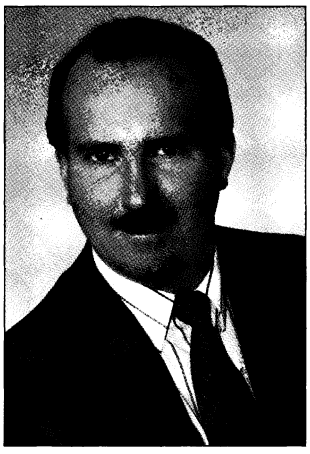
Forum

Trade and competition law convergence: code or comity approach to transborder mergers?



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Introduction

Trade liberalisation has led to greater integration of global economies. This in turn has substantially increased the level of cross-border trade and transborder mergers due to greater open market access. Concern over the potential anti-competitive effects of these mergers to limit competition, restrict market access and deny freer trade opportunities has prompted efforts to achieve substantive harmonisation of competition law within a global trade law context and to secure greater cooperation among competition authorities in respect of procedural enforcement. Both harmonisation and cooperation efforts are part of a convergence process involving international trade and competition law.

The purpose of this paper is to provide a brief outline of this convergence process in respect of transborder merger laws within the context of international trade. This will be done in five steps.

First, the reasons why trade and competition law are converging will be outlined. Second, the nature of this convergence will be described from two perspectives. Initially, the prospects for convergence of substantive merger laws through harmonisation will be assessed by briefly comparing the similarity of the basic merger tests and their underlying principles in the European Union, United States, Canada and Australia. Then, the prospects for convergence of procedural enforcement through greater cooperation among competition authorities will be outlined. Third, the methods of convergence involving multilateral, bilateral and regional approaches will be briefly discussed. Fourth, the implications of the convergence process for Australia and the ACCC will be outlined. The paper will discuss how the ACCC's merger policy has recently been revised to reflect international trade considerations (i.e. import competition and export enhancement). Fifth, the convergence process will be outlined in terms of both substantive law harmonisation and procedural enforcement cooperation for transborder mergers.

1 Dr Phillips would like to thank Bond Law Professor Mary Hiscock for reviewing an earlier draft of this paper. Comments on this paper or topic are welcome and may be sent via email to acphillips@hotmail.com

In short, the paper will try to answer whether convergence is being pursued merely to facilitate continued globalisation and consolidation through mergers or whether it is a necessary international policy response designed to address anti-competitive practices and protect open market access and hard won trade opportunities achieved through trade liberalisation. The paper is not intended to be a comparative analysis of world-wide merger laws but is more of an inquiry into the why, what and how of potential international convergence with a brief discussion of its objectives, nature and methods in order to draw some conclusions about the current convergence process overall and its implications for Australia.

Reasons for convergence of trade and competition law in respect of mergers

In recent years the world has witnessed rapid growth in international trade. This has resulted from the dynamic forces of trade liberalisation, new technology, improved communication and more efficient transport and trade distribution systems. Coupled with government moves to deregulate and privatise key economic sectors like transport, communication and energy, global economies have become more competitive and interdependent on trade.

As a consequence we have also witnessed the rise of multinational enterprises which have organised their production and distribution operations on a global scale as trade barriers have fallen.[2] This dynamic process of change has generally been referred to as 'globalisation'. Former US Secretary of Labour, Robert Reich, effectively defined the term 'globalisation' when he stated 'the very idea of a national economy is becoming meaningless, as are the notions of a national corporation, national capital, national products and national technology'.[3]

As globalisation continues and trade barriers are lowered, however, there is also an increasing realisation of the complementary relationship which should exist between trade and competition law. In short, hard won opportunities resulting from trade liberalisation and open markets will not, and cannot, be realised if public trade barriers are merely replaced by the establishment of private trade barriers from anti-competitive transborder mergers, international market sharing agreements, export cartels or restrictive practices in international distribution including the predatory pricing of exports (i.e. dumping).[4] Professor Michael Trebilcock outlines the rationale for convergence this way:

> ... the question remains as to what form effective domestic competition laws should take in a liberal international trade environment. Here the concern increasingly voiced is that, while liberal international trade policies will remove public (State-imposed) impediments to foreign competition, such policies will leave unaddressed private restrictions on competition, including foreign competition, and indeed may increase reliance on such restrictions by uncompetitive domestic producers, as a substitute for directly imposed State restrictions. In this respect, inadequately framed or enforced domestic competition laws are seen as an impediment to foreign competition and international trade and investment to the extent that they permit private market restrictions that preclude effective market access or an effective market presence by foreign competitors ... inadequate domestic competition laws are seen as an increasingly important non-tariff barrier.[5]

As a result, competition authorities are beginning to realise that the objectives of trade law and competition law are complementary. They both aim to enhance international economic welfare through a more efficient allocation of resources, whether it be by lowering government barriers to trade or by

2 Multinational enterprises are increasingly allocating production across many different countries depending on their comparative advantages. On the distribution side, a significant market presence is often required for marketing, sales and service. Thus, effective market access often requires an effective market presence and this is increasingly being accomplished through transborder merger or acquisition. See Michael J. Trebilcock, 'Competition Policy and Trade Policy: Mediating The Interface', *Journal of World Trade Law*, Vol. 30, No. 4, 1996, 71 at 72.

3 Robert Reich, *The Work of Nations*, London: Simon and Schuster, 1991, at 8.

4 In this paper I will focus on transborder mergers to explain the convergence process.

5 M. Trebilcock, supra n. 2 at 74.

promoting competition.[6] In short, since private anti-competitive trade barriers can potentially transcend national boundaries at an increasing rate due to trade liberalisation, convergence of trade and competition law is seen as the way to more effectively enforce domestic competition rules while at the same time promoting liberalised trade.[7]

At the same time, however, trade and competition law seem to be converging from two directions at once. First, from the competition side, convergence represents an attempt to achieve allocative efficiency in international trade markets by protecting hard won opportunities resulting from trade liberalisation and greater market access. Second, from the trade side, as global trading firms expand through transborder mergers and investment and face a multitude of domestic competition law regimes which are not uniform, convergence also represents an opportunity for these firms to lower their costs of compliance and to enhance cost efficiency and reduce regulatory uncertainty by having both a more harmonised substantive law framework and a more cooperative procedural approach to the enforcement of competition laws among the nations in which they operate.

Thus, both harmonisation and cooperation are included in the process of convergence, but the forces of convergence seem somewhat divergent, in my view, reflecting both concerns with market competition and firm competitiveness. Moreover, it appears that there may be conflict between these forces in that multinational firms themselves may seek convergence to be more competitive (i.e. to facilitate transborder mergers based on cost or dynamic efficiency arguments alone for example) but are less concerned with the effects of such mergers on market competition in the countries in which they operate (i.e. allocative efficiency may suffer in order to achieve cost efficiency through greater economies of scale). More will be said about this potential conflict later.

Other differences between competition and trade policy may make convergence difficult. First, government trade policy and competition policy have usually been formulated independently, which may make 'coordination' of convergence efforts difficult. Second, competition policy tends to give more weight to consumer interests (i.e. consumer welfare), whereas trade policy tends to favour producer interests.[8] This may not always be the case, however, particularly if a country's competition policy is keen to promote production efficiency through mergers so that its domestic firms can be more competitive in foreign markets. Third, antitrust problems are more likely to be resolved at the expense of foreign interests because these interests are not sufficiently represented in the domestic policy-making process. For example, lack of coordination in the regulation of anti-competitive transborder mergers can lead to trade distortions if countries tolerate certain anti-competitive mergers more than others or countries discriminate in favour of domestic companies by precluding foreign firms from providing additional import competition for the benefit of domestic consumers. Moreover, tolerance of anti-competitive behaviour that gives a country an advantage in export markets may appear rational at a domestic level but may also have a 'collectively welfare-deteriorating outcome' for international trade.[9]

Despite these divergent objectives, conflicts and potential difficulties, trade and competition law convergence is proceeding and the importance of this process has been recognised by the ACCC. Mr Hank Spier, the ACCC's Chief Executive Officer, recently observed:

> Although coordinating the two policies is difficult, one must not neglect the advantage of doing so, which is achieving the desired outcome of any trade and competition policy maker — a more efficient allocation of resources and enhancement of individual and social welfare. International cooperation in achieving a balanced and coordinated approach to trade and competition policy will greatly assist the desired outcome. This is because effective competition policy and trade liberalisation are mutually reinforcing, and, for so long as one is hampered, realising the full effects of the other is unattainable.[10]

6 Hank Spier, 'The Interaction between Trade and Competition Policy: the Perspective of the Australian Competition and Consumer Commission', Board of Foreign Trade Seminar on International Trade Policies, Taipei, 2 May 1997, at 1.
7 Id. at 2 & 3.
8 Id. at 4.
9 Id.
10 Id.

Nature of convergence

The process of trade and competition law convergence involves two branches. First, there are efforts to achieve harmonisation of substantive competition law within a global and liberalised trade context. Second, there are simultaneous efforts to achieve greater cooperation among competition authorities in respect of procedural enforcement. Both efforts form part of a convergence process involving international trade and competition law, although, as will been seen shortly, each branch of effort appears to rely on somewhat different methods of convergence.

Harmonisation of substantive merger laws and underlying principles

Within the context of trade and competition law convergence, efforts are being taken to harmonise the substantive laws among nations. While the term 'harmonisation' can convey a number of meanings, Canadian competition authorities have suggested a useful definition as follows.

> What is meant by harmonisation in the context of competition law? From our perspective, it does not imply identical rules across jurisdictions but simply denotes a greater convergence and coherence of underlying principles, statutory rules, enforcement practices and analytical methods across jurisdictions. The aim of harmonisation should be to promote a level of compatibility among the basic objectives and rules concerning competition under which business enterprises — both domestic and foreign — will operate without compromising a nation's fundamental right to regulate conduct in its own territory.[11]

One of the key problems of developing a harmonised system of competition laws is the degree to which substantive merger laws and their underlying principles among nations can differ when applied. While this paper is not intended to be a comprehensive comparison of merger laws per se, it is useful to compare the basic tests and principles underlying the merger provisions of the European Union and the United States and the relatively similar provisions of Australia and Canada. In particular, while most nations prohibit mergers which lessen competition, there are differences in assessment of the basic tests, their underlying principles and the consideration given to efficiencies which may result from a merger and which can enhance firm competitiveness at the expense of consumer welfare. In short, there is a tension between promoting market competition and enhancing firm competitiveness when a merger takes place and competition authorities have different approaches in practice when trying to strike a balance. Moreover, some legal frameworks insist that efficiency gains be fairly passed on to consumers while others do not. By outlining a brief comparison of these issues, it will become apparent how difficult harmonisation of substantive competition law in relation to transborder mergers will be.

European Union

In the European Union (EU), the principal function of competition rules has been to further European integration. EU merger law under the Treaty of Rome is therefore primarily concerned with private restraints of trade between member states and focuses on vertical trade restraints which act as an interstate trade barrier.[12]

In addition, under both the Treaty of Rome and the EU's 1989 Merger Regulation there is no formal efficiency defence to an anti-competitive merger.[13] However, one of the factors which

11 George N. Addy, Director of Investigation and Research, Bureau of Competition Policy, Government of Canada, 'International Harmonisation and Enforcement Cooperation: The Canadian Experience', *International Harmonisation of Competition Laws*, ed. Chia-Jui Cheng et al, Dordrecht: Martinus Nijhoff Publishers, 1995, 399 at 400.

12 See Articles 85 and 86 of the Treaty of Rome of 1957 as amended by the Maastricht Treaty on European Union, effective 1 November 1993. Article 85 prohibits any agreement or undertaking which may affect trade between member states and which has as its object or effect the prevention, restriction or distortion of competition within the Common Market. Article 86 prohibits concentrations which create or strengthen a market dominance position to the exclusion of all effective competition in a substantial part of the Common Market. Both articles can potentially apply to a merger under EU law. See E. Mestmacker, 'The Concept of Merger in Merger Control Legislation', *International Harmonisation of Competition Laws*, ed. Chia-Jui Cheng et al, Dordrecht: Martinus Nijhoff Publishers, 1995, 27 at 30 and 32.

13 Council Regulation 4064/89 on the Control of Concentrations Between Undertakings.

the European Commission must consider in determining whether a merger amounts to an agreement that pmrevents, restricts or distorts competition within the Common Market under Article 85 is whether or not the merger 'contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit ...'.[14] Efficiency gains, therefore, are capable of justifying a merger, although there is no formal efficiency defence in EU law.[15] Moreover, a fair share of the savings from any efficiency gains must be passed on to consumers. In addition, the Commission has indicated that both production (cost) efficiencies and dynamic efficiencies (combined research and development for example) can be treated as evidence under Article 86 that a proposed merger will also strengthen a market dominant position thereby restricting competition.[16]

United States

The United States, in contrast to the EU, tends to focus more on horizontal constraints resulting from mergers but it also has the power to deal with vertical and conglomerate mergers. Specifically, s. 7 of the Clayton Act makes it unlawful for 'any person (i.e. defined to include corporations) to acquire the stock or the whole or any part of the assets of one or more persons engaged in commerce, where in any "line of commerce", in any "section of the country", the effect of acquisition may be "substantially to lessen competition" ...'.[17]

Effectively, US courts have interpreted this test to require that the relevant product market be defined based on the economic substitution or interchangeability of products,[18] that the relevant geographic market be determined where the effect of the merger will be both immediate and direct,[19] that the acquisition not result in a significant increase in concentration (i.e. market share)[20] and that there must be a reasonable likelihood of a substantial lessening of competition.[21] Thus, this substantive US merger test focuses on limiting market power and promoting consumer welfare by promoting effective market competition.

In addition, s. 7 of the Clayton Act does not refer to a formal efficiency defence. Historically, US courts have been unreceptive to efficiency arguments.[22] More recently, though, some US courts have allowed evidence of efficiencies resulting from the merger if the efficiencies would ultimately benefit both competition and consumers.[23] However, much uncertainty still exists in US law about the scope and extent of an efficiency defence in relation to s. 7 of the Clayton Act.[24]

Most of the above market definition considerations supporting the merger test have been adopted and outlined in the Horizontal Merger Guidelines of 1992 by the US Department of Justice and the Federal Trade Commission. Nevertheless, under these merger enforcement guidelines,[25] these antitrust authorities will consider any significant net efficiencies resulting from a horizontal merger provided some savings are passed on to consumers (i.e. a consumer welfare as opposed to a total welfare approach).[26]

Canada

In Canada, a merger may be prohibited if it 'prevents or lessens or is likely to prevent or lessen competition substantially'.[27] This involves an assessment of market competition and various market considerations including the degree of economic substitution to define the scope of the market, market share to assess

14 Article 85(3) of the Treaty of Rome of 1957 as amended by the Maastricht Treaty on European Union, effective 1 November 1993.
15 A. Neil Campbell et al, 'Industrial Policy, Efficiencies and the Public Interest — the Prospects for Harmonisation of International Merger Rules', Centre For Trade Policy and Law — 8th Annual Conference, Ottawa, May 1993, at 4.
16 Id. at 5.
17 Clayton Act, 15 USC s. 7.
18 *United States v Continental Can Co.*, 378 US 441 (1964)
19 *United States v Philadelphia National Bank*, 374 US 321 (1963).
20 Id.; see also *Brown Shoe Co. v United States*, 370 US 294 (1962).
21 *United States v Penn-Olin Chemical*, 378 US 158 (1964).
22 *FTC v Proctor & Gamble Co.*, 386 US 568 (1967).
23 *FTC v University Health Inc.*, 938 F.2d 1206 (11th Cir. 1991).
24 For a thorough discussion of the scope and extent of this uncertainty see Mark N. Berry, 'Efficiencies and Horizontal Mergers: in Search of a Defence', *San Diego Law Review*, Vol. 33, No. 515, 1996.
25 United States Dept of Justice and Federal Trade Commission, 'Horizontal Merger Guidelines', 1992, at 4.
26 A.N. Campbell et al, supra n.15 at 4.
27 Section 92(1) of the Competition Act, RSC 1985, c. C-34 (as amended).

existing concentration levels, import competition as a domestic competitive influence and existing barriers to entry. These market considerations were set out in Merger Enforcement Guidelines in 1991 in a manner similar to the United States.[28] However, Canada is unique in that its Competition Act specifically provides for a statutory efficiency defence whereby any efficiency gains must outweigh the anti-competitive effects that are likely to result from the proposed merger.[29] In addition, Canada takes a total welfare approach (i.e. as opposed to a consumer welfare approach like the EU and US) and does not require that any efficiency gains be passed on to consumers.

In my view, Canada, through its statutory efficiency defence, places too strong an emphasis on promoting firm competitiveness and productive and dynamic efficiency as opposed to promoting market competition and being concerned about allocative efficiency (i.e. the distribution of scarce resources), particularly in its domestic market. One might also question why Canadians should not benefit from such efficiency gains given the attendant effects of consolidation (i.e. higher unemployment, reduction in real income) which they must endure and given that other major countries enforce their competition laws by considering efficiency from a consumer welfare perspective. This may explain why the Canadian economy has experienced significant consolidation in its resource, manufacturing and distribution industries and why some firms are doing very well while the average citizen feels he or she is not sharing in the so-called economic growth resulting from liberalised trade.[30] Nevertheless, Canada's dependence on foreign trade and its desire to make its industries more world competitive, may help explain its understanding of competition and its promotion in practice.

28 Merger Enforcement Guidelines (1991) prepared by the Director of Investigation and Research, Bureau of Competition Policy, Dept. of Consumer and Corporate Affairs, Government of Canada.

29 Section 96 of the Competition Act, RSC 1985, c. C-34 (as amended).

30 *The Economist* recently stated that 'Although growth and inflation are in line with OECD averages, Canada's unemployment rate remains high, at over 9%. Recent reforms to unemployment insurance and social assistance programs may help to reduce its high **structural** unemployment.'See *The Economist*, 'Economic Indicators', 15 November 1997, at 122.

Australia

Australia is very interesting in that it has recently adopted the Canadian merger test. Specifically, s. 50 of the Australian *Trade Practices Act 1974* (as amended) now prohibits mergers involving an acquisition of shares or assets if that acquisition would have the effect, or would be likely to have the effect, of substantially lessening[31] competition in a market[32] in Australia. Moreover, this test applies to both domestic and transborder mergers.[33]

As a consequence, the ACCC published revised Merger Guidelines in 1996 which outline a five-stage market consideration exercise it will go through in assessing whether or not any proposed merger substantially lessens competition in a market in Australia. These market considerations are effectively the same as those in the Canadian Merger Guidelines (i.e. market definition through substitution, concentration based on market shares, level of import competition and height of barriers to entry).

What is unique about the Australian merger test and the ACCC's 1996 guidelines is that the fifth market consideration under these guidelines is efficiency. In Canada, efficiency is not treated as a market consideration under the basic legal test but rather as a defence when the basic test is violated. In Australia, efficiency

31 Lessening of competition also means to prevent or hinder competition under s. 4(4) of the *Trade Practices Act 1974* (as amended).

32 The term 'market' also includes a market for other goods or services that are 'substitutes' under s. 4(E) of the Trade Practices Act.

33 The substantial lessening of competition in a market test under s. 50 of the Trade Practices Act applies to the following transborder acquisitions: (i) shares or assets in Australian companies, wherever the transaction is entered into; (ii) property wherever situated if the acquirer is incorporated in Australia, carries on business in Australia, is an Australian citizen or is ordinarily resident here; or (iii) acquisitions of a 'controlling interest' in the shares of an overseas corporation where that corporation has a controlling interest in a domestic trading company or the holding corporation of such a company. Section 50A(8) of the Act defines 'controlling interest' to include a corporation which becomes, directly or indirectly, a subsidiary of the acquirer. Section 4A provides that a corporation will be a subsidiary of another body corporate where it controls the composition of its board of directors, is in a position to cast more than 50 per cent of the maximum number of votes that can be cast at a general meeting, or holds more than 50 per cent of the issued share capital (excluding limited participation shares). See also paragraph 3.32 of the ACCC *Merger Guidelines* (1996).

can be argued either as a market consideration under the basic merger test or as a 'public benefit' defence to authorise an otherwise anti-competitive merger.

Specifically, the ACCC is very careful to distinguish the type of efficiency being claimed — be it productive, dynamic or allocative efficiency in the market. The ACCC will then judge which type of efficiency gain will actually promote competition in the market and not simply enhance firm competitiveness at the expense of competition in the market as a whole. However, if allocative efficiency and market competition is deemed to be lessened substantially, dynamic and productive (cost) efficiencies may still be argued as public benefits as part of a subsequent authorisation process.

Thus, while there is no statutory efficiency defence with respect to the basic merger test like in Canada, the ACCC may nevertheless authorise a merger (i.e. exempt it) even though it may substantially lessen competition in a market, provided that the public benefits outweigh the public detriments of the merger. In effect this means that where market competition is compromised, there must be a net benefit to the public resulting from the merger (i.e. dynamic and production efficiencies must outweigh the decline in allocative efficiency) and these efficiency gains should benefit consumers (i.e. a consumer welfare approach consistent with the EU and US).

The ACCC describes its handling of underlying efficiency principles this way:

> Efficiency issues are relevant both for consideration of the impact of a merger on competition under s. 50, and for assessments of the balance of public benefit under the authorisation process. First, where a merger is likely to enhance the cost and/or dynamic efficiency of the merged entity, this will be relevant to assessment under s. 50 of the impact of the merger on the competitive process. ...Where efficiencies suggest a pro-competitive impact from a merger, there is no conflict with s. 50. ... Second, where there is a conflict, that is, where an anti-competitive merger is alleged to improve cost or dynamic efficiency while damaging allocative efficiency an authorisation process is available as a means of weighing the conflicting claims under a public benefit test. Mergers or acquisitions which would otherwise contravene s. 50 may be authorised on the grounds of an overall public benefit.[34]

Two other public benefit factors which have trade ties are whether the merger will result in (i) a significant increase in the real value of exports and (ii) a significant substitution of domestic products for imported goods.[35] In addition, the ACCC has developed a long list of other public benefit factors in its 1996 Merger Guidelines.[36]

Comparative comments

Thus, while Australia has the same substantive law merger test as Canada, its merger review framework focuses more on market competition than on firm competitiveness. While Australia does not have a formal efficiency defence like the US and the EU, it does consider efficiency both in respect of the substantive test as a market consideration and as a potential public benefit in terms of authorisation. In short, in my view, Australia appears to be more focused than Canada in ensuring that transborder mergers will not thwart effective market competition.

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34 Allan Fels, 'Current Issues in Merger Policy and Regulation', *Corporate and Business Law Journal*, Vol. 9 No. 2, 1996, University of Adelaide, 173 at 186 and 187.

35 Section 90(a) of the Trade Practices Act.

36 The ACCC has identified the following market considerations as potential public benefits for the purposes of the authorisation process: (i) increased efficiency and better resource usage, resulting in economies of scale and scope and lower unit production costs; (ii) more efficient technology resulting in reduced input and/or energy costs; (iii) the combining of complementary research and development facilities; (iv) economic development in natural resources through encouragement of exploration, research and capital investment; (v) fostering business efficiency, especially where this results in improved international competitiveness; (vi) expansion of employment or prevention of unemployment in efficient industries and employment growth in particular regions; (vii) industrial harmony; (viii) assistance to efficient small businesses, such as guidance on costing and pricing or marketing initiatives which promote competitiveness; (ix) improvement in the quality and safety of goods and services and expansion of consumer choice; (x) supply of better information to consumers and businesses to permit informed choices in their dealings; (xi) promotion of equitable dealings in the market; (xii) promotion of industry cost savings resulting in contained or lower prices at all levels in the supply chain; (xiii) development of import replacements; (xiv) growth in export markets; and (xv) protection of the environment. See paragraph 6.38 of the ACCC *Merger Guidelines* (1996) and *ACI Operations Pty Ltd* (1991) ATPR 50-108 at 56,067.

Like the EU and the US, Australia also takes a consumer welfare approach as opposed to the total welfare approach in Canada. In my view, this is to be preferred because it puts Australians in a better economic position to benefit from the expanded trade opportunities resulting from trade liberalisation (i.e. for both its industries and its citizens) while ensuring that private constraints and excessive concentration do not materialise from excessive reliance being placed on individual firm competitiveness considerations. While Canada and Australia are trading nations, Australia seems to be able to strike a better balance between market competition and firm competitiveness. This is a better competition policy approach in response to liberalised trade, in my view, because it will more effectively limit private trade barriers from being created by anti-competitive transborder mergers over the long term.

Overall then, from the above comparison and brief analysis, it is clear that relative uniformity in the basic legal tests for mergers is not the key to harmonisation of the substantive laws in this area. But rather, in my view, greater discussion and perhaps even negotiation is needed on the basic underlying principles and concepts of effective competition (i.e. balancing market competition and firm competitiveness), market power, trade liberalisation, public versus private trade barriers, efficiencies and consumer welfare. How these principles and concepts are defined, incorporated and interpreted within domestic competition law structures will be the key to future progress in the area of substantive law harmonisation.

Cooperation in procedural enforcement of merger laws

The second branch of competition and trade law convergence involves efforts to achieve greater cooperation in procedural enforcement of merger laws in respect of transborder acquisitions.

This involves attempts to define and agree on the scope and extent of greater cooperation in procedural enforcement for transborder mergers with respect to notification, consultation, information sharing, competition assessment and coordination of action. In this respect, cooperation is seen as being more preferable in a liberalised trade environment than coping with the extraterritorial enforcement of another nation's antitrust laws, the sovereignty encroachment problem this creates and the counterproductive use of foreign blocking legislation which impedes effective competition enforcement of transborder restraints.[37]

There are many degrees of cooperation. It may simply involve the informal exchange of information or it may involve attempts to seek greater uniformity and certainty of competition enforcement procedures through bilateral or multilateral treaties. Along the spectrum sits a variety of other possibilities including the provision of technical assistance and the mutual recognition of antitrust judgments.[38]

With respect to multinational or transborder mergers, which can effect the trading interests of a number of nations, competition authorities view greater cooperation in consultation and information gathering as being critical to any assessment of competition. In this respect, cooperation may take the form of coordinated requests for information from the firms involved or unilateral requests from one authority to the other to assist in a formal investigation on behalf of the foreign competition authority. For example, the International Antitrust Enforcement Assistance Act of 1994 empowers the United States Department of Justice and Federal Trade Commission to enter into reciprocal antitrust mutual assistance agreements with foreign competition authorities. Australia entered into such an agreement with the United States on 28 April 1999. More will be said about this type of cooperation under bilateral approaches to convergence below.

In terms of coordination of enforcement action, the nature of convergence basically involves choosing to defer to the most affected

37 One need only recall the problems of the Laker cases in the early 1980s involving the predatory pricing suit Sir Freddie Laker of Laker Airways launched against British Airways, British Caledonian, Pan Am and TWA in US courts under US antitrust law. In response, the British airlines sought injunctions in UK courts under UK blocking legislation against any US judgment which escalated into an international trade dispute over the extraterritorial application of US antitrust law to international airline services governed by the Bermuda II bilateral air services agreement between the UK and the United States.

38 H. Spier, supra n. 6 at 6.

jurisdiction, to coordinate investigations by determining a lead jurisdiction or to have multiple investigations with no lead jurisdiction. Competition authorities have identified the following issues to be addressed as part of any convergence process.

First, any harmonised enforcement framework should be transparent in its administration of the law. A number of countries have taken steps to publish merger enforcement guidelines (US, Canada and Australia for example) so as to reduce regulatory uncertainty. In addition, the degree to which these guidelines are similar and based on relatively similar 'substantial lessening of competition' tests has to some degree reduced compliance costs. Second, methods of judicial review should be available. While common law countries share a similar approach to natural justice and fairness, efforts must be taken to ensure that countries which do not incorporate similar remedies appreciate the need for supervisory jurisdiction and appeals from competition assessments. In this regard, greater discussion of underlying principles would be useful. Lastly, differences in penalties for anti-competitive conduct and in standards for granting antitrust exemptions to cartels need to be resolved.[39]

Despite these outstanding issues, convergence in the procedural enforcement of competition laws appears to be proceeding based on two fundamental principles of trade law. The first is national treatment and the second is the principle of comity — both traditional and positive comity.

Applying a national treatment principle, a domestic competition authority should enforce its competition laws against a foreign firm in the same way that it would deal with a domestic firm. In effect, national treatment is a one-way non-discrimination principle which precludes foreign firms from being treated less favourably than domestic firms. For example, applying more stringent merger prenotification requirements to foreign firms involved in a transborder merger than to domestic firms involved in a domestic merger would be inconsistent with this principle.[40]

Traditional comity is essentially a doctrine of cooperation between nations to deal with jurisdictional conflicts. It includes the considerations that a sovereign nation ought to take into account in determining whether to pursue a case involving foreign firms in its jurisdiction or involving conduct by a domestic firm in a foreign jurisdiction (i.e. a transborder merger). Traditional comity arises in competition law enforcement where a competition law authority in one country decides to defer to the interests and efforts of an authority in another country.[41]

Positive comity also involves cooperation between States, but in contrast to traditional comity it focuses on positive acts of assistance rather than minimising the negative effects of jurisdictional conflict merely through restraint and deference to the jurisdiction of the other State.[42]

In this respect, countries are increasingly entering into bilateral cooperation agreements for the enforcement of competition of law. Positive comity is a key aspect of these agreements in that if a country believes that there are anti-competitive activities being carried out on the territory of another State which is adversely affecting its interests, that country may notify the other State and may request that the other State's competition authority initiate appropriate enforcement activities. As part of this enforcement activity, the two nations agree to share information and investigate firms each on behalf of the other when necessary. Positive comity obligations can assist countries regulate transborder mergers where two countries have an interest but where only one of them has the enforcement capability to effectively investigate the transborder merger.[43]

In the context of bilateral versus multilateral approaches to competition law convergence discussed below, these key trade principles will become more evident.

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39 Id. at 7.

40 A. Neil Campbell et al. 'Harmonisation of International Competition Law Enforcement', *Global Forum on Competition and Trade Policy* booklet, July 1995, at 6.

41 Id.

42 Id. at 8. See also J.R. Atwood, *Positive Comity — is it A Positive Step*, Fordham Corporate Law Institute, 1992, 79 at 81.

43 Id. at 8.

Methods of convergence

Multilateral approach: Havana Charter to a World Competition Code and WTO

Genesis in the Havana Charter and the ITO

The relationship of trade and competition policy was first considered on a multilateral basis in the 1940s in the restrictive business practices provisions outlined in Chapter V of the Havana Charter, which also advocated the creation of an International Trade Organisation (ITO).

While the Havana Charter was never adopted, the restrictive business practices chapter would have obliged the members of the proposed ITO to take appropriate measures to prevent private commercial enterprises that had effective control of trade from restraining competition, limiting access to markets or fostering monopolistic control in international trade.[44] Member states could complain about prohibited restraints to the ITO. The ITO could investigate and demand information during its investigation as well as recommend remedial action. If the ITO found a complaint to be valid, it would have been required to publish its findings and it could request reports from the offending member nation as to the progress of its remedial measures.[45]

UNCTAD Code and the OECD Agreement on Restrictive Practices

Further multilateral attempts in the 1950s through the Economic and Social Council of the United Nations and the General Agreement on Tariffs and Trade (GATT) to reach agreement on restrictive business practices were not successful. In the years that followed, extensive work on trade and competition policy was primarily carried out in the United Nations Conference on Trade and Development (UNCTAD) and the Organisation for Economic Cooperation and Development (OECD). This work resulted in the 1980 UNCTAD Code on Restrictive Trade Business Practices[46] and the 1986 OECD Agreement on Restrictive Business Practices Affecting International Trade.[47]

However, both the UNCTAD Code and the OECD Agreement had a limited multilateral impact. The UNCTAD Code took the form of recommendations and was not binding, as a result of tensions between developing countries and industrialised nations over the perceived conduct of multinational enterprises. The OECD Agreement imposed only modest notification,[48] consultation, exchange of information and coordination of action obligations.[49]

Since 1986 the OECD, through its Committee on Competition Law and Policy (CLP), has continued to provide a forum to explore the potential for greater harmonisation of

44 Concern over interference with domestic sovereignty and opposition from the US prevented the Havana Charter and Part V dealing with restrictive business practices from being adopted and the ITO was never created.

45 M. Trebilcock, supra n. 2 at 88.

46 The United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (i.e. the UN Set) was negotiated and implemented through UNCTAD in the form of a recommendation to States. This UN Set or UNCTAD Code was adopted by United Nations General Assembly Resolution 35/63 on 5 December 1980.

47 Note the 1986 OECD Agreement of 21 May 1986, C(86)44(Final), has since been revised in 1995. See 'Revised Recommendation of the Council Concerning Co-Operation between Member Countries on Anticompetitive Business Practices Affecting International Trade', C(95)130(Final), adopted 28 July 1995.

48 For example, s. 1(a) of the 1986 OECD Agreement states, 'When a member country undertakes under its restrictive business practices laws an investigation or proceeding which may affect important interests of another member country or countries, it should notify such member country or countries, if possible in advance, and, in any event, at a time that would facilitate comments or consultations; such advance notification would enable the proceeding member country, while retaining full freedom of ultimate decision, to take account of such views as the other member country may wish to express and of such remedial action as the other member country may find it feasible to take under its own laws to deal with the restrictive business practices.' Section 1(b) states, 'Where two or more member countries proceed against a restrictive business practice in international trade, they should endeavour to coordinate their action in so far as appropriate and practicable'. See OECD, 'Recommendation of the Council — Concerning Cooperation of Member Countries on Restrictive Business Practices Affecting International Trade', C(86)44(Final), adopted by Council on 21 May 1986.

49 Specifically, the 1986 OECD Agreement committed member states to notify another member state where enforcement action is being contemplated that may affect another state and to providing an opportunity for consultations; see M. Trebilcock, supra n. 2 at 89.

competition policy, law and enforcement.[50] However, its membership of two dozen mostly industrialised countries has hampered its effectiveness in achieving substantive law harmonisation on a multilateral basis. Nevertheless, the OECD has played a leading role in promoting enforcement cooperation among competition authorities. George Addy suggests that this work has been useful for harmonisation:

> The adherence to the 1986 Recommendations by OECD member countries has contributed significantly to the reduction of friction, the advancement of cooperative efforts and the trend toward more similar and compatible competition laws. This trend has been referred to as 'soft' harmonisation whereby harmonisation occurs not through international agreements but rather through the informal process of information sharing and discussion at fora like the OECD.[51]

Since 1981 UNCTAD has had an Intergovernmental Group of Experts (IGE) on Restrictive Business Practices. This group has met annually to provide a multilateral forum to review the UNCTAD Code. While the UNCTAD Code has undergone three successive United Nation conference reviews in 1985, 1990 and 1995, it was the third review conference in 1995 which approved a comprehensive work program to study the role of competition law and policy in sound economic development including greater efficiency in international trade.[52] UNCTAD continues to conduct its annual Expert Meeting on Competition Law and Policy and since 1997 has coordinated its work and meetings 'back to back' with the meetings of the WTO's Working Group on the Interaction of Trade and Competition Policy.[53] More will be said about the WTO Group shortly. In short, while the UNCTAD Code was limited in its multilateral impact by its non-binding nature, UNCTAD is now working closely with the WTO in a renewed multilateral focus while having been recognised for its strong efforts over the years in promoting technical assistance through its competition law and policy advisory/training programs, particularly in developing countries.

Draft International Antitrust Code (1993)

A comprehensive multilateral harmonisation of competition laws was also proposed through a draft International Antitrust Code (the Munich Code) by a private group of academic experts and practitioners in July 1993. This code advocated that minimum standards be incorporated into the GATT and that these standards be enforceable in domestic jurisdictions through an International Antitrust Authority operating under the WTO with disputes being adjudicated by a permanent International Antitrust Panel.[54] For example, in respect of transborder mergers, the minimum standards included per se prohibitions and rules of reason with rebuttable presumptions for horizontal and vertical constraints, with allowance for divergent national laws and for the balancing of costs and benefits.[55]

This code, however, received a lukewarm reception and was considered to be too ambitious.[56] Nevertheless, it has been suggested that the broad membership of the GATT–WTO makes this world competition code approach appealing because international competition concerns can arise wherever international trade

50 In 1991 the OECD Committee on Competition Law and Policy began studying the likelihood of convergence of international competition regulation. It issued an interim report in 1994, dealing primarily with market definition, barriers to entry and vertical restraints as opposed to abuse of dominance and monopolisation through transborder merger. Nevertheless, this report is noteworthy for having identified an emerging consensus that the objective of convergence should be to protect the process of competition rather than the viability of individual competitors. See A. Neil Campbell et al, 'The Role of Monopoly Laws in the International Trading System', Paper prepared for the Symposium on Competition Policy in a Global Economy, Taipei, 1995, at 17. By 1997 the OECD's Trade Committee and its Committee on Competition Law and Policy (CLP) began a joint program of study on trade and competition issues following a major study of Antitrust and Market Access (1996 Hawk study) and its own work on regulatory reform issues (see OECD Report on Regulatory Reform, OECD/GD(96)115 adopted May 1997). Horizontal agreements (cartels, mergers, joint ventures etc.), vertical restraints and abuse of dominant position are now key areas of interest. Also, the OECD is now working closely with the WTO. See OECD, 'Communication from the OECD to the WTO Working Group on the Interaction Between Trade and Competition Policy', WTO Document WT/WGTCP/W/21 (97-3191), 29 July 1997.

51 G. Addy, supra n. 11 at 406.

52 P.R. Brusic, Chief, Competition Law and Policy Section, International Trade Division, UNCTAD, 'Communication from UNCTAD to the WTO Working Group on the Interaction of Trade and Competition Policy', WTO Document WT/WGTCP/W/17 (97-2801), 4 July 1997, at 4.

53 Id. at 3 and 4.

54 M. Trebilcock, supra n. 2 at 94.

55 Ernst-Ulrich Petersmann, 'International Competition Rules for Governments and for Private Business', *Journal of World Trade*, Vol. 30 No. 5, 1996, 5 at 27.

56 A. Neil Campbell et al, 'The Role of Monopoly Laws in the International Trading System', Paper prepared for the Symposium on Competition Policy in a Global Economy, Taipei, 1995 at 15. See also 'OECD Lacks Enthusiasm for Draft International Antitrust Code', ATTR, Vol. 65 No. 771, 1993.

transactions take place. Moreover, building on the GATT–WTO framework is also likely to be more credible and easier than trying to establish a customised institutional framework from scratch.[57] Multilateral progress would be a challenge, however, due to the diversity of laws and political complexities of negotiations required to reach agreement on such a code. Concerns have been expressed that (i) the GATT–WTO focuses on government-to-government dealings and competition law is primarily concerned with regulating private conduct; (ii) that trade policy concepts might dilute effective competition policy; and (iii) that GATT–WTO is unlikely to become a forum for harmonised enforcement efforts until a substantive code is adopted.[58]

World Trade Organisation Working Group (1996–98)

Further multilateral consideration of the linkages between trade and competition policy occurred at the Ministerial Conference of the WTO in Singapore in December 1996. At this conference, WTO Trade Ministers decided to establish a WTO working group to study issues raised by WTO member nations relating to the interaction between trade and competition policy, including anti-competitive practices, to identify any areas that may merit further consideration in the WTO framework. On 27 April 1997 the WTO General Council appointed Professor Frederic Jenny (France) to chair this working group. The working group reports to the WTO's General Council annually and the Council will eventually make recommendations to Ministers on adopting international rules on trade and competition policy once a consensus among WTO member nations has been reached.

The WTO's Working Group on The Interaction Between Trade and Competition Policy met seven times throughout 1997 and 1998 to review written submissions from WTO member nations and from observer intergovernmental organisations including UNCTAD, OECD, APEC and the World Bank. On 8 December 1998, the working group recommended to the General Council that it continue its work on the study of issues raised by its members, including anti-competitive practices. It also recommended that there be a focused discussion on (i) the relevance of fundamental WTO principles of national treatment, transparency and most-favoured-nation treatment to competition policy and vice versa; (ii) approaches to promote technical cooperation and communication among members; and (iii) the contribution of competition policy to achieving the objectives of the WTO, including the promotion of international trade.[59]

In establishing the working group, the WTO recognised that, while government trade barriers have been reduced, there was a need to examine private constraints which potentially have trade-distorting effects including transborder mergers. In addition, the WTO recognised that differences in substantive law and effective competition law enforcement have consequences for liberalised trade. Moreover, competition policy issues were also seen to interface with a growing range of WTO activities, giving rise to an increasing need to ensure there is a 'mutual coherence' between trade and competition policy.[60] For example, under the GATT–WTO framework, the General Agreement on Trade in Services (GATS) contains provisions related to the control of anti-competitive practices. These relate not only to questions of market access and fair conditions of competition based on national treatment[61] but also to international cooperation to control anti-competitive business practices.[62] In addition, the Agreement on Trade-Related Investment Measures (TRIMs) will

57 A.N. Campbell et al, supra n. 40 at 12.
58 Id. at 13.
59 World Trade Organisation, 'Report (1998) of the Working Group on the Interaction between Trade and Competition Policy to the General Council', WTO Document WT/WGTCP/2, 8 December 1998 (98-4914), at 37 and 38.
60 WTO, Press release regarding the Ministerial Conference in Singapore, December 1996.
61 Article XVII of GATS, for example, states 'each member shall accord to services and service suppliers of any other member ... treatment no less favourable than it accords to its own like services and service suppliers'. This may include either formally identical or formally different treatment, but either of these will be considered 'less favourable' if such treatment 'modifies the conditions of competition in favour of services or service suppliers of the member compared to like services or service suppliers of any other member'.
62 See, in particular, Article IX of GATS, which recognises the potential of restrictive business practices to restrain competition and requires member countries to enter into consultations with a view to eliminating such practices at the request of any other member. See also Article XVI of GATS, which prohibits various restrictive measures for market access.

be reviewed by the end of 1999. At that time the WTO's Council for Trade in Goods will discuss whether or not the TRIMs Agreement should be complemented with provisions on competition policy.[63]

For its part, the WTO Working Group on the Interaction of Trade and Competition Policy is proceeding cautiously and gradually at the multilateral level in discussing the institutional linkages between trade and competition policy and the feasibility and desirability of expanded cooperation in competition law enforcement. While recognising the significant strengthening of bilateral and regional enforcement cooperation, the working group's multilateral efforts are in a formative stage and will likely be initially limited to discussions of two elements: '(i) the fostering of shared understanding and voluntary convergence through the sharing of national experiences, legislation and jurisprudence; and (ii) deliberations on possible basic standards to be incorporated in Members' competition legislation.'[64]

Relationship of multilateral to bilateral methods of convergence

In my view, a multilateral code approach involving the WTO will likely gain greater favour and momentum once there is greater consensus on the objectives of convergence, the basic principles and concepts that should underlie a harmonised transborder merger law, and an apparent risk of imminent and expanding private restraints that could undermine the open market access, expanded trade opportunities and effective market competition that have been realised through trade liberalisation.

In the same way that the success of the GATT Uruguay Round negotiations depended on an understanding that the multilateral trading and financial system had broken down and multilateral agreement was crucial, so too, in my view, will the growing threat of anti-competitive transborder mergers resulting from economic integration driven by globalisation and the forces of deregulation and privatisation have to be readily apparent before there will be a multilateral consensus to adopt a substantive competition law code.

In the meantime, bilateral and regional agreement efforts to coordinate competition law enforcement and liberalised trade activities based on positive comity are useful in that they lay the groundwork for future multilateral agreement on procedural enforcement. More importantly, in my view, they will probably also slow the prevalence of anti-competitive transborder mergers so that a substantive multilateral antitrust code can be effective in the future. The problem with extensive transborder mergers on a global scale is that effective market competition in world trade can be thwarted and not readily remedied once these mergers have taken place. A substantive antitrust code may be a moot point if it comes too late. The time to act is sooner rather than later and the problem with this is that most nations need to clearly see the threat before multilateral agreement becomes possible and this takes time.

Competition authorities appear to be using this time to establish a coordinated enforcement approach on a bilateral and regional basis. The key will be whether the coordinated enforcement approach will be effective in addressing the right issue. In my view, the issue is to promote and protect effective market competition and not the competitiveness of any one particular firm. Calls to establish greater cost efficiency and to reduce regulatory uncertainty for multinational enterprises as part of a convergence effort should not be misinterpreted to mean that there should be less competition law enforcement governing international trade transactions. Rather, effective competition law enforcement, in my view, means transborder mergers should be addressed from a market competition perspective within a widening liberalised trade framework. Moreover, competition authorities should not confuse market competition with the competitiveness of individual multinational enterprises. Understanding this distinction will be crucial to not only protect hard won trade liberalisation opportunities in the short term, but also to allow time to develop a multilateral substantive antitrust code before the damage is done and extensive private trade barriers cannot be remedied.

63 A.N. Campbell et al, supra n. 40 at 13.
64 World Trade Organisation, supra n. 59 at 7.

In this light, the comments of Auke Haagsma seem particularly noteworthy given the challenge of trade and competition law convergence which lies ahead:

> Trade is not liberalised by the absence of competition rules but precisely by their active enforcement. And trade is not enhanced so much by harmonising competition rules, but by making sure that active competition policies are established in all countries which participate in the world trading system. Thus a country without competition rules and enforcement policies is not to be commended for not creating a (government) trade barrier but is to be criticised for not eliminating (private) barriers to trade.[65]

Bilateral cooperation and regional approaches toward convergence

Convergence, then, depends not only on a common understanding of rationale, objectives and underlying substantive law principles but also on a consensus for an effective set of enforcement procedures to give effect to those principles.

Apart from the European Union, which effectively has a harmonised competition policy regime in place, regional agreements on competition law are usually severely constrained in scope and content by national sovereignty considerations. As a consequence, progress toward convergence of enforcement procedures has primarily been made through bilateral agreements between competition authorities. As Hank Spier, Chief Executive Officer of the ACCC, states:

> these agreements are not only valuable in themselves in lessening the impact or possibility of differences between the parties in the application of their competition laws, they also provide a more conducive environment from which to expand cooperation.[66]

These cooperative competition law enforcement agreements initially followed the pattern of the 1986 OECD recommendations based on traditional comity by providing for notification, exchange of information, consultation and coordination of enforcement action. More recently, a greater cooperative approach based on positive comity has been taking place based on the bilateral agreement for competition policy enforcement entered into by the United States and the European Union in 1991.[67]

Specifically, agreements based on the US–EU bilateral agreement include not only a traditional comity provision by which each country is obliged to consider the interests of the other, but also a positive comity provision by which one country can request that the other country initiate an investigation or commence enforcement proceedings for anti-competitive conduct in the other country when the former country's interests are adversely affected.[68] Unilateral action through extraterritorial enforcement of one's competition law, therefore, will be limited by the positive comity obligations under these agreements.

For example, the ACCC and the New Zealand Commerce Commission signed a positive comity cooperation agreement in July 1994 to exchange information and provide enforcement assistance to each other. This agreement was based on the US–EU agreement and it led to the ACCC negotiating a similar bilateral agreement with the Fair Trade Commission in Taiwan in September 1996. Moreover, on 28 April 1999, after two years of negotiations with the US Department of Justice and the US Federal Trade Commission, the ACCC concluded a bilateral agreement on mutual antitrust enforcement assistance based on traditional as well as positive comity principles.[69] In short, competition authorities in both countries will now be able to exchange evidence on a reciprocal basis in enforcement proceedings, including transborder mergers, and assist each other in obtaining evidence located in each other's country.[70] However,

65 Auke Haagsma, Official of the European Commission's Directorate General for Competition, 'An International Competition Policy as a Means to Create an Open Global Market Place', *International Harmonisation of Competition Laws*, ed. Chia-Jui Cheng et al, Dordrecht: Martinus Nijhoff Publishers, 1995, 409 at 412.

66 H. Spier, supra n. 6 at 7.

67 Agreement between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, 1991.

68 H. Spier, supra n. 6 at 8.

69 Id.

70 ACCC, 'Global Enforcement Cooperation', Media release 47/99, 28 April 1999.

such reciprocal assistance obligations are also subject to domestic public interest considerations and mutual confidentiality requirements which are annexed to the bilateral agreement.

Expanding bilateral progress on enforcement convergence has also led to a regional approach. The North American Free Trade Agreement (NAFTA) and meetings by APEC (Asia Pacific Economic Cooperation) are two examples of this emerging trend. For example, Article 1501 of NAFTA requires each party to adopt or maintain measures to proscribe anti-competitive business conduct, to take appropriate action with respect to these measures, and to consult each other about the effectiveness of these measures. The parties are also required to cooperate with each other in enforcement matters including mutual legal assistance, notification, consultation and exchange of information.

Greater regional harmonisation of competition policy has also been discussed at APEC. Specifically, the APEC Ministerial meeting of 1992 created an Eminent Persons Group (EPG) which recommended in November 1993 that APEC promote greater convergence of competition policy.[71] In 1995, APEC leaders identified competition policy as one of 15 action areas in its Osaka Action Agenda (OAA). The OAA was formulated to implement APEC's Bogor Declaration of 1994 which called for free and open investment in the APEC region by 2010 for industrialised countries and 2020 for developing countries.[72]

The OAA called upon APEC member nations to develop individual action plans and a collective action plan to implement its Bogor Declaration. The OAA also included guidelines for developing these plans. For competition policy, these guidelines called for transparency of competition law and its enforcement, development of appropriate technical assistance, and establishment of appropriate cooperation arrangements among APEC member countries. In 1996, as part of its Manila Action Plan, APEC outlined its first competition policy collective action plan (CAP) which reflects the collective action plan guidelines for competition policy in the OAA. To help implement its action plans, APEC has established a Committee on Trade and Investment (CTI). CTI is ultimately responsible for identifying areas for closer cooperation in competition policy, law and enforcement and it has utilised annual competition policy workshops since 1995 to facilitate this process (coordinated by New Zealand). These workshops have been engaged in preliminary study of 'the way in which effective laws and effective enforcement of laws, designed to protect processes of competition from anti-competitive business conduct and market structures, contribute to free trade and investment goals'.[73]

In addition, APEC has recently established a program of technical assistance seminars on competition policy and a database with Internet access which will outline the competition policies,[74] legislation, administrative organisation, guidelines, publications, cooperative agreements, academics, specialists and statistical data from all APEC member countries.[75] The annual workshops, technical assistance seminars and the Internet links are all aimed at harmonising both procedural enforcement and substantive competition law on a regional basis. The effectiveness of this approach clearly depends on contributions of information and the continuing support of APEC member nations.

As a consequence of the bilateral and growing regional approaches to convergence, the ACCC, in my view, is correct in its assessment that we are coming full circle to focus our efforts on trying to achieve a multilateral code solution again as a result of positive comity enforcement cooperation efforts. Specifically Hank Spier has stated:

71 G. Addy, supra n. 11 at 406.

72 Mark Steel, New Zealand Ministry of Commerce, Chairman APEC Workshops on Competition and Deregulation, 'APEC's Activities Relevant to the Interaction between Trade and Competition Policy — Communication from APEC to the WTO Working Group on the Interaction between Trade and Competition Policy'. World Trade Organisation Document WT/WGTCP/W/18, 4 July 1997, at 1.

73 Id. at 3.

74 APEC's Partners for Progress Technical Assistance Seminars on Competition Policy began in 1997 based on a proposal from Japan.

75 ACCC, *Exports and the Trade Practices Act*, October 1997, at 40. See also http://www.apeccp.org.tw/.

> Eventually, it is not beyond the imagination that some sort of plurilateral framework can be developed within which the varying forms of growing cooperation can take place. This is not a new idea — a European Commission Group of Experts[76] proposed in 1995 **a building block approach** involving a deepening of bilateral agreements and development of a plurilateral framework[77] which would develop and expand its coverage progressively through a domino effect. The plurilateral framework might involve elements already incorporated within bilateral agreements, to which would be added a set of minimum appropriate competition rules, a binding positive comity instrument and an effective dispute resolution mechanism. Such a mechanism has more chance of success if it involves the multilateralisation of an already successful cooperative approach. Continuing discussions on convergence in fora like the WTO should be encouraged and supported.[78]

Nevertheless, in my view, the success of achieving a multilateral consensus will depend (as I argued earlier) on there being a clear consensus about the impending threat to trade liberalisation from private anti-competitive trade barriers being created such that a multilateral solution is seen as a timely, necessary and preventative solution.

Implications of convergence process for Australia

Australia, like Canada, is a nation heavily dependent on export trade. Moreover, both nations must now compete within a liberalised trading framework against much larger nations. To this extent, it is critical that nations like Australia and Canada take the lead in the convergence debate, to define its objective as a necessary movement to address anti-competitive trade practices. This is necessary to protect hard won market access achieved through trade liberalisation. Toward this end, efforts must be taken to point out the underlying fundamental principle of effective market competition and its 'balanced' relationship with (i.e. not subservience to) individual firm competitiveness and efficiency arguments. So too, there should be a greater international focus on the concept of market power which can result from unrestrained private barriers to trade when government trade barriers are eliminated.

Australia appears to be in a better position than most nations to make this case given its domestic competition policy focus on effective market competition from a consumer welfare perspective and given that it already has an effective merger review mechanism for balancing the related principles of firm competitiveness and efficiency.

Indeed, Australia seems willing to take on this challenge. Specifically, as recently as October 1997, the ACCC, recognising the converging relationship between trade and competition policy, issued additional merger guidelines in respect of 'the Commission's approach to mergers, acquisitions and other collaborative arrangements that aim to enhance exports and the international competitiveness of Australian industry'.[79]

Australia's new competition policy focus on trade

Australia's revised merger policy seeks to accommodate international trade and transborder merger considerations in the following way.

Imports promote competition

As outlined previously, Australian merger review focuses on whether the proposed acquisition would have or is likely to have the effect of substantially lessening competition in a market in Australia.[80] In determining this

76 European Commission, 'Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules', Brussels, 1995. The expert group was comprised of three external experts and six EC officials.

77 Mr Spier's reference to a plurilateral framework likely refers to the potential integration of any potential multilateral harmonised competition code proposal into the WTO trade and legal framework as a plurilateral trade agreement in the sense of Annex 4 to the WTO Agreement. This would facilitate the extension of any initially limited membership to other WTO member countries as well as taking into account the interface problems of trade and competition law in trade in goods, trade in services, intellectual property rights and foreign investment. See Ernst-Ulrich Petersmann, supra n. 55.

78 H. Spier, supra n. 6 at 8.

79 ACCC, supra n. 75 at page i.

80 Section 50 of the Trade Practices Act.

question, the role of import competition in Australian markets is an important consideration[81] and the nationality of the acquiring company is not relevant. As ACCC Chairman, Professor Allan Fels, states: 'In a small open economy such as Australia, import competition is often a critical structural factor in the market providing the incentive for competitive conduct'.[82] When domestic producers are exposed to international competition through import competition, they must be innovative and generate efficiencies in production, distribution and management in order to compete. As a consequence, the ACCC views import competition as a critical constraint on the ability of merged firms to exercise market power, and it will not oppose mergers in the trade-exposed sector where there is a significant, sustained and competitive level of imports.[83]

Competitive distribution infrastructure promotes trade and exports

While trade liberalisation has reduced the ACCC's concern with the level of domestic concentration through mergers in trade-exposed industries due to greater import competition, merger policy has increasingly been focused on the non-traded sector, in particular service and infrastructure industries which support industries engaged in international trade. Both are critical suppliers of competitive inputs to the trade-exposed industries. In this respect, the ACCC has stated:

> Both policy makers and regulators in Australia recognise that it is critically important to ensure that those trade-exposed sectors of the economy have competitive input markets, so as to be able to compete internationally. In this way, competition policy is directed to supporting and complementing trade and industry policy objectives.[84]

The ACCC's focus in respect of mergers now centres on deregulating infrastructure industries in areas like energy, rail transport, communications and financial services. In this way, the ACCC 'has a role to play, through the implementation of competition policy, in encouraging the development of an environment in which firms in the trade-exposed sector are able to enhance their international competitiveness'.[85]

Effective merger enforcement protects hard-won open market access

Open market access achieved from trade liberalisation and the potential for greater competition (i.e. innovation and efficiency) from import competition may be defeated where private trade restraints can be created or continue to exist due to ineffective competition law enforcement. An anti-competitive transborder merger or other arrangement in the distribution sector of a market, for example, can prevent import competition from reaching retail consumers and may result in significantly higher prices being charged than in a more effectively competitive market (i.e. charging more and offering less through the exercise of market power restraints, not by being more innovative or efficient). Trade is affected (i.e. thwarted) if importers are thereby effectively denied open market access.

Effective competition law enforcement can ensure that the benefits of trade liberalisation are not defeated by the imposition of private barriers to trade. In addition, trade liberalisation and open competitive markets can complement competition law enforcement by reducing the problems that competition laws are designed to address. The potential for effective import competition in a traded goods sector can constrain the exercise of unilateral or coordinated market power in a domestic market.

At the same time, however, such imports must not be dumped at prices below their production costs. A related example of the application of competition law to trade policy is the abolition of Australia's and New Zealand's anti-dumping laws as between the two countries, such that dumping is now treated as a restrictive trade

81 Section 50(3)(a) of the Trade Practices Act.

82 Professor Allan Fels, ACCC Chairman, 'The Australian System of Competition Law and its Relationship to International Harmonisation of Competition Laws', *International Harmonisation of Competition Laws*, ed. Chia-Jui Cheng et al, Dordrecht: Martinus Nijhoff Publishers, 1995, 355 at 357.

83 H. Spier, supra n. 6 at 2. See also ACCC, supra n. 75 at 15. Note too that the ACCC will not likely oppose any merger where comparable and competitive imports have held a sustained market share of 10 per cent or more in the last three years under paragraph 5.104 of the ACCC *Merger Guidelines* (1996).

84 H. Spier, supra n. 6 at 2.

85 Id.

practice under competition legislation. Competition laws have thus been extended to anti-competitive conduct affecting trans-Tasman trade in goods in addition to transborder mergers.[86]

International competitiveness considered a public benefit for authorisation

The ACCC may regard any significant increase in the real value of exports or the level of import substitution for domestic products, or any other matters relating to the international competitiveness of Australian industry, as a public benefit when determining that an otherwise anti-competitive merger results in such a benefit to the public that it should be allowed to take place.[87]

Renewed commitment to trade liberalisation through convergence

The ACCC sees the objective of trade and competition law convergence as being 'to enhance the efficient allocation of resources and result in the maximisation of national economic welfare'.[88] In addition, the ACCC clearly recognises that the process of convergence is an international process which must deal with the problems of anti-competitive transborder mergers, cartels and private barriers to trade:

> ... there is a perception amongst most nations that trade policy needs to be complemented by a strong domestic competition policy. If so, can we rely on current domestic competition policies evolving in a harmonised manner? To adequately address competition problems arising out of anti-competitive international mergers, cartels and other conduct, it may be that an international lead is required to provide a basis for domestic policies which at present [i.e. international leads] are sometimes not contemplated in the formulation of domestic policies.[89]

In this respect, Australia is committed to playing an active and informed role in this international convergence process. As Professor Allan Fels recently stated:

> It is my belief that greater progress towards convergence of antitrust principles will be achieved as a matter of necessity. There are tangible benefits to be gained by nations through the harmonisation not only of competition laws themselves **but of the economic principles and goals underlying these laws.** Primarily, policymakers must keep in mind that economics carries a universal message: that competition will generally provide the best means of maximising national economic welfare. [emphasis added][90]

Summary of convergence trends and conclusions

Convergence of trade and competition law has as its main objective the elimination and prevention of private restraints which can limit open market access, trade opportunities and market competition once public trade barriers have been eliminated through trade liberalisation. Increasingly trade and competition policies are becoming more closely linked because trading nations realise that these policies have a complementary objective — the promotion and maintenance of market competition. A process of consensus building is therefore taking place in a manner consistent with both the nature and methods of trade and competition law convergence.

The nature of trade and competition law convergence involves both efforts to seek harmonisation of substantive laws based on a determination of common underlying principles and efforts to seek greater cooperation in procedural enforcement through positive comity.

The methods of convergence are also specific to the nature of convergence itself. Specifically, efforts to harmonise substantive law are increasingly taking place on a multilateral basis again within the WTO, which is evident by recent discussion of the development of an international antitrust code. But this is only happening now, in my view, because there has

86 Id. at 3. See also s. 46A of the Australian Trade Practices Act and s. 36A of the NZ Commerce Act.
87 Section 90(9A) of the Trade Practices Act.
88 A. Fels, supra n. 82 at 355.
89 Id. at 360.
90 Id.

been significant progress in the intervening years since the Havana Charter to establish procedural enforcement cooperation to deal with restrictive business practices. This progress has resulted from expanding and more uniform bilateral enforcement agreements as well as regional convergence initiatives (EU, NAFTA, APEC etc.) which in turn had depended on past efforts to establish non-binding guidelines by UNCTAD and the OECD.

Bilateral agreements have played an important role in two ways. First, procedural enforcement cooperation has increased through positive comity between enforcement agencies by facilitating information exchange, addressing jurisdictional conflicts and assisting in coordinated enforcement action. Second, and perhaps more importantly, the increasing use of positive comity and expanding bilateral agreements based on more uniform provisions has in turn provided the base on which to attempt to again build (i.e. return to) a multilateral code approach — first, for substantive law and its underlying principles and second, in the future, perhaps a comprehensive procedural enforcement mechanism under the auspices of the WTO.

Thus, the short answer to our question of whether convergence of trade and competition law has adopted a code or comity approach to transborder mergers is that the process has adopted both and that they have been mutually reinforcing over time as opposed to being competing approaches to achieve the same objective.

The world's trading nations are increasingly recognising that the forces of globalisation (i.e. deregulation, privatisation, financial integration and resulting transborder mergers) coupled with a liberalised trade environment (i.e. open market access) means that there needs to be a complementary set of competition rules and that these rules need to be effectively enforced to achieve effective market competition (i.e. innovation, allocative efficiency and increased consumer welfare). Similarly, there is a consensus emerging that anti-competitive transborder mergers or other distribution arrangements, which solely increase individual firm competitiveness (i.e. cost and dynamic efficiencies) at the expense of market competition overall and which enhances a firm's market power and the establishment of private non-tariff barriers to trade, need to be restrained.

Australia seems to be one country that can offer a balanced perspective and show leadership in this process. It has a clear understanding of the economic principles underlying an effective market competition policy and it has experience in developing a balanced merger review framework which has evolved to accommodate new international trade considerations.

In my view, Australia's active procedural enforcement experience, based on sound underlying principles of market competition, allocative efficiency and consumer welfare, can only help to progress the harmonisation of substantive competition and trade law. This will likely take place when the underlying principles and their relationship to shared objectives is discussed on an increasing regional or multilateral basis. This in turn, should help the process of liberalisation stay true to its objectives of achieving greater market competition through open market access.

Nevertheless, as Hank Spier recently stated:

> Ultimately, the progression of international cooperation in competition law and policy will depend upon the commitment of governments as well as their enforcement agencies. At this stage, cooperation is growing, and the fact that there is discourse on further minimising differences between competition regimes is indicative of further enhancement of the level of cooperation. This will ultimately serve to assist the Commission as well as other enforcement agencies in achieving their domestic competition policy objectives, and at the same time enhancing international trade access.[91]

In closing, it is hoped that the convergence of trade and competition law will assist the trade liberalisation process achieve the opportunity, innovation and prosperity that results from both trade and effective open market competition and that the role of convergence will be properly understood within a globalisation context as this takes place. The words of Yun-Peng Chu should be remembered as we take on this challenge:

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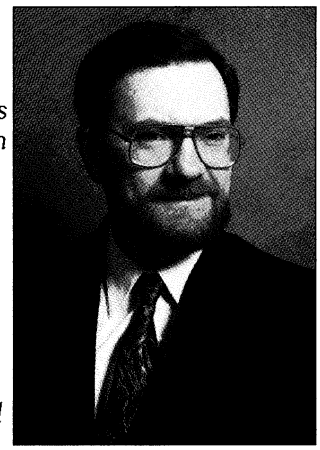
91 H. Spier, supra n. 6 at 9.

While competition is a dynamic force of change, it may also be a force of concentration. Winners will expand and are likely to use whatever means at their disposal to consolidate their turfs. Trade liberalisation without safeguards for fair competition could dangerously cause increasing concentration in some industries and less competition in the end. Should this be the case, the world trade could eventually stagnate for these industries, running contrary to the original intention of GATT negotiations. Consequently, the maintenance of competition is not only a supplement to the new world trade order, it should be part of the core, as it is key to the healthy survival of that new order.[92]

Competition first: engendering a regulatory framework in which developing economies can consider privatisation



The following article by Commission Deputy Chairman Allan Asher discusses issues of privatisation in relation to developing countries, in the light of Australia's experience in the reform of infrastructure services. It is based on a paper presented to the International Conference on Competition Policy and Economic Adjustment arranged by the World Bank, OECD and the Global Forum on Competition Policy — International Bar Association in Bangkok, Thailand on 27–28 May 1999.[93]

Introduction

> The British experience suggests the need for better integration of any privatization proposals with promotion of competition and preventing abuse of monopoly power in the industry, and for getting the regulatory framework right.[94]

Developing economies have legitimate expectations of strengthening sometimes-fragile infrastructure and bringing short supply of essential services into some sort of balance with demand. They also have wider social goals of promoting interaction and sharing opportunities between rural areas and cities, developing levels of literacy and skills, equitably distributing increases in national wealth, and harnessing technologies appropriate to the financial resources of the economy and the needs of its people and of the environment.

Privatisation is an instrument for attracting investment and improving the output and efficiency of economic sectors. However, advocates of reform initiatives must address the legitimate social goals of developing economies. Australia's deregulation and privatisation experience, in particular its policy emphasis on a competitive framework, has useful lessons.

The Australian context

Australia's implementation of micro-economic reform has focused on the network infrastructure industries including energy, telecommunications, airports, railways and water supply. Notable features include:

- incentive-based regulation of revenues or prices of natural monopolies;
- third-party access to infrastructure services to create opportunities for upstream and downstream competition;
- corporatisation or privatisation of government utilities so that resource utilisation and service provision mimics outcomes in a competitive market;
- winding up of territorial franchises; and
- jurisdictional review of legislation that restricts competition, subjecting it to a net public benefit test.

92 Yun-Peng Chu, 'Towards the Establishment of an Order of Competition for the International Economy', *International Harmonisation of Competition Laws*, ed. Chia-Jui Cheng et al, Dordrecht: Martinus Nijhoff Publishers, 1995, 399 at 453.

93 This article was prepared with the assistance of Peter Le Mesurier, Regulatory Affairs Division, ACCC.

94 Australian Consumers' Council, *Privatization of utilities: how are consumers affected?* Australian Government Publishing Service, Canberra, April 1995, p. 28.