

# **COMBATING FOREIGN ANTI-COMPETITIVE CONDUCT: WHAT ROLE FOR EXTRATERRITORIALISM?**

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*[Expanding globalisation has resulted in the growth of anti-competitive commercial activities that are transnational or have transnational effects. In the absence of a global competition agreement, as countries experience the consequences of foreign anti-competitive conduct, they will be forced to consider the range of remedial strategies available to them. One strategy is to look for a positive comity solution. Another strategy is to apply domestic competition laws extraterritorially. This article is essentially concerned with the latter strategy. While there are some notional advantages to applying domestic competition rules extraterritorially, the limitations or difficulties in doing so are formidable. The result is that extraterritorialism is often an ineffectual strategy.]*

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## I INTRODUCTION

Over the past two decades, many states have adopted competition laws as a key regulatory tool of commercial activities.<sup>1</sup> At the same time, expanding globalisation has resulted in the growth of commercial activities that are transnational or have transnational implications. The confluence of these two trends has generated an interest in global competition rules.<sup>2</sup> To date, however, attempts to construct a global competition agreement have failed, most recently at the World Trade Organization meeting in Cancún, following which competition policy was removed from the Doha trade agenda.<sup>3</sup> Consequently, other than within the European Union<sup>4</sup> and the Andean Community,<sup>5</sup> regulation of international anti-competitive activities remains largely a domestic concern.<sup>6</sup>

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<sup>1</sup> In the 1980s, only 20 jurisdictions had competition laws. By 2000, the number of jurisdictions with some form of competition law had grown to 98: see Michal Gal, *Competition Policy for Small Market Economies* (2003) 9.

<sup>2</sup> Until recently this interest was centred on the WTO. The WTO was established by the *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995). Competition policy and law were put on the WTO agenda by the Singapore Ministerial Conference which created the Working Group on the Interaction between Trade and Competition Policy ('WGTCP') to investigate trade and competition issues: *Singapore Ministerial Declaration*, WTO Doc WT/MIN(96)/DEC (13 December 1996) [20] (Ministerial Declaration). The WTO Ministerial Conference in Marrakesh in April 1994 identified competition policy as one issue amongst a number that required further investigation: *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 1A (*Agreement on Trade-Related Investment Measures*) 1869 UNTS 299, art 9.

<sup>3</sup> *Doha Work Programme*, WTO Doc WT/L/579 (1 August 2004) [1(g)] (Decision Adopted by the General Council).

<sup>4</sup> *Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community* [2002] OJ C 325, 1 (entered into force 1 February 2003).

<sup>5</sup> Commission of the Andean Community, *Decisión 608: Normas para la protección y promoción de la libre competencia en la Comunidad Andina* (29 March 2005). The Andean Community is made up of Bolivia, Columbia, Ecuador and Peru.

<sup>6</sup> Some competition provisions are built into the *General Agreement on Tariffs and Trade*, opened for signature 30 October 1947, 55 UNTS 194 (entered into force 29 July 1948) ('GATT 1947') and other WTO agreements: see, eg, Brendan Sweeney, 'Globalisation of Competition Law and Policy: Some Aspects of the Interface between Trade and Competition' (2004) 5 *Melbourne Journal of International Law* 375, 401–11. Australia and New Zealand have unified certain aspects of their respective competition laws and further convergence is expected over time: *Protocol to the Australia New Zealand Closer Economic Relations — Trade Agreement on Acceleration of Free Trade in Goods* [1988] ATS 18, art 4 (signed and entered into force 18 August 1988). There are also limited competition provisions in some regional and bilateral trade agreements: see, eg, *North American Free Trade Agreement*, opened for signature 17 December 1992, 32 ILM 289 (1993) (entered into force 1 January 1994) ('NAFTA'). For a discussion of the competition aspects of NAFTA, see Spencer Waller, 'The Internationalization of Antitrust Enforcement' (1997) 77 *Boston University Law Review* 343, 356–60. For other international arrangements, see generally WGTCP, *Report (2001) of the Working Group on the Interaction between Trade and Competition Policy to the General Council*, WTO Doc WT/WGTCP/5 (8 October 2001) [54].

As countries experience the consequences of foreign anti-competitive conduct, they will be forced to consider the range of remedial strategies available to them.<sup>7</sup> In the absence of a global competition agreement, one strategy is to look for a positive comity solution. The other main strategy is to apply domestic competition laws extraterritorially. These strategies are not mutually exclusive, but neither are they entirely harmonious. Indeed, in respect of any individual case, it is likely that the pursuit of one will hinder the pursuit of the other.

This article examines extraterritorialism in the context of the application of competition law. The article begins with a brief overview of the positive comity option. It then analyses the benefits of applying domestic competition law extraterritorially, before considering the disadvantages or limitations. In particular, the article examines the factors that determine the effectiveness of such extraterritorial application. The article concludes that extraterritorialism, whilst an important element of global competition enforcement, is quite limited in its capacity to solve the problems created by international anti-competitive conduct.

## II      POSITIVE COMITY

Positive comity first appeared in an international competition law context in the competition agreements forged between the United States and the EU in the 1990s.<sup>8</sup> These agreements were based on an Organisation for Economic Co-operation and Development Recommendation.<sup>9</sup> The object of positive comity is to allocate investigation and prosecution of anti-competitive conduct to the country in the best position to carry out those functions.<sup>10</sup> If anti-competitive

<sup>7</sup> This article does not attempt to analyse how a global competition agreement, if such a thing is feasible, might affect existing remedial strategies.

<sup>8</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* [1995] OJ L 95, 47 (signed and entered into force 23 September 1991); corrected at [1995] OJ L 131, 38. The agreement originally reached in 1991 was successfully challenged before the European Court of Justice: *French Republic v Commission* (C-327/91) [1994] ECR I-3641, I-3678. This agreement was supplemented by the *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* [1998] OJ L 173, 28 (signed and entered into force 4 June 1998) (collectively ‘US-EU Agreements’).

<sup>9</sup> Positive comity was recommended in the OECD’s Committee on Competition Law and Policy’s non-binding *Recommendation concerning a Consultation and Conciliation Procedure on Restrictive Business Practices Affecting International Trade* (1973) 1. See also OECD, *Recommendation of the Council for Co-operation between Member Countries in Areas of Potential Conflict between Competition and Trade Policies* (1986) 1. In a non-competition context, positive comity appeared in a number of bilateral treaties following World War II. For a short history of positive comity, see OECD, Committee on Competition Law and Policy, *Making International Markets More Efficient Through ‘Positive Comity’ in Competition Law Enforcement* (1999) 1, 7–11 (‘OECD Report on Positive Comity’). See also International Competition Policy Advisory Committee, *Final Report to the Attorney-General and the Assistant Attorney-General for Antitrust* (2000) 227–8 (‘ICPAC Report’).

<sup>10</sup> The OECD Report on Positive Comity sums up positive comity:

conduct — for example the arrangement and implementation of a price fixing cartel — occurs in country A with effects in both country A and country B, country A is clearly in a better position to investigate and prosecute the cartel (although to ensure an adequate level of deterrence it may be necessary to prosecute in both states). Assuming it has not already acted, country B may request country A to act. Country A is obliged to give the request full consideration and to notify country B of its decision. Assuming it decides to act, country A then applies its domestic anti-cartel law. Country A, however, is under no binding obligation to do so. The arrangement is entirely voluntary. This is a positive comity request as envisaged by the *US-EU Agreements*.<sup>11</sup>

In principle, positive comity has a number of benefits.<sup>12</sup> First, by encouraging the state best placed to discipline the relevant anti-competitive activities to take the lead, it restricts the likelihood of conflict arising from the extraterritorial application of domestic competition law. Thus, positive comity reinforces traditional comity.<sup>13</sup> Second, positive comity promotes more effective enforcement by reducing the considerable difficulties associated with obtaining access to foreign-located evidence and witnesses,<sup>14</sup> and by improving the

a country should give full and sympathetic consideration to another country's request that it open or expand a law enforcement proceeding in competition cases in order to remedy conduct in its territory that is substantially and adversely affecting another country's interests. In addition, the requested country is urged to take whatever remedial action it deems appropriate on a voluntary basis and in consideration of its own legitimate interests: above n 9, 2.

See also American Bar Association ('ABA'), *Comments of the Section of Antitrust Law and the Section for International Law of the American Bar Association in Response to the Antitrust Modernization Commission's Request for Comments regarding the Role of Comity in International Competition Law Enforcement* (2006) <<http://www.abanet.org/antitrust/at-comments/2006/04-06/AMC-comity.pdf>> at 18 May 2007 ('ABA Response on Comity').

<sup>11</sup> The US also has positive comity agreements with Canada, Brazil and Japan: *Agreement between the Government of Canada and the Government of the United States of America on the Application of Positive Comity Principles to the Enforcement of Their Competition Laws*, KAV 7023 (signed and entered into force 5 October 2004); *Agreement between the Government of the United States of America and the Government of the Federative Republic of Brazil regarding Cooperation between their Competition Authorities in the Enforcement of Their Competition Laws*, signed 26 October 1999, KAV 6167, art IV (entered into force 25 March 2003); *Agreement between the Government of the United States of America and the Government of Japan concerning Cooperation on Competition Activities*, KAV 5623 (signed and entered into force 7 October 1999). The EU has a positive comity agreement with Canada: *Agreement between the European Communities and the Government of Canada regarding the Application of the Competition Laws* [1999] OJ L 175, 50 Pt V (signed and entered into force 17 June 1999).

<sup>12</sup> See generally OECD Report on Positive Comity, above n 9, 4–5.

<sup>13</sup> The primary aim of traditional or negative comity is to defuse tensions created by state sovereignty, jurisdictional overlap and extraterritorialism. The mechanism employed to achieve this object is to encourage administrative, or political, deference; that is, governments are encouraged to consider each other's 'important interests' before acting. Where local interests are outweighed by foreign interests, the local government should defer to the foreign interest. For example, where the competition authority in one state proposes to impose a remedy that would require the relevant firms to act contrary to the laws or economic policies of a second state, the first state should weigh this outcome against its own interests in imposing the remedy before proceeding: see Roderick Meiklejohn, 'An International Competition Policy: Do We Need It? Is It Feasible?' (1999) 22 *World Economy* 1233, 1242. For a discussion on the origins and uses of comity, see Joel Paul, 'Comity in International Law' (1991) 32 *Harvard International Law Journal* 1.

<sup>14</sup> See below Part V(C).

opportunity for effective remedies.<sup>15</sup> Finally, and more fundamentally, the positive comity agreements provide a tangible commitment to the notion of cooperation.<sup>16</sup>

However, positive comity also has its limitations.<sup>17</sup> First, a voluntary scheme is not ideal where the main problem to be overcome is protectionism. For example, assume that exporters in country A are convinced that firms in country B are acting anti-competitively to block imports from country A. As a result, the exporters have persuaded country A to make a positive comity request. The request has been made because country B has so far failed to take any action. If country B's failure to act is due to limited resources or, *a fortiori*, protectionist pressures, it is unlikely that the positive comity request will alter the situation.<sup>18</sup> On this issue the ICPAC Report commented:

the historic enforcement record of worldwide antitrust agencies does not promote unqualified confidence in the willingness of antitrust authorities to pursue action against domestic firms that impair the ability of foreign firms to compete, despite possible domestic consumer harm. In the absence of a nation's serious commitment to take such actions, the benefits of positive comity may remain modest or illusory.<sup>19</sup>

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<sup>15</sup> ICPAC Report, above n 9, 237.

<sup>16</sup> See OECD Report on Positive Comity, above n 9, 16.

<sup>17</sup> See *ibid* 12. The limitations to positive comity include: (a) that the law of the requested country is applied and therefore the conduct must be illegal in that state; (b) statutory bans on sharing investigatory information (both confidential and non-confidential); (c) the need for experience, confidence and trust; and (d) the voluntary nature of comity: at 23. A range of possible principles and mechanisms for a form of enhanced comity are discussed in ABA Response on Comity, above n 10, 13–15.

<sup>18</sup> See, eg, Spencer Waller, 'Can US Antitrust Laws Open International Markets?' (2000) 20 *Northwestern Journal of International Law and Business* 207, 230 (arguing that few competition systems have shown impartiality between their own citizens and foreigners). See also OECD Report on Positive Comity, above n 9, 15–16 (recognising that states cannot be expected to shift resources from their own competition priorities to satisfy foreign requests).

<sup>19</sup> ICPAC Report, above n 9, 238.

One respected commentator put the matter more bluntly:

It is not realistic to expect one government to prosecute its citizens solely for the benefit of another. It is no accident that this has not happened in the past, and it is unlikely to happen in the future. We should not expect the principle of positive comity ... to impact dramatically on the proposition that laws are written and enforced to protect national interests.<sup>20</sup>

Second, the evidence suggests that the success of a comity agreement between two states is directly related to the political, economic and legal similarities between them.<sup>21</sup> Where such symmetries exist, states are likely to have the necessary degree of trust and confidence in each other's legal regimes to ensure that the voluntary nature of positive comity does not defeat its purposes.<sup>22</sup> Without such trust and confidence, positive comity is a poor enforcement tool. For example, an ABA Report ascribed much of the blame for the failure of US interests to accept the Japanese Fair Trade Commission's ('JFTC') investigation into the conduct of Fuji in the *Japan — Film* dispute to a lack of trust and confidence between the states.<sup>23</sup> The Report stated:

Although some of the dissatisfaction [of US interests with the JFTC investigation] may be attributed to the specific outcome of this informal referral, it seems more likely that a significant portion of the dissatisfaction may be attributed to a lack of confidence in the antitrust enforcement procedures and commitment in Japan. This lack of confidence stems from a number of factors, including historically inadequate levels of antitrust enforcement within Japan and Japan's reliance on administrative guidance and informal enforcement efforts rather than on formal and transparent decision-making processes.<sup>24</sup>

Third, positive comity is not appropriate for certain types of anti-competitive conduct. For example, the problem with export cartels is that while the conduct occurs in one country (the exporting state), the anti-competitive effects occur in another (the importing state). A request by the importing state for the exporting state to take action faces not only possible protectionist objections, it also faces the very real possibility that the export cartel is not unlawful in the exporting

<sup>20</sup> James R Atwood, 'Positive Comity — Is It a Positive Step?' in Barry Hawk (ed), *Annual Proceedings of the Fordham Corporate Law Institute: International Antitrust Law and Policy* (1993) 79, 87.

<sup>21</sup> The ICPAC Report claims that to be 'truly effective, positive comity ... requires fundamental symmetry between the parties' antitrust laws and enforcement commitment': above n 9, 238.

<sup>22</sup> See OECD Report on Positive Comity, above n 9, 13.

<sup>23</sup> *Japan — Measures Affecting Consumer Photographic Film and Paper*, WTO Doc WT/DS44/R (31 March 1998) (Report of the Panel) ('*Japan — Film*'). For a discussion of the *Japan — Film* case, see Sweeney, 'Globalisation of Competition Law and Policy', above n 6, 410–11; John Linarelli, 'The Role of Dispute Settlement in World Trade Law: Some Lessons from the Kodak–Fuji Dispute' (2000) 31 *Law and Policy in International Business* 263; Sara Dillon, 'Fuji–Kodak, the WTO, and the Death of Domestic Political Constituencies' (1999) 8 *Minnesota Journal of Global Trade* 197.

<sup>24</sup> ABA, Sections of Antitrust Law and International Law and Practice, *Report concerning Private Anticompetitive Practices as Market Access Barriers* (1999) 67–8 <[http://www.abanet.org/antitrust/at-comments/2000/reports/01-00/ma\\_rpt.pdf](http://www.abanet.org/antitrust/at-comments/2000/reports/01-00/ma_rpt.pdf)> at 18 May 2007 ('ABA Report on Market Access').

state.<sup>25</sup> Generally, export cartels are only unlawful where there are significant adverse domestic effects.<sup>26</sup> In the case of many export cartels, there are few or no adverse domestic effects.<sup>27</sup> In those states where export cartels are prohibited without proof of adverse domestic effects, exemptions are normally available.<sup>28</sup>

This discussion suggests that positive comity, although useful, is not a panacea for all international anti-competitive conduct. Indeed, in practice, positive comity has only rarely been used.<sup>29</sup> This means that countries will inevitably have to consider the benefits and disadvantages of applying their domestic competition laws extraterritorially.

Extraterritorial application of competition law is not new; it has been a controversial feature of US antitrust enforcement for many years.<sup>30</sup> What is new, however, is the number of states that now have competition rules. What was once a US phenomenon has become something approaching a global standard. Inevitably, more and more states will have to decide the jurisdictional scope of their rules as they are confronted with foreign conduct that has a significant effect on their economies.

For the purposes of this discussion, extraterritoriality does not require a precise definition; indeed, it has no universally accepted definition.<sup>31</sup> Here it is simply used as an expression to refer to those occasions where domestic law is sought to be applied and enforced against conduct that occurs outside the territorial boundaries of the state.

### III ADVANTAGES OF APPLYING COMPETITION LAWS EXTRATERRITORIALLY

There are three principal advantages in applying domestic competition laws extraterritorially. First, there are advantages to the state itself; second, there are advantages to other states (spill-over effects); and third, applying domestic competition laws extraterritorially reduces incentives for a ‘race to the bottom’.

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<sup>25</sup> See OECD Report on Positive Comity, above n 9, 15. See also William S Dodge, ‘Antitrust and the Draft Hague Judgments Convention’ (2001) 32 *Law and Policy in International Business* 363, 385–7.

<sup>26</sup> Bruno Zanettin, *Cooperation between Antitrust Agencies at the International Level* (2002) 202.

<sup>27</sup> While the cartel conduct occurs in the exporting state, most of the adverse effects are exported; that is, they are experienced in the importing state. For a description of export cartels, see generally Ulrich Immenga, ‘Export Cartels and Voluntary Export Restraints between Trade and Competition Policy’ (1995) 4 *Pacific Rim Law and Policy Journal* 93; Aditya Bhattacharjea, ‘Export Cartels — A Developing Country Perspective’ (2004) 38 *Journal of World Trade* 331. See also Brendan Sweeney, ‘Export Cartels: Is There a Need for Global Rules?’ (2007) 10 *Journal of International Economic Law* 87, 89–90.

<sup>28</sup> This is the case for Australia: *Trade Practices Act 1974* (Cth) s 51(2)(g).

<sup>29</sup> The only positive comity request made pursuant to the US–EU Agreements was made in 1997: European Commission, *Report from the Commission to the Council and the European Parliament on the Application of the Agreement between the European Communities and the Government of the United States of America regarding the Application of their Competition Laws 1 January 1999 to 31 December 1999* [2000] OJ C 618, 6. Of course, a positive comity request does not depend on the existence of an agreement. It may be made, and complied with, at any time as part of the informal relations between two or more states.

<sup>30</sup> See below Part V(A)(1).

<sup>31</sup> See Cynthia Day Wallace, *The Multinational Enterprise and Legal Control: Host State Sovereignty in an Era of Economic Globalization* (2002) 668–9.

### A Advantages to the State Applying Its Competition Law Extraterritorially

In the absence of a global competition agreement or a successful positive comity request, where a state suffers a loss of competition and a consequent loss of welfare from foreign conduct (such as a foreign price fixing cartel or foreign anti-competitive distribution practices), it may very well have something to gain by applying its laws extraterritorially, simply because the alternative — failing to apply its law extraterritorially — is to accept the loss.

Extraterritoriality also has advantages to the state when compared to some notional global competition agreement. Where a state is able to impose its law extraterritorially, the outcome is optimal for that state because it has not had to bargain away any elements of its preferred model. For example, one of the basic reasons for the strong US reaction against a global competition agreement was the fear that any agreement must derogate from the optimum US model.<sup>32</sup> There are at least two aspects to this advantage of extraterritorialism.

First, the state that is applying its law extraterritorially determines the substantive and remedial rules to be applied. This is important because states differ considerably in their estimation of the optimal shape of many competition rules, including vertical restraints, single firm conduct and mergers.<sup>33</sup> Even where competition rules are textually similar or even identical, their application may be quite different. There is a growing tendency in competition law to rely on open-ended, flexible standards such as ‘market dominance’, ‘market power’ and ‘substantial lessening of competition’.<sup>34</sup> In turn, these standards rely on concepts, such as ‘market’ and ‘competition’, which are notoriously open to differences in definition and application.<sup>35</sup> Where no fixed or universal meaning exists, the interpretation of juridical standards is open to local cultural, political and economic factors. Extraterritoriality reduces some of the uncertainty associated with a competitive effects test because the state will have precedent to guide it. The US, for example, has developed its complex and highly nuanced interpretation of the broadly worded provisions of the *Sherman Act*<sup>36</sup> over a period of more than 100 years.<sup>37</sup> Global rules will lack that historical perspective.

Second, by applying its competition law extraterritorially, the state can rely on its own procedures. Procedural systems are important in most competition regimes because enforcement decisions are left neither entirely to the court system nor to a government agency. Rather, enforcement decision-making is shared and the manner of the sharing depends on local constitutional, historical

<sup>32</sup> ABA Report on Market Access, above n 24, 99–100.

<sup>33</sup> For an overview of competition regimes, see Jürgen Basedow (ed), *Limits and Control of Competition with a View to International Harmonization* (2002).

<sup>34</sup> Competition regimes normally have some ‘per se’ rules which impose liability irrespective of effects. However, the tendency is to restrict per se liability to only the most egregious of hard core cartels.

<sup>35</sup> John Duns, Mark Davison and Caron Beaton-Wells, *Competition Law: Cases and Materials* (2<sup>nd</sup> ed, 2006) 40.

<sup>36</sup> 15 USC § 1–7 (2005).

<sup>37</sup> See, eg, William Kovacic, ‘The Modern Evolution of US Competition Policy Enforcement Norms’ (2003) 71 *Antitrust Law Journal* 377.

and social features of the jurisdiction.<sup>38</sup> For example, US antitrust law relies heavily on private actions conducted through normal judicial processes.<sup>39</sup> US antitrust authorities are not expected to shoulder the entire responsibility for enforcement. As a result, US authorities tend to have less overt power than their counterparts elsewhere, except perhaps in the area of mergers.<sup>40</sup> The US system of antitrust enforcement undoubtedly reflects a broader US preference for individual responsibility and reservations about centralised power.<sup>41</sup> The European tradition is more accepting of centralist bureaucratic involvement.<sup>42</sup> Consequently, the European Commission has a significant quasi-judicial role as well as its administrative functions. In Australia, the Australian Competition and Consumer Commission ('ACCC'), through management of the authorisation process, has a broader role in shaping national competitive processes than does the US Department of Justice or the Federal Trade Commission ('FTC').<sup>43</sup> The authorisation system enables the ACCC to declare conduct lawful that would

<sup>38</sup> This does not hold true for all competition regimes. For example, transitional states — those moving from centrally organised economies to market economies — relied of necessity on Western models that had little to do with local constitutional or social history. This lack of grounding sometimes showed: see, eg, Michael Egge, who cites the example of resale price maintenance in some of the newly democratised states of Eastern Europe: 'The Harmonization of Competition Laws Worldwide' (2001) 2 *Richmond Journal of Global Law and Business* 93, 95. According to Egge, although resale price maintenance was permitted by law, some national regulators simply prohibited it as a matter of bureaucratic fiat.

<sup>39</sup> Zanettin, above n 26, 39. See also Michael Pyles, Jeff Waincymer and Martin Davies, *International Trade Law: Commentary and Materials* (2<sup>nd</sup> ed, 2004) 480.

<sup>40</sup> Through the use of guidelines, enforcement policies and competition advocacy, the Antitrust Division of the Department of Justice actually yields considerably more influence than its statutory role indicates. Both the Department of Justice and the Federal Trade Commission ('FTC') have produced extensive papers and guidelines on various aspects of competitive conduct and have made their views, as the appropriate regulatory authorities, clear. Although their views have no force as law, they have been very influential in determining judicial attitudes: see generally Daniel Gifford, 'The Jurisprudence of Antitrust' (1995) 48 *Southern Methodist University Law Review* 1677 (discussing the various factors that have influenced the jurisprudence of US antitrust).

<sup>41</sup> See, eg, Robert Pitofsky, 'The Political Content of Antitrust' (1979) 127 *University of Pennsylvania Law Review* 1051, 1056; William H Page, 'Ideological Conflict and the Origins of Antitrust Policy' (1991) 66 *Tulane Law Review* 1. See also Wolfgang Page, 'Socio-Cultural Differences and International Competition Law' (1999) 5 *European Law Journal* 438, 445 (offering a brief comparison between US and European competition law systems).

<sup>42</sup> Giuliano Amato, *Antitrust and the Bounds of Power* (1997) 39–45. See also Diane Wood, 'International Law and Federalism: What is the Reach of Regulation?' (1999) 23 *Harvard Journal of Law and Public Policy* 97, 104–5, who comments that '[t]he European model is ... far more regulatory than the US version of antitrust, especially when it comes to single firm conduct'.

<sup>43</sup> Although there is no legislatively-sanctioned process of non-judicial authorisation under US antitrust law, both the Department of Justice (*Antitrust Division Business Review Procedure* 28 CFR Ch I §50.6) and the FTC (*Policy* 16 CFR Ch I §1.1) provide limited guidance in relation to proposed conduct, including the agency's enforcement intentions: see generally Judith A Moreland, 'Overview of the Advisory Opinion Process at the Federal Trade Commission' (Paper presented at National Health Lawyers Association: Antitrust in the Health Care Field, Washington DC, 13–14 February 1997) <<http://www.ftc.gov/bc/speech2.shtm>> at 18 May 2007. See also above n 40.

otherwise be unlawful.<sup>44</sup> This bureaucratic tendency has been particularly noticeable in Japan where the JFTC has had a significant role in determining the practice of competition law, including deciding which suits, both public and private, may be brought under the *Antimonopoly Law*.<sup>45</sup> The JFTC itself has traditionally been a minor player in a broader administrative culture.<sup>46</sup> Through the mechanism of administrative guidance and its power to grant exemptions from the *Antimonopoly Law*, the Ministry of International Trade and Industry<sup>47</sup> controlled economic activities in Japan, including competition policy and practice, whatever the views of the JFTC.<sup>48</sup> This culture is changing as Japan adapts to a more deregulated system.<sup>49</sup>

### B Spill-Over Benefits

There are possible advantages to other states where competition law is applied extraterritorially by one state. Although any extraterritorial application will be aimed at the anti-competitive effects occurring within the state applying its law, there will be flow-on effects to other states. Some of these effects will be beneficial (positive externalities). For example, if the US applies its antitrust law extraterritorially against a global cartel, a possible result is that the cartel will cease operations. Other states are able to free ride on US enforcement activities. This free ride may be particularly beneficial to the less developed states, many of which have either no functioning competition law or suffer from severe capacity constraints.<sup>50</sup> Despite possible sovereignty issues, the free ride may be an attractive proposition even where one or more of the firms are located in the

<sup>44</sup> Part VII of the *Trade Practices Act 1974* (Cth) gives the ACCC power to authorise conduct if it is convinced that there are public benefits that outweigh any reduction in competition. This has been an important mechanism for the regulation of joint ventures, trade associations and mergers.

<sup>45</sup> *Act concerning Prohibition of Private Monopolization and Maintenance of Fair Trade*, Act No 54 of 14 April 1947 (Japan) ('Antimonopoly Law'). The commencement of a private action is subject to approval by the JFTC: see James Fry, 'Struggling to Teethe: Japan's Antitrust Enforcement Regime' (2001) 32 *Law and Policy in International Business* 825, 843. The JFTC's reluctance to sanction most private actions has been a source of conflict between the US and Japan: see ICPAC Report, above n 9, 211–6; Eleanor Fox, 'Antitrust and Regulatory Federalism: Races Up, Down and Sideways' (2000) 75 *New York University Law Review* 1781, 1804. See also Tadashi Shiraishi, 'Japan' in Jürgen Basedow (ed), *Limits and Control of Competition with a View to International Harmonization* (2002) 261.

<sup>46</sup> For a discussion of the Japanese system, see generally Mitsuo Matsushita, *International Trade and Competition Law in Japan* (1993). See also Fry, above n 45, 835, who argues that '[b]ecause the JFTC does not have cabinet rank, it is not viewed as being as powerful as other agencies responsible for economic regulation such as the Ministry of International Trade and Industry or the Ministry of Finance'.

<sup>47</sup> Which became the Ministry of Economy, Trade and Industry in 2001.

<sup>48</sup> See Alex Y Seita and Jiro Tamura, 'The Historical Background of Japan's *Antimonopoly Law*' (1994) *University of Illinois Law Review* 115, 122–4.

<sup>49</sup> In April 2005, Japan introduced important amendments to its *Antimonopoly Law* through Act No 35 of 2005. These amendments strengthened Japan's competition law enforcement by increasing penalties for cartels, introducing a leniency program and by revising the JFTC's administrative powers and procedures: JFTC, 'The Bill to Amend the *Antimonopoly Act Approved*' (Press Release, 20 April 2005), available from <<http://www.jftc.go.jp>> at 18 May 2007. See also Kazuhiko Takeshima, 'Recent Developments in Antimonopoly Law in Japan' (Speech delivered at the International Competition Enforcement Conference, Tokyo, Japan, 20–21 April 2005), available from <<http://www.jftc.go.jp>> at 18 May 2007. Mr Takeshima is Chairman of the JFTC.

<sup>50</sup> See, eg, Zanettin, above n 26, 223.

developing state itself, for example, where the actors are subsidiaries of multinational enterprises. The evidence supports the view that the pursuit of international cartels during the past decade by industrialised states has produced spill-over effects beneficial to developing states.<sup>51</sup>

### C Extraterritorialism Helps to Prevent a 'Race to the Bottom'

If there is a strong connection between the shape of a country's competition law and its attraction as a destination for foreign investment, business or trade, a country may be persuaded to shape its competition law to maximise that attractiveness.

If investors and others are attracted to strong competition laws, the result could be a race between countries to have the strongest competition regime. This might be called 'a race to the top'.<sup>52</sup> In this instance the 'top' is not necessarily a beneficial outcome in welfare terms. In fact, it implies over-regulation. If, as is intuitively more likely, investors and others are attracted to weak competition laws, the result could be a race between countries to have the weakest competition regime, that is, 'a race to the bottom'.

Under economic models of regulatory competition, firms will seek laws that maximise benefits to the firms' shareholders or decision-makers. Therefore, the models suggest that firms will prefer competition laws that maximise producer profits (pro-monopoly laws) over competition laws that maximise consumer welfare (pro-competitive laws).<sup>53</sup> In welfare terms, a system that allows firms to choose the competition laws that apply to them is therefore bound to be sub-optimal.<sup>54</sup>

Extraterritorialism can do little about preventing a race to the top, but it will affect the viability of a race to the bottom. Extraterritoriality means that a firm cannot necessarily protect itself from effective competition law simply by moving its anti-competitive activities to a country with weak competition law. Although extraterritoriality often proves to be ineffective, its presence means that firms cannot be sure that they are safe behind foreign borders.<sup>55</sup> Consequently, extraterritoriality reduces incentives for states to engage in a regulatory race to

<sup>51</sup> See generally OECD, *Hard Core Cartels* (2000) 1; ICPAC Report, above n 9, 163–200, Annex 4-A. See also Simon Evenett, Margaret Levenstein and Valerie Suslow, 'International Cartel Enforcement: Lessons from the 1990s' (2001) 24 *World Economy* 1221, 1237–8.

<sup>52</sup> See generally Fox, 'Antitrust and Regulatory Federalism', above n 45.

<sup>53</sup> Jürgen Basedow, 'International Antitrust: From Extraterritorial Application to Harmonization' (2000) 60 *Louisiana Law Review* 1037, 1045–6. This seems to be true whether firms seek to maximise shareholder value or management value.

<sup>54</sup> As Paul Stephan pointed out:

Allowing producers to choose which regime will regulate the harm they impose on consumers would make sense only if consumers could boycott producers that choose consumer-unfriendly regimes. But competition law, at least in theory, focuses on exactly the kinds of producer actions that reduce consumer choice. In most instances, producer choices about competition law should have no significance.

Paul Stephan, 'Against International Cooperation' in Michael S Greve and Richard Epstein (eds), *Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy* (2004) 66, 85.

<sup>55</sup> See Andrew Guzman, 'Antitrust and International Regulatory Federalism' (2001) 76 *New York University Law Review* 1142, 1149.

the bottom. In other words, extraterritoriality limits the opportunities for states to engage in a race to produce a sub-optimal competition standard for the purpose of attracting foreign investment, business or trade.

However, the likelihood of a race to the bottom should not be overstated. There is no evidence of any *strong* link between foreign direct investment and competition law.<sup>56</sup> Firms are more likely to be influenced by taxation and government procurement policies, subsidies and tariff barriers.<sup>57</sup> In respect of legal structures, firms are more concerned with property laws and labour market regulations.<sup>58</sup> Although merger law is important in attracting some types of investment, competition rules dealing with market conduct are generally too broad in their scope and uncertain in their outcomes to be a central determinant of investment strategies.<sup>59</sup> For example, a lax competition regime is a double-edged sword; while it may enable the investor to engage in anti-competitive conduct, it will not protect the investor from the same conduct directed at it.

In summary, even without extraterritorial application, competition law is probably not an overly fertile field for a regulatory race to the bottom. The causal connection between the shape of competition law and foreign investment is not strong. Nevertheless, there are some marginal incentives to manipulate

<sup>56</sup> Marcus Noland, 'Competition Policy and FDI: A Solution in Search of a Problem?' (IIE Working Paper 99-3, Institute for International Economics, Washington DC, 1999). See also ABA, Sections of Antitrust Law and International Law and Practice, *Report on the Internationalization of Competition Law Rules: Coordination and Convergence* (2000) 15 <[http://www.abanet.org/antitrust/at-comments/2000/reports/01-00/conv\\_rpt.pdf](http://www.abanet.org/antitrust/at-comments/2000/reports/01-00/conv_rpt.pdf)> at 18 May 2007. The ABA commented that '[t]he quality of US antitrust law is not in jeopardy because of insufficient antitrust abroad, nor does it appear that capital has migrated away from the United States because of costs imposed by the US antitrust laws but not by the laws of other nations': at 15. See also John Braithwaite and Peter Drahos, *Global Business Regulation* (2000) 208, arguing that 'US business does not move off-shore to avoid the costs the *Sherman Act* imposes on it'. But see WGTCP, *Study on Issues Relating to a Possible Multilateral Framework on Competition Policy*, WTO Doc WT/WGTCP/W/228 (19 May 2003) [89] (Note by the Secretariat); WGTCP, *Synthesis Paper on the Relationship of Trade and Competition Policy to Development and Economic Growth*, WTO Doc WT/WGTCP/W/80 (18 September 1998) [18] (Note by the Secretariat). For a discussion on the linkage between foreign investment and competition regimes, see Kevin Kennedy, 'Foreign Direct Investment and Competition Policy at the World Trade Organization' (2001) 33 *George Washington International Law Review* 585, 595–9. See also Fox, 'Antitrust and Regulatory Federalism' above n 45, 1795–7, arguing that there may be a limited number of cases where states offer weak competition law to attract investment.

<sup>57</sup> The factors that determine the level and location of foreign direct investment are highly complex. Most studies point to the role of factor endowments, the level of skill in the workforce and the size of the market as being critical. Beyond this, however, it is clear that government incentives and legal structures do play some role, although this should not be overstated: see Wallace, above n 31, 182.

<sup>58</sup> Keith E Maskus, 'Intellectual Property Rights and Foreign Direct Investment' (CIES Policy Discussion Paper 0022, Centre for International Economic Studies, University of Adelaide, 2000). The importance of property rights will vary according to the industry. Property rights are affected to some degree by competition rules; this is especially the case with intellectual property rights. For a discussion on the importance of labour market conditions, see Valpy FitzGerald, 'Regulatory Investment Incentives' (Working Paper No 80, QEH Working Paper Series, Oxford University, 2002) 8.

<sup>59</sup> For a list of the various host country factors that are important in determining levels of foreign direct investment, see Padma Mallampally and Karl Sauvant, 'Foreign Direct Investment in Developing Countries' (1999) 36(1) *Finance and Development* 34, 36.

competition laws to attract investment. These largely vanish under the threat of extraterritorialism.

#### IV LIMITATIONS OF EXTRATERRITORIALISM

Applying domestic competition laws extraterritorially suffers from some important conceptual and practical limitations. First, the nature of extraterritorialism means that it lacks the capacity to solve two of the problems exposed by international anti-competitive conduct, namely, the global welfare deficit and the duplication of administrative and transaction costs. Second, and more importantly for this discussion, extraterritorialism is, in practice, often ineffective. The factors that determine the effectiveness of the extraterritorial application of domestic competition laws will be discussed at length in Part V. This part examines the conceptual limitations.

##### **A Extraterritorialism Does Not Solve the Problem of the Global Welfare Deficit**

Competition law and policy have traditionally been driven by domestic concerns. Thus, a major object of most competition regimes is to improve domestic welfare. Extraterritorialism maintains that focus. Some commentators regard the global welfare deficit that results from international anti-competitive conduct as one of the major reasons for a multilateral competition agreement.<sup>60</sup> It is therefore necessary to examine how the extraterritorial application of domestic competition law might affect global welfare outcomes.

###### **1 Welfare Analysis in a World without Extraterritorialism**

Assuming that maximisation of aggregate welfare is a key object of competition regulation, market conduct is harmful if it causes a net loss in aggregate welfare. Aggregate welfare is generally understood in this context to be the sum of consumer and producer surpluses.<sup>61</sup> Therefore, market conduct is harmful where the loss in consumer surplus outweighs any gain in producer surplus.

The simple model assumes a closed economy. When trade is added, welfare analysis can produce quite different results to those produced in a closed economy. The reason for this is the presence of externalities. Market activities conducted in a world where interstate trading is the norm produce benefits and costs that are experienced externally — that is, by foreigners. Generally, domestic decision-makers are not concerned with the welfare of foreigners; they

<sup>60</sup> David Gerber, ‘The US–European Conflict Over the Globalization of Antitrust Law: A Legal Experience Perspective’ (1999) 34 *New England Law Review* 123, 125.

<sup>61</sup> Consumer and producer surpluses refer to the distributive effects produced by market conduct. For example, all other things being equal, a shift from competitive pricing to monopoly pricing not only reduces total wealth, that is, it is allocatively inefficient, it also transfers wealth from consumers to producers. Aggregate welfare and consumer surplus fall, but producer surplus increases: see, eg, John B Taylor, *Principles of Microeconomics* (3<sup>rd</sup> ed, 2000) 227.

are only concerned with national welfare.<sup>62</sup> Thus, a merger or joint venture, which in a closed economy model might be rejected on the basis that it will cause a net aggregate welfare loss, may be allowed in an open economy model because a significant proportion of the welfare losses can be externalised (shifted to foreigners).<sup>63</sup> Assuming that maximisation of aggregate welfare is the object of competition policy, a world of *domestic* competition regimes will always be sub-optimal in global terms because domestic policy makers will pursue national interests ahead of global welfare.<sup>64</sup> In a world without extraterritoriality, competition will tend to be under-regulated when viewed from the perspective of global welfare.<sup>65</sup>

## 2 Welfare Analysis in a World Where Extraterritorialism is the Norm

The analysis so far has ignored the fact that domestic competition rules may be applied extraterritorially. Recent studies have attempted to model the economic incentives influencing choice of competition regime in both closed and open economies.<sup>66</sup> Assuming that domestic decision-makers prefer local interests over foreign interests and assuming the state will seek to maximise its aggregate welfare, the choice of competition regime — weaker or stronger than that which would be chosen in a closed global economy — depends both on the pattern of a nation's trade and on its capacity to apply its laws extraterritorially.<sup>67</sup>

Assuming that states are able to apply their laws extraterritorially, net importing nations are likely to be interested in regulating foreign producers whose activities can have serious effects on domestic consumers (in the form of supra-competitive prices). Net importing nations, therefore, have an incentive to

<sup>62</sup> See Fox, 'Antitrust and Regulatory Federalism', above n 45, 1803; Alan O Sykes, 'Externalities in Open Economy Antitrust and Their Implications for International Competition Policy' (1999) 23 *Harvard Journal of Law and Public Policy* 89, 92–3. Theoretically this assumption will probably hold true whether policymakers act according to public choice theory or in the public interest. According to public choice theory policymakers act in a rational or self-interested manner. Therefore, decision-making is subject to capture by the interest group most capable of providing the policymakers with political, financial or other private benefits. Normally, this will be the group with the lowest organisational costs. In most cases, local interests, usually producer interests, would be best placed to capture those who determine competition law and policy. However, this might not always be the case. It is possible that foreign or multinational interests will capture decision-making, particularly in smaller and less developed economies with undemocratic political institutions.

<sup>63</sup> See Sykes, above n 62, 92–3.

<sup>64</sup> Ibid 93–4; Eleanor Fox, 'Global Markets, National Law, and the Regulation of Business: A View from the Top' (2001) 75 *St John's Law Review* 383, 392; Guzman, 'Antitrust and International Regulatory Federalism' above n 55, 1152–5.

<sup>65</sup> See Andrew Guzman, 'Is International Antitrust Possible?' (1998) 73 *New York University Law Review* 1501, 1527; William S Dodge sees the possibility of under-regulation as a reason for preferring aggressive extraterritoriality to a comity approach, at least until a global political settlement is reached: 'Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism' (1998) 39 *Harvard International Law Journal* 101, 152–8. Guzman, on the other hand, prefers a territorial approach to jurisdiction. See also William S Dodge, 'An Economic Defense of Concurrent Antitrust Jurisdiction' (2003) 38 *Texas International Law Journal* 27, 30–5, criticising Guzman's preference for territoriality (exclusive jurisdiction) over extraterritoriality (concurrent jurisdiction).

<sup>66</sup> Guzman, 'Is International Antitrust Possible?', above n 65; Guzman, 'Antitrust and International Regulatory Federalism', above n 55; Andrew Guzman, 'Choice of Law: New Foundations' (2002) 90 *Georgetown Law Journal* 883.

<sup>67</sup> See Guzman, 'Is International Antitrust Possible?', above n 65, 1506–31.

implement strong competition laws because the losses in consumer surplus suffered as a result of the increase in market power that accompanies weak competition law would not be offset by increases in producer surplus. Net exporting nations, on the other hand, are less likely to be concerned with consumer surplus and, therefore, will favour weak competition laws. For the net exporting nation, the increase in producer surplus flowing from weak competition laws will outweigh the losses in consumer surplus because these losses are spread among consumers worldwide.<sup>68</sup>

The outcome is that, in a world where extraterritoriality is the norm without an international rule to allocate jurisdiction, competition will tend to be over-regulated when measured against the optimal level of regulation required to maximise global welfare. This is the logical consequence of an extraterritorial world in which regulation must ultimately be according to the most restrictive rule.<sup>69</sup> Thus, while extraterritoriality will ensure that all inefficient activities will be struck down, so too will many efficient ones.

### *3 Welfare Analysis in a World Where Extraterritorialism is Practised by Some States but Not Others*

Not all nations have the capacity to apply their domestic laws extraterritorially. Such capacity depends on at least two factors. First, the state must have the ability to make meaningful extraterritorial judgments. Owing to difficulties of foreign execution,<sup>70</sup> this will usually depend on whether the foreign targets have local assets over which judgments can be enforced. Normally, only the larger, developed economies fit this model.<sup>71</sup> Second, the state must have the ability to absorb any retaliatory measures.<sup>72</sup>

Theoretically, nations without extraterritorial capacity will tend to prefer a competition regime that is weaker than one which would optimise global welfare. The net exporting nation would do this because its preference is always for weak competition law.<sup>73</sup> This may partly explain Japan's traditional

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<sup>68</sup> This is the economic explanation for the exemption from domestic competition law granted by most nations to export cartels. Export cartels increase national welfare because the increases in producer surplus are captured domestically while the decreases in consumer surplus are felt overseas: see Guzman, 'Is International Antitrust Possible?', above n 65, 1534.

<sup>69</sup> Because the most restrictive rule (as opposed to the most restrictive regime) will regulate any given activity, international competition regulation in an extraterritorial world will be more restrictive than any single regime, unless that regime has the most restrictive rule for each and every occasion of anti-competitive conduct: see Guzman, 'Choice of Law', above n 66, 906–9.

<sup>70</sup> See below Part V(D) for a discussion on enforcement of foreign judgments.

<sup>71</sup> Zanettin, above n 26, 52.

<sup>72</sup> See, eg, states' responses to *Re Uranium Antitrust Litigation; Westinghouse Electric Corporation v Rio Algom Ltd*, 617 F 2d 1248 (7<sup>th</sup> Cir, 1980) ('Uranium Case'): see below Part V(A)(1)(a) and Part V(D)(1).

<sup>73</sup> See above Part IV(A)(2).

reluctance to apply its competition laws strictly. Despite its ostensibly strong laws, Japan is often accused of under-regulating anti-competitive conduct.<sup>74</sup>

The net importing nation, which, if it could apply its laws extraterritorially would select a stronger competition regime, would select a weaker regime when it cannot apply them extraterritorially. A strong competition regime could not, by definition, affect the anti-competitive conduct of foreign producers and, therefore, could not save the resulting losses in consumer surplus. But, by being applied to local producers, such a regime would make them comparatively uncompetitive. This may partially explain why developing states, even where they have apparently strong competition laws, do not enforce those laws.<sup>75</sup> Aside from any capacity constraints, developing states have reduced incentives to apply their competition laws vigorously.

Therefore, only net importing states that apply their competition law extraterritorially will opt for a competition policy that is more restrictive than the global optimum. The incentives for other states suggest a competition regime that is less restrictive than the global optimum.

#### 4 Assessing the Model

The model just described purports to demonstrate that the uneven patterns of world trade, the unequal distribution of economic power and the domestic preferences of national decision-makers create quite different incentives to adopt and apply competition rules. In all cases, the outcome is sub-optimal in aggregate welfare terms when compared with a global standard.<sup>76</sup> Only an international agreement which ensures that global, not just domestic, effects are internalised can potentially solve the problem of these divergent incentives and deliver optimal competition regulation.<sup>77</sup> As long as competition law remains domestic, the result will be sub-optimal welfare outcomes.

However, demonstrating the theoretical sub-optimality of domestic institutions does not necessarily prove that new international arrangements will be any more satisfactory. Regulation pursuant to an international agreement may carry significant costs. These include: increased detection costs, as the costs of establishing global effects will be higher than establishing domestic effects;<sup>78</sup> increased costs in monitoring whether states are carrying out their agreed

<sup>74</sup> See Waller, 'The Internationalization of Antitrust Enforcement', above n 6, 384. See also Harry First, 'Antitrust Enforcement in Japan' (1995) 64 *Antitrust Law Journal* 137, 142–5 (arguing that Japanese authorities give a higher priority to protecting national economic interests than to protecting consumers). US antitrust has sought to extend its fiat to Japan in a number of cases involving Japanese cartels, including: *Matsushita Electronic Industrial Co Ltd v Zenith Radio Corporation*, 475 US 574 (1986); *United States v Nippon Paper Industries Co Ltd*, 944 F Supp 55 (D Mass, 1996); rev'd 109 F 3d 1 (1<sup>st</sup> Cir, 1997); petition for writ of certiorari denied 522 US 1044 (1998).

<sup>75</sup> Of course, developing states can have other reasons, such as a lack of skilled personnel and/or a lack of funds: see Susan Sell, *Power and Ideas: North–South Politics of Intellectual Property and Antitrust* (1998) 149; Zanettin, above n 26, 233.

<sup>76</sup> Guzman, 'Is International Antitrust Possible?', above n 65, 1505.

<sup>77</sup> Guzman, 'Antitrust and International Regulatory Federalism', above n 55, 1156–7.

<sup>78</sup> Andrew Guzman, 'The Case for International Antitrust' (Working Paper No 10, Boalt Hall School of Law, University of California, Berkeley, 2003) 3–4; Daniel Tarullo, 'Norms and Institutions in Global Competition Policy' (2000) 94 *American Journal of International Law* 478, 479–81.

obligations; increased rent-seeking opportunities;<sup>79</sup> and, to the extent that any agreement requires rule unification, increased costs associated with a loss of regime diversity — especially loss of innovation opportunities. If these costs outweigh the aggregate welfare gains, then an international solution is not necessarily better than a world of domestic regimes.

### B Extraterritorialism Does Not Solve the Problem of Duplicating Costs

Domestic competition regulation involves costs that would not be incurred under a global regime. This is particularly so in respect of pre-merger reporting,<sup>80</sup> but also applies to other forms of commercial conduct.<sup>81</sup> Multinational enterprises must adjust their business activities to the specific concerns of each country in which they do business. This may mean, for example, that the firm has to implement a variety of distribution structures to satisfy local competition regulations.

Extraterritorialism does not have much effect on restricting these costs. In fact, extraterritoriality may increase the costs by adding to uncertainty. A multinational enterprise may have aligned its practices in country A to accord with that country's local law; however, that does not isolate it from an action by another state (country B) which claims that the conduct that is lawful in country A is adversely affecting country B's economy. The greater the number of states applying their competition laws extraterritorially, the greater the risk of regulatory action the multinational enterprise faces in respect of its conduct in any given state.

## V FACTORS THAT GOVERN THE EFFECTIVENESS OF EXTRATERRITORIALITY

There are two basic, interrelated reasons why the extraterritorial use of domestic competition law is often ineffectual. First, there are obstacles inherent in the nature of domestic regulation that make extraterritoriality difficult. These include: jurisdictional limitations;<sup>82</sup> the availability of sovereignty defences;<sup>83</sup> problems in gathering evidence located abroad;<sup>84</sup> and problems in the execution of judgments.

Second, by its very nature, extraterritorialism introduces the problem of concurrent jurisdiction. Inevitably, this provides scope for conflict. Conflict may

<sup>79</sup> Guzman, 'The Case for International Antitrust', above n 78, 4–6.

<sup>80</sup> On the costs of pre-merger reporting, see ICPAC Report, above n 9, 87–163. Although appropriate pre-merger reporting rules are undoubtedly efficient, the benefits of this are lost where the merging parties must supply different information to different agencies in different forms at different times. Presently, more than 65 states require pre-merger notification: at Annex 2-C. A considerable amount of work has been done to make pre-merger reporting more cost efficient: OECD, OECD Council, *Recommendation of the Council concerning Merger Review* (2005) 1; International Competition Network Mergers Working Group, 'Recommended Practices for Merger Notification Procedures' (Paper presented at the Second Annual ICN Conference, Mexico, 23–25 June 2003); Business and Industry Advisory Committee to the OECD, *Recommended Framework for Best Practices in International Merger Control Procedures* (October 2001), available from <<http://www.biac.org>> at 18 May 2007.

<sup>81</sup> For examples, see Meiklejohn, above n 13, 1240.

<sup>82</sup> Peter Nygh and Martin Davies, *Conflict of Laws in Australia* (7<sup>th</sup> ed, 2002) 45.

<sup>83</sup> Ibid 147.

<sup>84</sup> Ibid 314–15.

be driven by economic policy concerns or by legal system concerns.<sup>85</sup> Thus, country A may object to the extraterritorial application of country B's competition law because, as a matter of economic policy, country A disagrees with the substance of those laws (including remedial provisions). Additionally, or alternatively, even where there is no deep-seated conflict over the policy aspect of a rule, there may be sharp conflict over rules relating to procedural matters.<sup>86</sup> Systems conflict is a natural by-product of the tension between extraterritorialism and traditional notions of sovereignty.<sup>87</sup> Conflict reduces the effectiveness of extraterritoriality because the target state is able to exacerbate the problems already inherent in extraterritorialism. For example, the target state may retaliate by making the difficulties inherent in gathering evidence even more difficult by employing evidence-blocking laws.<sup>88</sup>

The factors that determine the level of effectiveness of the extraterritorial application of domestic competition laws may conveniently be discussed under the following categories:

- 1 Prescriptive or subject matter jurisdiction;
- 2 Sovereignty-related issues: a limitation inherent in extraterritorialism;
- 3 The problem of evidence-gathering: a problem inherent in extraterritorialism which may be exacerbated by conflict; and
- 4 The problem of enforcing judgments: also an inherent problem which may be exacerbated by conflict.

#### A Prescriptive or Subject Matter Jurisdiction<sup>89</sup>

The US has been by far the leading proponent of the extraterritorial application of competition law.<sup>90</sup> It still remains the country with the greatest

<sup>85</sup> Ibid 3.

<sup>86</sup> See *F Hoffman-La Roche Ltd v Empagran SA*, 542 US 155 (2004) (Amici Curiae Brief: Governments of the Federal Republic of Germany and Belgium), arguing that aside from treble damages '[o]ther controversial features of the US legal system include extensive discovery, jury trials, class actions, contingent fees, and punitive damages'. The Supreme Court acknowledged the distinction between primary conflicts (that is, the substance of the law) about which there may be convergence, and secondary aspects (for example, procedural matters) about which there may not be convergence. See generally Gerber, above n 60.

<sup>87</sup> See Nygh and Davies, above n 82, 4.

<sup>88</sup> See below Part V(C)(2)(c).

<sup>89</sup> Personal jurisdiction over the defendant, in the US sometimes referred to as jurisdiction to adjudicate, is also necessary for effective application of a state's law. Personal jurisdiction is a matter of domestic law and the rules vary from state to state. US courts claim the broadest personal jurisdiction. See generally Dodge, 'Antitrust and the Draft Hague Judgments Convention', above n 25, 365–71. US jurisdiction rules probably make personal jurisdiction largely co-extensive with prescriptive jurisdiction. This explains why personal jurisdiction has not generated the same level of discussion as prescriptive jurisdiction in antitrust cases. Personal jurisdiction is also important in determining whether a state will enforce a foreign judgment. See discussion below n 318.

<sup>90</sup> Guy Peters, 'United States Competition Policy Institutions: Structural Constraints and Opportunities' in Bruce Doern (ed), *Comparative Competition Policy* (1996) 40. See also Antitrust Division of US Department of Justice, *Timeline of Antitrust Enforcement in Highlights* (2000) <<http://www.usdoj.gov/atr/timeline.pdf>> at 18 May 2007.

commitment to extraterritorialism.<sup>91</sup> For a variety of reasons, US antitrust law is better suited to extraterritorial application than other competition law regimes: private suits are not only permitted but encouraged by the provision of treble damages;<sup>92</sup> pre-trial discovery rules are more generous to plaintiffs in the US than elsewhere;<sup>93</sup> class actions provide plaintiffs with an opportunity that would otherwise be financially beyond them;<sup>94</sup> and attorneys' fees favour plaintiffs, as does the imposition of joint and several liability.<sup>95</sup> Consequently, much of this discussion will centre on the US experience with extraterritorialism.

## 1 The Extraterritorial Application of US Antitrust Law

### (a) Development of the US Effects Doctrine

In 1909, Justice Holmes, delivering the opinion of the US Supreme Court in *American Banana Co v United Fruit Co*,<sup>96</sup> rejected the notion that US antitrust law applied to conduct occurring wholly outside the territorial boundaries of the US. According to his Honour, 'the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act was done'.<sup>97</sup> Justice Holmes was describing the strict territorial principle of jurisdiction.<sup>98</sup>

Many international jurists, however, have recognised a broader notion, often referred to as the objective territorial principle.<sup>99</sup> That principle recognises that a state may have jurisdiction over conduct occurring outside its territorial borders where the conduct produces effects within the territory.<sup>100</sup> In *Lotus*, the principle

<sup>91</sup> Warren Pengilley, 'United States Trade and Antitrust Laws: A Study of International Legal Imperialism From Sherman to Helms Burton' (1998) 6 *Competition and Consumer Law Journal* 187.

<sup>92</sup> See, eg, Richard Whish, *Competition Law* (5<sup>th</sup> ed, 2005) 297–8; Jean-Gabriel Castel, *Extraterritoriality in International Trade: Canada and United States of America Practices Compared* (1988) 51.

<sup>93</sup> See, eg, *US Federal Rules of Civil Procedure* § 26(b)(1) (2006). See also Whish, above n 92, 297–8;

<sup>94</sup> Whish, above n 92, 297–8;

<sup>95</sup> Ibid.

<sup>96</sup> 213 US 347, 356 (1909).

<sup>97</sup> Ibid.

<sup>98</sup> The territorial principle of jurisdiction is the primary basis for a state's exercise of jurisdiction. Thus, a state has jurisdiction over all matters and persons falling within its territorial limits. This is clearly accepted as a matter of international law. It underpins the idea of the world as a collection of nation states. The principle reflects the notion that all sovereign states are equal: Robert Y Jennings, 'Extraterritorial Jurisdiction and the US Antitrust Laws' (1957) 33 *British Yearbook of International Law* 146, 148. The territorial principle was explained by Lord Macmillan in *Compania Naviera Vascongado v Steamship 'Christina'* [1938] AC 485, 496: 'It is an essential attribute of the sovereignty of this realm, as of all sovereign independent states, that it should possess jurisdiction over all persons and things within its territorial limits and in all causes civil and criminal arising within these limits'.

<sup>99</sup> The objective territorial principle was relied upon by the majority of the Permanent Court of International Justice in *SS Lotus (France v Turkey) (Judgment)* [1927] PCIJ (Ser A) No 9 ('*Lotus*'). In *Lotus*, the Court upheld Turkey's jurisdiction to prosecute a French naval officer who had negligently caused a collision between a French vessel and a Turkish vessel which resulted in the deaths of a number of Turkish sailors.

<sup>100</sup> *Strassheim v Milton Daily*, 221 US 280, 285 (1911) (Justice Holmes).

was applied by the Permanent Court of International Justice to criminal conduct.<sup>101</sup>

In *United States v Aluminium Co of America* ('Alcoa'),<sup>102</sup> the principle was applied by the US Court of Appeal to US antitrust law. The US Department of Justice alleged that a Canadian producer had conspired with a number of European producers to control the production of aluminium, including exports to the US, in violation of § 1 of the *Sherman Act*.<sup>103</sup> The alleged unlawful agreements were made outside the US and would clearly have been in breach of the Act if made within the US. The Court of Appeal for the Second Circuit held that Congress intended the *Sherman Act* to catch conduct engaged in by a foreign national outside the borders of the US where that conduct had actual and intended effects within the US.<sup>104</sup> An effects test has been applied or accepted in numerous US cases since 1945.<sup>105</sup> The doctrine remains the cornerstone of US policy to discipline foreign anti-competitive conduct that affects US consumers.

From time to time, the effects doctrine has led to considerable tension between the US and some of its major trading partners. Concerns have been expressed, sometimes forcibly, about the consistency of the effects doctrine with international law.<sup>106</sup> However, more often than not, the main reason for conflict

<sup>101</sup> [1927] PCIJ (Ser A) No 9. See discussion above at n 99.

<sup>102</sup> 148 F 2d 416, 419 (2<sup>nd</sup> Cir, 1945).

<sup>103</sup> Ibid. Section 1 of the *Sherman Act* states that every contract, combination or conspiracy in restraint of trade or commerce among the several states or with foreign nations is illegal: 15 USC § 1 (2005).

<sup>104</sup> *Alcoa*, 148 F 2d 416, 433 (2<sup>nd</sup> Cir, 1945) (Justice Learned Hand). In previous cases at least some part of the impugned conduct had occurred in the US: see, eg, *United States v American Tobacco Co*, 221 US 106 (1911); *United States v Sisal Sales Corp*, 274 US 268 (1927). For a thorough analysis of the evolution of the effects doctrine, see *Zenith Radio Corporation v Matsushita Electric Industrial Co Ltd*, 494 F Supp 1161 (D Pa, 1980). For a discussion of the possible theoretical bases underlying extraterritorial jurisdiction, see Jennings, above n 98; Jay L Westbrook, 'Extraterritoriality, Conflict of Laws, and the Regulation of Transnational Business' (1990) 25 *Texas International Law Journal* 71; Basedow, 'International Antitrust', above n 53, 1039–42.

<sup>105</sup> See, eg, *United States v Imperial Chemical Industries Ltd*, 100 F Supp 504 (D NY, 1951); *United States v General Electric Co*, 82 F Supp 753 (D NJ, 1949); *United States v The Watchmakers of Switzerland Information Center Inc*, 1963–1 Trade Cases 70600 (SD NY, 1962); *Timberlane Lumber Co v Bank of America*, 549 F 2d 597 (9<sup>th</sup> Cir, 1976); *Mannington Mills Inc v Congoleum Corporation*, 595 F 2d 1287 (3<sup>rd</sup> Cir, 1979); *Uranium Case*, 617 F 2d 1248 (7<sup>th</sup> Cir, 1980); *Continental Ore Co v Union Carbide & Carbon Corporation*, 370 US 690 (1962); *Matsushita Electronic Industrial Co Ltd v Zenith Radio Corporation*, 475 US 574, 582 (1986); *Hartford Fire Insurance Company Co v California*, 509 US 764, 796 (1993).

<sup>106</sup> See, eg, the British amicus curiae brief in the *Uranium Case*. The brief stated:

It has long been the position of the British Government that, in the context of the application of the US antitrust laws to conduct outside the United States by non-US citizens, the 'effects' test is inconsistent with international law.

has been different attitudes to economic regulation. Thus, for example, when the US sought to apply its anti-cartel rules extraterritorially in the *Uranium Case*,<sup>107</sup> it directly confronted the economic policies of other states — Great Britain, Canada, France, Australia and South Africa — which actively encouraged certain cartels, or, at least, saw no reason to prohibit them.<sup>108</sup> Not surprisingly, these states objected vigorously.<sup>109</sup> The storm of indignation generated by the *Uranium Case* led the US Department of State to lodge a note of concern with the US Court of Appeals.<sup>110</sup> A number of the countries involved lodged strong

*Uranium Case*, 617 F 2d 1248 (7<sup>th</sup> Cir, 1980) (Amicus Curiae Brief: Government of the UK), as reproduced in Alan Lowe, *Extraterritorial Jurisdiction: An Annotated Collection of Legal Materials* (1983) 158–9, as cited in Stephen Ramsey, ‘The United States–Australian Antitrust Cooperation Agreement: A Step in the Right Direction’ (1983) 24 *Virginia Journal of International Law* 127, 133. See also *United States v Nippon Paper Industries Co Ltd* 109 F 3d 1 (1<sup>st</sup> Cir, 1997) (Amicus Curiae Brief: Government of Japan). Japan also objected to US extraterritorialism in *Zenith Radio Corporation v Matsushita Electric Industrial Co*, 513 F Supp 1100 (ED Pa 1981) and in the recent decision in *F Hoffman-La Roche Ltd v Empagran SA*, 542 US 155 (2004) (Amicus Curiae Brief: Government of Japan). Objections to the US effects doctrine were also forcibly expressed by Australia, Canada and South Africa during the *Uranium Case*. More recently, objections to extraterritorialism have been forcibly expressed by developing states: UN Conference on Trade and Development (‘UNCTAD’), *Communication from the Group of 77 and China regarding the Application of Coercive Economic Measures and Unilateral Sanctions against Developing Countries*, UNCTAD Doc TD/411 (6 August 2004) (‘Communication from the Group of 77 and China’).

<sup>107</sup> 617 F 2d 1248 (7<sup>th</sup> Cir, 1980).

<sup>108</sup> Ibid. For a discussion of the case, see Warren Pengilley, ‘Extraterritorial Effects of the US Commercial and Antitrust Legislation: A View from Down Under’ (1983) 16 *Vanderbilt Journal of Transnational Law* 833, 856; Ramsey, above n 106, 133. Cartels were the norm in many European countries and in Japan prior to World War II. Although competition laws were introduced after the war, they were not accorded the same central significance to economic policy that the antitrust laws played in the US. Consequently, they were often ignored (Japan) or subject to numerous exceptions (UK and many European states). Other states took longer to develop workable competition rules. The Australian economy was heavily cartelised prior to the introduction of competition rules in 1964. Even then it took many years for the business, political and general community to accept the necessity of anti-cartel rules: see Ray Steinwall, ‘Tensions in the Development of Australian Competition Law’ in Ray Steinwall (ed), *25 Years of Australian Competition Law* (2000) 1, 15–18.

<sup>109</sup> The already heightened tensions were exacerbated by the comments of the US Court of Appeals in the *Uranium Case*, 617 F 2d 1248, 1255 (7<sup>th</sup> Cir, 1980), where Judge William Campbell said:

In the present case, the [defendants objecting to US subject matter jurisdiction] have contumaciously refused to come into court and present evidence as to why the District Court should not exercise its jurisdiction. They have chosen instead to present their entire case through surrogates. Wholly owned subsidiaries of several defaulters have challenged the appropriateness of the injunctions, and shockingly to us, the governments of the defaulters have subserviently presented for them their case against the exercise of jurisdiction.

<sup>110</sup> For a reproduction of the State Department’s letter, see Marian Nash, ‘US Practice’ (1980) 74 *American Journal of International Law* 657, 665–7. See also Joseph Griffin, ‘Foreign Governmental Reactions to US Assertions of Extraterritorial Jurisdiction’ (1998) 6 *George Mason Law Review* 505, 521, claiming that the treatment of

friendly foreign government *amicus* briefs prompted the Legal Advisor of the State Department to request the Justice Department to inform the court that the court’s ‘language has caused serious embarrassment to the United States in its relations with some of our closest allies’.

See also Ramsey, above n 106, 150.

diplomatic protests.<sup>111</sup> They also responded with a range of retaliatory actions designed to impede the effective enforcement of US antitrust law, including evidence and enforcement-blocking laws and claw-back laws.<sup>112</sup>

At heart, the *Uranium Case* was a conflict over economic policies and the legitimacy of US institutions to determine the course of foreign regulation. However, as so often happens in such cases, the tension was exacerbated by particular aspects of the US legal system: notably, private antitrust actions; the right to treble damages; and US pre-trial discovery procedures.<sup>113</sup>

### (b) The Role of Traditional Comity

In 1993, the applicability of the effects doctrine was confirmed by the US Supreme Court in *Hartford Fire Insurance Co v California* ('*Hartford*').<sup>114</sup> A majority of the Court held that antitrust law applied to foreign conduct that 'was meant to produce and did in fact produce some substantial effect in the United States'.<sup>115</sup> Despite the requirement that the effects on US commerce be 'substantial',<sup>116</sup> in practice, US courts have tended to refuse jurisdiction only where the effect upon US commerce has been demonstrably marginal.<sup>117</sup>

The precise scope of the rule, however, remains uncertain. The critical issue is how US courts ought to respond to the revealed interests and attitudes of the foreign state in which the conduct occurred.<sup>118</sup> Should US courts apply US antitrust law to foreign conduct simply on the basis of proof of the requisite effects? Or should the effects doctrine be tempered by notions of international comity and, if so, how should this be done? There are two distinct points of view.

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<sup>111</sup> Ramsey, above n 106, 150. The *Uranium Case* was not the only antitrust litigation to result in diplomatic protests. In 1981, one US antitrust enforcement official noted that there had been 'five diplomatic protests of US antitrust cases for every instance of express diplomatic support, and three blocking statutes for every cooperation agreement': Joel Davidow, 'Extraterritorial Antitrust and the Concept of Comity' (1981) 15 *Journal of World Trade Law* 500, 502. See also Griffin, above n 110, 506.

<sup>112</sup> See discussion below Part V(C)(2)(c) (evidence blocking laws) and Part V(D) (judgment blocking laws).

<sup>113</sup> See *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] AC 547.

<sup>114</sup> 509 US 764 (1993). In 1997, the effects doctrine was applied for the first time to a criminal antitrust prosecution: see *United States v Nippon Paper Industries Co Ltd*, 944 F Supp 55 (D Mass, 1996); reviewed 109 F 3d 1 (1<sup>st</sup> Cir, 1997); petition for writ of certiorari denied 522 US 1044 (1998). For a discussion of the case and of the Japanese reaction, see Jennifer Farlow, 'Ego or Equity? Examining United States Extension of the *Sherman Act*' (1998) 11 *Transnational Lawyer* 175, 195–201.

<sup>115</sup> *Hartford*, 509 US 764, 796 (1993).

<sup>116</sup> *Ibid.*

<sup>117</sup> See Dean Brockbank, 'The 1995 International Antitrust Guidelines: The Reach of US Antitrust Law Continues to Expand' (1996) 2 *Journal of International Legal Studies* 1, 8, who argues that '[a]s a result of its evolution, passing the effects test is virtually as easy as showing that a particular transaction or business practice falls within the rubric of interstate commerce under a Commerce Clause analysis. Effects can almost always be found'.

<sup>118</sup> Sell, above n 75, 226; Russell J Weintraub, 'Globalization's Effect on Antitrust Law' (1999) 34 *New England Law Review* 27, 29.

(i) *The Timberlane Balancing Test*

The first approach is derived from *Timberlane Lumber Co v Bank of America* ('*Timberlane*')<sup>119</sup> and the minority judgment in *Hartford*.<sup>120</sup> Under this view US antitrust law, as it is presently enacted, would apply to foreign conduct only if US interests were sufficiently compelling.<sup>121</sup> This could only be determined by balancing the foreign interests involved in any particular case against US interests.<sup>122</sup> This balancing test is not an exercise of judicial deference, but rather a question of statutory interpretation; in other words, it is a rule based on comity of nations or prescriptive comity, not judicial comity.<sup>123</sup>

The *Timberlane* balancing test has been widely criticised for imposing an unworkable standard on the courts and for usurping the role of the political branch of government. The balancing test, so it has been argued, is inherently unworkable because it requires courts to make judgements about the interests of foreign states and then to measure these against US interests.<sup>124</sup> These are essentially political questions.<sup>125</sup>

(ii) *The Hartford True Conflict Test*

The second approach was adopted by the majority in *Hartford*.<sup>126</sup> The majority applied the effects doctrine without any recourse to a balancing test. According to the majority, comity, if indeed it was relevant at all, could only preclude an exercise of jurisdiction where there was in fact a true conflict between US and foreign law.<sup>127</sup> A true conflict exists only where foreign law *requires* the defendant to act in the impugned manner.<sup>128</sup> But because most competition regimes are proscriptive in nature, they generally do not *require*

<sup>119</sup> 549 F 2d 597 (9<sup>th</sup> Cir, 1976).

<sup>120</sup> 509 US 764 (1993) (Justice Scalia dissenting).

<sup>121</sup> *Timberlane*, 549 F 2d 597, 613 (9<sup>th</sup> Cir, 1976).

<sup>122</sup> A balancing of interests test was applied by the Third Circuit in *Mannington Mills v Congoleum Corporation*, 595 F 2d 1287, 1298 (3<sup>rd</sup> Cir, 1979), but was rejected by the Court of Appeals for the District of Columbia in *Laker Airways v Sabena Belgian World Airlines*, 731 F 2d 909 (DC Cir, 1984). In *Timberlane*, 549 F 2d 597, 613 (9<sup>th</sup> Cir, 1976) the Court of Appeal referred to the international balancing of interests test as a jurisdictional rule of reason test. The expression was first coined by Kingman Brewster, *Antitrust and American Business Abroad* (1958) 446.

<sup>123</sup> *Hartford*, 509 US 764, 817 (1993) (Justice Scalia).

<sup>124</sup> See, eg, Russell J Weintraub, 'The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a "Choice-of-Law" Approach' (1992) 70 *Texas Law Review* 1799; Dodge, 'Extraterritoriality and Conflict-of-Laws Theory', above n 65.

<sup>125</sup> In addition, allowing US courts to determine when the US should defer to foreign policies and interests on competition matters may make it considerably more difficult for the US political branch to negotiate international competition agreements: see, eg, Weintraub, 'The Extraterritorial Application of Antitrust and Securities Laws', above n 124, 1817.

<sup>126</sup> 509 US 764 (1993). The majority judgment was delivered by Justice Souter.

<sup>127</sup> Ibid 797.

<sup>128</sup> Ibid 799. But see Spencer Waller, 'The United States as Antitrust Courtroom to the World: Jurisdiction and Standing Issues in Transnational Litigation' (2002) 14 *Loyola Consumer Law Review* 523, who argues that the decision in *Hartford* is often simply ignored. According to the Department of Justice's guidelines for international operations, comity principles will be applied to interest-balancing by the Department of Justice as a matter of enforcement discretion: US Department of Justice and the FTC, *Antitrust Enforcement Guidelines for International Operations* (1995) [3.2], available from <<http://www.usdoj.gov>> at 18 May 2007 ('Antitrust Enforcement Guidelines').

firms to act in any particular manner.<sup>129</sup> Therefore, where substantive jurisdiction is based on the *Hartford* interpretation of the effects doctrine, US courts will generally have no discretion to defer to foreign interests.<sup>130</sup> In *Hartford* itself, for example, the British government appearing as amicus to the Supreme Court argued that US antitrust jurisdiction did not extend to conduct occurring in London because Great Britain had a regulatory scheme in place for the reinsurance industry and the impugned reinsurance agreements were exempt from Great Britain's competition laws under that scheme.<sup>131</sup> However, the agreements, although permitted under British law, were not compelled by British law. Therefore, the Court held that there was no true conflict between US antitrust law and British law.<sup>132</sup>

### (c) The Present Limits of US Antitrust Law

While *Hartford* is still the leading US case on antitrust extraterritoriality, it remains controversial.<sup>133</sup> The history of US antitrust extraterritoriality may be viewed as a struggle to find the right balance between deterring anti-competitive conduct and respect for foreign sovereignty.<sup>134</sup> As the US moved to being a net importer in a world that did not share its strong views on the virtues of

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<sup>129</sup> See, eg, *Foreign Extraterritorial Measures Act*, RSC 1985, c F-29, s 8; *Protection of Trading Interests Act 1980* (UK) c 11.

<sup>130</sup> See, eg, Sell, above n 75, 225–6; Weintraub, ‘Globalization’s Effect on Antitrust Law’, above n 118, 29.

<sup>131</sup> *Hartford*, 509 US 764, 798–9 (1993). Although the matter is not free of doubt (the majority in *Hartford* did not find it necessary to decide the issue) where a true conflict does exist, US courts will need to apply a comity analysis to determine whether jurisdiction should be exercised: Andreas Lowenfeld, ‘Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the *Insurance Antitrust Case*’ (1995) 89 *American Journal of International Law* 42, 48. It is clear that the majority in *Hartford* viewed comity in terms of judicial deference and not as part of a rule of statutory interpretation. However, the majority did not speculate on what factors might be important in applying the comity analysis. In any event, cases requiring the application of comity analysis are likely to be the exception. Moreover, where such cases do exist the defendant can probably avail itself of the act of state doctrine or the foreign state compulsion doctrine: *Trugman-Nash, Inc v New Zealand Dairy Board, Milk Products Holdings (North America) Inc*, 954 F Supp 733 (1997).

<sup>132</sup> *Hartford*, 509 US 764, 798–9 (1993).

<sup>133</sup> Both Justice Souter for the majority and Justice Scalia in dissent claimed to base their decision on the *Restatement (Third) of Foreign Relations Law of the United States* (1987). However, it has been claimed that both applied the *Restatement* incorrectly: Lowenfeld, above n 131, 48–50 (who was one of the authors of the *Restatement*). See also Phillip R Trimble, ‘The Supreme Court and International Law: The Demise of Restatement Section 403’ (1995) 89 *American Journal of International Law* 53, 54–7 (criticising the approach of the minority in particular); Weintraub, ‘Globalization’s Effect on Antitrust Law’, above n 118, 29–30 (explaining how the majority’s decision could be reconciled with the *Restatement* and criticising Justice Scalia’s analysis); Larry Kramer, ‘Extraterritorial Application of American Law after the *Insurance Antitrust Case*: A Reply to Professors Lowenfeld and Trimble’ (1995) 89 *American Journal of International Law* 750 (criticising the majority for failing to refer to relevant precedents, but otherwise disagreeing with both Lowenfeld and Trimble).

<sup>134</sup> Zanettin, above n 26, 10.

competitive markets, there was a need to deter foreign anti-competitive conduct that might hurt US consumers and producers. Thus, the scale tipped towards aggressive extraterritorialism even though this often caused offence to foreign sensitivities.<sup>135</sup>

As global trade and economic interdependence grew, and as more states adopted and applied competition laws, the pendulum began to swing back from assertive deterrence towards greater respect for foreign sovereignty.<sup>136</sup> The latter is viewed as a necessary step if the problems of concurrent jurisdiction are to be solved harmoniously. According to Supreme Court Justice Breyer:

This rule of statutory construction [that the Supreme Court ordinarily construes statutes to avoid unreasonable interference with the sovereign authority of other nations] cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony — a harmony particularly needed in today's highly interdependent commercial world.<sup>137</sup>

Justice Breyer made these comments in delivering the majority judgment in *Empagran*, a case which arose out of the worldwide cartel to fix the price of certain vitamins.<sup>138</sup> The issue before the Supreme Court was whether US antitrust law — on this occasion, the provisions of the *Foreign Trade Antitrust Improvements Act*<sup>139</sup> — entitled a foreign plaintiff injured outside the US by cartel activities, also occurring outside the US, to bring an action for damages in US courts. The cartel's activities in so far as they injured domestic US commerce were within the criminal jurisdiction of the US courts.<sup>140</sup> US courts also had jurisdiction over the antitrust injuries suffered by US plaintiffs as a result of the cartel's activities.<sup>141</sup> The foreign plaintiffs, however, were in a different situation. Although the same cartel was involved, the harm suffered by the foreign plaintiffs was independent of the harm suffered in the US.<sup>142</sup>

Deciding against the foreign plaintiffs, the Supreme Court stressed the need in a highly interdependent commercial world to interpret ambiguous statutes in a manner that avoided unreasonable interference with the sovereign authority of

<sup>135</sup> *Ibid* 34.

<sup>136</sup> Thus, an attempt to adjust the balance away from aggressive extraterritoriality failed narrowly with the majority's decision in *Hartford*, 509 US 764 (1993).

<sup>137</sup> *F Hoffmann-La Roche Ltd v Empagran SA*, 542 US 155, 164–5 (2004) ('*Empagran*').

<sup>138</sup> *Ibid*.

<sup>139</sup> 15 USC § 6a (2005).

<sup>140</sup> See, eg, US Department of Justice, '*F Hoffmann-La Roche* and BASF Agree to Pay Record Criminal Fines for Participating in International Vitamin Cartel' (Press Release, 20 May 1999). See also *United States v Nippon Paper Industries Co Ltd*, 944 F Supp 55 (D Mass, 1996); reviewed 109 F 3d 1 (1<sup>st</sup> Cir, 1997); petition for writ of certiorari denied 522 US 1044 (1998).

<sup>141</sup> *Pfizer Inc v Government of India*, 434 US 308 (1978) ('*Pfizer v India*').

<sup>142</sup> The independence of the foreign harm was assumed for the purposes of the Supreme Court decision. Having determined that the foreign plaintiffs were not entitled to sue in US courts where the harm was independent of any harm suffered in the US, the Court remitted the matter to determine whether the harm was in fact independent. The issue of the independence of harm is a difficult issue that is likely to require clarification by the Supreme Court in the future.

other nations.<sup>143</sup> Justice Breyer, for the majority (Justices Scalia and Thomas concurring), said:

No one denies that America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs. But our courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused. . . .

But why is it reasonable to apply those laws to foreign conduct *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?* Like the former case, application of those laws creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs. But, unlike the former case, the justification for that interference seems insubstantial. . . . Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?<sup>144</sup>

*Empagran* does not represent a sea change in US antitrust extraterritorialism.<sup>145</sup> It is not inconsistent with, nor does it purport to overrule *Hartford*. Neither is it inconsistent with *Pfizer v India*,<sup>146</sup> in which the Supreme Court confirmed that a foreign plaintiff harmed by a violation of US antitrust laws could sue in the US courts.

Although *Empagran* may be interpreted as applying a weighing or balancing jurisdictional test, this is true only in a very broad sense. There was no intention on the majority's part to endorse a *Timberlane* balancing test. Indeed, Justice Breyer, speaking for the majority, specifically rejected the notion that courts should apply a case-by-case comity analysis.<sup>147</sup> Nevertheless, *Empagran* does suggest a more restrained approach to extraterritoriality. How this will ultimately affect the *Hartford* test remains unclear.

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<sup>143</sup> *Empagran*, 542 US 155, 164 (2004).

<sup>144</sup> Ibid 164–5 (2004) (emphases in original).

<sup>145</sup> Cf 'The Supreme Court, 2003 Term — Leading Cases' (2004) 118 *Harvard Law Review* 248, 476–80. *Empagran* left some important issues unresolved. For example, the Supreme Court assumed that there was no causal connection between the foreign harm and the domestic US harm. Where a direct causal connection exists, foreign plaintiffs will still be entitled to bring a treble damages suit in US courts. US courts are presently wrestling with the precise nature of the causal connection required: *Empagran SA v F Hoffman-La Roche Ltd*, 417 F 3d 1267 (DC Cir, 2005); petition for writ of certiorari denied 126 S Ct 1043 (Mem) (2006); *Sniado v Bank of Austria AG*, 378 F 3d 210 (2<sup>nd</sup> Cir, 2004); *Re Monosodium Glutamate Antitrust Litigation*, 2005–1 Trade Cases P 74781 (D Minn, 2005). See Jeremy Suhr, 'Keeping the Door Ajar for Foreign Plaintiffs in Global Cartel Cases after *Empagran*' (2007) 105 *Michigan Law Review* 779.

<sup>146</sup> 434 US 308 (1978).

<sup>147</sup> *Empagran*, 542 US 155, 168 (2004), where Justice Breyer argues that case by case comity is 'too complex to prove workable'.

## 2 European Competition Law Extraterritorialism

In 1985, the European Commission fined a number of foreign wood pulp producers — from Finland, Canada and the US — for engaging in cartel activities that were in breach of the competition laws of the European Economic Community ('EEC')<sup>148</sup> — now the European Community ('EC'), the first pillar of the EU, as established by the *Treaty on European Union*.<sup>149</sup> The US defendants were operating under a *Webb-Pomerene* exemption, the effect of which was to exempt them from US antitrust laws.<sup>150</sup> Also found liable was the Kraft Export Association of the United States ('KEA'),<sup>151</sup> an export association to which some of the corporations belonged. KEA had not itself engaged in any trade with the EEC.

Although the agreements were made outside the EEC, the European Commission nevertheless determined that the defendants had agreed to fix prices and other trading terms — for example, resale and re-export bans — in breach of art 85 of the *Rome Treaty*.<sup>152</sup>

The *Wood Pulp* defendants appealed. The European Court of Justice ('ECJ') rejected the defendants' argument that the EEC did not have jurisdiction.<sup>153</sup> According to the ECJ, an illegal price-fixing agreement under art 85 is made up of two acts, the agreement itself and the implementation of that agreement.<sup>154</sup> If the implementation of the agreement occurred within the EEC, it is irrelevant that the agreement was made elsewhere.<sup>155</sup> The act of selling products pursuant to the unlawful agreements would amount to implementing the price agreement.<sup>156</sup>

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<sup>148</sup> European Commission, *Commission Decision of 19 December 1984 relating to a Proceeding under Article 85 of the EEC Treaty (IV/29.725 — Wood Pulp)* [1985] OJ L 85/1 ('Wood Pulp').

<sup>149</sup> Opened for signature 7 February 1992, [1992] OJ C 224, 1 (entered into force 1 November 1993).

<sup>150</sup> *Webb-Pomerene Act of 1918*, 15 USC §§ 61–6 (2005).

<sup>151</sup> KEA is now the Pulp, Paper and Paperboard Export Association of the United States.

<sup>152</sup> *Treaty Establishing the European Economic Community*, opened for signature 25 March 1957, 298 UNTS 11, art 85 (entered into force 1 January 1958) ('Rome Treaty') prohibits

all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member-States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which (a) directly or indirectly fix purchase or selling prices or any other trading conditions ... [and those which] (c) share markets or sources of supply.

This is now art 81 following the *Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts*, opened for signature on 2 October 1997, 1997 OJ C 340/85 (entered into force 1 May 1999) ('Amsterdam Treaty').

<sup>153</sup> *A Åhlström Osakeyhtiö and Others v Commission of the European Communities* (C-89, 104, 114, 116–7, 125–129/85) [1988] ECR 5193.

<sup>154</sup> Ibid 5243.

<sup>155</sup> Ibid.

<sup>156</sup> Ibid.

The issue therefore was whether the foreign defendants in *Wood Pulp* had sold the products within the EEC. The ECJ held that:

The producers in this case implemented their pricing agreement within the common market. It is immaterial in that respect whether or not they had recourse to subsidiaries, agents, sub-agents, or branches within the Community in order to make their contacts with purchasers within the Community.<sup>157</sup>

Therefore, the foreign defendants had implemented the agreement in the EEC. As a critical element of the impugned conduct had occurred within the EEC, the territorial principle applied to give the EEC jurisdiction over the defendants other than KEA. As KEA had not played a separate role in the implementation of the price agreements, the European Commission decision against it was void.

The ECJ rejected the suggestion that an international rule of non-interference — requiring the EEC to reject jurisdiction — applied in the circumstances.<sup>158</sup> In language similar to the ‘true conflicts’ test of *Hartford*, the ECJ said:

There is no need to enquire into the existence in international law of such a rule [of non-interference] since it suffices to observe that the conditions for its application are in any event not satisfied. There is not, in this case, any contradiction between the conduct required by the United States and that required by the Community since the *Webb Pomerene Act* merely exempts the conclusion of export cartels from the application of United States anti-trust laws but does not require such cartels to be concluded. ...

As regards the argument relating to disregard of international comity, it suffices to observe that it amounts to calling in question the Community’s jurisdiction to apply its competition rules to conduct such as that found to exist in this case and that, as such, that argument has already been rejected.<sup>159</sup>

Although the *Wood Pulp* implementation test clearly goes beyond more traditional notions of prescriptive jurisdiction and although in many cases it will undoubtedly deliver a similar result to the US effects doctrine,<sup>160</sup> it is not as broad as the US doctrine.<sup>161</sup> There are situations where a US effects doctrine, but not the EU implementation test, would deliver jurisdiction. An example of the broader scope of the US effects doctrine is probably to be found in *Wood Pulp* itself. Under the US effects doctrine, KEA would probably have been liable. Another, and somewhat more anomalous example, is the case of a concerted

<sup>157</sup> Ibid.

<sup>158</sup> Ibid 5244.

<sup>159</sup> Ibid.

<sup>160</sup> For example, the European Commission applied European law to fine the members of the lysine cartel, all of whom were non-EU firms: European Commission, *Commission Decision of 7 June 2000 relating to a Proceeding Pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/36.545/F3 — Amino Acids)* [2001] OJ L 152/24.

<sup>161</sup> See, eg, Michael Akehurst, ‘Decisions of the Court of Justice of the European Communities during 1987–8’ (1988) 59 *British Year Book of International Law* 409, 418 (arguing that the ECJ in *Wood Pulp* rejected an effects doctrine). Cf Jay L Westbrook, ‘Extraterritoriality, Conflict of Laws, and the Regulation of Transnational Business’ (1990) 25 *Texas International Law Journal* 71, 96–7, who argues that there is in practice little difference between the two doctrines. For a discussion on the possible differences between the US effects doctrine and the EU position, see Griffin, above n 110, 512–13. See also Alina Kaczorowska, ‘International Competition Law in the Context of Global Capitalism’ (2000) 21 *European Competition Law Review* 117.

refusal to deal. If a foreign, price-fixing cartel sells to EU buyers, it is caught by EU competition law. But if the foreign cartel refuses to supply an EU buyer, then arguably it would not be caught by EU law because it had not performed any act within the EU. From an economic aspect, there may not be much to distinguish the two cases.

To some extent, the European Commission is constrained in its use of extraterritoriality to expand jurisdiction by the attitude of the EU Member States, many of whom have expressed an aversion to extraterritoriality.<sup>162</sup> Thus, the European Commission is wary about aggressively pursuing an effects doctrine, and tends to rely as much as possible on alternative measures such as the group economic unit doctrine, under which the European Commission claims jurisdiction over the foreign corporate parents of any subsidiaries operating within the EU.<sup>163</sup>

### 3 Australian Competition Law

The jurisdictional scope of Australian competition law was considered by the Federal Court in a case that arose out of the global vitamins price fixing cartel.<sup>164</sup> Section 45(2) of the *Trade Practices Act 1974* (Cth) ('*Trade Practices Act*'), when taken in conjunction with s 45A(1), provides that a corporation shall not make or give effect to a price fixing agreement with its competitors. In *Bray v F Hoffman-La Roche Ltd*,<sup>165</sup> as part of the implementation of the vitamin cartel's worldwide agreement, the cartel members, all located outside Australia, instructed their Australian subsidiaries to carry out the terms of the cartel arrangement in Australia. The issue was whether the *Trade Practices Act* covered the cartel members' conduct. Merkel J commented:

The combination of the conduct constituting communications by the relevant parent to officers of the subsidiaries in Australia (that is, directions, instruction etc) and internal implementation of the cartel arrangement by officers of the subsidiaries in Australia on a regular and ongoing basis over a significant period constitutes, in my view, conduct by way of implementation of the cartel arrangement in Australia that, for the purposes of s 45(2)(b), can be inferred to be conduct of the foreign parent *in Australia*.<sup>166</sup>

Thus, an unlawful arrangement does not have to be made in Australia provided it is *given effect to* in Australia. This approach has similarities to the EU's implementation doctrine, discussed above.

Where the actions that constitute the making of *or* the giving effect to the agreement occur outside Australia, jurisdiction depends on s 5 of the *Trade*

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<sup>162</sup> Daniel G Goyder, *EC Competition Law* (4<sup>th</sup> ed, 2003), 499.

<sup>163</sup> *Imperial Chemical Industries Ltd v Commission* (48/69) [1972] ECR 619.

<sup>164</sup> *Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317.

<sup>165</sup> *Bray v F Hoffman-La Roche Ltd* (2002) 118 FCR 1; aff'd (2003) 130 FCR 317.

<sup>166</sup> *Bray v F Hoffman-La Roche Ltd* (2002) 118 FCR 1, 48 (emphasis in original).

*Practices Act*.<sup>167</sup> Section 5 provides that the competition laws extend to the engaging in conduct outside Australia by bodies corporate incorporated or carrying on business within Australia or by Australian citizens or persons ordinarily resident within Australia. For present purposes, the most important issue in s 5 is the interpretation of a body corporate ‘carrying on business within Australia’. There is no need for a firm to have a place of business in Australia to be carrying on business in Australia.<sup>168</sup> A foreign firm may carry on business in Australia through an Australian agent; although, having regard to Australia’s laws concerning separate corporate identity, it may be difficult to establish that a subsidiary is acting as an agent for its foreign parent.<sup>169</sup> The test is whether the ‘parent company is so directly and intimately connected with the conduct of the subsidiary that it is proper to regard the conduct of the subsidiary as that of the parent company as well’.<sup>170</sup> Alternatively, a foreign firm may carry on business in Australia directly.<sup>171</sup> Whether the latter has occurred will depend on the extent of the foreign firm’s involvement in business activities in Australia.<sup>172</sup> The mere presence in Australia of goods, the price of which has been fixed overseas by foreign companies, will not be sufficient to establish jurisdiction.<sup>173</sup> It is clear, therefore, that the extraterritorial scope of Australian competition law does not replicate the US effects doctrine.<sup>174</sup> Mere effects, no matter how substantial, will not be sufficient to attract jurisdiction.<sup>175</sup>

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<sup>167</sup> Section 45(2) makes no reference to whether the relevant conduct proscribed by s 45(2) must occur in Australia. There is a presumption (as a matter of statutory construction) against the extraterritorial operation of legislation. The question is ‘whether the *prima facie* presumption, that the Act ‘does not extend to penalize acts done outside Australia, by foreigners, has been displaced’: *Meyer Heine Pty Ltd v China Navigation Co Ltd* (1966) 115 CLR 10, 43 (Windeyer J). But see the comments of Merkel J in *Bray v F Hoffman-La Roche Ltd* (2002) FCR 118 1, 15:

In an era of e-commerce, electronic fund transfers, internet trading and information technology there may be much to be said for the view that, absent a contrary statutory intention, the time might have come to move to the ‘effects’ doctrine of jurisdiction developed in the United States ...

<sup>168</sup> *Bray v F Hoffman-La Roche Ltd* (2002) 118 FCR 1, 19.

<sup>169</sup> This issue was discussed at length at *ibid* 19–23.

<sup>170</sup> 55<sup>th</sup> *ILA Conference Report* (1972) 159, cited in Graham R Taylor, ‘The Extraterritoriality of the Australian Antitrust Law’ (1979) 13 *Journal of International Law and Economics* 273, 289.

<sup>171</sup> Pursuant to s 5(2) for the purposes of ss 47 and 48 of the *Trade Practices Act 1974* (Cth), the supply of goods or services by a person outside Australia to a person within Australia is sufficient to attract jurisdiction in relation to that supply.

<sup>172</sup> This matter was also canvassed at some length in *Bray v F Hoffman-La Roche Ltd* (2002) 118 FCR 1.

<sup>173</sup> Graham R Taylor, ‘The Extraterritoriality of the Australian Antitrust Law’ (1979) 13 *Journal of International Law and Economics* 273, 289.

<sup>174</sup> But see David Meltz, ‘The Extraterritorial Operation of the *Trade Practices Act* — A Time for Reappraisal?’ (1996) 4 *Trade Practices Law Journal* 185, 190–1 (arguing that s 6 of the *Trade Practices Act* may be interpreted as an effects doctrine).

<sup>175</sup> *Trade Practices Act 1974* (Cth) s 5(3) also provides that an action for damages based on extraterritorial jurisdiction requires the consent of the relevant Minister.

#### 4 Extraterritorialism and Other States

A number of states, other than the US and the EU, now claim extraterritorial reach for their competition laws.<sup>176</sup> The Antitrust and International Law Sections of the ABA recently commented that:

The impact of differences in approach among the competition rules of different jurisdictions is exacerbated by the observed tendency of competition-rule systems to claim authority to investigate and intervene based on the local market effects or implementation of transactions and conduct. As business organizations expand worldwide, and as transactions and conduct have wider effects in more jurisdictions, overlapping application of multiple antitrust rules to business conduct is becoming the norm.<sup>177</sup>

This conclusion tends to paint a more expansive picture of extraterritoriality than the facts warrant. In practice, few states utilise the potential extraterritorial reach of their laws in the same way that the US or even the EU have.<sup>178</sup> This is due in part to an historical reluctance to act extraterritorially, in part to a lack of power, and in part to the lack of private actions.<sup>179</sup>

For example, although Japan has shown signs of shifting to a broader interpretation of the jurisdictional reach of its merger laws,<sup>180</sup> in respect of other anti-competitive activities, it continues to apply a more traditional notion of the territorial principle.<sup>181</sup> This may change in the face of other states expanding their extraterritorial claims, but given Japan's traditional preference for horizontal and vertical linkages between commercial entities, it has to be doubted that Japan will, at any time in the near future, develop a taste for the aggressive pursuit of foreign conduct.<sup>182</sup>

Many states remain opposed to extraterritorialism. Some idea of the continuing unpopularity of extraterritorialism, at least where it represents a coercive agenda, is evident from the official statement of the Group of 77 and

<sup>176</sup> See Eleanor Fox, 'International Antitrust and the Doha Dome' (2003) 43 *Virginia Journal of International Law* 911, 916; Jürgen Basedow and Stefan Pankoke, 'General Report' in Jürgen Basedow (ed), *Limits and Control of Competition with a View to International Harmonization* (2002) 1, 27–8; William Kovacic, 'Extraterritoriality, Institutions, and Convergence in International Competition Policy' (2003) 97 *American Society of International Law* 309, 310.

<sup>177</sup> ABA, Sections of Antitrust and International Law, *Comments and Recommendations on the Competition Elements of the Doha Declaration* (2003) 10 <<http://www.abanet.org/antitrust/at-comments/2003/05-03/doha.pdf>> at 18 May 2007.

<sup>178</sup> Kovacic, above n 176, 309.

<sup>179</sup> Ibid 109–10.

<sup>180</sup> Takaaki Kojima, 'International Conflicts over the Extraterritorial Application of Competition Law in a Borderless Economy' (Fellowship Paper, Weatherhead Center for International Affairs, Harvard University, 2001–02) 14–15.

<sup>181</sup> Ibid 11–13. See also Geraldyn Trujillo, 'Mutual Assistance under the *International Antitrust Enforcement Assistance Act*: Obstacles to a United States–Japanese Agreement' (1998) 33 *Texas International Law Journal* 613, 623–4 (arguing that while the matter is not settled, the better view is that Japan's *Antimonopoly Law* is not to be applied extraterritorially on the basis of a substantial effects doctrine). See Taylor, above n 173, 293–4 (arguing that jurisdiction under the *Antimonopoly Law* is territorial in nature).

<sup>182</sup> For an extensive account of Japan's historical development of international competition policies, see Seita and Tamura, above n 48, 128–84. See also Trujillo, above n 181, 620; Robert L Cutts, 'Capitalism in Japan: Cartels and *Keiretsu*' (1992) 70 *Harvard Business Review* 48.

China at UNCTAD's São Paulo Conference.<sup>183</sup> The Report of the Conference stated their position as follows:

The Group of 77 and China expressed its deep concern at the increased application of coercive economic measures and unilateral sanctions against developing countries, including the new attempts aimed at extraterritorial application of domestic law, which constituted a violation of the United Nations Charter, the principles of the multilateral trading system and WTO rules. The Group of 77 and China firmly rejected the imposition of laws and regulations that entailed extraterritorial consequences and all other forms of coercive economic measures, including unilateral measures against developing countries, and reiterated the urgent need for their immediate repeal.<sup>184</sup>

While this statement was made with particular regard to unilateral trade sanctions,<sup>185</sup> it would appear to have clear implications for competition law as well.

### 5 Conclusion on Prescriptive Jurisdiction

Extraterritoriality means that domestic laws are applied beyond the state's geographic boundaries. In relation to competition law, the US remains by far the main user of extraterritorialism. This is due to a variety of factors, including some of the unique features of US antitrust law, such as the widespread use of private actions and the availability of treble damages.<sup>186</sup> Although the US effects doctrine is said to be based on a recognised principle of international law, this is not universally accepted or practised.<sup>187</sup> Indeed, many states remain opposed to extraterritorialism.

Extraterritorialism involves concurrent jurisdiction, which inevitably produces occasions of tension. In the past, this tension (and the manner in which states have responded to it) has often impeded the effectiveness of extraterritorialism. This still remains the case for many areas of competition policy, notably single

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<sup>183</sup> UNCTAD, *Communication from the Group of 77 and China*, above n 106. A full list of the Group of 77, comprising developing states, can be found at: The Group of 77 at the UN, *Member States of the Group of 77* (2004) <<http://www.g77.org/doc/members.html>> at 18 May 2007.

<sup>184</sup> UNCTAD, *Report of the United Nations Conference Trade and Development on Its Eleventh Session*, UNCTAD Doc TD/412 (20 August 2004) 39.

<sup>185</sup> See also Group of 77 and China, *Declaration by the Group of 77 and China on the Fifth WTO Ministerial Conference* (Cancún, Mexico, 10–14 September 2003) <<http://www.g77.org/main/docs/FinalG77Decl-22aug-5thWTO.pdf>> at 18 May 2007.

<sup>186</sup> Whish, above n 92, 297–8.

<sup>187</sup> UNCTAD, *Communication from the Group of 77 and China*, above n 106.

firm conduct and international mergers.<sup>188</sup> However, tension, though a frequent occurrence, is not inevitable. The convergence of views in the past decade about the proper policy approach to hard core cartels has enabled the US and, to a lesser extent, the EU to apply their competition laws extraterritorially in the successful pursuit of foreign-based cartels.<sup>189</sup>

### B Sovereignty-Related Defences

Respect for sovereignty affects the utility of applying domestic competition laws extraterritorially. This respect is expressed in a number of sovereignty-related doctrines.

#### 1 Foreign Sovereign Immunity

Foreign sovereigns are immune from competition law provided that their conduct is not commercial.<sup>190</sup> This defence is only available to the foreign sovereign and, therefore, has no application where only private parties are involved.<sup>191</sup>

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<sup>188</sup> In relation to single firm conduct, contrast the US reaction to Microsoft's activities in *United States v Microsoft Corporation*, 253 F 3d 34 (DC Cir, 2001) with the European Commission's response: European Commission, *Commission Decision of 24 March 2004 relating to a Proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 Microsoft)* [2004] EC Comm 12. In relation to mergers, consider the General Electric–Honeywell and Boeing–McDonnell–Douglas mergers. After the US raised no objection to the General Electric–Honeywell merger, the European Commission refused to allow it to proceed: *Initiation of Proceedings (Case Comp/M.2220 — General Electric/Honeywell)* [2001] OJ C 74, 6. The European Commission's rejection of the General Electric–Honeywell merger drew strong political disapproval in the US, including from President George W Bush: see generally Alec Burnside, 'GE, Honey, I Sunk the Merger' (2002) 23(2) *European Competition Law Review* 107. Another merger to cause transatlantic tension was the Boeing–McDonnell–Douglas merger in 1997: see generally Kaczorowska, above n 161; Barbara George, Lynn Dymally and Kathleen Lacey, 'Increasing Extraterritorial Intrusion of European Union Authority into US Business Mergers and Competition Practices: US Multinational Businesses Underestimate the Strength of the European Commission from GE–Honeywell to Microsoft' (2004) 19 *Connecticut Journal of International Law* 571 (discussing the tensions between US and EU authorities in a variety of cases).

<sup>189</sup> For a discussion on the pursuit of hard core cartels, see generally OECD, *Hard Core Cartels: Recent Progress and Challenges Ahead* (2003) 1.

<sup>190</sup> *Foreign States Immunities Act 1985* (Cth) s 11; *Foreign Sovereign Immunities Act of 1976*, 28 USC § 1605(a) (2005); *State Immunity Act 1978* (UK) c 33, s 3; *State Immunity Act*, RSC 1985, c S-18, s 5. The *Foreign States Immunities Act 1985* (Cth) s 11(3) defines a commercial transaction as

a commercial, trading, business, professional or industrial or like transaction into which the foreign State has entered or a like activity in which the State has engaged and, without limiting the generality of the foregoing, includes:

- (a) a contract for the supply of goods or services;
- (b) an agreement for a loan or some other transaction for or in respect of the provision of finance; and
- (c) a guarantee or indemnity in respect of a financial obligation; but does not include a contract of employment or a bill of exchange.

<sup>191</sup> *Foreign States Immunities Act 1985* (Cth) s 9.

## 2 Act of State Doctrine

Courts will also not inquire into matters that require them to judge the legality of the sovereign act of a foreign state done within its own territory.<sup>192</sup> The act of state doctrine, as it is called, is different to foreign sovereign immunity in that it concentrates on the sovereign nature of the act rather than the sovereign actor.<sup>193</sup> A private party may argue the act of state doctrine, even when no sovereign state is a party to the action.<sup>194</sup>

The precise nature and scope of the doctrine remain somewhat elusive. Indeed, it seems to be unknown in European civil law states.<sup>195</sup> According to the US *Antitrust Enforcement Guidelines for International Operations*, the Department of Justice and the FTC will not

challenge foreign acts of state if the facts and circumstances indicate that: (1) the specific conduct complained of is a public act of the sovereign, (2) the act was taken within the territorial jurisdiction of the sovereign, and (3) the matter is governmental, rather than commercial.<sup>196</sup>

The act of state doctrine was applied by the Ninth Circuit Court of Appeals to dismiss an action for damages against the OPEC oil cartel.<sup>197</sup> The Court held that there was sufficient evidence and precedent to show that control and exploitation

<sup>192</sup> See, eg, *W S Kirkpatrick & Co Inc v Environmental Tectonics Corporation International*, 493 US 400, 400 (1990) where the US Supreme Court held that '[t]he act of state doctrine ... requires that, in the process of deciding, acts of foreign sovereigns taken within their own jurisdictions be deemed valid'.

<sup>193</sup> See Martin Davies, 'Kuwait Airways Corp v Iraqi Airways Co: The Effect in Private International Law of a Breach of Public International Law by a State Actor' (2001) 2 *Melbourne Journal of International Law* 523, 523.

<sup>194</sup> See *International Association of Machinists and Aerospace Workers v OPEC*, 649 F 2d 1354, 1359–60 (9<sup>th</sup> Cir, 1981) ('OPEC Case'), arguing that the act of state doctrine was not subsumed by the *Foreign Sovereign Immunities Act*, 28 USC §§ 1602–11 (1976).

<sup>195</sup> F A Mann, 'The Foreign Act of State' (1990) 106 *Law Quarterly Review* 352, 353, arguing that '[the Act of State doctrine] does not exist anywhere on the [European] Continent where, for instance, no court would ever hesitate to investigate whether the foreign Act of State conformed to the requirements of the *lex auctoris* or the public policy of the forum'.

<sup>196</sup> *Antitrust Enforcement Guidelines*, above n 128, [3.33]. See also Jake S Tyshow, 'Informal Foreign Affairs Formalism: The Act of State Doctrine and the Reinterpretation of International Comity' (2002) 43 *Virginia Journal of International Law* 275.

<sup>197</sup> *OPEC Case*, 649 F 2d 1354 (9<sup>th</sup> Cir, 1981). See Andres Rueda, 'Price-Fixing at the Pump — Is the OPEC Oil Conspiracy beyond the Reach of the *Sherman Act*'? (2001) 24 *Houston Journal of International Law* 1, 5–6. See also *Occidental Petroleum Corporation v Buttes Gas & Oil Co*, 331 F Supp 92 (D Cal, 1971); aff'd *Occidental Petroleum Corporation v Buttes Gas & Oil Co*, 461 F 2d 1261 (9<sup>th</sup> Cir, Cal); petition for writ of certiorari denied 409 US 950.

of a country's natural resources was an act of state.<sup>198</sup>

The doctrine applies in the UK and in Australia,<sup>199</sup> where it is generally taken to mean, *inter alia*, that domestic courts will not inquire into the validity of acts and transactions of a foreign sovereign state within that sovereign state's own territory.<sup>200</sup> In Australia, the *Trade Practices Act* puts the matter of an extraterritorial damages claim specifically in the hands of the relevant Minister.<sup>201</sup> Extraterritorial damages claims cannot be instituted unless the Minister consents. Consent will be granted unless

- (a) the law of the country in which the conduct concerned was engaged in, required or specifically authorised, the engaging in of the conduct; and
- (b) it is not in Australia's national interest that the consent be given.<sup>202</sup>

In applying the act of state doctrine it is necessary to distinguish between an act of state and acts consequential upon an act of state.<sup>203</sup> The latter are not immune.<sup>204</sup> For example, courts in state A may refuse to question the grant of a patent in state B on the basis of an act of state, but this would not prevent the court from judging whether the acts of the patentee — for example, bundling the patented product with other products — amounted to unlawful anti-competitive conduct. The latter enquiry does not question the validity of the foreign state's act.<sup>205</sup>

To put the issue in a more contentious competition law context, assume that state A has exempted a price cartel that has effects in state B. If those harmed in

<sup>198</sup> A number of commentators have argued that the approach of the Ninth Circuit in the *OPEC Case* is no longer good law; that the ambit of the act of state defence was significantly narrowed by the Supreme Court in *W S Kirkpatrick & Co v Environmental Tectonics Corp*, 493 US 400 (1990). See, eg, Spencer Waller, 'Suing OPEC' (2002) 64 *University of Pittsburgh Law Review* 105, who nevertheless argues that, as there would be no meaningful remedy enforceable against the OPEC members, it would be foolish to bring an action.

<sup>199</sup> Davies argues that there are two doctrines, the act of state doctrine and a doctrine of non-justiciability: above n 193, 524. According to Davies, the latter 'prevents courts from dealing with sensitive issues in international relations': at 529–30 (citing the Court of Appeal decision in *Kuwait Airways Corp v Iraqi Airways Co* [2001] 1 *Lloyd's Reports* 161).

<sup>200</sup> See Ian Brownlie, *Principles of Public International Law* (6<sup>th</sup> ed, 2003) 483–4. For discussion generally on the act of state doctrine in the UK, see *Nissan v Attorney-General* [1968] 1 QB 286, 337–8 (Lord Denning MR). See also *Buttes Gas and Oil Co v Hammer (No 3)* [1982] AC 888. In Australia, see *Petrotimor Companhia De Petroleos SARL v Commonwealth of Australia* (2002) 126 FCR 354; *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd (No 2)* (1988) 165 CLR 30; *Ali v Commonwealth of Australia* [2004] (Unreported, Supreme Court of Victoria, Bongiorno J, 23 January 2004). The origins of the doctrine are not entirely clear. Mann claims the doctrine has its origins in the US: above n 195, 352–4, criticising use of the doctrine by UK courts. Cf Michael Singer, 'The Act of State Doctrine of the United Kingdom: An Analysis, with Comparisons to United States Practice' (1981) 75 *American Journal of International Law* 283. The act of state doctrine also means that domestic courts are precluded from inquiring into the meaning or validity of agreements and other transactions between sovereign states: *Buttes Gas & Oil Co v Hammer (No 3)* [1982] AC 888; *J H Rayner Ltd v Department of Trade and Industry* [1990] 2 AC 418. But see *Kuwait Airways Corporation v Iraqi Airways Co (No 4 and 5)* [2002] 2 AC 883, 1076–81.

<sup>201</sup> *Trade Practices Act 1974* (Cth) s 5(3).

<sup>202</sup> *Trade Practices Act 1974* (Cth) s 5(5).

<sup>203</sup> *A Ltd v B Bank (Bank of X intervening)* [1997] FSR 165.

<sup>204</sup> *Ibid.*

<sup>205</sup> See, eg, *Rohm and Haas Co v Dawson Chemical C, Inc*, 557 F Supp 739 (D Tex, 1983). *Contra Mannington Mills Inc v Congoleum Corporation*, 595 F 2d 1287 (3<sup>rd</sup> Cir, 1979).

state B bring an action against the cartel members, can the cartel members shield themselves behind the act of state doctrine? This time the impugned act, the fixing of prices, has a direct causal relationship with the foreign state act — exempting the fixing of prices. Export cartels exempt in the US by virtue of the *Webb-Pomerene Act* are not protected by the act of state doctrine.<sup>206</sup> As one might expect, the act of state doctrine has rarely been raised in European competition law cases.<sup>207</sup>

### 3 Foreign Sovereign Compulsion

In the US, factual contexts likely to raise an act of state issue are more often examined under the rubric of foreign state compulsion which US courts have developed as a cognate, but somewhat more extensive, notion.<sup>208</sup> As previously discussed, foreign sovereign compulsion is a jurisdictional doctrine forming part of the *Hartford* ‘true conflict’ test.<sup>209</sup> It is also a matter going to the justiciability of an issue.<sup>210</sup>

Whether utilised as an issue going to justiciability or to jurisdiction, foreign sovereign compulsion applies where: (1) the impugned private act is mandated by the foreign state; (2) there is a threat of tangible sanctions; and (3) the defendant has made a good faith attempt to comply with US law.<sup>211</sup> There must be some positive act of compulsion by the foreign state. It is not sufficient that the foreign state has a policy to permit or encourage the conduct, or, *a fortiori*, merely tolerates or acquiesces in the conduct by doing nothing.<sup>212</sup> Even direct involvement by a foreign sovereign is not sufficient per se.<sup>213</sup>

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<sup>206</sup> *A Åhlström Osakeyhtiö and Others v Commission of the European Communities* (C-89, 104, 114, 116–7, 125, 129/85) [1988] ECR 5193, 5244.

<sup>207</sup> It was mentioned by the ECJ in *Compagnie Maritime Belge Transports SA and Others v EC Commission* (C-395) [2000] ECR I-1365 but was left undecided.

<sup>208</sup> *Linseman v World Hockey Association*, 439 F Supp 1315 (D Conn, 1977). See *Restatement (Third) of Foreign Relations Law of the United States* (1987) § 441.

<sup>209</sup> *Hartford* 509 US 764 (1993); see above Part V(A)(1)(b).

<sup>210</sup> See *Interamerican Refining Corporation v Texaco Maracaibo Inc*, 307 F Supp 1291, 1298 (D Del, 1970) in which foreign sovereign compulsion was applied to deny antitrust jurisdiction in a case where the Venezuelan government specifically ordered the defendant not to trade with the plaintiff oil company. See also *Trugman-Nash Inc v New Zealand Dairy Board Milk Products Holdings (North America) Inc*, 954 F Supp 733 (1997), where foreign sovereign compulsion was applied to deny the plaintiff an antitrust action against the New Zealand Dairy Board after the Dairy Board was compelled by New Zealand statute to refuse the plaintiff’s application for a licence to export dairy products to the US. See generally Don Wallace Jr and Joseph P Griffin, ‘The Restatement and Foreign Sovereign Compulsion: A Plea for Due Process’ (1989) 23 *International Lawyer* 593.

<sup>211</sup> *Restatement (Third) of Foreign Relations Law of the United States* (1987) § 441; *Antitrust Enforcement Guidelines*, above n 128, [3.32].

<sup>212</sup> *United States v Watchmakers of Switzerland Information Center Inc*, 1963–1 Trade Cases 70600 (SD NY, 1962); *Hartford*, 509 US 764, 799 (1993). See especially *Mannington Mills Inc v Congoleum Corporation*, 595 F 2d 1287, 1293 (3<sup>rd</sup> Cir, 1979).

<sup>213</sup> *United States v Watchmakers of Switzerland Information Center Inc*, 1963–1 Trade Cases 70600 (SD NY, 1962).

### C Problem of Accessing Foreign-Based Evidence

Competition cases are often very fact intensive; the court or regulatory authority will generally need to consider evidence from a broad range of witnesses and to examine a massive amount of documentation.<sup>214</sup> Where the conduct occurs abroad, much of the relevant evidence is naturally located abroad. Indeed, the evidence may be scattered across various countries. This presents serious forensic problems, which arise from both policy differences and diversity of legal systems.

#### 1 Sources of Tension That Exacerbate the Difficulties of Foreign Evidence-Gathering

##### (a) Policy Tensions

Where the state in which the evidence is located objects to any foreign competition proceedings, it may effectively stall those proceedings by inhibiting the availability of evidence.<sup>215</sup> In the past, attempts to apply US antitrust law extraterritorially have led to evidence-blocking laws. In the wake of the *Uranium Case*, for example, blocking laws were employed or threatened by Australia, UK, Canada, New Zealand and South Africa.<sup>216</sup> The *Uranium Case* generated blocking laws because at issue were economic policy differences between the US and the ‘blocking’ states.<sup>217</sup>

##### (b) Legal System Tensions

Economic policy differences do not provide a full explanation of the problems associated with accessing foreign-based evidence. Even where there is a considerable degree of economic policy convergence between states, the state in which the evidence is located may have objections to the collection of that evidence on the basis of differing legal systems. This problem is particularly acute between the US and the civil law states.<sup>218</sup> The US Department of State, in

<sup>214</sup> Zanettin, above n 26, 45–6.

<sup>215</sup> See Paul Crampton and Milos Barutciski, ‘Trade Distorting Private Restraints: A Practical Agenda for Future Action’ (1999) 6 *Southwestern Journal of Law and Trade in the Americas* 3, 16–18, arguing that the major enforcement problems are confidential information and obtaining evidence ex-jurisdiction.

<sup>216</sup> See discussion above Part V(A)(1)(a).

<sup>217</sup> See Nash, above n 110, 696–9. For an example of Australian blocking legislation see Pengilley, ‘Extraterritorial Effects of the US Commercial and Antitrust Legislation’, above n 108, 860–1.

<sup>218</sup> See *Restatement (Third) of Foreign Relations Law of the United States* (1987) § 442 (Reporters’ Notes 1: ‘No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States’). See also David Gerber, ‘Comparing Procedural Systems: Toward an Analytical Framework’ in James Nafziger and Symeon Symeonides (eds), *Law and Justice in a Multistate World: Essays in Honor of Arthur T von Mehren* (2002) 665, 668 arguing that in respect of rules relating to the acquisition of data the ‘[d]ifferences between the US and most, if not all, civil law countries are particularly significant’.

its advice on *Obtaining Evidence Abroad*, warns:

Some countries view the taking of any form of evidence, even voluntary depositions, as an infringement on their judicial sovereignty. This applies to party and non-party witnesses. Telephone depositions are prohibited in many countries. Many countries do not permit the pre-trial discovery of documents. Attempting to obtain evidence without following the requirements of the foreign country may result in the arrest, detention, deportation or imprisonment of participants, including American counsel. The blocking statutes of some countries even extend to informal contact.<sup>219</sup>

To civil law countries the US discovery rules are excessive.<sup>220</sup> In civil law countries, discovery is determined and conducted by the judge, with attorneys having a very restricted role.<sup>221</sup> Civil states are suspicious of the US system, which enables parties to obtain 'pre-trial' discovery without judicial supervision.<sup>222</sup> Therefore, when US attorneys seek to conduct US pre-trial procedures in civil law countries, they are seen as improperly performing a public judicial act.<sup>223</sup>

US pre-trial evidence gathering procedures also go beyond those permitted in most common law states, including Great Britain and Australia.<sup>224</sup> In the US, discovery is permitted of all information, which, although inadmissible at trial, appears reasonably calculated to lead to the discovery of admissible evidence.<sup>225</sup> English courts have sometimes referred to this as a 'fishing expedition'.<sup>226</sup> The US system of pre-trial deposition taking is quite different to other common law countries. Lord Diplock commented on the US system as follows:

the [originating] complaint is accompanied, or immediately followed, by a request to the defendants for pre-trial discovery which bears little resemblance to the kind of discovery that is available in English civil actions. Its breadth, the variety of

<sup>219</sup> US Department of State, *Obtaining Evidence Abroad* [1] <[http://travel.state.gov/law/info/judicial/judicial\\_688.html](http://travel.state.gov/law/info/judicial/judicial_688.html)> at 18 May 2007.

<sup>220</sup> For example, there are considerable differences between states on the issue of professional privilege: see, eg, James McComish, 'Foreign Legal Professional Privilege: A New Problem for Australian Private International Law' (2006) 28 *Sydney Law Review* 297, 298, 300–10.

<sup>221</sup> See James H Carter, 'Obtaining Foreign Discovery and Evidence for Use in Litigation in the United States — Existing Rules and Procedures' (1979) 13 *International Lawyer* 5, 6–7; Jacques Borel and Stephen Boyd, 'Opportunities for and Obstacles to Obtaining Evidence in France for Use in Litigation in the United States' (1979) 13 *International Lawyer* 35, 36, specifically describing the framework of discovery in France.

<sup>222</sup> See, eg, Bate C Toms III, 'The French Response to the Extraterritorial Application of United States Antitrust Laws' (1981) 15 *International Lawyer* 585, 596. See generally Borel and Boyd, above n 221, describing French practices.

<sup>223</sup> One of the causes of the tension between the US and civil law countries is that the notion of 'pre-trial' is a very common law construct. Activities which in the US are viewed as 'pre-trial' — and, therefore, within the responsibility of the attorney — are seen as a part of the judicial process in civil law countries: see Carter, above n 221, 6–7.

<sup>224</sup> Lawrence Collins, 'Opportunities for and Obstacles to Obtaining Evidence in England for Use in Litigation in the United States' (1979) 13 *International Lawyer* 27, 27–8.

<sup>225</sup> *US Federal Rules on Civil Procedure* § 26(b)(1) (2006).

<sup>226</sup> In *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] AC 547, Viscount Dilhorne described the difference between US and UK discovery as the difference between the obtaining evidence in the strict sense and 'the obtaining of information which might lead to the obtaining of evidence': at 621. The broad nature of US discovery procedures was also the subject of discussion in *Radio Corporation of America v Rauland Corporation* [1956] 1 QB 618, and by the House of Lords in *British Airways Board v Laker Airways Ltd* [1985] AC 58.

methods, oral and written, that it makes available for a wide-roving search for any information that might be helpful to the case of the party seeking discovery, the enormous expense, irrecoverable in any award of costs to a successful defendant, in which it may involve parties from whom discovery is sought, and its potentiality for oppressive use by plaintiffs, particularly in antitrust actions, receive sufficient mention in the various speeches in this House *In Re Westinghouse Electric Corporation Uranium Contract Litigation M D L Docket No 235 (Nos 1 and 2) [1978] A C 547.*<sup>227</sup>

As an international problem, overcoming objections to evidence gathering is likely to prove just as intractable as overcoming substantive differences.<sup>228</sup> If that is the case, then even a shared understanding of, for example, the evils of cartels, will not necessarily make states amenable to US-style extraterritorial discovery.<sup>229</sup>

## 2 Methods of Collecting Evidence Abroad

In the absence of a specific competition agreement covering the matter — as for example in the EU<sup>230</sup> — there are basically four ways in which regulators or plaintiffs can obtain evidence outside the jurisdiction.<sup>231</sup> First, a court may issue letters rogatory.<sup>232</sup> Second, where the requesting and the requested state are contracting members, the procedures set out in the *Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters* ('Hague Convention') may be used.<sup>233</sup> Third, a nation may apply its domestic discovery laws extraterritorially.<sup>234</sup> Fourth, states may share information collected by their competition or other agencies.<sup>235</sup> All four ways are subject to substantial problems or limitations.

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<sup>227</sup> *British Airways Board v Laker Airways Ltd* [1985] AC 58, 78.

<sup>228</sup> See Nina Hachigian, 'Essential Mutual Assistance in International Antitrust Enforcement' (1995) 29 *International Lawyer* 117. See also John Reitz, 'Doubts about Convergence: Political Economy as an Impediment to Globalization' (2002) 12 *Transnational Law and Contemporary Problems* 139, 148–54; Toms, above n 222.

<sup>229</sup> The problems are not limited to discovery rules. For example, the rules relating to legal professional privilege (or solicitor-client privilege) vary from state to state. The common law states generally recognise a much broader right of this privilege than do the civil law states: see, eg, *Three Rivers District Council v Governor and Company of the Bank of England* (No 6) [2005] 1 AC 610. In contrast, Germany, for example, hardly recognises any legal privilege, although a form of legal professional privilege has been recognised as a component of the right to a fair trial enshrined in the *Charter of Fundamental Rights of the European Union* [2000] OJ C 364, 1 art 47.

<sup>230</sup> The EU has now adopted cooperative procedures as between the Member States of the EU: *Council Regulation (EC) No 1206/2001 of 28 May 2001 on Cooperation between the Courts of the Member States in the Taking of Evidence in Civil and Commercial Matters*, opened for signature 28 May 2001, OJ L 174 1 (entered into force on 1 June 2001).

<sup>231</sup> See Hachigian, above n 228, 132–6.

<sup>232</sup> Nygh and Davies, above n 82, 315.

<sup>233</sup> *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, opened for signature 18 March 1970, 847 UNTS 231 (entered into force 7 October, 1972). As at May 2007, the Hague Convention had been adopted by 44 states including many European states, the US and Australia.

<sup>234</sup> For a discussion of this issue in relation to the US, see above n 133.

<sup>235</sup> See, eg, *Agreement between the Government of the United States and the Government of Australia on Mutual Antitrust Enforcement Assistance*, opened for signature 27 April 1999, 2117 UNTS 203 (entered into force 5 November 1999).

### (a) Traditional Letters of Request

A letter rogatory, or ‘letter of request’, is a formal request from a court in one country to ‘the appropriate judicial authorities’ in another country requesting the compulsory taking of testimony, documentary or other evidence.<sup>236</sup> Although the request is made to a court in another country, many states require the request to be made through government channels and not directly to the court.<sup>237</sup> The scope of the power to issue a letter of request depends on the law of the requesting state and the scope of the response depends on the law of the requested state.<sup>238</sup> Depending on the states involved, letters rogatory may be used in both civil and criminal cases. They have also been used in administrative matters. This makes them potentially a useful device in competition matters because the nature of competition regulation varies from civil to criminal to administrative, depending on the country regulating and the matter being regulated.

Unless a specific treaty obligation is involved such as the *Hague Convention*, courts in the requested state have no obligation to respond. However, they will normally do so out of a spirit of international comity provided the request is in keeping with their domestic procedures and provided there is no specific domestic law prohibiting such a response.<sup>239</sup>

Letters rogatory have not proved to be popular, especially with the main seekers of extraterritorial evidence, namely US attorneys acting for private plaintiffs.<sup>240</sup> The first reason for this unpopularity is that most civil law states will not give effect to a request for traditional US pre-trial discovery.<sup>241</sup> Second,

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<sup>236</sup> US Department of State, *Obtaining Evidence Abroad*, above n 219.

<sup>237</sup> Hachigian, above n 228, 134. In Australia, the taking of evidence abroad is relevantly covered by the *Foreign Evidence Act 1994* (Cth) s 7(1)(c), which empowers a court to ‘issue a letter of request to the judicial authorities of a foreign country to take the evidence of a person [situated abroad] or cause it to be taken’. See also Nygh and Davies, above n 82, 314–16.

<sup>238</sup> Hachigian, above n 228, 134.

<sup>239</sup> See *ibid*; Reitz, above n 228, 152. The principle of comity is discussed in above n 13. For example, in Japan, execution of a letter of request is subject to the *Act relating the Reciprocal Judicial Assistance to be Given at the Request of Foreign Courts*, Law No 63 of 13 March 1905 (Japan), as amended by Law No 7 of 29 March 1912 and by Law No 17 of 22 March 1938. See William Baker, ‘Obtaining Evidence: International Discovery Techniques — The Taking of Evidence Abroad for Use in American Courts’ (2000) 688 *Practising Law Institute, Litigation and Administrative Practice Course Handbook Series Litigation* 427, 518–21.

<sup>240</sup> Patricia Kuhn, ‘*Société Nationale Industrielle Aérospatiale*: The Supreme Court’s Misguided Approach to the *Hague Evidence Convention*’ (1989) 69 *Boston University Law Review* 1011, 1020–1.

<sup>241</sup> Hachigian, above n 228, 133. See also *Restatement (Third) of Foreign Relations Law of the United States* (1987) §442 (Reporters’ Notes 1).

letters rogatory are generally regarded as a slow and expensive method of gathering evidence.<sup>242</sup> The US Department of State warns that requests can take six to twelve months to process.<sup>243</sup> Third, as there are no agreed formal procedures for initiating a request, including no clear indication which court should be petitioned, the process lacks procedural certainty.<sup>244</sup> This leads to confusion and delays. Fourth, and specifically in relation to US private antitrust cases, US plaintiffs are often confronted by blocking laws.<sup>245</sup> Finally, the form in which the evidence is provided by the foreign court may present problems of admissibility. In civil law states, the judge often provides simply a summary of the evidence given rather than a verbatim report.<sup>246</sup> In some states, this problem may be overcome by a special request that the evidence be recorded in a particular manner.<sup>247</sup>

#### (b) Hague Convention

The *Hague Convention* provides that evidence may be taken in countries that are signatories to the Convention by making a request to the central authority nominated by the signatory country.<sup>248</sup> Under the *Hague Convention*, there are three ways in which evidence may be collected from abroad: by letter of request; by consular or diplomatic official; or by appointed commissioner.<sup>249</sup> Consular and diplomatic officials and commissioners may only take evidence from willing witnesses.<sup>250</sup> Where a witness is unwilling to furnish evidence, the letter of request must be used.<sup>251</sup> A letter of request is made by a court in one contracting country to the nominated central authority of another contracting state, requesting that a competent authority there 'obtain evidence, or ... perform some other judicial act'.<sup>252</sup> This is an improvement on traditional letters rogatory because of the designated central authority. The request is carried out according to the laws of the state requested<sup>253</sup> but witnesses may refuse to cooperate on the basis of a privilege recognised either in the requested state or the requesting

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<sup>242</sup> US Department of State, *Obtaining Evidence Abroad*, above n 219. The Department actually warns that '[L]etters rogatory are a time consuming, cumbersome process and should not be utilized unless there are no other options available'. US Department of State, *Preparation of Letters Rogatory* <[http://travel.state.gov/law/info/judicial/judicial\\_683.html](http://travel.state.gov/law/info/judicial/judicial_683.html)> at 18 May 2007. See also Hachigian, above n 228, 135.

<sup>243</sup> US Department of State, *Preparation of Letters Rogatory*, above n 242.

<sup>244</sup> See generally *ibid*; Borel and Boyd, above n 221.

<sup>245</sup> See discussion below Part V(C)(2)(c) (evidence blocking laws) and Part V(D) (judgment blocking laws).

<sup>246</sup> See Baker, above n 239, 434.

<sup>247</sup> *Ibid* 455–6.

<sup>248</sup> *Hague Convention*, above n 233, art 2. For a discussion of discovery under the *Hague Convention*: see Baker, above n 239, 452–60.

<sup>249</sup> *Hague Convention*, above n 233, arts 1, 15, 17.

<sup>250</sup> *Ibid* arts 15, 17.

<sup>251</sup> *Ibid* art 22.

<sup>252</sup> *Ibid* art 1.

<sup>253</sup> *Ibid*.

state.<sup>254</sup> Unlike traditional letters rogatory, which are subject to uncertain principles of comity, a request under the *Hague Convention* is binding as an international treaty obligation.<sup>255</sup>

Theoretically, the *Hague Convention* is an improvement on traditional letters rogatory, particularly where evidence is sought from a non-common law state. The system is more flexible in that there is provision for certain proceedings to be conducted before a diplomatic or consular officer.<sup>256</sup> This is a useful process in the case of compliant witnesses. The system also allows the requesting court to ask for evidence to be presented in a particular form, for example a transcript rather than just a summary.<sup>257</sup> Some civil law states, such as France, have even relaxed their strict local procedures to allow counsel to ask questions.<sup>258</sup>

For a number of reasons, however, the *Hague Convention* has rarely been used in competition cases.<sup>259</sup> First, the number of signatory states is still quite limited. While it includes most of the states of the EU and the US, it does not include many Asian nations. Japan, for instance, has not signed the Convention.<sup>260</sup>

Second, the *Hague Convention* lacks comprehensive coverage. This is due to the fact that art 23 of the Convention provides that a contracting country may declare that it will not execute letters of request for discovery of documents, as is done in common law countries.<sup>261</sup> Most signatories have specified that they do not accept pre-trial discovery of documents.<sup>262</sup> This means that most states will only approve a request for documents or evidence to prove or disprove facts at trial rather than documents or evidence which may lead to the discovery of evidence.<sup>263</sup> Additionally, the Convention only applies to civil and commercial

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<sup>254</sup> Ibid art 11. See, eg, *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] AC 547, in which the British *corporate* defendants were entitled to the privilege against self-incrimination on the basis that complying with the US request would expose them to possible action by the European Commission for breaches of art 85 of the *Rome Treaty*, and 'the *individual* witnesses were entitled to the privilege against self-incrimination given by the [US] Fifth Amendment': at 437 (emphasis added).

<sup>255</sup> Baker, above n 239, 440.

<sup>256</sup> *Hague Convention*, above n 233, ch II.

<sup>257</sup> Ibid art 3(h).

<sup>258</sup> Borel and Boyd, above n 221, 39.

<sup>259</sup> See Hachigian, above n 228, 135.

<sup>260</sup> Hague Conference on Private International Law, *HCCH Members: Japan* <[http://www.hcch.net/index\\_en.php?act=states.details&sid=47](http://www.hcch.net/index_en.php?act=states.details&sid=47)> at 18 May 2007.

<sup>261</sup> This was the only way in which agreement could be reached: see Andreas Lowenfeld, 'Introduction: Discovering Discovery, International Style' (1984) 16 *New York University Journal of International Law and Politics* 957, 959.

<sup>262</sup> Currently the only exceptions to this are the Czech Republic, Israel, the Slovak Republic and the US.

<sup>263</sup> In civil law states, the plaintiff must generally certify that the evidence is sought for use at trial: see Baker, above n 239, 434. This interpretation has also been adopted by the British courts: *Radio Corporation of America v Rauland Corporation* [1956] 1 QB 618; *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] AC 547. It has been applied by Australian courts: *British American Tobacco Australia Services Limited v Sharon Y Eubanks for the United States of America* (2004) 60 NSWLR 483.

matters.<sup>264</sup> This means that it does not apply to criminal proceedings.<sup>265</sup> Given that the trend is to criminalise certain anti-competitive conduct (mainly cartels), this limits the utility of the Convention. The US Department of Justice, for example, pursues most international cartels as criminal cases.<sup>266</sup> The Convention does not apply to administrative proceedings.<sup>267</sup> Many states are likely to view competition cases as administrative rather than civil or commercial.<sup>268</sup>

Third, as with letters rogatory, the procedures set out in the *Hague Convention* are regarded as slow and expensive.<sup>269</sup> Even though the Convention requires that requests be executed ‘expeditiously’, the US Department of State estimates that requests take from six months to 12 months.<sup>270</sup>

Fourth, as many civil law states still do not permit attorneys to examine the witness, the utility of the testimony may be directly related to the presiding judge’s grasp of the relevant issues. By general consensus, competition issues going to such matters as market definition and competitive effects are often very complex. Judges, who are not often or never exposed to competition litigation, may struggle with these concepts.

### (c) Applying Domestic Procedural Rules Extraterritorially

The third method of gathering evidence abroad is for a state to apply its procedural rules extraterritorially.<sup>271</sup> For states with liberal procedural rules, this is potentially quicker, cheaper and more effective. However, there are serious drawbacks. Extraterritoriality has no operation in the case of unwilling witnesses. Even where witnesses are willing, the state may object unless the procedure conforms with the *Hague Convention* or some other relevant treaty.<sup>272</sup>

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<sup>264</sup> *Hague Convention*, above n 233, art 1.

<sup>265</sup> See Lowenfeld, ‘Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe’, above n 131, 959.

<sup>266</sup> See, eg, US Department of Justice, ‘F Hoffmann-La Roche and BASF Agree to Pay Record Criminal Fines for Participating in International Vitamin Cartel’ (Press Release, 20 May 1999). See also *United States v Nippon Paper Industries Co*, 118 US 685 (1998).

<sup>267</sup> *Hague Convention*, above n 233, art 1.

<sup>268</sup> See Hachigian, above n 228, 136.

<sup>269</sup> See Baker, above n 239, 434.

<sup>270</sup> US Department of State, *Hague Convention on Taking Evidence Abroad in Civil and Commercial Matters* [20] <[http://travel.state.gov/law/info/judicial/judicial\\_689.html](http://travel.state.gov/law/info/judicial/judicial_689.html)> at 18 May 2007.

<sup>271</sup> For example, the *Restatement (Third) of Foreign Relations Law of the United States* (1987), § 442(1)(a) provides that:

A court or agency in the United States, when authorized by statute or rule of court, may order a person subject to its jurisdiction to produce documents, objects, or other information relevant to an action or investigation, even if the information or the person in possession of the information is outside of the United States.

<sup>272</sup> Hague Conference on Private International Law, Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters: *Reservations and Declarations of Switzerland* <[http://www.hcch.net/index\\_en.php?act=status.comment&csid=561&disp=resdn](http://www.hcch.net/index_en.php?act=status.comment&csid=561&disp=resdn)> at 18 May 2007.

Private US attorneys, however, still view extraterritorial procedures as the preferred option.<sup>273</sup> As previously discussed, US attorneys view traditional letters rogatory and *Hague Convention* procedures as slow, cumbersome and inadequate.<sup>274</sup> This has prompted the so-called practice of ‘legal tourism’, that is, US attorneys ignoring more formal procedures to gather evidence directly using the fact that US procedural rules operate extraterritorially.<sup>275</sup> This results from the decision in *Société Nationale Industrielle Aérospatiale v US District Court* where the US Supreme Court held that compliance with the *Hague Convention* provisions was at the option of the presiding court, and not mandatory.<sup>276</sup> In determining whether to apply the *Hague Convention*, US courts have, in practice, favoured the use of US Federal Rules of discovery.<sup>277</sup> This contrasts with the view of many states that regard the *Hague Convention* as the exclusive method of gathering evidence abroad.<sup>278</sup>

The aggressive attitude of US courts towards protecting US jurisdiction through the use of procedural extraterritoriality creates international tension, just as subject matter extraterritoriality creates tension. Indeed, according to the *Restatement (Third) of the Foreign Relations Law of the United States*:

No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the request for documents associated with investigation and litigation in the United States.<sup>279</sup>

<sup>273</sup> See Hachigian, above n 228, 132–3.

<sup>274</sup> See US Department of State, *Preparation of Letters Rogatory*, above n 242.

<sup>275</sup> Borel and Boyd, above n 221, 45. See *Société Nationale Industrielle Aérospatiale v United States District Court for the Southern District of Iowa*, 482 US 522 (1987) (Amicus Curiae Brief: Government of France).

<sup>276</sup> *Société Nationale Industrielle Aérospatiale v United States District Court for the Southern District of Iowa*, 482 US 522 (1987).

<sup>277</sup> See generally Hannah Buxbaum, ‘Assessing Sovereign Interests in Cross-Border Discovery Disputes: Lessons from *Aérospatiale*’ (2003) 38 *Texas International Law Journal* 87, arguing that the main reason for this forum bias is that in applying the *Aérospatiale* principles, courts have largely concentrated on interests specific to the particular case before the court at the expense of foreign sovereign interests, for example, a foreign state’s interest in choosing to repose evidence gathering powers solely in the hands of the judiciary, or more generally ‘international system interests’: at 92. The type of judicial interest balancing analysis envisioned by Buxbaum has been criticised by others. US Federal Rules were applied in *Re Vitamins Antitrust Litigation*, 120 F Supp 2d 45, 54 (DC Cir, 2000) (‘Vitamins’). This case involved jurisdictional discovery, that is, discovery to determine whether the US court had personal jurisdiction over some or all of the defendants, whereas *Aérospatiale* involved ‘merits’ discovery. The District Court in *Vitamins* nevertheless applied the *Aérospatiale* test.

<sup>278</sup> See, eg, *Société Nationale Industrielle Aérospatiale v United States District Court for the Southern District of Iowa*, 482 US 522 (1987) (Amicus Curiae Brief: Government of France), 8–9, stating that the ‘Republic of France strongly believes that the language and negotiating history of the Convention demonstrate that it sets forth mandatory procedures by which evidence located abroad may alone be sought, unless the foreign sovereign permits otherwise’.

<sup>279</sup> (1987) § 442 (Reporters’ Notes 1).

Many countries, particularly the civil law states, perceive US procedural extraterritorialism as a challenge to sovereignty.<sup>280</sup> Civil law states have elected to retain the role of evidence gatherer in the hands of the state — in the person of a judicial officer.<sup>281</sup> Common law states, on the other hand, have elected partly to ‘privatise’ this function by passing responsibility to the parties. The US has gone further down the ‘privatisation’ road than other common law countries.

US procedural extraterritorialism has led to extensive blocking legislation.<sup>282</sup> Blocking legislation significantly reduces the effectiveness of prescriptive extraterritorialism.

#### (d) Information Sharing

Domestic competition agencies have broad powers to collect information as part of their investigatory role. These powers, and the agencies’ capacity to fully utilise them, vary from state to state, and include the power to: seize or copy documents; conduct compulsory interviews; operate phone taps and electronic eavesdropping; and collect evidentiary statements as part of an immunity or leniency program. Competition agencies also collect or generate a range of other information, everything from industry and market statistics to opinions and analyses (done by the agency, the main parties or third parties).<sup>283</sup> Some of this information is confidential, some not. Most competition regimes restrict the power of the competition agency to share this information without the prior consent of the parties involved.<sup>284</sup>

So far, there has been little success in developing any kind of formal international framework for sharing information.<sup>285</sup> A number of bilateral competition agreements exist, including the positive comity agreements discussed above,<sup>286</sup> but most of these agreements, while recognising the problem of information sharing, do not include any specific provisions to solve it.<sup>287</sup> In

<sup>280</sup> See, eg, *Société Nationale Industrielle Aérospatiale v United States District Court for the Southern District of Iowa*, 482 US 522 (1987) (Amicus Curiae Brief of the Government of France).

<sup>281</sup> Carter, above n 221, 6–7. See, eg, Borel and Boyd, above n 221, 36–7.

<sup>282</sup> In 1980, France amended its law to prevent the use of US pre-trial discovery procedures and to all but require exclusive use of the *Hague Convention* procedures: Law No 80–538, enacted on 16 July 1980, JO of 17 July 1980, 1799, discussed in Toms, above n 222. In the wake of the *Uranium Case*, the UK and Australia introduced laws to block evidence gathering: *Protection of Trading Interests Act 1980* (UK) c 11; *Foreign Proceedings (Prohibition of Certain Evidence) Act 1976* (Cth), repealed by *Foreign Proceedings (Excess of Jurisdiction) Act 1984* (Cth).

<sup>283</sup> See generally Competition Commission of the UK, *Chairman’s Guidance on Disclosure of Information in Merger and Market Inquiries* (July 2003) 6–7 <[http://www.competition-commission.org.uk/rep\\_pub/rules\\_and\\_guide/pdf/guidance7.pdf](http://www.competition-commission.org.uk/rep_pub/rules_and_guide/pdf/guidance7.pdf)> at 18 May 2007.

<sup>284</sup> See OECD, *Hard Core Cartels* (2000), above n 51, 7.

<sup>285</sup> See, eg, OECD, *Hard Core Cartels: Recent Progress and Challenges Ahead*, above n 189, 31. For a general discussion on the issues relating to information sharing between national regulators, see OECD, Centre for Co-operation with Non-Members, *OECD Global Forum on Competition: Information Sharing in Cartel Investigations* 1. See also generally Hachigian, above n 228.

<sup>286</sup> See above Part II.

<sup>287</sup> See, eg, *Protocol to the Australia New Zealand Closer Economic Relations — Trade Agreement on Acceleration of Free Trade in Goods* [1988] ATS 18, art 4 (signed and entered into force 18 August 1988).

fact, most bilateral agreements expressly provide that a domestic agency is under no obligation to communicate information collected by it.<sup>288</sup>

In 1994, the US legislature enacted the *International Antitrust Enforcement Assistance Act* to permit US antitrust authorities to enter into reciprocal agreements with other competition authorities concerning mutual assistance on antitrust matters, including the exchange of confidential information.<sup>289</sup> In a dozen years, however, the only agreement made pursuant to this enabling legislation is one between the US and Australia.<sup>290</sup>

There are a number of treaties providing for mutual legal assistance in criminal matters ('MLATs').<sup>291</sup> However, MLATs are only relevant to international competition enforcement where the treaty partners have made competition law infringement a crime. To date, this still tends to be the exception

<sup>288</sup> Most domestic agencies are expressly prohibited from disclosing or sharing confidential information: see, eg, *Agreement between the Government of the United States of America and the Government of the Federative Republic of Brazil regarding Cooperation between Their Competition Authorities in the Enforcement of Their Competition Laws*, signed 26 October 1999, KAV 6167, art IX (entered into force 25 March 2003); *Agreement between the Government of the United States of America and the Government of Japan concerning Cooperation on Competition Activities*, KAV 5623, art IX (signed and entered into force 7 October 1999).

<sup>289</sup> *International Antitrust Enforcement Assistance Act of 1994*, 15 USC §§ 6201–6212 (2005) ('IAEA Act'). The IAEA Act specifically excludes information required to be provided in pre-merger notifications by the *Hart-Scott-Rodino Antitrust Improvements Act of 1976*, 15 USC § 18a and evidence provided to a grand jury: 15 USC § 6204. See Waller, above n 6, 370–4.

<sup>290</sup> *Agreement between the Government of the United States and the Government of Australia on Mutual Antitrust Enforcement Assistance*, opened for signature 27 April 1999, 2117 UNTS 203 (entered into force 5 November 1999). The ICPAC Report noted that a comprehensive antitrust assistance agreement between Australia and the US was only possible (from the point of view of the US) because Australia had a strong regime of confidentiality laws: above n 9, Annex 1-C, vii. The IAEA Act requires that any agreement entered into pursuant to the IAEA Act must contain

an assurance that the foreign antitrust authority is subject to laws and procedures that are adequate to maintain securely the confidentiality of antitrust evidence that may be received [pursuant to the IAEA Act agreement and that the protection afforded such evidence] is not less than the protection provided under the laws of the United States to such antitrust evidence: 15 USC § 6211(2)(B) (2005).

<sup>291</sup> See, eg, *Treaty between Government of Canada and Government of the United States of America on Mutual Legal Assistance in Criminal Matters*, opened for signature 18 March 1985, 24 ILM 1092 (entered into force 24 January 1990). In the US, a treaty takes legal effect once ratified by the Senate. The US, for example, has ratified MLATs with over 50 states. A full list is available from the US Department of State website <<http://www.state.gov>> at 18 May 2007. See also Buxbaum, above n 277, 88. The relevant Canadian provisions giving effect to Canada's treaty obligations can be found in the *Competition Act*, RSC 1985, c C-34, Part III.

rather than the norm, although the situation, particularly in regard to hard core cartels, is changing.<sup>292</sup>

Some progress has been made at an informal level.<sup>293</sup> Thus, competition agencies share information on such matters as investigative strategies and market information, but not material generated by specific investigations.<sup>294</sup> While clearly having forensic limitations,<sup>295</sup> this kind of informal cooperation is nevertheless quite useful.<sup>296</sup> The situation has improved recently, with a number of states now making specific provision for the sharing of information with other competition agencies.<sup>297</sup>

The most successful cooperation in respect of sharing information between the US and the EC has occurred where firms have agreed to the sharing of information.<sup>298</sup> This is reasonably common in merger cases where the merging parties often have strong incentives to agree to such exchanges.<sup>299</sup> From time to time, it has also occurred in vertical and unilateral conduct cases.<sup>300</sup> The same incentives do not exist for cartel cases, although the expanding use of leniency programs has meant that firms seeking to avail themselves of leniency in as many states as possible now do have incentives to provide information to a

<sup>292</sup> A number of states that have hitherto treated competition law as a civil matter have introduced criminal sanctions or are reconsidering the matter. The UK has recently introduced criminal penalties for breaches of the cartel provisions of the *Enterprise Act 2002* (UK) c 40, s 188. Australia is debating whether to criminalise certain cartel activity: Dawson Committee, *Review of the Competition Provisions of the Trade Practices Act* (January 2003) 161–2, in which criminal sanctions were recommended for cartel activity provided that an appropriate definition of serious cartel conduct could be constructed. For a list of sanctions by state: OECD, *Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes* (2002), 1 Annex B. See also Basedow and Pankoke, above n 176, 25–7.

<sup>293</sup> OECD, *Hard Core Cartels: Recent Progress and Challenges Ahead*, above n 189, 32.

<sup>294</sup> Ibid.

<sup>295</sup> Ibid 36–7, describing South Korea's difficulties in prosecuting members of the graphite electrodes cartel because other states would only supply publicly available material. At the time, Korea had no formal cooperation agreements with any other state.

<sup>296</sup> Ibid 32.

<sup>297</sup> See, eg, *Enterprise Act 2002* (UK) c 40, s 243. The *Act of 22 May 1997 Providing New Rules for Economic Competition (Competition Act)* (1997) (the Netherlands) s 91 authorises the Competition Director-General to provide information to a foreign competition institution for the application of competition rules, provided that: provision of the information is in the interests of the Dutch economy; confidentiality of the information or data is sufficiently protected; and sufficient assurances are given that the information or data will not be used for any purpose other than that for which they are provided. Similar provisions now apply in France, Denmark and Norway: OECD, *Hard Core Cartels: Recent Progress and Challenges Ahead*, above n 189, 40.

<sup>298</sup> Joel Klein and Preeta Bansal, 'International Antitrust Enforcement in the Computer Industry' (1996) 41 *Villanova Law Review* 173, 181; George, Dymally and Lacey, above n 188, 597–8.

<sup>299</sup> See International Competition Network, *Waivers of Confidentiality in Merger Investigations* <<http://www.internationalcompetitionnetwork.org/media/archive0611/NPWAiversFinal.pdf>> at 18 May 2007, containing sample waivers for the European Commission and the US Department of Justice.

<sup>300</sup> For example, in 1994, Microsoft Corporation agreed to the sharing of information by the European Commission and the US Department of Justice. As a result, the European Commission and Department of Justice worked closely together in negotiating a settlement and consent decree: ICPAC Report, above n 9, 195, Annex 1-C, xii. See also Klein and Bansal, above n 298, 181–90.

number of agencies simultaneously. This is not so much an example of cooperation, as the power of appropriate leniency programs.

It will not be simple to get states to agree to further relax their protection of information, especially confidential information. There are numerous reasons why states protect such information. First, it is important to safeguard the reputation of firms during the investigation process.<sup>301</sup> Second, sensitive securities markets need to be protected against a premature release of information.<sup>302</sup> Third, it is necessary to preserve incentives for firms and individuals to volunteer information to competition authorities.<sup>303</sup> Witnesses often request anonymity; frequently, they must be protected against harassment. Finally, it is vital that sensitive financial and strategic business information does not fall into the hands of the competitors of those firms compelled to provide the information.<sup>304</sup> This is the particular concern of a business which is suspicious that vital information provided to some foreign regulators will be 'leaked' by that authority to its local firms.<sup>305</sup> Clearly this could do considerable damage to the firm's competitive advantage. In the case of information supplied to US authorities, there is an additional concern that information will fall into the hands of private plaintiffs (via pre-trial discovery or freedom of information legislation) and then be used in actions seeking treble damages.<sup>306</sup> For these reasons, business interests apply considerable political pressure to avoid any weakening of the confidentiality laws.<sup>307</sup>

The slow progress on sharing information, especially confidential information, despite years of urging by the Competition Law and Policy Committee of the OECD<sup>308</sup> and despite success in other areas of regulation,<sup>309</sup> suggests that states are not yet convinced that the benefits to be gained from sharing confidential information outweigh the losses entailed in exposing citizens to foreign scrutiny.

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301 Hachigian, above n 228, 125, 127.

302 Ibid 127.

303 Ibid.

304 Ibid.

305 See ICPAC Report, above n 9, 191–2; John Parisi, 'Enforcement Co-operation among Antitrust Authorities' (1999) 20 *European Competition Law Review* 133, 139; Hachigian, above n 228, 127. These fears may be more a matter of perception than reality. US antitrust officials assert that there have been no leaks of information gathered from non-US firms: ICPAC Report, above n 9, 192. There is no reason to believe that where the law prohibits such disclosures, the competition authorities of, for example, the EU are any more likely to contravene their own law and disclose the matter to local firms than are US authorities. Perhaps the fear is based on a suspicion that the authorities of the former communist states have not fully absorbed the notion of the rule of law. Indeed there may be some credence to this fear particularly where the state has significant state-owned enterprises.

306 ICPAC Report, above n 9, 192.

307 See Hachigian, above n 228, 130.

308 OECD, *Hard Core Cartels*, above n 51, 33.

309 Greater progress, for example, has been made in the area of securities regulation: William Connolly, 'Lessons to Be Learned: The Conflict in International Antitrust Law Contrasted with Progress in International Financial Law' (2001) 6 *Fordham Journal Corporate and Financial Law* 207; Hachigian, above n 228, 141–6.

#### D      *Enforcing Competition Orders*

An effective competition law regime ultimately depends on enforcement. In addition to a declaration (which requires no element of enforcement), competition law decisions may involve any of the following orders:

- 1      Criminal penalties;
- 2      Civil fines;
- 3      Damages, including treble damages in the US;
- 4      Injunctions, both negative and mandatory; and
- 5      Other orders, which are sometimes quite prescriptive.

In determining whether these orders can be effectively enforced against a foreign firm, it is necessary to distinguish between enforcing the judgments at home (that is, in the jurisdiction rendering the judgment) and enforcing the judgment in a foreign jurisdiction.

##### **1      *Enforcing Judgments at Home against Foreign Firms***

Where the defendant has assets within the jurisdiction, enforcement of any order involving a monetary amount is relatively straightforward. Execution may be levied on the assets within the jurisdiction. This puts the larger industrialised nations, such as the US and those in the EU, in a much better position than other states for the simple reason that foreign firms are more likely to have assets in the US and the EU than in smaller or less developed economies.<sup>310</sup>

In the wake of the *Uranium Case*, Australia and the UK introduced legislation providing that any damages in excess of those *actually* suffered, paid pursuant to an antitrust award in a foreign jurisdiction, could be clawed back in an action against the recipient of those excessive damages.<sup>311</sup> Claw-back laws have not been widely used, but they remain a potent symbol that extraterritorialism can evoke strong reactions, and that powerful retaliatory weapons exist.<sup>312</sup>

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<sup>310</sup> See Dodge, ‘Antitrust and the Draft Hague Judgments Convention’, above n 25, 380.

<sup>311</sup> *Foreign Proceedings (Excess of Jurisdiction) Act 1984* (Cth) s 10; *Protection of Trading Interests Act 1980* (UK) c 11. See generally Foreign Antitrust Judgments (Restriction of Enforcement) Amendment Bill 1979 (Cth). This Bill provided that an Australian corporation may seek reimbursement in Australian courts for any damages awarded by a foreign court in an antitrust action for treble damages. It was only discontinued when Australia and the US reached agreement in 1983.

<sup>312</sup> See generally Deborah Senz and Hilary Charlesworth, ‘Building Blocks: Australia’s Response to Foreign Extraterritorial Legislation’ (2001) 2 *Melbourne Journal of International Law* 69.

## 2 Enforcing Judgments Abroad

Where the defendant has no assets or presence within the jurisdiction, enforcement is very unlikely. Outside the EU,<sup>313</sup> there is no single multilateral treaty dealing with the enforcement of foreign judgments. Even if accepted in its current draft form, the *Hague Convention on Jurisdiction and Foreign Judgments*<sup>314</sup> will not apply to competition law matters.<sup>315</sup> Thus, the ability to enforce a judgment abroad depends on a host of regional and bilateral treaties and domestic rules. A full analysis of these is beyond the scope of this article. In general, however, states will invariably refuse to enforce foreign competition orders for one or more of the following reasons:

- Enforcement would amount to enforcing a penal or public law of another state;<sup>316</sup>
- Enforcement would be contrary to a specific law of the state in which enforcement is sought, thus blocking such enforcement;<sup>317</sup>
- The judgment to be enforced was obtained without personal jurisdiction;<sup>318</sup> or

<sup>313</sup> Judgments involving EU Member States are subject to *Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, opened for signature 22 December 2000 [2000] OJ L 12, 1 (entered into force 1 March 2002). The Regulation covers private actions but probably not administrative fines. The latter, however, is unlikely to create significant problems having regard to the cooperation arrangements put in place as a result of the Modernisation Program. See *Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty*, opened for signature 16 December 2002 [2002] OJ L 1, 1 (entered into force 1 May 2004); European Council and European Commission, *Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities* (2002) <[http://ec.europa.eu/comm/competition/antitrust/others/js\\_en.pdf](http://ec.europa.eu/comm/competition/antitrust/others/js_en.pdf)> at 18 May 2007; European Commission, *Commission Notice on Cooperation within the Network of Competition Authorities* [2004] OJ C 101, 43.

<sup>314</sup> See Hague Conference on Private International Law, *International Jurisdiction and Foreign Judgments in Civil and Commercial Matters* (Preliminary Document No 7, April 1997), available from <<http://hcch.e-vision.nl>> at 18 May 2007.

<sup>315</sup> Competition matters were excluded from the recently completed *Convention on Choice of Court Agreements*, opened for signature 30 June 2005, 44 ILM 1294, art 2.2(h) (not yet entered into force).

<sup>316</sup> As a matter of public policy, most states will not enforce the penal or revenue laws of another state: see, eg, *Huntington v Attrill* [1893] AC 150. This covers not only criminal fines but also civil penalties. Although the matter is far from clear, it seems that some states will not enforce a US treble damages judgment not because it is a penalty but because to do so would be to enforce another state's public law. To enforce such a law would be to extend the judgment state's sovereignty beyond the limits of its authority: see *Attorney-General of New Zealand v Ortiz* [1984] AC 1, 21 (Lord Denning MR). See also *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30; *The Antelope*, 23 US (1 Wheat) 66, 123 (1825). For a critique of the public law 'taboo', see William S Dodge, 'Breaking the Public Law Taboo' (2002) 43 *Harvard International Law Journal* 161.

<sup>317</sup> See *Protection of Trading Interests Act 1980* (UK) c 11; *Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979* (Cth), repealed by the *Foreign Proceedings (Excess of Jurisdiction) Act 1984* (Cth); *Foreign Extraterritorial Measures Act*, RSC 1985, c F-29, s 8. Arguably Japan and South Korea have legislative measures to block foreign competition judgments, particularly treble damages judgments: Seung Wha Chang, 'Extraterritorial Application of US Antitrust Laws to Other Pacific Countries: Proposed Bilateral Agreements for Resolving International Conflicts within the Pacific Community' (1993) 16 *Hastings International and Comparative Law Review* 295, 301–3.

- The judgment to be enforced is otherwise tainted by procedural irregularities.<sup>319</sup>

As foreign enforcement is not a realistic option, effective enforcement depends on the state's ability to enforce its judgments at home. In general, only the larger industrialised states have this ability.

## VI CONCLUSION

In the absence of a global competition agreement, a state confronted with the effects of foreign anti-competitive conduct has a number of choices. First, it may elect to do nothing. This is not necessarily a zero benefit option — the state may enjoy some spill-over benefits from the actions of other states. Second, if the state is a party to a relevant positive comity agreement,<sup>320</sup> the state may make a positive comity request. There are few, if any, disadvantages to the making of such a request, but there are many reasons why a positive comity request will not be acted on.<sup>321</sup> Third, the state may decide to apply its own competition law extraterritorially.

Prior to the 1960s, extraterritorial enforcement of competition laws was limited. Almost all of it was attributable to actions by US government antitrust agencies. There was virtually no private international antitrust enforcement, as very few other states had any competition law and none sought to exercise it outside their territorial borders.<sup>322</sup>

Since the 1960s, US extraterritorialism, both public and private, has grown and continues to do so. Initially, this expanding extraterritorialism was met by

<sup>318</sup> US rules on personal jurisdiction are broader than those for other states. A US court may exercise personal jurisdiction over a foreign defendant provided the defendant has 'certain minimum contacts' with the forum 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice': *International Shoe Co v State of Washington Office of Unemployment*, 326 US 310, 316 (1945). US courts have been expansive in their interpretation of minimum contacts. According to Dodge:

US courts have tended to exercise general jurisdiction based on the defendant's unrelated 'continuous and systematic' business contacts with the forum. They have also exercised specific jurisdiction based either on the effects within the forum of the defendant's conduct elsewhere or on the conduct of the defendant's [US] co-conspirators within the forum: 'Antitrust and the Draft Hague Judgments Convention', above n 25, 372

The effect of US personal jurisdiction rules is that personal jurisdiction will invariably exist where the 'effects doctrine' applies to confer subject matter jurisdiction.

<sup>319</sup> States will often refuse to enforce foreign judgments where service of process was effected or evidence gathered (within the recognition state) contrary to the recognition state's laws. For example, a number of important states do not accept service of originating process by mail. Thus, Germany, China, Japan, Korea and the Russian Federation, among others, have declared that the provisions of art 10(a) of the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, opened for signature 15 November 1965, 658 UNTS 163 (entered into force 10 February 1969), which permits service by post, do not apply. These states would not enforce a damages judgment where service was made by post.

<sup>320</sup> As most of the positive comity agreements are bilateral, a relevant positive comity agreement is one where the other party to the agreement is the state in which the anti-competitive conduct occurred.

<sup>321</sup> See discussion above Part II.

<sup>322</sup> Whish, above n 92, 427–35.

widespread hostility.<sup>323</sup> Hostility was directed not just at the expansion of US antitrust law as an expression of US economic policy but also at the use of expansive procedural rules (such as the discovery rules) and the broad nature of US remedies (particularly treble damages).<sup>324</sup> In this phase, US extraterritorialism was blatantly unilateral; it represented a clear determination on the part of the US, even in the face of sometimes hostile resistance, to impose its economic laws wherever it perceived a threat to its interests. In doing so, the limitations inherent in extraterritorialism were well tested, and some new ones — for example, blocking laws and claw-back laws — added.

In the past 15 years, the level of hostility has reduced considerably due to a number of factors.<sup>325</sup> First, a growing number of states now recognise that anti-competitive activities — most notably hard core cartels, which until recently made up most of the international cases — are bad for their own economies.<sup>326</sup> This growing recognition has produced a rush of new competition regimes. It has also fostered a spirit of cooperation, resulting in a number of collaborative initiatives, including positive comity.<sup>327</sup> Second, a number of states have indicated that they are prepared to apply their competition laws extraterritorially; this has tended to mute complaints by those states against US extraterritorialism. Third, US antitrust authorities and, more recently but to a lesser degree, US courts, have become more sensitive to the legitimate concerns of other states.<sup>328</sup> The consequence is that competition law extraterritorialism is no longer necessarily just a matter of aggressive unilateralism. It can, and often does, operate in a cooperative environment; it is no longer just a US phenomenon.

Notwithstanding this easing of international tension, extraterritorialism remains contentious and often ineffective. There are a number of reasons for this. First, although more countries now have their own competition laws, these laws are not uniform. Consequently, and particularly in light of the continuing rapid growth of global economic interdependence, there is still plenty of scope for policy clashes.

Second, despite the fact that more states now accept extraterritorialism and despite the decision in *Empagran*, the extraterritorial reach of US antitrust law remains quite broad, much broader than many states are prepared to tolerate. When combined with the fact that extraterritoriality is not a solution equally open to all states — extraterritorialism is particularly adapted to the needs of the larger industrialised states — it is not difficult to see that extraterritorialism remains a potent source of conflict.

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<sup>323</sup> Ibid 446.

<sup>324</sup> Ibid 297–8.

<sup>325</sup> ABA, Section of Antitrust Law, *Report on the Use of Private Litigation to Challenge Private Anticompetitive Conduct Affecting US Foreign Commerce* (Report presented to the International Competition Policy Advisory Committee, Washington DC, 17 May 1999) 21–2 <<http://www.abanet.org/antitrust/at-comments/1999/reports/E290D2EC.pdf>> at 18 May 2007.

<sup>326</sup> ICPAC Report, above n 9, 185–6.

<sup>327</sup> See, eg, *Hague Convention*, above n 233; *US–EU Agreements*, above n 8, and other positive comity agreements, above n 11.

<sup>328</sup> ABA, *Report on the Internationalization of Competition Law Rules*, above n 56, 87. See *Empagran*, 542 US 155 (2004).

Third, extraterritorialism tends to draw attention to differences in national procedural rules. These differences will continue to be a source of tension. Convergence on procedural rules is less likely than for substantive competition rules simply because the rules are not specific to competition law, but rather form part of the state's general legal system.

Extraterritorialism, however, can have benefits even where applied in an uncooperative environment. Extraterritorialism may produce beneficial spill-over effects upon which other states, often not in a position to act themselves, are able to take a free ride. Extraterritorialism also largely negates what incentives exist for a regulatory race to the bottom, although the danger of such a race should not be overstated. For those states able to act extraterritorially, applying domestic laws to foreign conduct enables the state to impose competition laws tailored to its own needs.

As long as there is no global competition agreement, extraterritorialism will continue to remain an important mechanism in combating international anti-competitive conduct. However, it has to be recognised that extraterritorialism is, and will remain, controversial, and that it is not a panacea for global competition problems.