International Conference
TRADE AND COMPETITION IN THE WTO AND BEYOND
Venice, December 4th-5th, 1998

GLOBALIZATION AND INTERNATIONAL ANTITRUST COOPERATION

Massimiliano Montini
Fondazione Eni Enrico Mattei and University of Siena

REVISED DRAFT, 31 March 1999

TABLE OF CONTENTS

INTRODUCTION

GLOBALIZATION AND INTERNATIONAL ANTITRUST COOPERATION

The globalization of the world economy on the one side and the expansion of national systems of antitrust law on the other side over the last few years have raised to the top of the international agenda the trade and competition issue [1].

The globalization of the world economy has been driven by the *General Agreement on Tariffs and Trade* (GATT) from 1947 to 1994, through eight negotiations rounds which have progressively lowered down tariffs and increased the volume of trade in goods and services [2]. In 1994, the *World Trade Organization* (WTO) was created with the aim of driving and regulating the constant increase of trade at a global level and the consequential integration of world markets [3].

National economies are, therefore, more open than ever to foreign competition and foreign direct investments. The number of transnational firms increases. Most of the firms traditionally operating at a national level now adopt global strategies, which in turn modify their production methods. Countries increasingly become interdependent, and the reference markets of many goods and services become regional or global.

While trade barriers are falling lower and business internationalizes, cross-border anticompetitive practices increase. Such practices, which may reduce effective competition and undermine the benefits of globalization, dramatically reveal the limits of an «asinchronized» international antitrust regime [4].

It is generally very difficult for the panoply of national antitrust systems to tackle domestically cross-border anticompetitive practices, which by their very nature are planned

---

[1] *See* E.U. PETERSMANN, *International Competition Rules for Governments and for Private Business,* 30:3 J. WORLD TRADE 5 (1996); E. FOX, *Toward World Antitrust And Market Access*, 91:1 AMER. J. INT'L L. 1 (1997).

[2] On the GATT, *see* generally R.E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT SYSTEM (1993); R.E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY (1990); J.H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS (1989); J.H. JACKSON, WORLD TRADE AND LAW OF THE GATT (1969).

[3] On the WTO, *see* generally J.H. JACKSON, THE URUGUAY ROUND, WORLD TRADE ORGANIZATION AND THE PROBLEM OF REGULATING INTERNATIONAL ECONOMIC BAHAVIOUR (1995); E.U. PETERSMANN, *The Transformation of the World Trading System through the 1994 Agreement Establishing the World Trade Organization*, EUR. J. INT'L. L. 161 (1995); T.J: DILLON Jr., *The World Trade Organization: A New Legal Order for World Trade?*, 16 MICH. J. INT'L L. 349 (1995).

[4] *See* M.H. HAUSER & E.U. PETERSMANN, *International Competition Rules in the GATT/WTO System*, SWISS REV. INT'L ECON. REL. 169 (1994); E.U. PETERSMANN, *Competition Policy Aspects of the Uruguay Round - Achievement and Prospects*, OECD (1994); M. WEIDEBAUM, *Antitrust Policy for the Global Market Place*, 28:1 J. WORLD TRADE 27 (1994); *see* also 1996 OECD Joint Report of the Trade Committee and Competition Law and Policy, *Strengthening the coherence between trade and competition policies,* OECD GD (96)90.

and implemented by several actors under several jurisdiction and have negative effects in many countries. Most of the countries with efficient national antitrust law regimes lack appropriate instruments to efficiently investigate and enforce their decisions against multi-jurisdictional antitrust violations. In the absence of international cooperation, it is unlikely for antitrust authorities to be able to seek in foreign territory the information necessary to establish infringements [5].

As a result of a lack of rules at international level, companies may be subject to different national competition rules, and national governments may seek to remedy the *vacuum* by extending the territorial scope of their antitrust provisions. This of course increases uncertainties, likely constitutes a barrier to the expansion of trade and of international investments and - last but not least - causes political frictions [6].

Various attempts to synchronizing competition principles with a newly liberalized trading system by establishing an harmonized international antitrust regime have dramatically failed [7] Meanwhile, various countries have concentrated their efforts on the development of bilateral cooperation agreements mainly focused on procedural rules to facilitate the exchange of information and some limited forms of cooperation in the enforcement stage between their domestic antitrust authorities [8] The best example of the satisfactory, albeit limited, results achieved by bilateral cooperation agreements in this sphere is represented by the 1991 EC-US cooperation agreement, which has been recently supplemented by a new 1998 agreement dedicated to the positive comity principle [9].

---

[5] *See* EUROPEAN COMMISSION (DGIV- Competition), Report of the Group of Experts, *Competition Policy in the new trade order: strengthening international cooperation and rules*, July 1995, available on Internet at the WWW site http://europa.eu.int/en/comm/dg04/interna/; *see* also EUROPEAN COMMISSION, Communication to the Council, *Towards an international framework of competition rules*, COM (96) 284, 18 June 1996, available on Internet at the WWW site http://europa.eu.int/en/comm/dg04/interna/.

[6] *See* P. TORREMANS, *Extraterritorial Application of EC and US Competition Law*, EUR. L. REV. 280 (1996); M. DEMETRIOU and A. ROBERTSON, *US Extra-territorial Jurisdiction in Antitrust Matters: Recent Developments*, 8 ECLR 461 (1995); J.P. GRIFFIN, *US Supreme Court Encourages Extraterritorial Application of US Antitrust Laws*, 21 INT'L. BUSINESS LAWYER 389 (1993).

[7] *See* C.J. CHENG, INTERNATIONAL HARMONIZATION OF ANTITRUST LAWS (1995); M. TREBILCOCK, *Competition Policy and Trade Policy: Mediating the Interface*, 30 J. WORLD TRADE 71 (1996).

[8] *See* J.P. GRIFFIN, *EC and US Extraterritoriality: Activism and Cooperation*, 17 FORDHAM INT'L L. J. 353 (1994); C.D. EHLERMANN, *The International Dimension of Competition Policy*, 17 FORDHAM INT'L L. J. 833 (1994); R.P. ALFORD, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 VA. J. INT'L L. 1 (1992); J. WALKER, *Extraterritorial Application of US Antitrust Laws: the Effect of the European Community - United States Antitrust Agreement*, 33 HARV. INT'L. L. J. 583 (1992); A.J. HIMMELFARB, *The International Language of Convergence: Reviving Antitrust Dialogue Between the United States and the European Union with a Uniform Understanding of Extraterritoriality*, 17:3 U. PA. J. INT'L ECON. L. 909 (1996); P. TORREMANS, *Extraterritorial Application of EC and US Competition Law*, ECLR 280 (1996).

[9] *See* 1991 EC-US Agreement (*Agreement between the United States and the European Communities regarding the application of their competition laws*), [1995] E.C.O.J. L95/47; 1998 EC-US Agreement (*Agreement between the United States and the European Communities on the application of positive comity principles in the enforcement of their competition laws*), available on Internet at the WWW site http://europa.eu.int/en/comm/dg04/interna/.

The first part of this paper will be devoted to analize the main features of the EC-US bilateral cooperation agreements. On the basis of this analysis, I will argue that bilateral cooperation, although it must be recognized as an important achievement in the present preliminary stage of the globalization of the world economy, should be gradually supplemented, and eventually replaced, by some forms of multilateral antitrust cooperation, possibly within the framework of the WTO [10] In the second part of this work, I will present some concrete options for the development of multilateral antitrust cooperation in this sense.

[10] *See* C. COCUZZA and M. MONTINI, *International Antitrust Cooperation in a Global Economy*, ECLR 156 (1998); E. FOX, *International Antitrust: against minimum rules; for cosmopolitan principles*, 2 THE ANTITRUST BULLETTIN 5 (1998); E. FOX, *Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade*, 4 PACIFIC RIM. LAW & POLICY JOURNAL 1 (1995); E. FOX and J.A. ORDOVER, *The Harmonization of Competition and Trade Law: the Case for Modest Linkages of law and Limits to Parochial State Action*, 19:2 WORLD COMPETITION JOURNAL OF LAW AND ECONOMICS 5 (1995).

CHAPTER I

BILATERAL ANTITRUST COOPERATION: THE EC AND US EXPERIENCE

The 1991 EC-US Agreement

On 23 September 1991 the Government of the United States of America and the European Commission signed a bilateral agreement composed of eleven articles whose purpose is «to promote cooperation and coordination and lessen the possibility or impact of differences between the Parties in the application of their competition laws» [11].

The 1991 Agreement requires each Party to notify the other whenever its competition authorities are engaged in enforcement activities which may affect important interest of the other Party (article II) and provides for periodical meetings between officials from the competition authorities of each Party (article III). The 1991 Agreement also contains a limited duty to render assistance to the competition authorities of the other Party and provisions on cooperation and coordination of enforcement activities (article IV) [12]

Articles V and VI are the most innovative and interesting parts of the Agreement. They codify respectively the positive comity principle and the negative comity principle.

The *negative comity principle* essentially consists in a doctrine of politeness and good manners between nations, according to which a sovereign country, in case of a transnational violation, although having the right to apply its law, can in certain situation decide not to

---

[11] *See* Agreement between the Government of the United States and the Commission of the European Communities Regarding the Application of Their Competition Laws, 23 September 1991, O.J. EUR. COMM. L 95/47; 30 I.L.M. 1487 (1991).
The 1991 Agreement was challenged before the European Court of Justice by France, supported by Spain and the Netherlands, for procedural reasons regarding the limits of the external powers of the EC Commission. According to article 228(1) of the EC Treaty, in fact, the European Commission has the power to negotiate, but not conclude agreements with foreign countries. The conclusion of such agreements rests within the competence of the Council, which has to consult the European Parliament. The ECJ found that, in the material case, the European Commission, in the absence of a delegation of powers by the Council to conclude on his behalf the Agreement in question, lacked the powers to conclude the agreement, and, therefore, nullified the agreement for improper procedure (Case C-327/92, France v. Commission, 1994 [ECR] 3641). The 1991 Agreement finally entered into force on 10 April 1995, following an exchange of interpretative letters between the EC and US authorities, by means of a joint decision of the EC Commission and the EC Council, which formally approved the Agreement in question on behalf of the European Communities (Decision of the Council and of the Commission of 10 April 1995 Concerning the Conclusion of the Agreement of the United States of America Regarding the Application of Their Competition Laws, O.J. EUR. COMM. L 95/45.

[12] *See* A. HAAGSMA*, International Competition Policy Issues: The EC-US Agreement of September 23, 1991*, in P.J. SLOT & A. MC DONELL (eds.), PROCEDURE AND ENFORCEMENT IN EC AND US COMPETITION LAW (1995); J. HAM, *International Cooperation in the Antitrust Field and in particular the Agreement between the Unites States of America and the Commission of the European Communities*, 30 CMLR 571 (1993); J. RILEY, *Nailing the Jellyfish: the Illegality of the EC / US Government Competition Agreement*, 3 ECLR 101 (1992); J. RILEY, *The Jellyfish Nailed: the Annulment of the EC / US Competition Co-operation Agreement*, 3 ECLR 185 (1995); A.J. HIMMELFARB, *The International Language of Convergence: Reviving Antitrust Dialogue Between the United States and the European Union with a Uniform Understanding of Extraterritoriality*, (*see* note 8 above).

pursue an investigation and leave it to the authorities of another country, when significant interest of that foreign country might otherwise be affected. The negative comity principle can be applied by national enforcement authorities and courts in the enforcement stage as well as in the adjudication stage.

Article VI of the 1991 EC-US Agreement, which deals with the negative comity principle, provides that:

> «within the framework of its own laws and to the extent compatible with its important interests, each Party will seek at all stages in its enforcement, to take into account the important interests of the other Party. Each Party shall consider important interest of the other Party in decisions as to whether or not to initiate an investigation or proceeding, the scope of an investigation or proceeding, the nature of the remedies or penalties sought, and in other ways, as appropriate».

As we can see, the negative comity principle merely imposes a generic obligation on the contracting Parties to take into account the important interest of the other Party, when enforcing its own competition laws and to the extent compatible with its own important interests. Moreover, the 1991 Agreement does not specify in which situations the important interest of the other Party should be taken into account, but merely contains some non-binding principles to help the national enforcement authorities of the one Party to decide on a case-by-case basis when the important interest of the other Party should be deemed to be affected [13].

It appears from the above that the negative comity principle does not impose any obligation upon the Parties on when and how to refrain from enforcement activities in order to protect the important interest of the other Party and does not really imply a coordination of efforts between the different domestic antitrust authorities, but merely creates a framework for avoidance of conflicts between EC and US competition authorities over enforcement activities.

The *positive comity principle* differs from negative comity in that it consists in positive acts of cooperation and reciprocal assistance between national antitrust authorities placed in different countries, rather than simply in decisions not to pursue an investigation in certain cases and leave it to the authorities of another country.

The positive comity principle is not simply a means of avoiding conflicts between antitrust authorities of different countries and finally between the Governments of those countries, as the negative comity principle, but it is usually the cornerstone of broad schemes of cooperation between national antitrust authorities located in different countries.

Article V of the 1991 EC-US Agreement, which deals with the positive comity principle, provides that:

> «if a party believes that anticompetitive activities carried out in the territory of the other Party are adversely affecting its important interests, the first Party may notify the other Party and may request that the other Party's competition authorities initiate appropriate enforcement

[13] See article VI of the 1991 EC-US Agreement.

On the basis of the positive comity principle, as enshrined in the 1991 EC-US Agreement, in case of a transnational antitrust violation which is carried out in one country and is likely to have negative effects in another country, the antitrust authority of the latter country if it recognizes that the enforcement authority of the former country is better placed to efficiently tackle the transnational violation, will ask it to investigate and will remain at disposal of the proceeding enforcement authority to give all the possible positive assistance.

The great limit of such a mechanism is that it does not create any binding obligation on the Parties, which do not have any binding obligation to coordinate their enforcement activities. Such a type of positive comity, in fact, simply creates a voluntary mechanism to try and foster an effective cooperation between the competition authorities of the Parties, with the aim of achieving a certain coordination between them and avoiding duplication of enforcement efforts.

The 1991 US-EC Agreement has to be considered a positive step in the way of a closer and fruitful cooperation and coordination between enforcement authorities placed in different countries, since it constitutes an useful tool to avoid conflicts and prevent waste of time and resources. However, it has at least two major drawbacks which considerably limits its effectiveness. Such drawbacks are:

(1) first of all, the functioning of the Agreement is greatly hampered by the presence of a «confidentiality rule», contained in article VIII, which provides that «notwithstanding any other provision of [the] Agreement, neither party is required to provide information to the other party if disclosure of that information to the requesting party (a) is prohibited by the law of the party possessing the information, or (b) would be incompatible with important interests of the party possessing the information» [14].

(2) secondly, the Agreement has an intrisic limit, which consists in the fact that its cooperation and coordination mechanisms are essentially of a voluntary nature and do not create any binding obligation on the Parties.

The 1998 EC-US Agreement

In June 1998, the European Commission and the Government of the United States «recognizing that the 1991 Agreement has contributed to coordination, cooperation and avoidance of conflicts in competition law enforcement» and «believing that further elaboration of the principles of positive comity and of the implementation of those principles would enhance the 1991 Agreement's effectiveness» have signed a supplementary Agreement on the application the positive comity principles, commonly referred to as the 1998

[14] The provision of article VIII (a) prohibits to the enforcement authorities of either Parties to share information which are not liable to disclosure according to their own internal rules. Such a provision creates some problems particularly to the EC Commission. This is due to the fact that article 20 of EC Regulation n. 17 of 1962, the most important Regulation containing procedural rules on investigation by the EC Commission, prescribes that the Commission «shall not disclose information acquired as a result of the application of the Regulation and of the kind covered by the obligation of professional secrecy» This means, in practice, that information received by the Commission from undertakings, by means of a notification or in the framework of an investigation, cannot be communicated to American antitrust enforcement authorities, unless the concerned undertaking expressly accept to waive its confidentiality rights.

Agreement. [15] [16]

The 1998 Agreement «shall supplement and be interpreted consistently with the 1991 Agreement, which remains fully in force» [17]. In practice, the new Agreement is designed to apply «where a Party satisfies the other that there is reason to believe that the following circumstances are present: (a) anticompetitive activities are occurring in whole or in substantial part in the territory of one of the Parties and are adversely affecting the interest of the other Party, and (b) the activities in question are impermissible under the competition laws of the Party in the territory of which the activities are occurring» [18].

An advanced version of the positive comity principle is the core subject of the 1998 Agreement. The new definition of the positive comity principle is a very broad one and contemplates the possibility of requesting the other country's authorities to investigate and remedy anticompetitive activities which might have a negative impact on the requesting country. The advanced version of the positive comity principle, contained in article III of the 1998 EC-US Agreement, prescribes that:

> «the competition authorities of a Requesting Party may request the competition authorities of a Requested Party to investigate and, if warranted, to remedy anticompetitive activities in accordance with the Requested party's competition laws. Such a request may be made regardless of whether the activities also violate the Requesting party's competition laws, and regardless of whether the competition authorities of the Requesting Party have commenced or contemplate taking enforcement activities under their own competition laws.»

The advanced version of the positive comity principle goes further than the old one. In fact, under the new Agreement, a Party (the Requesting Party) can request the competition authorities of the other Party (the Requested party) to act even if the targeted activities do not violate the other Party's competition laws and even if the competition authorities of the other Party have no interest to take any enforcement activities, and the Requested Party has a general duty to act in conformity with the request.

However, even in its advanced version, the positive comity principle does not loose its voluntary character. Moreover, the 1998 Agreement does not contain any provisions which may limit the negative impact of the «confidentiality rule» contained in the 1991 Agreement. Therefore, it appears that the new Agreement will not be able to modify in a considerable way the present situation, characterised by an embryonic cooperation between the EC and the US

---

[15] *See* Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws, signed on June 1998, [not yet published], available on Internet at the WWW site http://europa.eu.int/en/comm/dg04/interna/.

[16] The main purposes of the 1998 EC-US Agreement are to (a) «help ensure that trade and investment flows between the Parties and competition and consumer welfare within the territories of the Parties are not impeded by anticompetitive activities for which the competition laws of one or both Parties can provide a remedy; (b) establish cooperative procedures to achieve the most effective and efficient enforcement of competition law, whereby the competition authorities of each Party will normally avoid allocating enforcement resources to dealing with anticompetitive activities that occur principally in and are directed principally towards the other Party's territory, where the competition authorities of the other Party are able and prepared to examine and take effective sanctions under their law to deal with those activities» (see article I(2) of the 1998 EC-US Agreement).

[17] See article VI of the 1998 EC-US Agreement.

[18] See article I(1) of the 1998 EC-US Agreement.

competition authorities.

An evaluation of the EC-US bilateral cooperation

In October 1996, the European Commission presented the *First Annual Report on the EC-US Agreement*, covering the period from 10 April 1995 to 30 June 1996 [19]. The *Second Report*, covering the remaining of the calendar year 1996, was issued in …..… 1997 [20]. The *Third Report*, which covers the whole year 1997, was presented on 11 May 1998 [21].

If we look at the number of notifications exchanged by the competition authorities of the European Community and of the United States, since the signature of the first cooperation Agreement, back in 1991, we have to recognize that the EC-US antitrust cooperation has certainly achieved the result of creating a framework to develop contacts between the two sides of the Atlantic, to provide a forum for exchange of views and discussion and ultimately to facilitate mutual understanding and cooperation in the broader sense [22].

However, if we forget «routine» situations and we focus instead on «key» antitrust cases with a global dimension, such as the Boeing-McDonnell Douglas merger [23], we can easily perceive the limits of the scheme of bilateral antitrust cooperation put in place by the EC and the US. The drawbacks of such scheme, that we have briefly summarized above under the headings of the strong confidentiality rule and of the voluntary nature of the cooperation commitments by the Parties, dramatically appear in their magnitude when Parties deal with antitrust issues strongly linked with national domestic trade policies and industrial policies.

The «natural limits» of the EC-US type bilateral cooperation in the sphere of antitrust have been well explained by Alexander Schaub, EC Director-General of Competition at DGIV [24]. According to him, a lesson to be learned from a case such as the Boeing-MDD merger is that:

«procedures of notification and consultation and the principles of traditional and positive

---

[19] Commission Report to the Council and the European Parliament on the Application of the Agreement between the Government of the United States and the Commission of the European Communities regarding the application of their competition laws, COM (96) 479 final, 8 October 1996, [hereinafter First Annual Report].

[20] Commission Report to the Council and the European Parliament on the Application of the Agreement between the Government of the United States and the Commission of the European Communities regarding the application of their competition laws, COM (97) 346 final, ……., 1997 [hereinafter Second Annual Report].

[21] Commission Report to the Council and the European Parliament on the Application of the Agreement between the Government of the United States and the Commission of the European Communities regarding the application of their competition laws, COM (98) ..... final, 11 May 1998 [hereinafter Third Annual Report].

[22] During 1997, 42 notifications were made by the European Commission to the US enforcement authorities, pursuant to article II of the 1991 EC-US Agreement. During the same period the European Commission received 36 notifications from the US authorities, namely 24 from the DOJ and 12 from the FTC. The majority of notifications from both sides during 1997 concerned merger cases (30 from the EC side and 20 from the US side). The Third Annual Report also contains information on notifications made in the previous years. By observing the data provided, one can see that in the last three years (1995, 1996, 1997) the number of notifications from both sides has remained substantially stable, and so has remained constant the predominant role of merger notifications.

[23] *See* Boeing- McDonnell Douglas case, Case IV/M.877, Decision of the European Commission, 30July 1997, O.J. EUR. COMM., L 336/16.

[24] *See* A.SCHAUB, *International co-operation in antitrust matters: making the point in the wake of the Boeing-MDD proceedings*, EC Competition Policy Newsletter, vol. 4, no. 1, 1998.

comity allow us to bring our respective approaches closer in cases of common interest but there exist no mechanism for resolving conflicts in cases of substantial divergence of the analysis».

CHAPTER II

MULTILATERAL ANTITRUST COOPERATION WITHIN THE WTO

Global antitrust issues: the WTO as possible forum

The emergence of cases with a genuine global dimension, such as the Boeing-MDD merger, which are likely to put into danger the «fragile» bilateral cooperation schemes such as the one built by the EC and the US, and which could involve other domestic antitrust authorities around the world gives us the perception that in an increasingly globalized economy there are some antitrust issues which cannot be adequately dealt with by bilateral cooperation, but should be devoted instead to multilateral cooperation.

I have already argued elsewhere that, given its very broad membership and its growing «political» importance at a global level, the WTO appears nowadays to constitute the better-suited forum to try and develop some forms of multilateral antitrust cooperation [25].

In fact, the international antitrust issue has been on the political agenda of the WTO since the establishment of the Organization was still under negotiation. In 1993, in the framework of the negotiation for the creation of the MTO, then WTO, a Working Group of experts at the Max Planck Institute proposed a *Draft International Antitrust Code* [26]. The Draft Code envisaged the creation of an international competition law regime, based on «minimum standard» substantive provisions and on the establishment of a centralized enforcement and dispute settlement structure.

The international antitrust regime was to be administered by an *International Antitrust Authority* The Authority would have been allowed to bring actions against national authorities when a national authority refuses to take appropriate measures, sue private parties for injunctions, hold a right of appeal even when it is not a Party to a case, have a duty to sue a party before the *International Antitrust Panel*, assist parties in the enactment of antitrust law and in antitrust enforcement.

The too ambitious nature of the *Draft Code* was probably the main reason of its scarce success, but it remains an useful documents for discussion on international antitrust law. In fact, the minority of the Working Group of experts at the Max Planck Institute which prepared the Draft Code had warned from the beginning that the approach of the Code was too ambitious and had urged a minimalist approach. The minimalist approach was based on 15 principles upon which States could build a progressive convergence of their antitrust policies and legislation to achieve in the medium-long term a limited degree of harmonization, encompassing common rules on certain basic issues and freedom to the member States as

---

[25] *See* C. COCUZZA and M. MONTINI, *International Antitrust Cooperation in a Global Economy* (see note 10 above).

[26] *See* Draft International Antitrust Code as a GATT-MTO Plurilateral Trade Agreement (Munich, Max Planck Institute, 1993), 65 BNA Antitrust and Trade Regulation Report 1628 (1993) (Special Supp.); *See* E.U. PETERSMANN, *International Competition Rules for Governments and for Private Business,* (*see* note 1 above); E. FOX, *Toward World Antitrust And Market Access*, (*see* note 1 above).

regard other marginal issues [27]. Not even the minimalist alternative to the *Draft Code* received a sufficient consensus at international level. Therefore, no agreement on international competition law could be inserted among the *Plurilateral Treaties* annexed to the WTO Charter.

A later attempt to establish an international framework of competition rules at international level in the framework of the WTO was made at the *1996 First Ministerial Conference of the Parties to the WTO* The issue had been promoted before the Singapore Meeting by various parties to the WTO, among which the EC played a major role [28] The issue of international cooperation in competition law was considered of a relevant interest by most Parties, but no consensus on substantial actions to be taken could be achieved in Singapore. The Ministers simply agreed to establish a Working Group, with the aim of examining the interaction between trade and competition policy, including anti-competitive practices, in order to identify areas that may merit further consideration in the WTO framework [29].

The WTO Working Group on Trade and Competition Policy was set up in spring 1997 and after nearly two years of intense activity, in December 1998, has finally issued a comprehensive Report on its activities to the WTO General Council [30]. An appraisal of the work carried out by the WTO Working Group on Trade and Competition Policy in the last two years goes beyond the scope of this paper, which will instead focus on some possible options for the future development of multilateral antitrust cooperation within the WTO.

Multilateral antitrust cooperation within the WTO: options for the future

In the next paragraphs, I will try to provide some possible options to stimulate the discussion with a view to develop in the near future some kind of multilateral antitrust cooperation at international level, under the auspices of the WTO.

Generally speaking, it can be said that any kind of multilateral antitrust cooperation, should necessarily consist both of procedural and substantive rules, supplemented by some enforcement standards and a kind of dispute settlement regime.

(1) PROCEDURAL RULES

Any reasonable effort of cooperation at international level in the antitrust sphere must contemplate the adoption of certain fundamental procedural principles, which necessarily constitute the prerequisite for any sort of cooperation.

(A) Non-discrimination principle

The cornerstone for every kind of trade and antitrust cooperation at international level

---

[27] *See* 65 BNA Antitrust and Trade Regulation Report 259 (1993). *See* E. FOX, *Toward World Antitrust And Market Access*, (*see* note 1 above).

[28] *See* EUROPEAN COMMISSION, Communication to the Council, *Towards an international framework of competition rules*, COM (96) 284, 18 June 1996, available on Internet at the WWW site http://europa.eu.int/en/comm/dg04/interna/.

[29] *See* 1996 Singapore Ministerial Conference of the Parties to the WTO, Singapore Ministerial Declaration, 18 December 1996.

[30] *See* 1998 Report of the Working Group on the interaction between trade and competition policy to the General Council, WT/WGTCP/2, 8 December 1998.

must be the acceptance and the effective enforcement by national governments of the non-discrimination principle. Broadly speaking, the non-discrimination principle prohibits discrimination among nations (MFN principle) and discrimination between domestically produced and imported goods or between domestic and foreign providers of services (NT principle). Both direct and indirect discrimination are prohibited.

(B) Transparency and Assistance

The concept of transparency and assistance in the international antitrust scenario refers to all the means of exchange of information and coordination of efforts between domestic antitrust authorities placed in different national countries, such as simple forms notification and exchange of information on the one side and more advanced forms of consultation and coordination of efforts on the other side.

The starting point for the development of the concept of transparency and assistance at international level could be the *1995 OECD Recommendation on Cooperation between Member Countries on Anticompetitive Practices affecting International Trade* [31].

The main features of the 1995 Recommendation consist of:

(1) a general duty on a Member Country undertaking an investigation or a proceeding which may affect important interests of another Member Country or Countries to notify such Member Country or Countries, if possible in advance, and, in any event, at a time that would facilitate comments or consultations;

(2) a general duty on the Member Countries to supply one another with all relevant information on anticompetitive practices (as far as their legitimate interest permit them to disclose such information) with a view to cooperate when dealing with anticompetitive practices with an international dimension;

(3) the possibility to request consultation for a Member Country which considers that an investigation or a proceeding being conducted by another Member Country, under its own competition laws, may affect its important interests.

It should be noted that the 1991 EC-US cooperation agreement contains both a duty of notification and a duty to exchange information, such as those contained in the OECD Recommendation under item (1) and (2). Moreover the 1991 EC-US Agreement contains a general duty of assistance, cooperation and coordination of efforts in enforcement activities between the antitrust authorities of the Parties, which goes much further the limited possibility to request consultation, contained in the OECD Recommendation under item (3). Therefore, the 1991 EC-US Agreement certainly constitute a more advanced instruments in this respect, which should be taken into account when drafting a multilateral cooperation agreement [32].

All the means of transparency and assistance described above (notification, exchange of information, cooperation and coordination of efforts) constitute the necessary prerequisite for the more sophisticated ways of cooperation, represented by joint enforcement activities carried out by national authorities of different countries in the framework of the negative

[31] *See* 1995 OECD Recommendation, *Cooperation between Member Countries on Anticompetitive Practices affecting International Trade,* OECD (95) 130.

[32] *See* articles II, III, IV of the 1991 EC-US Agreement.

comity and positive comity principles.

(C) Negative comity principle

The *negative comity principle* essentially consists in a doctrine of politeness and good manners between nations, according to which a sovereign country, in case of a transnational violation, although having the right to apply its law, can in certain situation decide not to pursue an investigation and leave it to the authorities of another country, where significant interest of that foreign country might otherwise be affected.

As we have seen above, the negative comity principle, as enshrined in the 1991 EC-US Agreement, does not impose any binding obligation upon the Parties on when and how to refrain from enforcement activities in order to protect the important interest of the other Party and does not really imply a coordination of efforts between the different domestic antitrust authorities, but merely creates a framework for avoidance of conflicts between domestic competition authorities placed in different countries.

However, the negative comity principle, although it does not seem to me to be a very efficient instrument of cooperation at bilateral level, could prove an extremely useful tool if inserted in a multilateral agreement on antitrust cooperation. This is essentially because the avoidance of conflicts should be certainly the primary aim of such a kind of international agreement.

(D) Positive comity principle

The *positive comity principle* differs from negative comity in that it foresees positive acts of cooperation and reciprocal assistance between national antitrust authorities placed in different countries, rather than simply decisions not to act in certain cases and leave the investigation of certain activities to the antitrust authorities of another country.

The positive comity principle can be surely defined the most innovative feature of the EC-US bilateral cooperation in the antitrust sphere. A «basic version» of the principle was contained in the 1991 EC-US agreement. Such a basic version of the positive comity principle creates a voluntary mechanism to try and foster cooperation between competition authorities of the Parties, with the aim of achieving better coordination between them and avoiding duplication of enforcement efforts. However, the great limit of such a mechanism it is that it does not create binding obligations on the Parties, which do not have any binding obligation to coordinate their enforcement activities.

Maybe for this reason the 1991 agreement has been supplemented by the 1998 EC-US agreement, which contains an «advanced version» of the positive comity principle. Under such an «advanced version» of the positive comity principle, a Party (the Requesting Party) has the right in certain cases to ask the competition authorities of the other Party (the Requested party) to tackle anticompetitive activities which take place in territory of the requested Party, and the latter has a general duty to act in conformity with the request.

The positive comity principle, particularly in its advanced version, can constitute the cornerstone of broad schemes of «active» cooperation between national antitrust authorities of

different countries. Positive comity in this sense may on the one side help to ensure that anticompetitive activities do not hinder or impede trade and investment flows between the Parties, and on the other side may be a very helpful tool to:

(1) tackle more efficiently transnational conducts which have anticompetitive effects in several countries and

(1) avoid duplicating investigations on the same anti-competitive activities by national antitrust authorities placed in different countries.

The great limit to the possible adoption of the positive comity principle in the framework of an international antitrust cooperation agreement may be the fact that, in order to work well, the positive comity principle should be placed in a context of highly developed and efficient antitrust law regimes, similar substantive and procedural antitrust provisions and a considerable level of reciprocal trust between the concerned enforcement authorities. Such a context presently does not exists at international level, and this possibly limits the potential role for the positive comity principle at a multilateral level in the near future.

(2) SUBSTANTIVE RULES

After the dramatic failures of the various attempts to draft a world competition code or at least to provide a sort of harmonization of some substantive antitrust rules at international level, many scholars have nowadays abandoned any reference to the possibility of working for the approximation of substantive rules at international level [33] I do not share such pessimistic view and in the next paragraphs I will try to show how some limited and gradual form of approximation of substantive rules may still be possible and should be welcomed.

(A) Horizontal agreements

The recent *1998 OECD Recommendation on Effective Action Against Hard-Core Cartels*, which was actively supported also by the Government of the United States, provides a good example of the still existing scope for some limited forms of approximation of substantive rules negotiated at a multilateral level [34].

The 1998 OECD Recommendation starts from the assumption that hard-core cartels constitute «the most egregious violations of competition law» and that «effective action against hard-core cartels is particularly important from an international perspective because they generally operate in secret, and relevant evidence may be located in different countries» Member countries are encouraged to have or to put in place domestic competition laws that effectively halt and deter hard-core cartels [35] In particular such domestic laws should provide for:

(1) effective sanctions, of a kind and a level adequate to deter firms and individuals from participating in such cartels;

---

[33] See E. FOX, *International Antitrust: against minimum rules; for cosmopolitan principles*, (see note 10 above).

[34] *See* 1998 OECD Recommendation, *Effective Action Against Hard-Core Cartels*, OECD (98) …..

[35] For the purpose of the OECD 1998 Recommendation, an hard-core cartel is defined as «an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share and divide markets by allocating customers, suppliers, territories, or lines of commerce».

(2) enforcement procedures and institutions, with powers adequate to detect and remedy hard-core cartels.

The substantive provisions seen above are also supplemented by norms on international cooperation and comity in enforcing domestic laws against hard-core cartels, but the most interesting feature of the 1998 OECD Recommendation is certainly the call for a progressive approximation of the domestic laws against hard-core cartels. This demonstrates, in my opinion, that multilateral antitrust cooperation should not be limited to the development of procedural rules or enforcement activities, but it could also refer partially to substantive rules, maybe initially just by means of recommendations, guidelines and other forms of non-binding documents negotiated at international level.

(B) Vertical agreements

It is well known that, the case of vertical agreements represents the paramount example of the existing distance between various countries and various legal systems, which make it impossible to foresee the possibility of any form of approximation of domestic antitrust legislation in this sphere.

Besides resale price maintenance, which is generally subject to a per se prohibition in most jurisdictions, national approaches towards vertical agreements in different countries are generally controversial, because of the fact that effects of vertical agreements may be either anti-competitive or pro-competitive largely depending on the kind of evaluation undertaken and the market structure considered.

Notwithstanding this, the *1996 EC Green Paper on Vertical Restraints* [36] and its follow-up the EC Commission's *1998 Communication of the application of the Community Competition rules to vertical restraints* [37], which resemble in many respect the traditional US views on these topics, in my opinion constitute an excellent example of the fact that even in this area some forms of approximation could be envisaged in the near future, maybe in the form of international guidelines containing a «rule of reason» approach against certain practices, rather than «per se» prohibitions.

(C) Monopolization / Abuse of dominant position

Market dominance by one of more firms is generally not «per se» prohibited under antitrust law. Market dominance, however, can be detrimental to competition, in so far dominant firms usually tend to abuse of their high market power and to monopolize the market. Despite the fact that in the US system the stress of the antitrust legislation is put on the conduct of firms which monopolize or attempt to monopolize the market, whilst in the EC system the focus is on the abuse of a dominant position by dominant firms, the underlying rationale of both legal regimes is placed rather on the conduct of dominant firms, than on the results on the anticompetitive conduct.

---

[36] *See* EUROPEAN COMMISSION, *EC Green Paper on Vertical Restraints in EC Competition Policy*, COM (96) 712.

[37] *See* EUROPEAN COMMISSION, *Communication from the Commission on the application of the Community competition rules to vertical restraints*, COM (98)…..

Given these commonality of approach, it cannot be excluded that some limited kinds of international cooperation could be envisaged in the future also in this sphere, maybe in the form of international guidelines containing a «rule of reason» approach against certain practices, rather than «per se» prohibitions.

(D) Mergers

The problem of tackling adequately mergers with an international dimension is probably one of the most sensitive issues in the international antitrust sphere, following cases such as the Boeing-MDD merger [38].

Due to the fact that merger policy is usually closely linked to industrial policy, nowadays most countries are not ready to relinquish part of their sovereign rights in this area in order to support some sort of international merger policy, negotiated and implemented at a multilateral level. Therefore, absolutely no agreement on substantive rules to tackle mergers, not even in the form of «rule of reason» guidelines, seems to be foreseeable at international level in the near future.

However, given the great disruptive potential on world trade of mergers with an international dimension, it is clear that the inclusion of the transparency and assistance rules as well the negative and positive comity principles in a multilateral agreement negotiated at international level would not constitute a sufficient guarantee for the world trading system as a whole. For this reason, it is my opinion that such «general» procedural rules should be supplemented, in the case of mergers, by some *ad hoc* procedural rules, which could call for instance for an approximation of the domestic procedural requirements regarding the notification of mergers, such as thresholds, timetables, quantity and quality of information required, uniformity of filing criteria, and so on.

(3) ENFORCEMENT

(A) Existence of antitrust enforcement authorities at domestic level

The first and foremost pre-requisite for the establishment of an international antitrust cooperation agreement at multilateral level is the existence in each of the countries of an effective and efficient antitrust law regime, with an adequate domestic enforcement authority, such as to guarantee a real and satisfactory implementation of the existing domestic antitrust legislation.

(B) Willingness and capability to enforce antitrust law at domestic level

It goes without saying that the existence in each of the parties of an effective and efficient antitrust law regime, with an adequate domestic enforcement authority, is not enough to guarantee an effective enforcement of the existing domestic antitrust legislation if the domestic enforcement authority does not have the willingness or the capability to enforce.

---

[38] *See* above note 23; *see* also J.P. GRIFFIN, *Antitrust Aspects of Cross-Borders Mergers and Acquisitions*, ECLR 12 (1998); A.F. BAVASSO, *Boeing/Mc Donnell Douglas: Did the Commission Fly Too High?*, ECLR 243 (1998); J.P. GRIFFIN, *Antitrust Aspects of Cross-Borders Mergers and Acquisitions*, ECLR 12 (1998).

The problem of the willingness and capability to enforce is not merely an academic one, if we consider for example the various controversies that have opposed in recent years the US authorities with the Japanese ones, which have been often accused not to put enough efforts in enforcing their own domestic antitrust legislation, thus putting US firms at a competitive disadvantage towards local firms in the Japanese market [39].

A similar problem could also arise in many developing countries, which in spite of their adoption of modern antitrust codes and of their willingness to enforce, might lack the technical expertise and human resources necessary to do so. For this reason, the «effective enforcement» issue should be given a priority role in the debate over the possibility of future developments in the field of international antitrust cooperation, in order to minimise the risk that important achievement on the side of the approximation of procedural and substantive rules may be undermined by the lacking of effective enforcement by domestic antitrust authorities.

(C) Determination of standards of enforcement

A significant step towards an effective and efficient enforcement of domestic competition laws by national authorities could consist in the development at a multilateral level of some standards of enforcement to be included in each national antitrust legislation. Such standards could include *inter alia* an obligation to the Parties to set up fair and equitable domestic enforcement procedures, to make available some forms of private enforcement to private parties affected by anticompetitive activities, and to grant standing also to foreign firms under domestic enforcement procedures.

(1) DISPUTE SETTLEMENT

(A) Do we need a dispute settlement regime ?

If one argues that firstly there is a scope for a sort of approximation of domestic antitrust legislation at international level both in the procedural and substantive rules as well as in the enforcement standards, and secondly that the WTO appears to be the right forum to promote the development of some antitrust cooperation at international level, the obvious question which follows is whether the envisaged regime should be subject to a dispute settlement system, such as the one established by the WTO Dispute Settlement Understanding (DSU), annexed to the WTO Charter.

My opinion is that, in spite of the fact that the WTO appears to be the right forum for an effective international antitrust cooperation, neither the DSU dispute settlement regime, nor a similar dispute settlement regime, empowered to render binding judgements on the Parties, should be used to resolve trade and competition controversies. This is because most countries normally find the typical trade and competition issues as being closely linked to their national industrial policies, and are therefore normally not willing to relinquish their sovereign rights in this area.

[39] See WTO DSB Panel, Report WT/DS44/R, 31 March 1998.

(B) Towards a WTO Trade and Competition Committee

For the reasons explained above, multilateral antitrust cooperation in the framework of the WTO should be primarily aimed at developing some procedural and substantive rules, supplemented by some enforcement standards, such as those suggested above, and should not initially focus on dispute settlement. In my view, in fact, at the present stage, any form of international cooperation should have the modest but very concrete aim of creating the conditions to promote dispute avoidance in the trade and competition sphere, rather than pretend to impose binding decisions on the WTO member States, which may finally have the result of enhancing conflicts among the members and of diminishing their confidence on the authority of the WTO itself.

The move towards multilateral antitrust cooperation within the WTO could be guided by the work of the existing *Working Group on the interaction between trade and competition policy*, which in the coming years might need to be transformed in a standing *Trade and Competition Committee*, with the role of a real negotiating forum rather than a mere brainstorming and consultative arena as it appears to have been until now.