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Competition of Competition Laws

Karl M. Meessen *

I. THE COMPETITION PARADIGM

The situation is succinctly described by Professor Rahl.[1] There are indeed inconsistencies in competition policy, law, and enforcement. One cartel, tolerated or even endorsed by the exporting state, may fall subject to the verdict of the competition law of the importing state. States do not seem to remember that they adopted the resolution containing the Code on Restrictive Business Practices ("RBP Code") by way of consensus, thereby pledging to take "appropriate action" against restrictive business practices "adversely affecting international trade, particularly that of developing countries . . . ."[2]

The Rahl problem makes present policies look parochial and out of step with the general trend toward globalization of markets. A grand design for international action seems to impose itself. However, instead of once again listing the numerous reasons calling for harmonization or at least joint or mutual enforcement of competition laws, this Article focuses on the limits of such strategies and ventures to find some merits in the situation as it now exists.

If there were no divergence of competition laws and related laws of economic and social policy, there could be no "competition of competition laws." Competition seems to be for business only. When lawyers

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[1] This Article is dedicated to Professor James Rahl on the occasion of his 70th birthday. The author gratefully remembers the guidance provided by Professor Rahl's book, COMMON MARKET AND AMERICAN ANTITRUST (1970), on which he relied in preparing VÖLKERRECHTLICHE GRUNDSÄTZE DES INTERNATIONALEN KARTELLRECHTS (1975).

[2] *Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, G.A. Res. 335/63, 48 U.N. GAOR Supp. (No. 61c) at 223, § C(i)1 [hereinafter RBP Code]. The identical text also appears in 19 I.L.M. 813 (1980).

turn to discussing competition law itself, they purport to know what is best, and they will not leave its development to the discovery process of a competition of competition laws. Yet they should. This Article argues that competition laws are just like cars in that they improve through competition. States producing competition laws eagerly compare the performance of their own laws with those of other states. The present bandwagon-type proliferation of free market elements in state economic policies is not due to superior academic argument. Instead, it is due to the actual performance of market economies in North America, Western Europe, and above all, in the Far East.

Worldwide uniformity, or harmonization approaching uniformity, would have its costs. Those costs, as will be explained in Section II, suggest that harmonization should not be carried too far. Section III argues that concepts of joint or mutual enforcement would soon reach inherent limits. Therefore, one is left with the task of coping with the problems resulting from a diversity of competition laws and enforcement policies.

The challenge of extraterritorial application of competition laws, and the response thereto in the form of adoption and occasional enforcement of blocking and claw-back statutes, produce the all-too-familiar conflicts of jurisdiction. To perceive these measures as a competition of competition laws helps in understanding the role international law must play. Section IV discusses the various principles and rules of international law in light of the *Wood Pulp* decision by the European Court of Justice,[3] the 1988 Antitrust Enforcement Draft Guidelines issued by the U.S. Department of Justice ("1988 Draft Guidelines"),[4] and the recently terminated *Minorco* takeover litigation.[5]

II. Risks of Overextending Harmonization

In Europe, supranational competition law is gradually replacing national laws. Moreover, in the world at large, states are undertaking commitments to pursue similar competition policies, and they are taking parallel action to introduce and strengthen elements of the market economy. Yet differences in competition laws persist. Conflicts among those

[3] A. Ahlström Osakeyhtiö v. Commision, [1987-1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,491 (Sept. 27, 1988)[hereinafter Wood Pulp].

[4] Department of Justice, Antitrust Enforcement Guidelines for International Operations, 53 Fed. Reg. 21,584 (1988) [hereinafter 1988 Draft Guidelines].

[5] Consolidated Gold Fields v. Anglo American Corp., 698 F. Supp. 487 (S.D.N.Y. 1988), *aff'd in part, rev'd in part and remanded*, Consolidated Gold Fields v. Minorco, S.A., 871 F.2d 252 (2d Cir. 1989), Consolidated Gold Fields v. Anglo American Corp., 713 F. Supp. 1457 (S.D.N.Y. 1989), 1989-1 Trade Cas. (CCH) ¶ 68,586 (S.D.N.Y. 1989)[hereinafter Minorco].

laws, and with related laws of an industrial policy character, continue to trouble decision-makers in business. The resulting need for accommodation causes state administrators to fall short of enforcing their intended policy goals.

To discuss overextension of harmonization may seem premature. Indeed, today's trend toward harmonization should be commended for a number of reasons. In the regional setting of European integration, however, some of the risks which may be associated with carrying harmonization too far have already begun to surface. What are those risks?

The European Economic Community ("EEC") recently adopted its Regulation on the Control of Concentrations Between Undertakings ("EEC Merger Regulation")[6] on December 21, 1989. This occurred after more than 16 years had passed from the time the EEC tabled the first proposal for merger control[7] in 1973. The two main issues which kept civil servants busy and political agreement in suspense during all those years were the standards of review and their scope of application vis-à-vis member state law. The same issues are likely to be the subject of further controversy, and statements made in the Council at the time the EEC Merger Regulation was adopted may well have a bearing on future disputes. In a most unusual step, those statements will be published in the *Official Journal of the European Community.*[8]

As to the standards of review, the EEC Merger Regulation in its final form came down in favor of making mergers subject to competition law criteria only. The question presented is, will the merger "create or strengthen a dominant position?" The merger regulation draft of November 30, 1988, still contained what could be understood as an industrial policy exemption.[9] Under Article 2(3) of that proposal, mergers qualified for an exemption if they contributed "to promoting technical or economic progress." Technical and economic progress are factors for evaluation with respect to the question whether "effective competition would be significantly impeded" in the final version of the EEC Merger Regulation. The deletion of the industrial policy exemption, at first sight, means victory for competition policy purists. Its price, however, is to dilute the very standards of competition law by blending them with industrial policy elements.

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6 *Council Regulation No. 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings,* 32 O.J. EUR. COMM. (No. L 395) 1 (1989)[hereinafter *EEC Merger Regulation*].

7 *Proposal for a Regulation (EEC) of the Council on the Control of Concentrations Between Undertakings,* 16 O.J. EUR. COMM. (No. C 92) 1 (1973).

8 *EEC Merger Regulation, supra* note 6, at n. 7.

9 *Amended Proposal for a Council Regulation on the Control of the Concentrations Between Undertakings,* 32 O.J. EUR. COMM. (No. C 22) 14 (1989).

For the time being, the scope of application of European merger control is rather narrowly defined. The EEC Merger Regulation is expected to cover some 50 cases per year in a market of 320 million people.[10] All other mergers continue to be subject to Member State merger control as it exists in some Member States and not in others. In addition, the Commission is given discretion to refer to a Member State authority those mergers of a "community dimension" where the relevant market in that Member State "presents all the characteristics of a distinct market."[11] Finally, Member States retain concurrent jurisdiction in cases of a community dimension to pursue their "legitimate interests" outside competition law, such as public security, plurality of the media, and prudential rules.[12]

European merger control demonstrates in the first place how difficult it is to single out competition as a subject matter of its own and separate it from bordering industrial policy considerations and other less related matters, such as national defense and freedom of the press. In other words, any move toward more harmonization of competition laws also affects a number of other areas of state activity. The question then arises whether those activities should be harmonized as well.

The General Agreement on Tariffs and Trade ("GATT")[13] provides freedom of trade in goods and may soon provide for freedom of trade in services.[14] The resulting globalization of markets, however, is not matched by any globalization of industrial and distributory policies which are intended to promote technological progress or compensate actual or perceived market failures and undesirable effects on income distribution.[15] Unless harmonization reaches those policies as well, nation-states will continue to act individually and inconsistently, and they will continue to prejudice the policy goals of other states. The national bias such policies imply often should be deplored as mercantilist and protectionist. Yet total elimination of the bias would require an international structure quite different from the one that presently exists. This would approach engaging in some type of world state utopia.

The second, and more indirect, lesson contained in the European

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[10] Press Release of the Commission of the European Community (Dec. 22, 1989), Memo 77/89, at 2.

[11] *EEC Merger Regulation, supra* note 6, art. 9.

[12] *Id.*, art. 21.

[13] General Agreement on Tarriffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (effective Jan. 1, 1948)[hereinafter GATT].

[14] *General Agreement on Tariffs and Trade: Decisions Adopted at the Mid-term Review of the Uruguay Round*, 28 I.L.M. 1023 (1989).

[15] For a discussion of the need for such policies, see Ordover, *Conflicts of Jurisdiction: Antitrust and International Policy*, LAW & CONTEMP. PROBS. 165 (1987).

merger control example is that complete harmonization, even in the wake of the 1992 integration,[16] is neither necessary nor desirable. Most mergers will continue to be reviewed, or not reviewed as the case may be, under Member State law. The resulting differences in the legal environment in the various parts of the European market cannot be ignored. But it is for business and for the respective state to determine future merger activity. The "new approach" to harmonization[17] is to substitute supranationally imposed harmonization by a mutual recognition of standards, which exposes those standards to a competition among themselves.

Despite shrinking distances and globalization of markets, states remain the principal forum for political decision making. Competition law, with its industrial policy and distribution policy implications, continues to be a central field for state political action. Overextending harmonization would make competition law inflexible because agreement on any change would be slow to reach and unresponsive to economic reality, and because factual conditions could not be the same throughout an extensive area. Furthermore, a competition of competition laws will sustain that elements of political choice and personal freedom, which democratically organized peoples should be anxious to retain.

Business, by making decisions regarding cross-border investment and disinvestment, indicates success or failure. If harmonized competition law were to fail on a universal scale, adjustment would still be possible. A more successful example in a neighboring state may be observed and imitated. In a way, the competition of competition laws follows the same succession of innovation and imitation that is the pattern of competition in business conduct. The best outcome for competition itself can be expected if harmonization is not carried to an extreme and a lively competition of competition laws is promoted.

III. Limits to Joint and Mutual Enforcement

Harmonization could be replaced, to some extent, by joint or mutual enforcement of competition laws. Mutual recognition of home state or country of origin standards in fact moved European integration out of the blind alley in which harmonization policy found itself in the early 1980s, when Member States were unable to agree on common standards. Perhaps a similar device of mutual enforcement of competition laws, or a

[16] *See* Meessen, *Europe En Route to 1992: The Completion of the Internal Market and its Impact on Non-Europeans*, 23 INT'L LAW. 359 (1989).

[17] *See Council Resolution on a New Approach to Technical Harmonization and Standards*, 28 O.J. EUR. COMM. (No. C 136) 1 (1985).

more extreme step of immediate joint enforcement of competition laws, should be employed.

The practice of competition law has seen little joint enforcement. Joint defensive action is quite common, though.[18] There has never been a case where the United States, Japan, and the European Communities ("EC"), for example, have joined forces against a particular cartel. At present, multiple foreign governments could not be plaintiffs in such civil or criminal proceedings. One might consider changing national law in that respect, or better still, consider setting up an international law instrument of that kind. Is there a need, however, for joint enforcement along these lines?

Joint enforcement, under present law, could be organized only in the form of parallel action, with each state proceeding under its own laws to fight a single set of restrictive practices. Such parallel action was taken in the *IBM* case.[19] In that case, the U.S. government and several private litigants instituted proceedings charging IBM with illegal lead-time practices. After this litigation had proceeded for several years, the Commission of the European Communities ("Commission") initiated its own investigation and filed suit against IBM shortly after Ronald Reagan defeated Jimmy Carter in the 1980 presidential elections. The Reagan administration was critical of the duplicative character of the EC proceedings and, understandably, stepped up its criticism once it dropped its own civil action against IBM in the beginning of 1982. As of that time, the EC proceedings ceased to be parallel to the U.S. proceedings. Instead, they had become contradictory to the position then held by the U.S. government, which also saw its international law objections reinforced.

The *IBM* case shows that joint enforcement in the form of parallel action carries the risk that enforcement policies later will float apart. Parallel action seems justified where each state has a valid case of its own which could be continued independently if one state drops out of the litigation. As a device for mutual support, parallel enforcement is not warranted. The remedies of one state usually suffice. Enterprises have property interests spread all over the world and thus are subject everywhere to the execution of fines, penalties, and other monetary awards

[18] For examples of cases where foreign governments, through diplomatic notes and amicus briefs, have joined forces to defend their respective nationals against the enforcement of domestic competition law, see Meessen, *Antitrust Jurisdiction Under Customary International Law*, 78 AM. J. INT'L L. 783, 791-94 (1984)[hereinafter Meessen article 1].

[19] International Business Machines Corp. v. Commission, 1981 E. Comm. Ct. J. Rep. 1857, 32 Comm. Mkt. L.R. 93. For later developments, see Legal Times, Jan. 18, 1982, at 29; Wall St. J., Mar. 31, 1982, at 1, col. 6; Wall St. J., Aug. 3, 1984, at 2, col. 2.

enforcing competition law, unless they foreclose all intention of ever doing business in a particular state. Fact-finding, of course, presents a serious problem of enforcement, but that problem need not be solved by parallel action. Consultations and exchanges of information will suffice, and indeed such cooperation is standard practice as it has developed under a series of OECD recommendations.[20]

Mutual enforcement of competition laws—*i.e.*, one state seeking to apply and enforce the law of another state—is not popular either. The RBP Code envisions mutual enforcement when it calls upon states to fight restrictive business practices whenever they affect international trade, whether or not anticompetitive effects on the domestic market are present.[21] This call has been ignored, however, as have, until recently, all suggestions of private international law doctrine to apply the competition law of a foreign state affected by restrictive business practices, even where that state's law is not the proper law of the contract.[22] An exception to the rule is Article 137(1) of the Swiss statute on private international law, which provides for the application of foreign law in such circumstances. Article 137(2) of the Swiss statute adds, however, that no claim for damages could be awarded which would not also be founded under Swiss law.[23]

Mutual enforcement of competition law, in all its variants, encounters a difficulty which does not seem to be present in fields of law where foreign law is traditionally applied. That difficulty results from the volatility of competition law itself. Market conditions are always on the move. An assessment of the factual situation in a particular case which may have been correct at the outset need not hold true through the last state of fact-finding. The problem then is how to arrange for foreign fora to constantly update their findings.

Moreover, in competition law, policy goals and legal instruments are subject to continuous change. Competition law is political law. It does not lend itself easily to being applied by the courts of other states. The application and enforcement of competition law cannot be separated from policy trends. The *IBM* case demonstrated this. Even German law has seen direct government intervention in certain cases. In Germany,

20 For the latest version of the OECD Recommendations, see *Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Restrictive Business Practices Affecting International Trade*, 25 I.L.M. 1629 (1986).

21 RBP Code, *supra* note 2.

22 *See* M. MARTINEK, DAS INTERNATIONALE KARTELLPRIVATRECHT (1987).

23 Schweizerisches Bundesblatt 1988, I 5. For an English translation, see P. KARRER & K. ARNOLD, SWITZERLAND'S PRIVATE INTERNATIONAL LAW STATUTE OF DECEMBER 18, 1987, 128-29 (1988).

cartel agreements and merger transactions may be exempted from statutory prohibition, even if confirmed by the courts, through a decision to that effect by the Federal Minister for Economics.[24] The acquisition of the aircraft producer MBB by the automobile and electronics group Daimler-Benz/AEG is the most recent example of the occasional exercise of that ministerial authority.

Should Switzerland, under its Article 137, make the outcome of private litigation dependent on such foreign government intervention? Should it guess what shift in enforcement policy will occur when one U.S. administration is succeeded by another? Enforcement subject to foreign government instructions does not work. Ignoring the instructions would be incorrect. To refrain from directly applying foreign competition law seems the only answer. This means, however, that private parties are left with seeking judicial review of restrictive practices before the courts of the state upon whose laws they rely. If that proves to be cumbersome or unfeasible, at least the parties know where they are.

Competition law, as noted above, cannot be separated from its economic and social policy context. Therefore, enforcement can be handled only by the state which produces the law and constantly monitors its development. Neither joint nor mutual enforcement helps to solve the problems resulting from the continued diversity of competition laws.

IV. International Law on the Competition of Competition Laws

The diversity of competition laws and of their enforcement may produce conflicting demands for business conduct. In addition, national legislators could shy away from regulating international conduct, thereby producing a competition law vacuum which allows restrictive business practices to develop free from state supervision. Both problems are due to the basic dilemma of international economic law: territorially limited state power must cope with transnational business operations.[25]

International law, although the only legal system binding upon all state decision-makers, has but a limited role in regulating the competition of competition laws. It is mainly for the competing states themselves to delimit the respective spheres of jurisdiction through "mutual

[24] German Law on Restraints of Competition, §§ 8, 24(3), BGB1.I 1761 (1980). For an English translation, see R. Mueller, M. Heidenhain & H. Schneider, German Antitrust Law (3d ed. 1984).

[25] For a general examination of the international law of jurisdiction, see Meessen, *Conflicts of Jurisdiction Under the New Restatement*, 50 Law & Contemp. Probs. 47 (1987)[hereinafter Meessen article 2].

adjustment"[26] brought about by national conflict of laws rules. International law comes in only when states deviate from the general pattern of jurisdictional conduct as developed by a process of mutual adjustment. That pattern reflects the minimum standard of international law, whereas it is for national conflicts legislation to seek the optimal solution from the perspective of the respective state.[27]

Following the structure of the *Restatement (Third) of Foreign Relations Law of the United States* ("*Restatement*"), three principles of international law on state jurisdiction have emerged: 1) the minimum contacts principle, 2) the principle of reasonableness, and 3) the principle of balancing state interests.[28]

A. Minimum Contacts

Section 402 of the *Restatement* offers a wide choice of connecting factors which may be relied upon to establish a basis for state jurisdiction.[29] That choice is somewhat narrowed when it comes to vindicating jurisdiction in a particular field of law, such as competition law. This subject is stated in § 415 of the *Restatement* only as a matter of U.S. law, implying its conformity with international law.[30] The key question discussed in international law doctrine is whether substantial, direct, and foreseeable effects on the domestic market would suffice to justify the application of domestic competition law (the effects principle), or whether some elements of domestic business conduct would have to be established (the principle of territoriality).

In the *Wood Pulp* case, the Court of Justice of the European Communities confirmed EC jurisdiction over agreements by Canadian, Finnish, and U.S. producers, which allegedly fixed the price of exports into the EC.[31] On the one hand, the Court found the territoriality principle to be "universally recognized in public international law."[32] On the other hand, the Court construed the territoriality principle to refer to the place of implementation, adding that it would be "immaterial" whether or not the producers implemented their agreement within the EC by taking "recourse to subsidiaries, agents, subagents or branches within the

26 For a sociological study of that process, see C. LINDBLOM, THE INTELLIGENCE OF DEMOCRACY, DECISION MAKING THROUGH MUTUAL ADJUSTMENT (1965).

27 *See* Meessen article 1, *supra* note 18, at 789-90, 801-02.

28 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402-403 (1987)[hereinafter RESTATEMENT].

29 *Id.* § 402.

30 *Id.* § 415.

31 *Wood Pulp, supra* note 3.

32 *Id.*

Community in order to make their contacts with purchasers within the Community."[33]

If the *Wood Pulp* court's interpretation of the territoriality principle is correct, the effects principle must be credited for setting more clearly defined and narrower standards. Basing jurisdiction on effects on domestic competition has the additional advantage of corresponding to the rationale for competition law, namely the establishment and protection of a particular economic system by the state exercising jurisdiction.[34] Meanwhile, the whole controversy will have to be reconsidered since all of the member states of the United Nations have, under the RBP Code, consented to an exercise of antitrust jurisdiction whenever restrictive business practices affect international trade, even if it is unrelated to the state exercising jurisdiction.[35] The common denominator of state practice might turn out to be that states simply follow their enlightened self-interest, and not any preference for a particular connecting factor.[36]

B. Reasonableness

The *Restatement* emphasizes the principle of reasonableness. According to sections 403(1) and 403(2) of the *Restatement*,[37] reasonableness requires a state to consider the exercise of jurisdiction in any given case under a combination of all conceivable factors, and then suggest to go ahead, refrain from regulatory action, or find some medium way of accommodation. A principle this broad can best be operated under national law, where the constitution and a body of statutory provisions set up a "reasonable" and predictable framework for arguing "reasonableness."

What may seem reasonable under the law of one state, however, need not be considered reasonable under the law of another state. Otherwise there would be no conflicts of jurisdiction. As a principle of international law, reasonableness merely means that in conflicts cases, states should not satisfy themselves with a single-minded pursuit of their regulatory goals, but should exercise restraint by taking into account all pertinent factors, such as individual hardship and conflicting interests of other states.[38]

Reasonableness is identical to comity under U.S. law. It shares its

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[33] *Id.* at 18,612.

[34] *Cf.* Puttler, *Summary of A. Ahlström Osakeyhtiö v. Commission*, 83 AM. J. INT'L L. 357, 360 (1989).

[35] RBP Code, *supra* note 2, § E(4).

[36] Meessen article 1, *supra* note 18, at 798-801.

[37] RESTATEMENT, *supra* note 28, § 403(1) & (2).

[38] For an elaboration of this point, see Meessen article 2, *supra* note 25, at 54-60.

flexibility where there is no congressional intent to the contrary. If there is contrary intent, comity or reasonableness is defined by Congress, or maybe by the President. In its 1988 Draft Guidelines, the Justice Department denies U.S. courts the right to decide on the basis of comity antitrust suits that are prosecuted by the government.[39] In private litigation, U.S. courts may and, under the guidance of amicus briefs of the government, should exercise restraint on the basis of comity. Whether or not there is an "executive" prerogative of defining comity in such a manner is for U.S. law and its constitutional principles on separation of powers to determine. International law is not involved. The *Restatement's* extensive reliance on the principle of reasonableness should not cloud its basic weakness under internaional law.

C. Balancing State Interests

The workability of the competition of competition laws is at stake when one state interferes with another state's application of its competition law, or with another state's industrial policy priorities. Whether this type of conflict occurs will vary from case to case. It is possible that the government of a state affected by a particular practice will not object to the extraterritorial application of competition law, and a state may in fact welcome such action where it takes a pro-competition stand as well. If, however, a conflict arises, then section 403(3) of the *Restatement* suggests to "defer to the other state if that state's interest is clearly greater."[40]

The foregoing balancing rule of non-interference differs from the principle of reasonableness in that it reduces the open-ended multifactor approach to the weighing of just two factors: the interests of the regulating state and those of the foreign state affected. The rule is still controversial. The *Restatement* states it as a non-mandatory rule, using the language "should defer."[41] This author, however, believes it to be a binding rule of international law. If state practice is considered as a whole, and diplomatic practice is included, as it should be from the perspective of international law, the operation of the rule is evidenced by the ultimate resolution of many conflicts of antitrust jurisdiction since the end of World War II.[42]

The rule is reflected in recent case law as well. In the *Wood Pulp* case, the U.S. applicants pleaded an infringement of the international law

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39 1988 Draft Guidelines, *supra* note 4, at 21,594-95.

40 RESTATEMENT, *supra* note 28, § 403(3).

41 *Id.*

42 *See* Meessen article 1, *supra* note 18 at 802-08; Meessen article 2, *supra* note 25, at 60-65.

rule of non-interference, which "prohibits a state from adopting measures under its national law if those measures have an adverse effect on the interests of another state and if those interests outweigh its own."[43] The Court saw no need to inquire into the existence of the principle, but it also took pains to explain that in this particular case, it was not infringed upon.[44] The application of EEC competition law indeed did not prejudice "greater interests" of the United States. The U.S. government, fully aware that it would have taken a similar attitude had the agreements been aimed at the U.S. market, had declared itself "satisfied with the results" of the consultations held with the EC Commission.[45]

In the *Minorco* litigation, the U.S. District Court for the Southern District of New York effectively blocked a foreign takeover.[46] Minorco, a Luxembourg subsidiary of the South African Harry Oppenheimer group, was to buy the shares of the British company Consolidated Gold Fields PLC. The majority of Gold Fields' shareholders accepted the bid. The main link to the United States was the 57% owned U.S. subsidiary of Gold Fields. The antitrust charge was that the Oppenheimer group would dominate the gold market and shift production from its future U.S. subsidiary Newmont to its less profitable but fully owned South African companies. The charge was upheld even though Minorco offered to divest itself of Newmont.[47]

The U.S. antitrust litigation was resented in Britain as yet another instance of extraterritorial imperialism on the part of the United Staes.[48] It should be mentioned, however, that the British Takeover Panel ("Panel"), while enjoining Gold Fields itself from continuing the antitrust action in the United Staes, did nothing to prevent Newmont from continuing that lawsuit.[49]

The self-restraint of the Panel may be interpreted as complying with the general British attitude of refraining from all kinds of extraterritorial jurisdiction. Yet there are other reasons why the Panel may have stopped halfway, effectively allowing the U.S. Court to frustrate what essentially was a takeover of a British company by a Luxembourg company. One reason was that the British company would have been made

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43 *Wood Pulp*, *supra* note 3.

44 *Id.*.

45 Summary of U.S.-EC Consultations on the EC's Proceeding Against Wood Pulp Producers, quoted in full in View of Current International Antitrust Issues (paper delivered by Charles Stark before the World Trade Institute (May 20, 1982)).

46 Minorco, *supra* note 5. *See also Lessons of the Minorco Bid*, Fin. Times, May 18, 1989, at 14, col. 1 [hereinafter *Lessons*].

47 Minorco, 698 F. Supp. at 493.

48 *Lessons*, *supra* note 46.

49 Fin. Times, Aug. 8, 1989, at 17, col. 2

part of a South African group. In fact, Gold Fields was acquired shortly afterwards by another British firm. The British government, in stark contrast to its attitude in other cases of jurisdictional conflict, reportedly did not take any diplomatic steps in defense of the consummation of the takeover. Though opposed to any kind of extraterritoriality at the expense of British companies in the abstract, the United Kingdom in this particular case does not seem to have been entirely unhappy about the outcome. Reviewing the dispute under the balancing rule, therefore, one may find that British interests were not impaired.

The balancing rule will be criticized in the future, as it was in the past, as demanding too much of national courts if they are expected to accord greater weight to foreign state interests than to domestic interests under certain circumstances. Yet U.S. courts have an impressive record in reconciling foreign and domestic interests and thereby establishing jurisdictional conflicts as false conflict cases. In cases where a true conflict exists, national courts indeed are not in a particularly good position to apply the balancing rule. The rule was produced by ministries of foreign affairs and, as any other rule of international law, it can be made subject to adjudication or arbitration by international tribunals. Balancing state interests is not a task unfamiliar to them.

The balancing rule represents what international law presently has to offer. It is in line with the basic principle of equality of states. The competition of competition laws, just like the competition among enterprises, can develop only on the basis of equality. Nevertheless, the international law on the competition of competition laws is open to improvement, and the instrument for such improvement would be to convene mulitilateral conventions on the subject. Such conventions could develop the principles outlined here and, above all, secure their recognition and enforcement.

V. CONCLUSIONS

The world of competition law is likely to remain an imperfect world. Harmonization may be desirable, but only up to the point where flexible adjustment to changing conditions by way of a competition of competition laws still remains possible. Joint and mutual enforcement can be introduced only to a limited extent, in view of the constraints resulting from the economic and social policy context of competition law. The task, therefore, is to enhance the international law organizing the competition of competition laws so as to fill the gaps and to deal with the frictions as they arise from time to time. The resulting transaction costs are

a tolerable price to pay for the benefits of a world-wide competition of competition laws.