

International Conflicts over the Extraterritorial Application of
Competition Law in a Borderless Economy

By Takaaki Kojima¹

Fellow

Weatherhead Center for International Affairs, 2001-2002

¹ The author wrote this paper while he was a Fellow at the Weatherhead Center for International Affairs at Harvard University. The views expressed here are solely those of the author and do not reflect those of either the Japanese Government or the Weatherhead Center for International Affairs.

I. Introduction

We are witnessing increasingly widespread and penetrating economic globalization today. As a result of trade liberalization, import restrictions or regulations on trade and investment have decreased substantially, and trans-border business activities face less barrier. At the same time, the role of trans-border business activities, especially those by so-called multinational or global enterprises, have become increasingly important and even dominant in some sectors.

As far as the territorial scope of business activities are concerned, state borders are more or less diminishing to become almost borderless; as for legal regimes, however, sovereign states retain in principle exclusive jurisdiction over their territories and nationals under international law. Business activities are regulated by the domestic laws of sovereign states or by international agreements concluded among sovereign states. The pertinent question is how to coordinate “borderless” business activities within the existing legal regimes governed by sovereign states. In the field of trade law, the measures of each state are restricted by international agreements, in particular under the GATT/WTO regime. In the field of competition law, such an international regime is lacking and the domestic laws of each state regulate private restraints of trade in the relevant markets.

Serious jurisdictional conflicts have transpired in the last several decades between the United States and other states over the so-called extraterritorial application of U.S. antitrust laws on anticompetitive conducts abroad. This problem has also caused diplomatic frictions between the United States and other states, as it concerns state sovereignty. In this essay, the author will review the historical development of

international conflicts caused by the extraterritorial application of competition law and attempt to examine the options available to circumvent or solve these conflicts. The main focus will be U.S. antitrust law and its relation with other jurisdictions, mainly the European Union and Japan, considering the grave implications to competition law and policy as well as to the world economy.²

II. Extraterritorial Application of U.S. Antitrust Laws

Problems concerning the extraterritorial application of U.S. antitrust laws have been discussed in many publications. Of the U.S. antitrust laws, the Sherman Act applies to “commerce ... with foreign nations” (Section 1) without qualifying provisions concerning its territorial scope as “within the United States” (Section 2) or “in any section of the country” (Section 3) as specified in the Clayton Act. In the past, U.S. courts interpreting the Sherman Act of 1890 and other antitrust laws commonly followed the traditional territorial principle with regard to its jurisdictional reach. In the *American Banana* case (213 U.S. 347 (1909)), where all the acts complained of were committed outside the territory of the United States, including the defendant’s alleged inducements of the Costa Rican government to monopolize the banana trade, the U.S. Supreme Court dismissed the complaint on the ground, *inter alia*, that acts committed outside of the United States are not governed by the Sherman Act. In this case, the territorial principle in the classic sense was applied.

In later decisions such as the *American Tobacco* case (221 U.S. 106 (1911)) and

² In this article, “extraterritorial application of law” means “application of law “application of law by a state to a foreign national’s conduct, the whole or a part of which is engaged outside the territory of that state,” and “antitrust law” means “competition

the Sisal case (274 U.S. 268 (1927)), jurisdiction was exercised over the defendants on the ground that although the agreements in question were concluded by foreigners outside the United States, jurisdiction was limited to what was performed and intended to be performed within the territory of the United States. In these cases, the territorial principle was applied more flexibly, but it has been observed that this application cannot be argued other than as a sensible and reasonable deployment of the objective territorial theory.³

An entirely different approach was taken in the Alcoa case (148 F.2d. 416 (1944)), in which foreign companies outside the United States had concluded the agreements. The Court of Appeal for the Second Circuit held it settled law that any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders. It went on further to state that the agreements, although made abroad, were unlawful if they were intended to affect imports and did affect them.

This theory of the intended effect (the effects doctrine) elaborated in the Alcoa case was criticized by many as an excess of jurisdiction under public international law. For instance, R.Y. Jennings noted that “in this new guise it apparently comprehends the exercise of jurisdiction over agreements made abroad, by foreigners with foreigners provided only that the agreement was intended to have repercussions upon American imports or exports,”⁴ while F.A. Mann argued that “the type of effect within the meaning

law” and will be used in reference to the competition law of the United States.

³ R.Y. Jennings, British Yearbook of International Law 1957, 164. Under the objective territorial principle, jurisdiction is established for conduct that was commenced outside the territory but consummated within the territory of the state that exercises its jurisdiction.

⁴ R.Y. Jennings, BYIL 1957, 166.

of the Alcoa ruling has nothing in common with the effect which by virtue of established principles of international jurisdiction confers that right of regulation.”⁵ Nevertheless, since the Alcoa case, U.S. courts have continued to follow the new jurisdictional formula of the effects doctrine.

In response to excessive application of U.S. antitrust laws, especially with respect to courts’ orders to produce documents such as subpoena duces tecum located abroad, a considerable number of states have issued diplomatic protests. Australia, France, the United Kingdom, the Netherlands, and New Zealand have even enacted blocking legislation.⁶ The protesting states maintain that taking evidence abroad, including an order to produce documents, is an exercise of extraterritorial enforcement of jurisdiction that, under international law, requires the consent of the state where the evidence is located. The United Kingdom has been one of the strongest opponents to U.S. claims of extraterritorial jurisdiction. The U.K. government stated for instance that “HM Government considers that in the present state of international law there is no basis for the extension of one country’s antitrust jurisdiction to activities outside of that country of the foreign national.”⁷ The Protection of Trading Interest law was enacted in 1980, which provides to extensively thwart the extraterritorial application of U.S. antitrust laws. The U.K. government invoked the provisions in the Laker Airways case (1983 W.L.R. 413) in 1983.

Having faced the antagonistic reactions of other states, U.S. courts began to show some restraint in assuming extraterritorial jurisdiction. In the *Timberlane* case (549 F.2d.

⁵ F.A. Mann, Recueil des Cours 1964, 104.

⁶ OECD, Competition Law Enforcement 1984, Annex III.

9th Cir. (1976)), the court concluded that it had jurisdiction over alleged anticompetitive conducts in Honduras but refrained from asserting extraterritorial jurisdiction after having applied three tests: first, whether the challenged conduct had had some effect on the commerce of the United States; second, whether the conduct in question imposed a burden on U.S. commerce; and third, whether the complaint's interests of and links to the United States were sufficiently strong vis-à-vis those of other nations to justify an assertion of extraterritorial authority. The Foreign Trade Antitrust Improvements Act enacted in 1976 applies to foreign conduct that has a direct, substantial and reasonably foreseeable effect on U.S. commerce, The U.S. enforcement agencies, the Department of Justice (DOJ) and the Federal Trade Commission (FTC), have adopted this jurisdictional rule of reason formula since the Enforcement Guidelines for International Operations of 1988. However, divergent views exist as to whether the third test of balancing the interests of other states is a rule of international law or just a comity.⁸ Furthermore, not all U.S. courts have consistently applied the test of balancing interests.⁹

In 1993, the Supreme Court decision in the Hartford Fire Insurance case (113 S. Ct. 2891 (1993)) reaffirmed the effects doctrine, stating that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States. The Court then took a restrictive view on the test of balancing interests, stating that the only substantial question is whether there is a true conflict between domestic and foreign law, and held that no such conflict seemed to exist because

⁷ 28 July 1978, Diplomatic Note 196.

⁸ K.K. Meesen, "Antitrust Jurisdiction under International Law," AJIL 1984, 783.

⁹ E. M. Fox and R. Pitovsky, Global Competition Policy 1997, 263.

British law did not require defendants to act in a manner prohibited by U.S. law.¹⁰

Japan maintains the territorial principle and rejects the effects doctrine, stating that the effects doctrine cannot be regarded as an established rule of international law. In the view of the Government of Japan, the extraterritorial application of U.S. domestic laws (including U.S. antitrust laws) based on the effects doctrine is not allowed under general international law.¹¹ In the *Nippon Paper* case, where a Japanese company was prosecuted under the Sherman Act, the Japanese government submitted a brief of amicus curiae where it stated, inter alia, that the extraterritorial application of the Sherman Act to a conduct of a Japanese company engaged in business in Japan is unlawful under international law.¹² Nonetheless, the U.S. Supreme Court affirmed the Court of Appeal decision, which assumed the extraterritorial application of the Sherman Act to a criminal case for the first time (118 S. Ct. 685 (1998)).

III. E.U. Enforcement of Competition Law against Foreign Companies

While the aggressive extraterritorial enforcement of U.S. antitrust laws has caused serious conflicts, a definite trend can be observed in the expanding scope of the extraterritorial application of competition laws in other jurisdictions, including the European Union. Among the member states of the European Union, the competition laws of Germany, Austria, and Greece, for instance, have specific provisions incorporating the

¹⁰ A.F. Lowenfeld, "Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe," *AJIL* 1995, 48.

¹¹ Comments of the Government of Japan on the draft of the 1995 U.S. Enforcement Guidelines for International Operations, 1.

¹² Brief of Amicus Curiae of the Government of Japan in the *Nippon Paper* case, U.S. Ct. App. 1st Cir. 18 November 1996.

effects doctrine. Competition provisions in the Rome Treaty (Articles 85 and 86) lack express stipulation on the territorial scope of jurisdiction. The European Commission, as the enforcement agency of competition law, has repeatedly applied the effects doctrine in its decisions. In the Sixth Report on Competition Policy in 1977 the Commission restated its view, concluding that the Community authorities “can act against restrictions of competition whose effects are felt within the territory under their jurisdiction, even if companies involved are locating and doing business outside the territory, and of foreign nationality, have no link with that territory, and are acting under an agreement governed by foreign law.”¹³

The European Court has not upheld the effects doctrine adopted by the European Commission. One example would be in the Wood Pulp cases,¹⁴ where wood pulp producers established outside the European Community had concerted on the prices to be charged to their customers in the European Community and sold directly or through branches, subsidiaries, etc., to purchasers in the Community. The European Commission justified the Community’s jurisdiction on the ground that “the effect of the agreements and practices announced and/or charged to customers and on resale of pulp within the EEC was therefore not only substantial but intended, and was the primary and direct result of the agreements and practices.”¹⁵

Following the Commission’s decision, the wood pulp producers and association of wood pulp producers lodged applications with the European Court. They maintained

¹³ E. Nerep, Extraterritorial Control of Competition under International Law 1983, 281-282.

¹⁴ European Court Judgment of 27 September 1988, European Court Reports 1988, 5193.

¹⁵ European Commission Decision IV/29.725 of December 1984.

that the Commission had misconstrued the territorial scope of Article 85 of the Rome Treaty. They added that even if there is a basis in Community law for applying Article 85 to them, the action of applying the rule interpreted in that manner would be contrary to public international law, which precludes any claim by the Community to regulate conduct restricting competition adopted outside the territory of the Community merely by reason of the economic repercussions that that conduct produces within the Community.

The European Court held that the Commission's decision was not contrary to Article 85 of the Rome Treaty or to the rules of public international law. The Court observed that the decisive factor is not the place where the agreement, decision, or concerted practice was concluded but the place where it is implemented—in this case, the pricing agreement was implemented within the Common Market. The Court also concluded that it is immaterial in that respect whether or not the producers had recourse to subsidiaries, agents, or branches within the Community. The Court noted that the Community's jurisdiction to apply its competition rules to such conduct is covered by the territorial principle as universally recognized in public international law. On the other hand, the Court held that the Commission's decision be void so far as it concerns the association of wood pulp producers (KEA), noting that the KEA did not engage itself in manufacture, selling, or distribution, and that the KEA had not played a separate role in the implementation of the pricing agreements.

In the Wool Pulp cases, while the Commission adopted the effects doctrine, the Court based its judgment on the territorial principle. However, the objective territorial principle on which the Court based its jurisdiction was a modified one in the sense that the only requirement was that the implementation (sale) take place within the European

Community, while the existence of a branch, a subsidiary, etc., within the Community was irrelevant. In practice, it has come much closer to the effects doctrine. Nevertheless, the Court's position still contains certain theoretical as well as practical differences from that of the Commission, as the Court reversed the decision of the Commission on the KEA on the ground that the KEA had not engaged in the conduct (the sale) to the Community.

The territorial scope of the E.E.C. Merger Regulation (Regulation No. 4064/89) and its justification under international law was reviewed in the Gencor case concerning a merger of two South African companies.¹⁶ The Court of First Instance of the European Community observed that “according to Wood Pulp, the criterion as to the implementation of an agreement is satisfied by mere sale within the Community, irrespective of the location of the sources of supply and the production plant. It is not disputed that Gencor and Lonrho carried out sales in the Community before the concentration and would have continued to do so thereafter. Accordingly, the Commission did not err in its assessment of the territorial scope of the Regulation by applying it in this case to a proposed concentration notified by undertakings whose registered offices and mining and production operations are outside the Community.” The Court further observed that the “application of the Regulation is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community” and then after having applied the three criteria of immediate, substantial, and foreseeable effect to the case held that “the application of the Regulation to the proposed concentration was consistent with public

¹⁶ Judgment of the Court of First Instance, 25 March 1999.

international law.” In the above decision, although the Wood Pulp cases were referred to and the “implementation” test was applied in connection with the territorial scope of the E.E.C. Merger Regulation, the effects doctrine (not the objective territorial principle applied in the Wood Pulp cases) was applied for the justification of jurisdiction under public international law.

Since the Court of First Instance handed down the Gencor decision, it was not challenged in the European Court, so whether the European Court will change its position with regard to E.U. competition jurisdiction from the objective territorial principle to the effects doctrine remains to be seen. Nonetheless, the European Union is definitely assuming the extraterritorial application of its competition law in a much-widened scope.

IV. Territorial Scope of Japan Competition Law

Under the Antimonopoly Act enacted in 1947, the Japan Fair Trade Commission (JFTC), as an independent administrative agency, has the power to enforce the Act, subject to judicial review. With regard to the territorial scope of the Act, no provision in the Act explicitly stipulates it, nor has there been any judicial decision on this point. It can therefore only be judged by the JFTC’s enforcement practices.

A JFTC-organized study group observed in its report that the JFTC’s application of the Antimonopoly Act to foreign firms was limited compared to the European Court’s decisions in the Wood Pulp cases, where firms located outside the European Community were subjected to E.C. competition law because they sold goods to the European Community under a price agreement. As illustrated through its Nippon Yusen case¹⁷

¹⁷ JFTC Decision, 18 August 1972.

decision, which “cannot be classified as based either on the territorial principle or the effect principle,” the JFTC decided that the Act should be applied “when a specific act within Japan (such as entering into a contract) fell within one of the prohibited acts set forth in the [Act’s] provisions.”¹⁸

In the study group’s view, “if a foreign firm undertakes activities such as exporting goods to Japan, and such activities are sufficient to form an act in violation of the Antimonopoly Act, then it is deemed that a violation of the Antimonopoly Act exists and the conduct is subject to the Antimonopoly Act regulations. Presence in Japan of a foreign firm’s branch or subsidiary is not necessarily a condition for the applicability of the Antimonopoly Act, with respect to acts which harm competition in the domestic market ... [If their acts sufficiently violate the Act] then it is appropriate to consider that the foreign firms are subject to regulation under the Antimonopoly Act.”¹⁹

It has been suggested that the study group’s above view recommended the JFTC to follow the effects doctrine.²⁰ The wording of the study group’s report may be read as such; however, a subsequent statement by the JFTC with respect to the 1995 U.S. Guidelines clearly rejects the effects doctrine, stating that “the application of the U.S. antitrust laws against anticompetitive conduct overseas would fundamentally come into conflict with the positions of other countries, including Japan, on the jurisdiction of national competition laws and would raise problems under international law.”²¹

¹⁸ Report of the Study Group for the Antimonopoly Act on External Affairs, February 1990.

¹⁹ Report of the Study Group for the Antimonopoly Act on External Affairs, February 1990.

²⁰ Akira Koderu, Kokka kankatsuken 1998, 356.

²¹ JFTC Statement, 8 February 1995.

Nonetheless, two significant developments observed in the last several years might suggest that the territorial scope of competition law application has been extended externally.

The first concerns the Nordion case,²² involving a Canadian company that produces and sells a product for a radioactive medicine. The share of its production and sales is more than half in the world market. Nordion concluded two separate contracts with two Japanese companies in Tokyo by which the latter were respectively obliged to purchase all of the produce to be acquired, used, consumed, or processed for 10 years from 1996. The JFTC held that Nordion violated the Antimonopoly Act (Section 3) by concluding the above contracts, excluded the business activities of other producers/sellers of the material, thereby causing, contrary to the public interest, a substantial restraint of competition in the trade of the material in Japan. It thus issued an order to Nordion to eliminate such acts.

The above JFTC decision has been pointed out as the most typical extraterritorial application of the Antimonopoly Act, where unlawful conducts were committed in Japan in the form of restraints against the purchaser and the exclusion of competitors, as well as in Canada in the form of production and export.²³ It can be argued that the contracts in question were concluded and implemented in Japan, and therefore the JFTC could assume jurisdiction over this case in accordance with the territorial principle (at least with the objective territorial principle). In any case, no decisive clue in the decision itself illuminates whether the effects doctrine was applied in this case. However, it would be significant to note that the Antimonopoly Act was enforced against a foreign company, a

²² JFTC Decision with regard to M.D.S. Nordion Inc., 3 September 1998.

part of whose conduct (export) to Japan was engaged outside Japan, which is tantamount to an extraterritorial application of the Act.

The second development is the amendment of the merger review provisions of the Antimonopoly Act. Chapter 4 of the Act concerning stockholding and mergers was amended to enter into force in January 1999. Prior to this amendment, the qualifying formulation of “in Japan” limited the scope of application of these provisions to stockholdings and mergers that took place in Japan. As a result of the amendment, the deletion of “in Japan,” the Act now applies to stockholdings and mergers by or between foreign firms, which take place outside the territory of Japan. As far as a literal interpretation of the provisions is concerned, there is room for such interpretation as any territorial nexus is excluded from the jurisdictional reach of the Act.

How the Antimonopoly Act will be applied as a result of the amendment remains to be seen through the practice of the JFTC. The first test case was the consolidation between Exxon and Mobil. The JFTC “examined the consolidation planned by Exxon Corporation ... and Mobil Corporation ... both of the United States ... the [J]FTC assessed its possible impacts in the field of crude oil production sales, on the basis of reference materials submitted by the consolidating companies and their subsidiaries and other information. [The J]FTC has concluded that the planned consolidation was not likely to violate the provisions of the Antimonopoly Act.”²⁴

In the Exxon Mobil case, there is some territorial nexus with Japan in the sense that subsidiaries and products sales of the firms concerned are located and done in Japan. However, this case is a clear precedent of the extraterritorial enforcement of Japanese

²³ Mitsuo Matsushita, Kokusai shojihomu vol. 26, no. 11, 1998, 1131.

competition law in the field of mergers, as the merger itself was between foreign companies and it was agreed upon and implemented outside Japan. It is not clear on what principle the JFTC based its justification for its jurisdiction under international law. It seems that the only territorial nexus with Japan, if any, was the sale of the products through their subsidiaries or agents in Japan.

Although the transition to a more extensive (extraterritorial) application of competition law has not been so evident as in the E.U. jurisdiction, Japan is also shifting toward extending its jurisdictional reach, especially in the case of merger review, as it is faced with increasing trans-border business activities that affect competition in relevant markets.

V. Trade Frictions and New Dimensions of U.S. Antitrust Jurisdiction

As international trade expanded, successive international trade negotiations from the Kennedy Round to the Uruguay Round achieved considerable trade liberalization, which lowered tariffs and reduced other trade barriers. As official trade barriers were reduced, anticompetitive practices have substituted official trade barriers. There is a commonly shared concern that the benefits of trade liberalization could be denied by anticompetitive business practices in the private sector distorting trade. Through expanding trans-border trade and investment, anticompetitive behavior such as hard-core cartels have come to dominate more international dimensions.

On the other hand, since the 1970s the trade deficit of the United States has continued to increase and has caused serious trade frictions with its major trade partners,

²⁴ JFTC Press Release, 18 October 1999.

especially Japan. U.S. government trade negotiators began to take up non-trade government measures and private business practices that disturb market access. Against this background, the increased interaction between trade and competition has added a new dimension to the problems related to the extraterritorial application of competition law and posed questions that are different in nature from classic jurisdictional conflicts over the extraterritorial application of U.S. antitrust laws.

As the Organisation for Economic Co-operation and Development (OECD) points out, because the United States has strong, well-established enforcement institutions and a strong tradition of professionalism and judicial oversight due to institutional independence, its enforcement decisions do not appear dependent on political influence.²⁵ In the past, U.S. competition policy was implemented in a manner largely independent of the goals and programs of other trade and investment policies. However, a new dimension of antitrust law enforcement has emerged since the late 1970s. In 1982, export cartel exemptions were enacted, purporting to promote U.S. exports.²⁶

Furthermore, the United States began to expand the extraterritorial application of its antitrust laws so as to improve market access by protecting U.S. exporters' interests. In the early 1980s, the Sherman Act was applied extraterritorially against Japanese importers for the protection of U.S. exporters in several precedents. In the *Daishowa* case (1982-2 Trade Case 774, NC Cal. 1982), where a Japanese paper manufacturer's alleged anticompetitive conduct in Japan in response to a U.S. exporters' cartel was complained, a U.S. court assumed jurisdiction over the Japanese defendant; thus the Sherman Act was enforced extraterritorially. In the *Kyokuyo* case (1983-3 Trade Case,

²⁵ OECD Review of Regulatory Reform in the United States 1999, 52.

1982 U.S. Dist. Lexis 15621), the DOJ enforced the Sherman Act on an import cartel for U.S. fishery products agreed to by Japanese companies in Japan, which was upheld by a U.S. court.

The DOJ then made public its position in the 1988 DOJ Antitrust Enforcement Guidelines for International Operations, limiting its scope of enforcement protection to U.S. consumers' interests. The guidelines stated in its footnote 159 that the DOJ "is concerned only with adverse effects on competition that would harm U.S. consumers by reducing output or raising prices." Nonetheless, this policy was maintained for only a few years. In April 1993 the DOJ announced that it would withdraw footnote 159 and take appropriate enforcement action against foreign anticompetitive conduct that restrains U.S. exports, regardless of whether the conduct results in direct harm of U.S. consumers.²⁷ This change of policy was confirmed by the 1995 Guidelines of the DOJ and the FTC, which replaced the 1988 Guidelines.

The rising U.S. trade deficit with Japan, U.S. business criticism of Japanese market closure "by private as well as government restraints ... [and the fact that the] United States and Japan were then engaged in the Structural Impediments Initiative (SII)"²⁸ have been noted with regard to the background of the above change. "The U.S. antitrust and trade officials had an idea: the synergistic use of trade and antitrust obligations to open foreign markets ... The Bush Administration's program to use the antitrust laws against firms acting to close their home markets and thus exclude U.S. exports was endorsed by the Clinton administration ... Thus, the U.S. Government has

²⁶ E.M. Fox and R. Pitovsky, "The United States," Global Competition Policy 1997, 261.

²⁷ DOJ Press Release 2 April 1993.

two potentially potent tools: the Sherman Act as applied to outbound trade (unilateral antitrust), and Section 301 (unilateral trade remedies).”²⁹

Against the above revision, not only Japan but also the European Union and others voiced criticism or reservations on the ground that such an extensive claim of jurisdiction should not be permitted under international law. The Japanese government stated: “Regarding the Department’s policy statement on April 3, 1992, the government of Japan has expressed serious concern ... pointing out that extraterritorial application of the U.S. antitrust laws announced in the above-mentioned policy statement is not allowed under the general international law, and that such antitrust enforcement for the purpose of protecting U.S. exporters may result in a deviation from the purpose of the competition laws which is to maintain competitive markets.”³⁰

The above change in U.S. antitrust policy to apply antitrust laws to protect U.S. exporters’ interests indicates not only the broadening of jurisdictional reach under the effects doctrine but also that trade policy (market access) consideration has come into play in the extraterritorial application of U.S. antitrust laws. In this connection, it is important to note that even the European Commission, which itself adheres to the effects doctrine, criticized the withdrawal of footnote 159 of the 1988 DOJ guidelines, and this was one of the main reasons the E.C. negotiated the 1988 E.C.-U.S. Supplement Agreement.³¹

The Fuji Kodak case, which has attracted widespread attention in the international

²⁸ Fox and Pitovsky, 239.

²⁹ E.M. Fox, “Toward World Antitrust and Market Access,” *AJIL* 1997, 11.

³⁰ Comment of the Government of Japan on the 1994 Draft Guidelines.

³¹ Karel Van Miert, Fordham Conference 1997.

community with respect to both trade and competition policies, could have become an important test for the application of the 1995 guidelines on extraterritorial enforcement to protect U.S. exporters' interests if the United States had resorted to antitrust proceedings. In May 1995, Kodak, a U.S. film maker, filed a complaint with the U.S. Trade Representative (USTR) under Section 301 of the 1974 Trade Act (as amended) alleging that Japan was tolerating anticompetitive practices by Fuji, a Japanese film maker, obstructing Kodak to acquire an appropriate market share in the Japanese consumer photographic film and paper market. The United States requested that Japan enter into bilateral negotiations but Japan rejected bilateral negotiations under Section 301. Japan maintained that Kodak's complaint concerned enforcement of the Antimonopoly Act of Japan and that Kodak could file its complaint directly with the JFTC.

In June 1996, the USTR made public the results of its investigation, concluding that the actions of Japan were unreasonable and therefore violated Section 301. At the same time, the USTR also requested consultations with Japan in accordance with the dispute settlement provisions of the World Trade Organization (WTO). Consultations were held under GATT Article XXIII:1 in July but failed to reach a resolution, while a panel of the WTO was established in October. After two panel meetings in 1997, the panel's report was issued in January 1998, finding that the allegations put forward by the United States under GATT provisions were not proven.

It is often argued that this type of dispute is not readily handled by either trade or competition jurisdiction. However, with respect to the main complaints by Kodak concerning alleged anticompetitive trade practices by Fuji, Kodak had brought the case to neither the Japanese competition authority nor the U.S. antitrust law enforcement

agencies before the U.S. government brought the case to the WTO, although Kodak could have done so if it sought remedies under the competition laws of Japan or the United States. As a matter of fact, in its complaint with the USTR, Kodak stated that it would not request that the U.S. government enforce antitrust laws, and the DOJ did not exercise extraterritorial antitrust jurisdiction. It has been pointed out that the fact that Kodak did not file complaints with the JFTC would make the DOJ refrain from investigating or prosecuting the case, and that if the DOJ should prosecute Fuji while acquiescing to the high market share held by and practices of Kodak in the U.S. market it would be unjustified as a matter of comity.³²

VI. Merger

Mergers are another important aspect of a competition jurisdiction in which economic globalization has brought about a new dimension of international conflicts over the extraterritorial application of competition law. Merger reviews have some interface with market access as well. First, trade flows can be affected by the approval of mergers. Second, merger reviews are often criticized as affected by industrial policy considerations such as “protection of domestic industry” or supporting “national champions,” which can also be politically sensitive.

Because of rapidly growing international trade and investment as well as diminishing trade and investment barriers, business operations across borders have increased in recent years. One of the preferred mechanisms for international expansion has been through mergers and acquisitions. As national markets evolve into a global market, more and more companies are deciding that they must become larger to compete

³² D.I. Baker and W.T. Miller, Report to the USTR on 24 April 1996.

effectively. In 1999, global mergers reached US\$3.4 trillion, an increase from US\$2.5 trillion in the previous year.³³ Trans-border mergers have also increased. In 1997, 25 percent of the requests filed with the FTC were merger cases that involved parties or assets in at least two different countries and sometimes as many as eight or ten.³⁴

Multi-jurisdictional merger reviews can create international frictions as a result of the extraterritorial enforcement of competition (merger review) law with extraterritorial effects by the decisions concerned. Even if there is no difference in substantive law, trans-border mergers can easily have different effects on different national markets; therefore, divergent decisions can be reached by the competition authorities concerned. Since the late 1990s, several major conflicts have occurred with respect to merger reviews between the United States and the European Union. It must be noted on this issue that the United States is more on the defensive rather than on the offensive, unlike the cartel litigations where the United States applied its antitrust laws extraterritorially through the past several decades.

In the Boeing McDonnell merger case, friction erupted between the United States and the European Union due to the different conclusions reached on the requested merger. Boeing held a share of about 60 percent in the global civil aircraft market, and the proposed merger would have left Airbus as its only remaining rival. On the U.S. side, the FTC approved the merger proposal in July 1997. The European Commission, on the other hand, issued a Statement of Objections on the proposed merger in May 1997. After

³³ Report of the International Competition Policy Advisory Committee to the Attorney General and the Assistant Attorney General for Antitrust (ICPAC), February 2000, Chapter 3.

³⁴ FTC Chairman Pitovsky, European Institute's 8th Annual Transatlantic Seminar on Trade and Investment, 4 November 1998, 3.

consultation with the European Commission, the Boeing side conceded to agree to terminate its exclusive supply contracts with three carriers, among other concessions. Consequently, the European Commission approved the merger with these conditions attached on 24 July.

These divergent decisions have caused political repercussions and at one point it was commented that the U.S. government may take retaliation measures against the European Union as a “trade war threat.”³⁵ Many in Europe viewed the lack of a FTC challenge inexplicable, given the agency’s aggressive enforcement posture in many other merger cases, while the European Commission’s high-profile decision to challenge the transaction was attacked by some in the United States as reflecting an industrial policy favoring a “national champion” rather than the principled application of European competition principles.³⁶

GE and Honeywell are the two premier manufacturers of U.S. military helicopter engines, collectively accounting for a substantial majority of all engines powering U.S. military helicopters flying today. On the GE Honeywell merger review, an agreement was reached in principle in May 2001 on the U.S. side between the DOJ and GE on the conditions for the proposed acquisition to be approved. However, the European Commission subsequently rejected the proposed GE acquisition in July 2001 on the ground that the merger would reduce competition in the aerospace industry and result in ultimately higher prices for customers, particularly airlines. The European Commission has been criticized for making a politically motivated decision and protecting the European Union’s trade interests.³⁷ The DOJ stated “having conducted an extensive investigation of the GE/Honeywell acquisition, the Antitrust

³⁵ Financial Times, 5 July 1997.

³⁶ ICPAC, Chapter 2.

Division reached a firm conclusion that the merger, as modified by the remedies we insisted upon, would have been procompetitive and beneficial to consumers. Our conclusion was based on findings, confirmed by customers worldwide, that the combined firm could offer better products and services at more attractive prices than either firm could offer individually. That, in our view, is the essence of competition.

The EU, however apparently concluded that a more diversified, and thus more competitive, GE could somehow disadvantage other market participants. Consequently, we appear to have reached different results from similar assessments of competitive conditions in the affected markets. Statement by Assistant Attorney General, DOJ, July 3, 2001.”

Most larger scale mergers affect two or more major economies, such as the United States, the European Union, or Japan, and therefore fall within the merger reviews of multiple national authorities. Even powerful multinational companies would find it difficult to ignore decisions by any of the jurisdictions. In this sense, each enforcement agency has effective leverage against these companies. While substantive and procedural standards for merger reviews display significant commonalities, the possibility of international friction caused by divergent outcomes will remain as long as each jurisdiction conducts its reviews independently of other jurisdictions. These multiple review procedures are also putting undue or unnecessary burdens on the requesting companies.³⁸

³⁷ New York Times, 24 June 2001.

³⁸ ICPAC, Chapter 2.

VII. Comity: Solutions for Avoiding Conflicts of Jurisdiction

Cause for conflicts. The causes for international conflicts over extraterritorial application of competition law has two aspects: jurisdictional conflicts and conflicts over substantive law and policy. First are conflicts that stem from different positions over state jurisdiction or sovereignty under international law, which are classic causes of disputes concerning the extensive extraterritorial application of U.S. antitrust laws based on the effects doctrine. Although the gap with regard to the extraterritorial application of competition law between the United States and some other jurisdictions have narrowed, there remain considerable differences, for instance, between the United States and the United Kingdom or Japan, which rejects the effects doctrine as a justification for the extraterritorial application of competition law. Even the European Commission is against the extraterritorial application of competition law to protect exporters' interests, as noted above. Even when the position with regard to state jurisdiction or sovereignty is no different, problems may arise in the concurrent claims for exercising jurisdiction over the same case. For instance, to what extent should the competition law of a state where the alleged conduct took place be applied to another state's law where the anticompetitive effects occurred?

Second, conflicts may arise over differences with respect to substantive law and policy in the field of competition, unlike in the criminal field where little substantive difference exists concerning law and policy. For instance, in competition law, certain conducts are lawful in one state while the same conduct can be unlawful in another state. In most jurisdictions, certain categories of conduct, such as export cartels, are exempted from the application of competition law. In the case of multi-jurisdictional merger

review, even if the substantive law is no different, it would not be so exceptional to reach different conclusions on the same merger case from one jurisdiction to another when the respective merger rules are applied to different markets. The increased interaction between competition policy and trade policy tends to make conflicts more serious, which may bring about political repercussions.

The unilateral approach. As examined above, in most cases international conflicts have been caused initially by the extraterritorial enforcement of U.S. antitrust laws by the United States, followed by vehement reactions from other jurisdictions. Faced with such reactions as well as practical limits on unilateral antitrust law enforcement, such as collecting evidence abroad, the United States has tried to introduce some self-restraint based on comity or balancing the interests of states, mainly through judicial decisions coupled with the policy guidelines of enforcement agencies. However, this unilateral approach of self-restraint will neither suffice nor be appropriate for the following reasons.

First, in order to identify the interests of states, it is vital that foreign governments' views be presented adequately. Foreign governments are considerably reluctant to submit their views to courts by appearing before the court or by filing a brief of amicus curiae because they are concerned about sovereignty or the practical burdens imposed. Second, it is questionable that any domestic court has the competence or expertise to judge complicated states' interests involving not only legal matters but also various political, economic, and other implications.³⁹ U.S. court decisions have not been consistent with regard to the balancing of interests. In any case, since the U.S. Supreme Court decision in the Hartford Fire Insurance case, the margin of states' interests or

³⁹ D.W. Bowett, "Jurisdiction," BYIL 1982, 1.

comity to be considered by U.S. courts has become extremely limited, as the Court seems to equate conflict with foreign compulsion.⁴⁰ More fundamentally, international conflicts should be solved by international agreements between the states concerned, and should not be subjected to unilateral actions by any organ of the state, including domestic courts.

Bilateral approach. The OECD has played a leading role in international efforts to avoid international conflicts over the extraterritorial application of competition law through the decades, “recognizing that the unilateral application of national legislation, in cases where business operations in other countries are involved, raises questions as to the respective sphere of sovereignty of countries concerned” and that “anticompetitive practices, investigations and proceedings by one Member country may, in certain cases, affect important interests of other Member countries.”⁴¹ Since 1967, the OECD has adopted and revised a series of recommendations concerning cooperation between member countries that aim for two goals: more effective law enforcement and avoiding jurisdictional conflicts. In the context of the OECD recommendations, the concept of comity describes a voluntary policy calling for a country to give full and sympathetic consideration of other countries’ important interests while deciding the enforcement of its own competition law. Comity involves two aspects: first, a country’s consideration of how it may prevent its law enforcement actions from harming another country’s important interests, and second, a country’s consideration of another country’s request that it open or expand a law enforcement proceeding in order to remedy conduct that is substantially and adversely affecting that country’s interest. These aspects have come to

⁴⁰ A.F. Lowenfeld, AJIL 1995, 46.

⁴¹ OECD Recommendation Concerning Cooperation Between Member Countries on Anticompetitive Practices Affecting International Trade, 1995.

be referred to as “negative comity” and “positive comity,” respectively.⁴²

Following the OECD recommendations, bilateral cooperation agreements have been concluded between the United States and several other industrialized states such as Australia, Canada, and Germany to avoid friction in competition law enforcement.⁴³ The milestone would be the U.S. and E.U. agreement of 1991 that set forth, inter alia, positive comity as well as negative comity for the first time in a bilateral agreement. This agreement was supplemented by a more detailed agreement on positive comity in 1998, which even provides for the deferral of enforcement proceedings by the requesting side under certain conditions. Although enforcement cooperation has been strengthened, the European Commission has explained that eliminating the jurisdictional “imbalance” was one of the main reasons the E.C. negotiated the positive comity provisions in the supplement agreement.⁴⁴ In the Commission’s view, “it is clearly preferable ... that the United States avail itself of the principle of positive comity when considering anticompetitive behavior taking place within the European Community rather than seeking to apply U.S. competition law. Through positive comity the Commission can retain control, where it wishes, of enforcement procedures addressing such behaviour.”⁴⁵

Bilateral conflicts have frequently arisen between Japan and the United States over the latter’s extraterritorial application of antitrust laws, as the two countries hold divergent positions with regard to state jurisdiction under international law and against the background of increasingly expanding trade between the two countries. The Japan-

⁴² OECD CLP Report on Positive Comity, 1999, 4-5.

⁴³ OECD Competition Law Enforcement 1984, Annex IV; OECD CLP Report 1999, 9-11.

⁴⁴ K. van Miert, Fordham Conference, 1997.

⁴⁵ European Commission Communication to the European Council, 18 June 1997.

U.S. Agreement, which was concluded in October 1999, should be the test case as to how effective a bilateral agreement could work for avoiding or mitigating potential bilateral conflicts. Several points should be elaborated upon here.

First, Article II stipulates the obligation of the competition authority of each party to “notify the competition authority of the other party with respect to enforcement activities” that may “affect the important interests of the other party.” This notification procedure is the foundation of cooperation and coordination in the agreement and “important interests” are interpreted to include not only interests concerning competition law enforcement but also interests concerning sovereignty and other legal or policy matters.⁴⁶

Second, Article VI stipulates that “each party shall give full consideration to the important interests of the other party throughout all phases of its enforcement activities.” In seeking an appropriate accommodation of competing interests, such factors as the conduct’s relative significance to the anticompetitive activities, the relative impact of the anticompetitive activities on the important interests, etc., should be considered. These provisions represent so-called “negative comity” and are expected to work toward avoiding jurisdictional conflicts, which may be caused, for instance, by the extraterritorial application of U.S. antitrust law, through such consideration for balancing interests tests. However, the fundamental gap with regard to their respective positions on jurisdictional justification or sovereignty, as shown in the Nippon Paper case, could not be bridged by this provision of (negative) comity itself.

Although an unilateral attempt to extend the application of domestic legislation

⁴⁶ K. Unotoro No. 590 Koseitorihiki 1999, 6.

extraterritorially violates the basic principle of territoriality in international law, the need for regulatory measures to be applied across national borders has also become a reality with the growth of transnational economic and social relations and the consequent emergence of a borderless society on a global basis. In this respect, the position of Japan is too rigid in resisting to accept the need for the extraterritorial adjustment of national competence, as evidenced in the negotiations between Japan and the United States for regulating transnational activities involving unfair competition across national borders.⁴⁷ As seen above, the Government of Japan still formally rejects the effects doctrine; however, adjustment of extraterritorial jurisdiction that justifies extending jurisdiction with respect to foreign companies' conduct abroad could be based on (a modified version of) the objective territorial principle, as has been applied in the Wood Pulp cases by the European Court. This justification could be compatible with the recent practice of the JFTC on the Nordion case and on the Exxon Mobil merger review.

Third, Article V stipulates that if the competition authority of a party believes that anticompetitive activities “in the other country adversely affect the important interests of the former party ... [it] may request that the competition authority of the other party initiate the appropriate enforcement activities.” The requested competition authority shall carefully consider whether to initiate enforcement activities. These provisions represent the so-called “positive comity” and the requested competition authority is expected to take into account “the importance of avoiding conflicts regarding jurisdiction,” which is explicitly set forth in the article.

Positive comity may play an important role in export restraints (market access)

⁴⁷ H.Owada, “Japan, International Law and the International Community,” Japan and

cases where the requesting country's interest is protection of its exporters' interests.⁴⁸ It has been observed that the Soda Ash case has positive comity aspects, where after U.S. trade officials complained that U.S. soda ash producers faced barriers to access in Japan, the JFTC conducted an investigation and issued a cease and desist order against Japanese producers.⁴⁹ In such cases as the Fuji Kodak case, the United States could have invoked positive comity; however, U.S. enforcement agencies would have had to consider the similar position of Kodak in the U.S. market as that of Fuji in the Japanese market. Positive comity's role may be limited in certain categories of export cartel cases because of the exemptions under the Export Trade Act in Japan and under the Webb Pomerene Act, etc., in the United States.

Positive comity under the Agreement raised concerns that it would further intensify U.S. demands for more vigorous law enforcement against anticompetitive conduct relating to market access while requests of positive comity from Japan to the United States would be rare. Nevertheless, such concerns seem off the mark. Apart from the voluntary nature of positive comity, the alleged conduct's illegality under the requested state is a prerequisite to invocation of positive comity, and if any complaint is filed on an alleged illegal conduct, the JFTC would consider the possibility of enforcement in any case. Furthermore, Japan may request positive comity in such cases as alleged abuse of antidumping procedures against Japanese exporters by a U.S. company in the United States, even though Japanese competition law does not apply to protect Japanese exporters' interests. Again, if Japan considers that a U.S. firm maker's

International Law: Past, Present, and Future, 1999, 365.

⁴⁸ OECD CLP Report on Positive Comity, 1999, 14.

⁴⁹ *Ibid.*, 12.

conduct in the United States is anticompetitive, it may request positive comity to the United States, regardless of the fact that Japan claims to have no extraterritorial jurisdictional reach over the film maker's conduct in the United States. In these situations, jurisdictional "imbalance" between the two countries could, to some extent, be eliminated.

The effectiveness of this agreement in terms of avoiding conflicts remains to be judged from how it will be applied in practice. Although this agreement is an executive agreement that is to be implemented within the framework of existing laws and regulations of the two states, the obligation to consider negative and positive comity will facilitate cooperation and coordination with a view to reducing conflicts. Comity is essentially voluntary but its flexibility may work better in solving a potential conflict, which ultimately depends on good working relations between the two governments, especially between the enforcement agencies, based on mutual trust. At the same time, it must be remembered that U.S. courts will not be bound by this agreement; therefore, effectiveness of both negative and positive comity under this agreement has significant institutional limitations with respect to U.S. case law.

VIII. Multilateral Approach

The cooperative approach through bilateral agreements, including negative and positive comity, definitely contributes in reducing conflicts over the extraterritorial application of competition laws. Is this approach sufficient? Does the international community not need to explore the multilateral approach? Having witnessed the disputes between the United States and the European Union over the merger review in the Boeing

case and GE Honeywell case, although both sides claim to have established a much closer cooperative relationship by the U.S.-E.U. agreement, the bilateral approach has limitations and a multilateral approach must be taken into account. Mega-merger cases and international cartel cases, which affect multiple jurisdictions, are increasing exponentially and thus the chances for international conflicts among multiple jurisdictions over the extraterritorial application of competition law will be much greater. Today, more than 80 countries have competition laws, out of which around 60 have merger control rules. Therefore, in the long run, multilateral rules that regulate competition should be and will be made. The question we should address is, how should we proceed henceforth for this purpose?

The multilateral approach will not be incompatible with the bilateral approach; to the contrary, the two approaches are complementary. Increased trust, confidence, and analytical convergence based on voluntary bilateral cooperation could facilitate multilateral or plurilateral agreements. Alternatively, a multilateral or plurilateral framework could facilitate the spreading and deepening of bilateral cooperation.⁵⁰ One of the rationales for the unilateral extraterritorial application of competition law by one state has been the lack of competition law regulating anticompetitive acts within the other state. With regard to conflicts that stem from differences in substantive law and policy that have global implications, coordination or convergence should be sought through the multilateral approach, although full harmonization of substantive laws will not be possible in the near future due to the lack of consensus among the major jurisdictions with regard to global standards.

⁵⁰ OECD, Trade and Competition Policies 2001, 18.

The increasing interaction between trade and competition, including so-called hybrid private/government restraints, has made the interface of competition regimes with trade regimes closer as the latter is regulated in the framework of the WTO. In several WTO agreements such as the General Agreement on Trade in Services and the Agreement on Trade-Related Intellectual Property Rights, competition clauses have already been incorporated. Trade remedies such as antidumping measures have some significant interface with competition law. Taking the interaction between antidumping and competition, for instance, while both antidumping law and competition law regulate “predatory pricing,” with different standards antidumping measures tend to produce anticompetitive effects.⁵¹ Abuse of trade remedies including antidumping procedures could be anticompetitive and subject to competition law enforcement.⁵² In cases such as in the 1995 U.S. guidelines, in which the effects doctrine for protecting exporters’ interests should be applied, abuse of antidumping procedures would be subject to extraterritorial application of competition law by the country whose nationals are targeted in the states’ antidumping procedures, which would lead to another source of international friction. A bilateral approach would not work in this case, and a multilateral approach could better address this type of question.

The above considerations would indicate that competition law and policy has become more and more a global issue that affects the world market in general and that the need for a multilateral approach including the framework of the WTO should be sought in solving international conflicts. With regard to the modality of a multilateral approach,

⁵¹ R.A. Lipstein, “Using Antitrust Principles to Reform Antidumping Laws, Global Competition Policy 1997, 405.

⁵² 1988 U.S. Guidelines, Case 13.

there are wide gaps between the United States, on the one hand, and the European Union as well as Japan on the other hand, especially concerning the role to be played by the WTO.

The European Union, with its acquired experience and expertise on community rule-making with respect to competition law, took the initiative. Sir Leon Brittan, then Commissioner, proposed in his speech on 3 February 1992 at the World Competition Forum at Davos to explore the possibility of making common rules on competition within the framework of the WTO. Following the E.U. proposal, it was decided at the Singapore Ministerial meeting in 1996 to set up a working group in the WTO. The reasoning of the European Union is summarized as follows: first, competition law enforcement is gaining an increasingly international dimension; second, the WTO objective of trade liberalization and a commitment to effective competition law enforcement are closely connected; third, despite differences in domestic legal and institutional structures, there is growing international consensus regarding the fundamentals of competition law and policy.⁵³ Japan is also in favor of seeking a competition regime within the framework of the WTO and has submitted its view to WTO working group meetings.⁵⁴

The United States, on the other hand, rejected the idea of any WTO agreement at this stage, saying: “This is a bad idea. It is entirely too early to move in this direction, especially in an organization that has no real experience with antitrust enforcement ... WTO antitrust rules would be useless, pernicious, or both, and would serve only to politicize the long-term future of international antitrust enforcement through the intrusion

⁵³ Keynote Address, Leon Brittan, OECD, Trade and Competition Policies 1999, 29.

⁵⁴ WT/WGTCP/W/119.

of trade disputes disguised as antitrust problems.”⁵⁵ Judging from subsequent U.S. government support for the Global Competition Initiatives proposed by ICPAC⁵⁶ as well as to the continuation of the WTO Working Group on Trade and Competition agreed to in the Doha Declaration to identify factors for negotiation, the present position of United States does not seem to be totally against the multilateral approach. However, the United States definitely wishes to retain its unilateral lever of extraterritorial enforcement together with the bilateral approach including positive comity, while it may be in favor of competition advocacy or “culture” creation through the OECD or other international forums, not necessarily excluding the WTO.

Under these circumstances, there are naturally considerable limitations in exploring the multilateral approach. However, there is some common ground to work with in seeking ways and means through the multilateral approach to avoid conflicts over the extraterritorial application of competition laws. First, at present, merger seems to be the most promising field for a possible multilateral approach. With regard to merger reviews, the United States is also concerned about such disputes as the Boeing case and the GE Honeywell case, where its decisions were challenged by foreign authorities. The U.S. business community, including U.S.-based multinational enterprises, faces and bears the burdens imposed on requesting firms through the multi-jurisdictional review process. Therefore, strong incentives or motivations exist on the U.S. side as well to try to harmonize or converge the substantive and procedural rules concerning mergers.

Second, soft harmonization, or convergence, could be another item to be taken up.

⁵⁵ Keynote Address, U.S. Assistant Attorney-General J.L. Klein, OECD, Trade and Competition Policies 1999, 37.

⁵⁶ Klein, 14 September 2000 at EC Merger Control 10th Anniversary.

Although the United States rejects any binding multilateral code on competition, it is in favor of soft convergence of law as seen in the OECD Hard Core Cartel Recommendation (1998) for which the United States was one of the keen promoters. Third, exemptions, including export cartel exemptions, could also be taken up as a matter of possible multilateral coordination. If export exemptions were banned and the competition law of the exporting state is enforced, international friction over the unilateral application of competition law by the importing state would be reduced. Fourth, concerning dispute settlement procedures, there is almost a consensus that the multilateral dispute resolution process is not appropriate for the review of individual antitrust decisions due to the problems of sovereignty, the fact-intensive nature of antitrust cases, and the application of judgment in the assessment of those facts.⁵⁷ However, with respect to disputes on sovereignty or allocation of competition jurisdiction, some general agreements can be taken up.

On the scope of participation in multilateral agreements, as far as conflict avoidance is concerned, the plurilateral approach, which comprises the United States, the European Union, Japan, and other major jurisdictions would suffice as well as being more feasible, at least for the time being. Concerning the appropriate forums for the multilateral/plurilateral approach, the OECD should be best suited for the soft convergence of law, with its long experience, expertise, and advantage to be flexible, not being a rule-making organization. The WTO should be the forum for trade-related aspects, including dispute settlement procedures, in the long run. Nevertheless,

⁵⁷ OECD, Trade and Competition Policies 1999, 22.

considering the skeptical view as to competition rule-making at the WTO,⁵⁸ plurilateral rule-making unrelated to trade may be taken up outside the framework of the WTO with the involvement of the competition authorities from major jurisdictions. Such items as jurisdictional allocation or merger reviews could be formulated without the involvement of the WTO.

IX. Summary and Conclusions

Historically, international conflicts over the application of competition law were caused by the unilateral extraterritorial enforcement of U.S. antitrust laws based on the effects doctrine, because of the different positions held concerning state jurisdiction—that is, sovereignty. The gap in positions between the United States and the European Union and some of its member states have been narrowed but there remain wide gaps between the United States and other states, including Japan and the United Kingdom, which retain the traditional territorial principle with respect to state jurisdiction.

As economic globalization deepens, trans-border cartel and mega-merger cases have greatly increased and will continue to increase. Faced with this situation, a considerable number of states have begun to apply their competition laws to foreign companies' anticompetitive conducts abroad, which affect the relevant markets. If the effects doctrine is not adopted, justification for such an extraterritorial application of competition law could be based on a modified version of the (objective) territorial principle.

Increased interaction between trade and competition has brought about new

⁵⁸ ICPAC, Chapter 5.

dimensions in international conflicts over the extraterritorial application of competition law. Extraterritorial enforcement of U.S. antitrust laws for the protection of U.S. exporters' interests has become another source of diplomatic friction. On the other hand, in the field of merger reviews, which are expected to increase, the U.S.-based companies have become the primary target for the extraterritorial application of the competition law of other states.

Efforts must be made to solve or reduce international conflicts over the extraterritorial application of competition law. The unilateral approach by self-restraint and balancing interests of states is neither sufficient nor appropriate. The bilateral approach, bilateral cooperation and coordination through comity is the best available means at the moment. Nevertheless, in the long run, multilateral rule-making will be required. Considering the deepened interaction between trade and competition, the incorporation of trade-related competition rules including dispute settlement procedures into the WTO system must be studied, if possible through the Doha negotiation process. In the meantime, the multilateral approach utilizing all available international forums including the OECD and some plurilateral arrangement comprised of major jurisdictions should be explored.

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