission, C-75/84, [1986] E.C.R. 3021

Europemballage Corporation and Continental Can Company Inc. v. Commission, C-6/72, [1973] E.C.R. 215

Imperial Chemical Industries Ltd. v. Commission, C-48/69, [1972] E.C.R. 619

J.R. Geigy v. E.E.C. Commission, C-52/69, [1972] E.C.R. 787

Court of First Instance

Gencor, T- 102/96, [1999] E.C.R. 753

US Cases

Supreme Court

Hartford Fire Ins. Co. v. California, 509 US 764 (1993)

American Banana Co. v. United Fruit Co., 213 US 247(1909)

Court of Appeals

United States v. First National Bank of Chicago, 699 F. 2d 341 (1983),

United States v. Bank of Nova Scotia, 691 F.2d 1384 (1982)

Federal Trade Commission v. Compagnie de Saint-Gobain-Pont-à-Mousson, 636 F.2d 1300 (1980)

Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (1977)

United States v. First National City Bank, 396 F. 2d 897 (1968)

United States v. Aluminum Co., 148 F.2d 416 (1945)

District Court

“Krupp”, Case no. M82-2 MISC. District Court for the Western District of Michigan, Northern Division, in: *International Legal Materials* 1983, at 742.

Dominicus Americana Bohio v. Gulf & Western Indus., 473 F.Supp. 680 (S.D.N.Y. 1979)

WTO/GATT Panel Reports

(available at <http://www.wto.org>)

Japan – Measures Affecting Consumer Photographic Film and Paper Mar. 31, 1998, WT/DS44/R

GATT Dispute Panel Report, Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies, Feb. 18, 1992, GATT B.I.S.D. (38th Supp.), 27 (1992)