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**Title of paper: The Internationalization of Merger Review: Extraterritoriality, Conflicts and Convergence**

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**Abstract**

Differences in the assessment standards and notification procedures of merger policy across jurisdictions impose substantial transaction costs on international business and commerce. In this paper, the issue of the internationalization of merger policy will be discussed by focusing on the extraterritorial applications, conflicts, and solutions provided by three important antitrust jurisdictions - the US, EU and China. Empirical studies on merger decisions in the US, EU and China shows that such difference may come from the higher, or lower standard in the analysis of merger effects, and the different priorities of competition goals by the antitrust authority. An international convergence in merger policy may face challenges because jurisdictions may easily incorporate non-economic goals, such as protecting domestic enterprises, when making decisions on transnational mergers. Since EU and the US proposed two distinct approaches on the internationalization of competition policy, and after the initiatives on creating a global antitrust legal framework failed, today's antitrust world relies on bilateral agreements and multilateral cooperation through transnational networks. Technical assistance, experts' working groups, and the use of "best practice" recommendations provide useful resources for antitrust agencies' to enhance mutual learning. A global convergence in merger policy, although is difficult from the view of agreeing on one single text of global antitrust law, might be gradually achieved through the efforts by antitrust agencies across jurisdictions that improving their capacity, applying similar analytical tools, and harmonizing assessment procedure rules.

**Keywords**

merger policy, extraterritoriality, global competition network, competition goals

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# The Internationalization of Merger Review: Extraterritoriality, Conflicts and Convergence

Jingyuan Ma

## 1. Introduction

The development of international commerce and the wave of global mergers raise the debate of merger policies in jurisdictions with antitrust laws. At the same time, compared with other competition issues, merger policy has a significant global impact. Mergers between multinational companies are required to notify to competition authorities in several jurisdictions (Niels and Kate, 2004, 1). It may impose compliance costs on businesses if merger rules are implemented differently in each country due to different concerns of policy goals; furthermore, the divergences and conflicts between merger control policies may constrain future economic growth, increase transaction costs and the uncertainty of multinational business (Hunt 2007).

In this paper, I attempt to address the issue of the internationalization of merger policy by focusing on the extraterritorial applications, conflicts, and solutions provided by three important antitrust jurisdictions - the US, EU and China. I will first compare merger policies in the US, the EU and China and discuss how empirical evidence could show the differences in the merger decisions. Next, I will analyze how different understandings of merger policy, in particular the pursuit of competition goals, would give rise to conflicts in global merger review. Following this discussion, I will present the current solutions proposed towards the internationalization of merger review, including bilateral and multilateral agreements, harmonization of merger rules and the cooperation between regulators. The last section concludes.

## 2. Comparing Merger Policy in the US, the EU and China

### 2.1 Merger Policy in the US and the EU

Merger policy in the US is based on section 7 of the 1914 Clayton Act. The Clayton Act was amended by the Robinson-Patman Act in 1936, the Celler-Kefauver Act in 1950, and the Hart-Scott-Rodino Act in 1976. Section 7 of the Clayton Act states that the acquisition which 'may be substantially to lessen competition, or to tend to create a monopoly', should not be allowed. The EU merger control policy was not explicitly included in the Treaty of Paris, or the Treaty of Rome. The EC Merger Control Regulation, as a separate legal act was after a long debate adopted in 21 December 1989, and came into force in 1990. All concentrations that have an 'EU dimension' will come under the control of this regulation. Both the US courts and the EU Commission followed the ex-ante assessment approach and evaluate merger effects through the market structure.

There are several empirical studies comparing the merger policy in the US and the EU. By using a set of explanatory variables, including structural variables such as the post-merger HHI, the post-merger market share, and institutional variables, such as whether the merger enforcement was more stringent or more lenient, Bergman *et al.* compared the hypothetical decisions to actual decisions and gave a few of important findings on the merger decisions in the EU and the US (Bergman et al 2010a, 305-331). Their study shows that for merger cases with low post-merger market share, if the US merger cases were decided by antitrust authorities

in the EU, the enforcement in the EU would have been stricter than it was in the US (Bergman et al 2010a, 327-328). When the post-merger market share increases, the difference between the merger enforcement in the EU and the US falls. In general, by following a dominance theory, the EU antitrust authorities tend to impose a tougher standard for mergers than the US authorities, and this trend could be observed more clearly when the post-merger market share is below 70 percent (Bergman et al 2010a, 329).

In another empirical study on notified mergers in the EU and the US from 1990 to 2007 (Bergman et al. 2010b), Bergman *et al.* argued that in the US, the proposed merger has to meet the comprehensive notification requirements, and therefore there are more filings in the US than in the EU. However, it was observed that there are more investigations per filing under the EU merger policy and for the given investigation the number of challenged case is higher than the US. According to their study, among all the notified mergers, about 8 percent will be investigated under the EU regime whereas in the US it was around 2 percent, although merger policies in the EU and the US share the same basic reporting requirements (Bergman et al 2010b).

The empirical analysis conducted by Bergman *et al.* also shows that antitrust authorities in the EU and the US put different emphasis on the use of economic theory. In the EU, the competition authorities are more likely to challenge merger cases related to market dominance, and are less strict towards mergers which cause coordinated effects. Moreover, efficiency gains are less accepted by the antitrust authorities in the EU (Bergman et al 2010b). In merger cases before 2004, the year that the new Merger Regulation was implemented in the EU, efficiency claims only appeared in 3 percent of the merger cases; and from 2004 to 2007, this number increased to 11 percent. By contrast, among all the sample cases studied by Bergman *et al.*, efficiency considerations were taken as a key issue in the merger analysis in the US. This tendency could be observed by reading the reports issued by the Bureau of Competition and the Bureau of Economics at the FTC, in which economists gave merit to efficiencies by raising 161 claims, and legal staff raised 80 efficiency claims. For horizontal merger cases, efficiency claims appear much more frequently in the reports issued by the FTC (83 percent) than the EU Commission (5 percent) (Bergman 2010b).

## 2.2 Merger Policy in China

Merger policy has been frequently enforced in China after the Anti-Monopoly Law came into force. Until the end of September 2009, among all formally notified transactions, 23 transactions were between domestic enterprises, 55 transactions were between foreign enterprises, and 9 transactions were between domestic and foreign enterprises.<sup>1</sup> Multinational companies were involved in 40 cases, comprising 69 percent of the total cases.<sup>2</sup> From August 2008 to June 2010, 140 mergers were notified and 95 percent of them were approved unconditionally (Healey 2010, 58). In 2011, 160 merger reviews were completed and 151 cases were cleared without condition. In the four cases approved under certain conditions, a behavioral remedy was imposed in three cases, and a structural remedy was imposed in one case. In 2012, 154 merger reviews were completed with 142 merger cases were cleared without condition. In the six merger cases approved under certain conditions, four of them received a behavioral remedy; in one case a structural remedy was imposed. As of June 2013, the MOFCOM - the merger enforcement authority in China, has received 754 notifications, with

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<sup>1</sup> X. WANG (2009), 'New Development of China's AML - From Merger Control Perspective', December 2009, presentation at the 5th Annual Asian Competition Law Conference 2009, available at <[www.asiancompetitionforum.org/asianfile\\_091207.html](http://www.asiancompetitionforum.org/asianfile_091207.html)>

<sup>2</sup> Ministry of Commerce, Press Conference on 17 August, 2009

690 cases have been reviewed. In the 643 cases in which a decision was issued, 624 were approved without conditions, 18 were approved with restrictions and one was prohibited. From August 2008 to June 2013, only the *Coca Cola/Huiyuan* merger was blocked by the MOFCOM. Among all the 18 cases that were granted remedies, nine received combined structural and behavioral remedies. Compared with the conditionally approved merger cases in the EU, it seems that the MOFCOM is particularly in favor of behavioral remedies. According to Mario Mariniello, from 2008 to August 2013, 60 percent of MOFCOM's conditionally cleared mergers were imposed behavioral remedies, with 20 percent for structural remedies, and the rest was for combined remedies. For the same period, the EU Commission has imposed structural remedies for 77 percent of the mergers cleared with restrictions, and 7 percent for behavioral remedies. The remaining 16 percent was for combined remedies (Mariniello 2013, 6-8).

### 3. Extraterritorial Enforcement and Conflict of Merger Regulation

#### 3.1 US Antitrust Law

In the US, the extraterritorial enforcement of the Sherman Act follows the 'intended effects test', which was first developed by Judge Learned Hand at the Second Circuit in *Alcoa* case 1945<sup>3</sup>. When non-US firms reached cartel agreements in other countries, for example, in Switzerland, but have an 'intended effect' within the United States - where the products are sold, the US antitrust laws will hold jurisdiction on the foreign conduct. The central question to be asked is not where the cartel agreement was made, but whether such agreement has effects on the US market. Since then, 'intended effects test' have been widely applied by US courts and enforcement agencies, although courts had different opinions upon measuring the severity of the effects and how to define the meaning of "intent" (Mcneil 1998, 433). In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, the Supreme Court held that "a conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries."<sup>4</sup>

This principle was further reinforced in Supreme Court judgment in *Hartford Fire Insurance Co. v. California*<sup>5</sup>, where British reinsurers conspired with US partners to influence the American commercial insurance market (Mcneil 1998, 426). The Supreme Court held that "It is well established by now that the Sherman Act applied to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."<sup>6</sup> "True conflict" means that the party cannot comply with both domestic law and foreign laws simultaneously. In this case, it was made clear that the principle of comity will not be incorporate because the defendant could have complied with the US law without violating the British law (Guzman 1998, 1508).

#### 3.2 EU Competition Law

Articles 101 and 102 of the EU Competition Law do not provide clear provisions on extraterritorial applications, however, extraterritorial enforcement of the EU Competition law

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<sup>3</sup> 148 F. 2d 416 (2d Cir. 1945)

<sup>4</sup> *Continental Ore Co. v. Union Carbide & Carbon Corp.* 370 U.S. 690, 704 (1962)

<sup>5</sup> 509 US 764 (1993) 773; 799; 796-797

<sup>6</sup> *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993)

was made possible by going through three stages in case law. Before the 1988 *Wood Pulp* case, the European Commission first established the ‘economic entity doctrine’, referring how the location where the undertakings operates will be relevant for the application of the EU Competition Law<sup>7</sup>, and later the ‘implementation doctrine’ was applied. It clarifies that the place where the entity ‘implements’ their cartel decisions will be addressed by the extraterritorial application of the EU Competition Law.<sup>8</sup> (Geradin, Reysen and Henry, 3-4). Under the *Wood Pulp* case, the EU Competition can be applied when non-EU firms ‘implement’ cartel agreements within the EU market. In *Gencor* judgment, EU Competition Law has jurisdiction as long as the proposed merger have “immediate, reasonably foreseeable, and substantial effect” in the community,<sup>9</sup> even the concentration is between non-EU firms (Geradin, Reysen and Henry, 4).

The aim of these principles established by EC case law is to “catch” those illegal cartel violators locate outside the jurisdiction of the community (Geradin, Reysen and Henry, 4-6). The ‘economic entity doctrine’ will be applied to price fixing subsidiaries even when their decisions are made by non-EC parent companies. The ‘implementation doctrine’ and the ‘effects doctrine’ both are originate from the ‘territoriality principle’, which are established to deal with illegal cartels that do not locate in the Community, but have their decisions “implemented” or have an “effect” on the trade or consumer welfare of the European Community (Geradin, Reysen and Henry, 4-6).

### 3.3 Conflicts of Regulatory Regimes

In the US, since the “effects test” was established in *Alcoa*, price fixer outside the US territory but sell products in the US will be reached by the “long arm” of the Sherman Act. Similarly, since the *Wood Pulp* case, the EU Competition Commission implicitly referred the “effects doctrine” in order to catch the price fixing cartels which have anti-competitive effects on the Commission dimension. In *Gencor v. Commission*<sup>10</sup>, the Court of First Instance (‘CFI’) adopted the “effects doctrine” in deciding whether EC Merger Regulation could be applied to enterprises established outside the territory of the European Community (George, Dymally, and Lacey 2004, 571). The US model of utilizing “effects test” has raised very active criticisms and rejections from international counterparts, “blocking statutes” were promulgated to strengthen their counterbalance power to the extraterritoriality of the US law. For example, some argued that the use of “effects doctrine” in the EU may seem to be a consequence in order to counterbalance their enforcement power in the transnational antitrust practice (Calvani 2005, 1130). The Australian Cartels Act states that it applies to “cartels conducted abroad but affecting the domestic market”.<sup>11</sup> Countries such as Canada, Australia, Republic of the Philippines, Japan and Korea even invoked discovery blocking statutes and judgment blocking statutes to reject the enforcement of US court judgments (Chang 1993, 295-320).

In merger review, the conflict of antitrust enforcement was a consequence of the differences in regulatory control in different jurisdictions. Competition authorities may apply

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<sup>7</sup> see judgements in *Imperial Chemical Industries Limited v. Commission (Dyestuffs)*; and *Case 6/72, Europemballage Corporation and Continental Can Company Inc v. Commission*, [1973] E.C. R. 219, p. 15

<sup>8</sup> see judgement in *Woodpulp European Court of Justice, Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85. A. Ahlström Osakeyhtiö and others v Commission* [1988] E.C.R. 5193

<sup>9</sup> see *Case T-102/96, Gencor v. Commission*, [1999] E.C.R. II-753, para. 90, Court of First Instance

<sup>10</sup> *Case T-102/96, Gencor Ltd. v. EC Commission*, 1999 E.C.R. II-753, [1999] 4 CMLR 971

<sup>11</sup> The Australian Trade Practice Act of 1974

different criteria, procedure or standards in anticompetitive assessment, therefore international companies may face different judgment and decisions, such as receiving substantial fine in one country, but receive approval or settlement in another country.<sup>12</sup> In the Boeing-McDonnell Douglas case in 1997<sup>13</sup>, the merger was opposed by the EU Commission after receiving approval from the US counterpart. Similarly, in GE-Honeywell case in 2001, the European Commission blocked the merger without considering the reactions from the US regulators.<sup>14</sup> In Microsoft, Inc case in 2004<sup>15</sup>, Microsoft received 497 million Euro fines by the Commission but was settled in the US.

As many have argued, the differences in the merger decisions between the US and the EU may come from the different competition goals that the antitrust jurisdiction strives to pursue (Van den Bergh and Camesasca 2006; Van den Bergh 2006; Faure and Zhang 2011) . By reviewing the decisions in the *Virgin/British Airways* and the *GE/Honeywell* cases, commentators argued that in general the US antitrust authority seems to be less interventionist (Niels and Kate 2004, 7). Cento Veljanovski provided the data that in 2000, the probability of intervening by the EU Commission was about ten times higher than the US authority, and it was about nine times more likely to block a merger (Veljanovski 2004, 156). One of the explanations which have been widely agreed was that this difference was due to the lack of consensus regarding the ultimate aim of antitrust law (Stevens 2002, 284-285). The US antitrust law has developed for over a century and since the mid-1980s, the antitrust policy in the US has been framed under the strong influence of the Chicago School. In contrast, the European approach has a strong focus on the concept of dominance, and therefore tends to follow a legalistic approach (Niels and Kate 2004, 11). In the EU, if a firm holds a dominant position, its effects on competition in the given market, or in another market (through the ‘leveraging the market power’) must be treated with caution (Niels and Kate 2004, 13). The concerns of preventing the abuse of dominant position and protecting the competition process reflected the influence of Ordoliberalism (Schmitz 2002, 338). Seeing the different decisions for *GE/Honeywell* as well as *Boeing/McDonnell Douglas* made by the antitrust authority in the US and the EU, some commentators criticized the EU approach was to ‘protect competitors’(Kolasky 2004, 30; Boeder 2000, 142-143; Karacan 2004, 234). The divergent views on competition goals may bring difficulties in harmonizing antitrust practice among jurisdictions (Scnnell 2004, 253), which would add transaction costs for global business operators, and impose deterrence effects on the efficiency-enhancing mergers (Kolasky 2002, 547).

#### 4. The Internationalization of Merger Review: Cooperation and Convergence

United States and the European Union hold two different positions on the internationalization of competition rules. The EU approach focuses on the development of an international institutional framework, such as international organizations or treaties, through diplomatic efforts, under which national sovereignty is respected, and states act in their own interest. EU

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<sup>12</sup> Boeing and McDoell case; *F. Hoffman-Larouche Ltd. Empagran S.A.*, 124 S. Ct. 2359(2004); *Intel Corp. Advanced Micro Devices, Inc.*, 542 U.S., 124 S. Ct. 2466(2004)

<sup>13</sup> Case IV/M. 877, *Boeing/McDonnell Douglas v. Commission*, 1997 O.J. (C 372) 17

<sup>14</sup> Case M. 2220 *General Electric/Honeywell*, Commission Decision of July 3, 2001; Commission Decision 2004/134/EC of 3 July 2001 Declaring a Concentration (merger) between General Electric Co. and Honeywell International, Inc. Incompatible with the Common Market and the EEA Agreement, 2004 O.J. (L48) 1

<sup>15</sup> see Case T-201/04, *Microsoft Corp. v. Commission*; Press Release, European Commission, Commission Gives Microsoft Last Opportunity to Comment before Concluding its Antitrust Probe (August 6, 2003), Ref. No. IP/03/1150

approach expects international community to take the EU competition law as the main source of influence, and international cooperation could be promoted through harmonization. In contrast, the US approach is against establishing international competition rules; rather, international cooperation could be facilitated through horizontal coordination between national government officials, as well as the extraterritorial application of national laws (Maher 2002, 113; Waller 1996, 1111). These two positions became more integrated in the process of internationalization of competition law (Maher 2002, 113), and international regimes are developed into two main categories: one is bilateral agreements signed between national governments, and the other is multilateral agreements functioning under international organizations and transnational networks.

#### 4.1 Bilateral Agreements

The most effective antitrust cooperation on enforcement is the bilateral agreements signed between competition agencies. These agreements are non-binding “soft law” aiming at promoting cooperation on exchange information and performing duties of notification and consultation. It is not mandatory, however, for each party to take action or to change the substances of their national laws (Matsushita 2002, 468). The goal of bilateral agreements is to remind both parties to take into account of the consequences of their competition decisions on their competition decisions, in particular to compare the “relative significance” of the cartel activities on one party’s jurisdiction with the effect on the other’s territory. This consideration is also often written under the “comity principle”(Geradin, Reysen and Henry, 8) If positive comity is incorporated in the bilateral agreements, the party has to respond to the request of the other state by invoking domestic competition law when an anticompetitive conduct in its jurisdiction has negative effect on the other state (Matsushita 2002, 470) Positive comity is an effective mechanism to control transboundary business when it has anticompetitive effects but locates out of the jurisdiction of domestic law. Therefore, signing bilateral agreements with positive comity could be a useful tool when the extraterritorial application of domestic competition law is weak (Matsushita 2002, 470). In addition, bilateral agreements serve as a tool to facilitate antitrust cooperation by encouraging states to exchange information and evidence in antitrust investigation. These requirements, however, are not mandatory and do not provide detailed guidelines on how both agencies and courts can release confidential information, evidence and testimony in antitrust proceedings. In *United States v. Baker Hughes, Inc*<sup>16</sup> and *Hartford Fire Ins. Co.*<sup>17</sup>, the US courts made clear that courts cannot challenge the exercise of jurisdiction if enforcement agencies (Department of Justice or the Federal Trade Commission) have taken the position of positive comity (Pitofsky, Rill, Wood, Ehlermann and Lipsky 1995, 396)

The US and EU signed bilateral agreement on competition cooperation in 1991<sup>18</sup>, and this agreement was reinforced in 1998.<sup>19</sup> Bilateral agreements have also been signed between US

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<sup>16</sup> *United States v. Baker Hughes, Inc.*, 731 F. Supp. 3,

<sup>17</sup> *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891, 2909 (1993)

<sup>18</sup> Agreement between the Government of the United States of America and the Commission of the European Communities Regarding the Application of their Competition Laws, September 23, 1991; O.J. L 95/47

<sup>19</sup> Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, June 3-4, 1998 (entered into force June 4, 1998); O.J. L. 173/28

and its trading partners: Canada<sup>20</sup>, Australia, Brazil, Germany, Israel, Japan<sup>21</sup> and Mexico<sup>22</sup> (Maher 2002, 131). Positive comity was incorporated in the bilateral agreements between EU and Israel, Brazil, Japan, and Canada (Epstein 2002, 359). More than forty mutual assistance treaties have been signed under the 1994 American International Antitrust Enforcement Assistance Act, which could be counted as bilateral agreements on mutual assistance of enforcing competition laws, and such cooperation is often on a case-by-case basis (Maher 2002, 131). Bilateral agreements between the US and EU, the US and Canada, Australia and New Zealand<sup>23</sup> went one step further and was called “second-generation” cooperation, because the exchange of confidential information was allowed on reciprocity basis (Pitofsky, Rill, Wood, Ehlermann, and Lipsky 1995, 401).

Although bilateral agreements established rules on information exchange and notification, it did not clarify how both authorities and courts can cooperate at substantial level in investigation proceedings, recognizing evidence, exchange witness, anticompetitive effects assessment. Also, since bilateral agreements are non-binding soft laws, it does not solve the conflicts in international antitrust cooperation when two nations have different standards in assessing anticompetitive effects. The state may refuse to take actions when the conduct is exempted or approved in their national law (Matsushita 2002, 471). A successful cooperation between two countries must be supported by a harmonized competition rules in the substance or procedure of assessing anticompetitive effects across borders.

#### 4.2 Transnational Networks and Multilateral Agreements

Shortly after the Second World War, the International Trade Organization (‘ITO’) was proposed under the Havana Charter in order to establish a global competition legal framework.<sup>24</sup> ITO, together with the World Bank and the International Monetary Fund, was designed to build the post-war economic order (Waller 1997, 347-350). This proposal, however, after receiving objection from the US, was replaced by the General Agreement on Tariffs and Trade (‘GATT’) system under which competition issues were neglected (Smitherman 2004, 834). In 1993, a working group called Munich Group drafted a detailed antitrust code to be adopted by the WTO.<sup>25</sup> Their efforts of harmonizing international antitrust law was supported by Europe, but rejected by the US government officials (Waller 1997, 347). In 1995, the EU proposed to incorporate a Working Group on the Interaction between Trade and Competition Policy within the WTO, and the principal task of this working group is to consider the possibility of harmonizing national competition rules (Damtoft and Flanagan 2009, 142). The working group was created in 1996 during the WTO Ministerial Meeting in Singapore, with a core mission of identifying the trade and competition issues between

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<sup>20</sup> Agreement between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive marketing Practices Laws, August 3, 1995

<sup>21</sup> Agreement between the Government of the United States of America and the Government of Japan Concerning Cooperation on Anticompetitive Activities, October 7, 1999

<sup>22</sup> [www.usdoj.gov/atr/public/international/docs/](http://www.usdoj.gov/atr/public/international/docs/)

<sup>23</sup> Closer Economic Relations - Trade Agreement, March 28, 1983; Adel Nemeth (2006), ‘Trade and Competition Policy Reforms’, *Acta Oeconomica*, vol. 56, No. 4, p. 450

<sup>24</sup> Havana Charter for an International Trade Organization, March 24, 1948. Article 46 U.N. Doc. E/c/2/78

<sup>25</sup> International Antitrust Code Working Group, Draft International Code as a GATT-MTO-Plurilateral Trade Agreement, July 10, 1993



Members that should be considered within the WTO framework.<sup>26</sup> In 2001 Doha Ministerial Declaration, it made clear that negotiations on the harmonization of competition issues should be held after the next WTO Ministerial Meeting. This proposal, however, failed because of the objection from the US, and was dropped in 2003 at the Fifth Ministerial Conference in Cancun (Damtoft and Flanagan 2009,142). In 2004, the Decision by the General Council of the WTO stated that Doha Work Program should not include issues on the “interaction between trade and competition policy”.<sup>27</sup> Thus, initiatives on establishing a global antitrust legal framework failed and there is no harmonized international competition rule until today (Geradin 2009, 195).

In 1967 and 1973, responding to the GATT’s concern on the US extraterritorial application of its antitrust law, Organization for Economic Cooperation and Development (OECD) established the Competition Law and Policy Committee (CLPC), and issued its first recommendation on competition.<sup>28</sup> To promote information sharing and cooperation in enforcement between antitrust agencies, as well as legal harmonization of competition rules, since 1967, OECD has issued several recommendations, asking members to notify other states with important interests in their antitrust investigation, coordinate in procedures and exchange information (Smitherman 2004, 839). Also, members are encouraged to sign agreements between themselves based on recommendations.<sup>29</sup> These recommendations helped antitrust agencies among OECD member countries to cooperate and to learn from the “best practices”, although these recommendations are non-binding and a strict compliance is not required (Sokol 2007, 47).

For UN Members, antitrust issues were negotiated under the United National Conference on Trade and Development (‘UNCTAD’). UNCTAD adopted the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices in 1980<sup>30</sup>, aiming at building information exchange channels between states in the proceedings of detecting restrictive business conduct, and states were required to perform a duty of consultation during their investigation (Basebow 2000, 1043). In addition, the recent development of Global Competition Forum, and the UNCTAD Intergovernmental Group of Experts on Competition Law and Policy, provides useful forum for discussions among developing countries and developed economies (Maher 2002, 122).

Within the EU, national authorities of the Member States cooperate on the forum of the European Competition Network (‘ECN’); whereas outside the EU, since 2001 competition authorities have cooperated under the International Competition Network (‘ICN’). Both transnational networks function as useful platforms for information sharing and the convergence in procedural and substantive issues (Smitherman 2004, 840). Non-governmental stakeholders, including practitioners, organizations, academics, both lawyers and economists

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<sup>26</sup> Singapore Ministerial Declaration, December 13, 1996.  
<[http://www.wto.org/english/thewto\\_e/minist\\_e/min96\\_e/wtodec\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm)>

<sup>27</sup> Doha Ministerial Declaration, November 14, 2001.  
<[http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm)>

<sup>28</sup> Organization for Economic Cooperation and Development, Council Recommendation Concerning Cooperation between Member Countries on Restrictive Business Practices Affecting International Trade (October 5, 1957)

<sup>29</sup> Organization for Economic Cooperation and Development: Revised Recommendation of the Council Concerning Cooperation between Member Countries on Anticompetitive Practices Affecting International Trade July 27 - 28 1995

<sup>30</sup> U.N. Doc. TD/RBP/Conf./10 (1980)

are encouraged to participate in various Working Groups, and to work with antitrust agencies in the process of promoting convergence in substantive and procedural laws.<sup>31</sup>

#### 4.3 Harmonization

Conflicts in international antitrust enforcement would be hardly mitigated if national authorities apply different criteria, procedure, and standards in competition assessment. It is possible that antitrust cases are legal under one country's legalization but illegal in another country. National competition authorities and regulators are not empowered to investigate even there are bilateral agreements and comity provisions do apply. It has been argued that, many international conflicts, such as *Wood Pulp*, *Laker Airways*, *Hartford Fire Insurance case*, are the clear example showing the result of different treatment of anti-competitive practice (Klodt 2001).

It is not a new topic to discuss the possibility of harmonizing competition rules and to set a common standard among jurisdictions. On the one hand, Member States adopt competition laws by following the same model of the EU competition law during the EU Enlargement in 2004 (Calvani 2005, 1136), differences in merger regulation in the EU and US tend to become smaller today (Calvani 2005, 1136); on the other hand, conflicts in applying the standard of anti-competitive effects still remain.

To lower the costs for firms doing transnational business, some have advocates for the convergence on a single, uniformed international antitrust law; or, if "perfect convergence" is not feasible, the substance of national competition laws should at least to some extent harmonized (Shenefield 2004, 386), or set minimum standards (Basedow 2000, 1048); some others have argued for a common notification procedures (Kovacic 2003, 310). For example, since the basic requirements in merger control, including the process of collecting data, the waiting periods and deadlines in the pre-merger notification process, do not have significant differences, and have the potential for harmonization across jurisdictions (Gerber 2002, 293).

The discussion of harmonizing international competition law focuses on two issues: one way of harmonization refers to the mutual agreement on a minimal level of international law in order to implement the same law in all countries. The other way is to have essential harmonization, with mutually agreed differences. One of the most important advantage of harmonizing international competition policy is reducing legal uncertainty. The costs of researching, learning competition laws in order jurisdictions, as well as adopting relevant business strategies are substantially high. By reducing legal uncertainty, harmonizing international competition law is advocated for the reason of reducing transaction costs, information costs, and in this way sustains cross-border business activities.

#### 4.4 International Regulators

The strong reliance on administrative enforcement of merger policy makes it important to discuss how national regulators could cooperate at international level. Although various information sharing mechanisms have been developed for decades<sup>32</sup>, cooperation in the substance of antitrust agencies remains difficult. It may be valid to argue that the weak cooperation between antitrust agencies attributes to the low capacity of antitrust institutions in

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<sup>31</sup>D.D. SOKOL, 'Limiting Anti-Competitive Government Interventions that Benefit Special Interests', [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1463462](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1463462), p. 30

<sup>32</sup> In October 1994, the US Congress adopted the International Antitrust enforcement Assistance Act. (Pub. L. 103438, 108 Stat. 4597) Attorney General and the FTC cooperate with antitrust agencies in other countries.

developing countries. Substantial efforts were devoted to organize workshops and courses to train regulators in countries have weak experience in antitrust law. In developed world, regulators sit in the working group on a routine basis and try to reach a harmonized regulatory guidelines and standards. For example, EU and the US signed a document on bilateral cooperation on merger review, which is called the “Best Practices” document. This document is the result of the Merger Working Group, and the group’s goals is to provide “a set of best practices on cooperation in reviewing mergers that require approval on both sides of the Atlantic with a view to enhancing the good relationship developed over the last decade.”<sup>33</sup>

For antitrust agencies in developing countries, learning from the “best practices” from experienced agencies might be helpful to improve their capacity and the quality of their decisions. For antitrust enforcers, their decision making power is often politically bounded, and their rule-making authority is strongly associated with the national governments, which makes it institutionally difficult to propose for a truly independent international antitrust agency with its own rules and enforcement policies (Guzman 2004, 366) Thus, antitrust technical assistance is provided through the “short term interventions” and “long term advisors” program. These programs offers opportunities for young antitrust agencies to receive help from exchanged experts, for example, allowing an economists from the FTC to work at the antitrust agency in Mexico for a year (Sokol 2009, 1088). In this way, enforcement agencies in developing countries could seek help from more experienced agencies, and improve their capacities through mutual learning.

## 5. Conclusions

Differences in the assessment standards and notification procedures of merger policy among jurisdictions impose substantial transaction costs on international business and commerce. Empirical studies on merger decisions in the US, EU and China shows that such difference may come from the higher, or lower standard in the analysis of the merger effects, as well as the different priorities of competition goals by the antitrust authority. An international convergence in merger policy may face challenges because jurisdictions may easily incorporate non-economic goals, such as protecting domestic enterprises, when making decisions on transnational mergers. Since EU and the US proposed two distinct approaches on the internationalization of competition policy, and after the initiatives on creating a global antitrust legal framework failed, today’s antitrust world relies on bilateral agreements and multilateral cooperation through transnational networks. Technical assistance, experts’ working groups, and the use of “best practice” recommendations provide useful resources for antitrust agencies’ to enhance mutual learning. A global convergence in merger policy, although is difficult from the view of agreeing on one single text of global antitrust law, might be gradually achieved through the efforts by antitrust agencies across jurisdictions that improving their capacity, applying similar analytical tools, and harmonizing assessment procedure rules.

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<sup>33</sup> Press Release, European Commission Competition Directorate General, EU and US Issue Best Practices Concerning Bilateral Cooperation in Merger Cases, October 30, 2002.

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