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ALL ASPECTS OF THE SET OF MULTILATERALLY
AGREED EQUITABLE PRINCIPLES AND RULES
FOR THE CONTROL OF RESTRICTIVE BUSINESS
PRACTICES
Geneva, 13-21 November 1995
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REVIEW OF ALL ASPECTS OF THE SET OF MULTILATERALLY AGREED EQUITABLE PRINCIPLES AND RULES FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES: (a) REVIEW OF 15 YEARS OF APPLICATION AND IMPLEMENTATION OF THE SET

Restrictive business practices that have an effect in more than one country, in particular developing and other countries, with overall conclusions regarding the issues raised by these cases

Note by the UNCTAD secretariat

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INTRODUCTION

1. The Intergovernmental Group of Experts on Restrictive Business Practices on its fourteenth session, acting as preparatory body for the Third United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices*, requested the UNCTAD secretariat, inter alia, "to prepare a draft note describing selected cases of restrictive business practices that have an effect in more than one country, in particular developing and other countries, with overall conclusions regarding the issues raised by these cases" (Agreed Conclusions I (b), in annex I to the report of the fourteenth session, TD/B/42(1)/3-TD/B/RBP/106).

2. Accordingly, the present note first describes selected cases of restrictive business practices having an effect in more than one country, in particular developing and other countries, and gives a succinct analysis of each case, including a commentary. The second part contains a number of conclusions which might serve as a basis for discussions at the Third Review Conference.

* Hereinafter referred to as the Set.

I. Cases

1. French/West African Shipowners' Committees 1/

(a) Facts

The procedure initiated by the European Commission, upon complaints by a number of independent shipowners and the Danish Government, involved four liner conferences and 11 shipowners' committees which had agreed among themselves on restraints of competition regarding trade between France and 11 West African and Central African countries, that is, Benin, Burkina Faso, Cameroon, Central African Republic, Congo, Gabon, Guinea, Mali, Niger, Senegal and Togo. The arrangements agreed upon were aimed at allocating between their members all the freight carried by liners, and providing for machinery to monitor this arrangement set up to cover each of the shipping lines. Furthermore, the members systematically shared among themselves, on a monthly basis, all the traffic between France and the above-mentioned countries. In addition, after seeking the adoption by the authorities in these African countries of measures intended to reserve all freight traffic for themselves, the members took an active part in the implementation of such measures with a view to denying access to the traffic concerned by shipowners wishing to operate outside the committees.

(b) Action

In its decision, the European Commission held that these arrangements were contrary to the provisions of article 85 of the EEC Treaty and that their practices were in breach of article 86 of the EEC Treaty. The Commission pointed out that the group exemption for liner conferences did not cover the arrangements and practices in question and did not allow the establishment of a cartel in respect of the whole of the trade, or of a number of trades, so as to hinder outsiders from securing access, with the object or effect of eliminating all effective competition. The Commission deemed furthermore that the infringement constituted a serious breach of law, and imposed fines totalling ECU 15 million on the three main participants and lower fines of between ECU 2,400 and ECU 56,000 on less involved cross-traders. The Commission also indicated that it was ready to enter into talks with the authorities of these countries with a view to helping their countries' carriers secure a greater share of the traffic generated by their external trade.

(c) Commentary

In terms of substantive law, and also in terms of the Set [Section D.3 (a) and (c)], the restraints of competition agreed upon constituted hard-core arrangements between competitors. Furthermore, these restraints produced anticompetitive effects not only in Europe, but also in the 11 African countries mentioned above. The fact that the total elimination of all effective competition was in part owing to measures adopted by the countries concerned, at the request of the members of the shipowners' committees, raises wider questions of competition law and policy in these countries. It also gives rise to the issue of how to deal with the petitioning of foreign Governments to adopt measures to support private restraints of competition. The case shows that the enforcement of regional competition law providing for sanction against hard-core horizontal arrangements between competitors can also have procompetitive effects in other countries, including developing countries.

2. United States v. Kanzaki Speciality Papers Inc. 2/

Her Majesty the Queen and Kanzaki Speciality Papers Inc. 3/

(a) Facts

In these cases initiated in the United States and in Canada, competition authorities found that the enterprises involved - an American firm, an American wholly-owned subsidiary of a Japanese firm and the Japanese parent company of this subsidiary - had restrained inter-State and foreign trade by a continuing agreement, understanding and concert of action the substantial terms of which were to fix prices of jumbo roll thermal facsimile paper sold in the United States and Canada. For the purpose of forming and carrying out this arrangement, the enterprises had, among other actions, discussed and agreed to increase the price of such paper on various occasions in meetings and telephone conversations, issued price increase announcements to customers in accordance with their agreements and charged higher prices for such paper in the United States and Canada.

(b) Action

The arrangements agreed upon and carried out in this case were price cartels in breach of Section 1 of the Sherman Act and Section 45 of the Canadian Competition Act, R.S.C. 1885, c. C.-34, as amended. In Canada, a total of CAD 950,000 in fines was imposed against participating firms. In terms of substantive law, the cases were comparatively uncomplicated. What makes them particularly noteworthy in the present context is the fact that they were handled by the Antitrust Division of the United States Department of Justice and the Canadian Bureau of Competition Policy in close cooperation at the investigatory stage, in pursuance of the cooperation agreement between the two countries. The cooperation was felt to be helpful in successfully dealing with these cases in both countries. 4/

(c) Commentary

The cases concerning hard-core restraints of competition between competitors under the laws of both the United States and Canada, and also in terms of the Set [D.3 (a)], clearly illustrate that close cooperation based on bilateral cooperation agreements between countries in serious competition cases is both feasible and desirable. Cooperation had increased the effectiveness of law enforcement and probably also had reduced enforcement costs. The fact that substantive law and procedure differed in each country was no obstacle, at least as far as restrictive arrangements between competitors were concerned. It may also be noted that cooperation facilitated the imposition of fines on foreign firms in Canada, illustrating the effectiveness of national legal instruments in the defence against restraints of competition emanating from enterprises located outside national territory.

3. Electrolytic Tinplate 5/

(a) Facts

In this case, a Pakistani enterprise using electrolytic tinplate as basic packing material for the cooking oil it produces had invited quotations for the purchase of 4,600 metric tons of such tinplate. It received quotations from six foreign firms and found that the three lowest bids - from Luxembourg, United Kingdom and Germany for 2,300, 1,500 and 800 metric tons respectively - corresponded exactly to the total of the quantity required. In the end, the Pakistani firm had to buy 1,500 tons from the United Kingdom, 800 tons from Germany and 2,300 tons from two Japanese firms, as the bidder from Luxembourg refused to supply.

(b) Action

The Monopoly Control Authority of Pakistan initiated investigations under the competition law of Pakistan because of the fact that the three lowest bids covered exactly the total requirement and that this was unlikely to have occurred other than as a result of collusive tendering. No action was taken.

(c) Commentary

The fact that no action was taken despite strong circumstantial evidence may be explained by the absence of a practicable substantive law covering such restraints of competition and based on the effects doctrine which allows the establishment of jurisdiction even in cases where there is no relevant conduct on national territory, but only effects emanating from anticompetitive arrangements agreed upon abroad; and by the insufficiency of procedural instruments, in particular of investigatory powers allowing the collection of sufficient evidence to support a case against foreign firms, when such evidence is partly or entirely located abroad. The experience provided by, among others, that outlined in case 2 above, shows that, on the basis of appropriate national legislation and in cooperation among foreign competition authorities, such hard-core cases can be successfully handled even if the participating firms are located abroad. In terms of the Set, the relevant principles and rules fell under Section D.3 (b).

4. United States v. Pilkington Plc 6/

(a) Facts

Pilkington, a United Kingdom glass producer and the world's largest manufacturer of float glass, had imposed considerable restraints on licensees of its technology. According to the United States Department of Justice, Pilkington had limited licensees to specific countries, restricted their right to sub-license the technology and required them to report back all improvements they made in the commercial float glass process.

(b) Action

The United States Department of Justice initiated proceedings under Section 2 of the Sherman Act and eventually settled the case by consent decree. Pilkington agreed to end certain restrictions on licensees for the use of its float glass technology, allowing American licensees of Pilkington using pre-1983 technology to sub-license such technology to any overseas company, subject to certain confidentiality obligations.

(c) Commentary

The case shows that powerful action on vertical restraints of competition affecting outbound trade of a country is possible even if the addressee of such action is located in another country, and that such action may have procompetitive effects in other countries, including developing countries. It may be argued, however, that the likelihood of success of such action may at least to a certain extent depend on the commercial interest which the foreign enterprise has in the market controlled by the authority exercising jurisdiction and on its interest in avoiding conflict with this authority. Thus, for smaller countries, comparable action may be more difficult in practical terms.

5. Hartford Fire Insurance Co. v. California 7/

(a) Facts

In this case, 19 states and many private plaintiffs had alleged that four United States primary insurers selling reinsurance contracts to insurers, two United States trade associations, a domestic reinsurance broker and reinsurers based in the United Kingdom had violated the Sherman Act by engaging in various conspiracies aimed at forcing certain other primary insurers to change the terms of their standard domestic commercial general liability insurance policies to conform with the policies which the insurers involved in the arrangement wanted to sell. According to the plaintiffs, the United Kingdom firms involved had agreed to restrict the terms on which reinsurance would be written and to refuse to insure certain risks, to write all North American casualty reinsurance agreements with a pollution exclusion, and to boycott retrocessional insurance agreements which included certain North American property risks.

(b) Action

The District Court granted the defendants’ motion to dismiss. The Court of Appeals reversed this ruling, rejecting the Districts Court’s conclusion that the defendants were entitled to antitrust immunity, stating, among other reasons, that the foreign defendants did not enjoy such protection because their activities could not, as required by the law, be "regulated by State law", and that the principle of international comity barred it from exercising Sherman Act jurisdiction over some claims brought solely against the United Kingdom reinsurers. The Supreme Court affirmed the judgement in part, reversed it in part and remanded the case.

As to the United Kingdom defendants’ argument that the case should have been dismissed under the principles of international comity, the United States Supreme Court’s majority ruling stated that "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States". An abstention from exercising such jurisdiction for comity considerations was to be contemplated only if there was a true conflict between United States and foreign law. Such true conflict does not exist in view of the Court's majority when a person subject to regulation by two nations can comply with both. Comity principles would apply only if compliance with the law of the United States constituted a violation of another country's law. The dissenting minority of the Supreme Court felt that this was a "breathtakingly broad proposition" inconsistent with prior decisions of the Court and that the majority's interpretation would lead the United States into sharp conflict with foreign countries' interests.

(c) Commentary

The case has been decided by the Federal Supreme Court of the United States based on considerations similar to the ones taken into account by the Commission of the European Communities in a number of cases and allowing a relatively aggressive assertion of jurisdiction in international cases over foreign defendants. 8/ The Court's line of argument supports the idea that the forceful application of national competition laws is largely in conformity with public international law. It is also in line with the idea that such enforcement, in the absence of binding and enforceable international competition law, is at present the best instrument to protect competition. The practices in question could have met the criteria set out in Section D.3. (c) of the Set.

6. United States v. Microsoft Corp. 9/

(a) Facts

Microsoft, a United States enterprise and the world's largest computer software supplier, had engaged, among others, in "per-processor" licensing arrangements. In exchange for important discounts, Microsoft had required producers of personal computers to pay a royalty for each computer they shipped, regardless of whether the unit contained a Microsoft operating system. The consequence of these arrangements was that producers intending to install a competing operating system would have to pay double royalties. Furthermore, Microsoft had concluded licensing agreements exceeding a year and sometime exceeding the life-cycle of an operating system. Also, Microsoft had concluded very restrictive non-disclosure agreements, requiring some software writers working with the firm's next version of Windows to sign agreements that effectively precluded them from working with Microsoft's competitors.

(b) Action

Both the Antitrust Division of the United States Department of Justice and the European Commission initiated competition proceedings based on Section 2 of the Sherman Act for Monopolization and on article 86 of the EEC Treaty for abusing a market dominant position. The authorities of both legislative jurisdictions coordinated their investigations. The case in the United States was settled by consent decree and that in the European Union by the acceptance of undertakings given by Microsoft to the European Commission. Both authorities considered their cooperation to have been useful. The Assistant Attorney-General in charge of the Antitrust Division said that the proceedings of and the cooperation between the two authorities sent "a powerful message that antitrust authorities of the United States and the European Union are prepared to move decisively and promptly to pool resources to attack conduct by multinational firms that violates the antitrust laws of the two jurisdictions". The European Commission likewise stated that cooperation in this case "serves as an important model for the future, as it shows how the two authorities can combine their efforts to deal effectively with giant multinational companies".

(c) Commentary

The case shows, in particular, that cooperation between competition authorities enforcing national or regional laws can facilitate their work effectively vis-à-vis large and powerful enterprises operating worldwide. Differences in substantive law and procedure are obviously no obstacle to such cooperation, in particular if it is based on a practicable bilateral cooperation agreement such as the one agreed upon by the United States and the European Union. Likewise, the fact that the enterprise was located on the territory of one of the two jurisdictions involved did not stand in the way of effective cooperation.

7. CEWAL Liner Conference 10/

(a) Facts

In the CEWAL (Associated Central West African Lines) case, as in case 1, the European Commission initiated procedures following complaints by the Danish Government and several shipowners and found that the members of this liner conference providing regular shipping service between western European ports and the ports of Angola and Zaire had acted in three different ways to eliminate competition as to traffic between northern European ports and Zaire from their chief competitor G & C, a common service between a Belgian and an Italian shipowner:

(i) They participated in a cooperation agreement with the Zairian maritime authority under which all cargo on this line would be carried by CEWAL members.

(ii) They used the "fighting ship" method. If a competitor offered rates cheaper than those of CEWAL, the conference would hold a meeting to undercut that competitor, and ensure that CEWAL members scheduled their sailing at or around the same time as those of the competitor in order to win over its customers. Charges equivalent to any losses incurred by the competitor would then be shared out among CEWAL members.

(iii) CEWAL imposed 100 per cent loyalty rebates, under which members would have to surrender all their cargo to the conference in order to qualify for a rebate. Blacklists would be drawn up with the names of shippers who broke the 100 per cent rebate system.

(b) Action

The European Commission held in its decision that the members of CEWAL by the practices described above abused their dominant position in breach of article 86 of the EEC Treaty and imposed fines totalling ECU 10.1 million on four CEWAL members. This decision is the Commission's first against a liner conference. The Commission pointed out that none of the offending practices was covered by the group exemption for liner conferences.

(c) Commentary

In terms of substantive law, and also in terms of the Set [Section D.4. (a)], the practices concerned appear to be clear abuses of a dominant position. Furthermore, these abuses produced anticompetitive effects not only in Europe, but also in Africa. As in case 1, the fact that the total elimination of all effective competition was in part due to measures adopted by the country concerned, on the petitioning of the members of the shipowners' committees, again raises broader questions of competition law and policy. While the case raises the issue of how to deal with the petitioning of foreign Governments to adopt measures to support private restraints of competition, it also shows that the enforcement of regional competition law providing for sanctions against the abuse of a dominant position can have procompetitive effects in other countries as well, including developing countries.

8. Pakistan/Tea Suppliers 11/

(a) Facts

In Pakistan the leading tea suppliers were Lipton (Pakistan) Limited and Brooke Bond Pakistan Limited, accounting for more than 50 per cent of the market. All tea sold in Pakistan is imported. The parent companies of both firms had merged through Unilever Plc, United Kingdom, which held 75 per cent and 58 per cent of the shares in Lipton (Pakistan) Limited and Brooke Bond Group Limited, United Kingdom, respectively. For its part, the latter held 50 per cent of the share capital of Brooke Bond Pakistan Limited. Over the years, the share of imports from Kenya had increased. The price of tea imported from Kenya was substantially higher than the prices on the international market.

(b) Action

The Pakistan Monopoly Control Authority investigated the situation under the competition law of Pakistan and found that the average prices of tea imported from sister companies in Kenya were higher than the prices paid by them to other sellers in the international market. In the case of Lipton alone, about one third of its tea imports for a particular year were from Kenya and out of this more than 90 per cent of the purchases were from the sister companies. The Pakistani authorities initiated negotiations with the representative of Unilever during which this firm offered in principle to withdraw one of its brand names from the market and to undertake some structural changes of its investment in the country. The authorities felt that this would reduce Lipton’s share of tea sales in the market. Eventually, Unilever reduced its shareholding in Unilever (Pakistan) from 50 to 40 per cent. 12/

(c) Commentary

The competitive structure of the tea market in Pakistan is characterized by the presence of two major suppliers accounting for more than half of the sales market and controlled by a single parent company. The Pakistan Monopoly Control Authority dealt with the case under the aspect of excessively high prices and initially tried to solve the problem by the elimination of one of the two brands and some structural changes. It may be argued that the first measure would have opened up competition for the market share previously accounted for by this brand, with the consequence that smaller competitors and the remaining brand would compete for this share of the market. It does not seem unlikely, however, that a substantial part of this share would have been taken over by the remaining other leading brand. The possible effects of the divestment of 10 per cent of shares in the local subsidiary cannot be assessed in the absence of further information. A possibly more effective way to deal with the situation might have been by merger control. A prohibition of the merger brought about by Unilever as far as the tea market in Pakistan is concerned would have forced Unilever to sell one of the two subsidiaries in Pakistan to an independent acquirer. That such an approach can be successful is illustrated, for instance by the Philip Morris/Rothmans case in Germany, where the international merger was in the end limited to a transaction, as far as its German part was concerned, that no longer met the requirements of a merger within the meaning of German competition law. 13/ The case may have been relevant under Section D.4. (b) or (c) and Section F of the Set.

9. MAN Aktiengesellschaft/Sulzer Aktiengesellschaft 14/

(a) Facts

MAN Aktiengesellschaft, a German producer of, among others, machinery and commercial vehicles with sales of about DM 15 billion in 1988 and ranking No. 81 on the Fortune list of the 100 largest enterprises in that year, intended to acquire the worldwide diesel engine activities of Gebrüder Sulzer Aktiengesellschaft, shortly before the latter became reorganized in MBS Dieselmotoren - Sulzer Diesel-AG, a Swiss firm with sales of about SwF 4.6 billion in 1988. The competitively relevant product market was large (over 500 kilowatt) two-stroke diesel engines for large commercial ships. The two companies, which both had licensed producers worldwide, supplied the German market with such engines mostly bought from their licensees in East Asia. In Germany, the merger would have made the merged firm the sole supplier of such engines. Worldwide market shares of MAN were 52.8 per cent, of Sulzer 37.9 per cent and of Mitsubishi (producing under MAN and Sulzer licences and not supplying European markets under the relevant licensing agreements) 9.3 per cent.

(b) Action

In August 1989, the German Federal Cartel Office prohibited the merger under Section 24 (2) sentence 1 in conjunction with Section 98 (2) sentence 1 of the German Act against Restraints of Competition because it would have led to a market dominating position in the relevant domestic product market. An application by the participants for a special authorization under Section 24 (3) of the Act against Restraints of Competition to complete the merger prohibited by the Federal Cartel Office was dismissed by the Federal Minister of Economics; a special report of the German Monopolies Commission on the project had recommended such a decision.

(c) Commentary

In terms of the substantive standards of German law, the case was clearly anticompetitive. It appears likewise obvious that, in view of the worldwide network of licensing arrangements controlled by MAN and Sulzer, the anticompetitive effects of the merger would have materialized in many countries, including developing countries. This shows that the enforcement of effective national merger control in international merger cases can successfully be handled if at least one of the participating firms is located on the territory of the enforcing country. It also shows that merger control in international cases will often also tend to protect competition in other countries. In terms of the Set, the merger project seems to meet the criteria defined in Section D.4. (c).

10. Gillette/Wilkinson 15/

(a) Facts

In the spring of 1990, the United States firm Gillette acquired, with the exception of the EU and United States based activities, 100 per cent of Wilkinson Sword, a United Kingdom company. Because of merger control regulations in the European Union and in the United States, Gillette had previously acquired only a 22.9 per cent non-voting capital participation in Eemland Holding N.V., a Netherlands firm and sole shareholder of Wilkinson Sword Europe, accompanied, however, by additional agreements providing a competitively significant influence on Eemland and consequently also on Wilkinson Sword Europe. Gillette and Wilkinson are the world-wide largest manufacturers of wet-shaving products, including razor blades and razors, the relevant product market as defined by all authorities involved. Although the market shares of both firms varied from country to country, they held the two leading positions in most relevant geographical markets. In many west European countries, Gillette and Wilkinson accounted for a combined market share of around 90 per cent. In March 1993, Eemland disposed of its Wilkinson Sword business to Warner Lambert and retransferred the trademarks and businesses in various non-EU countries.

(b) Action 16/

The transactions described led to the initiation of competition proceedings in 14 jurisdictions. As regards the European transaction, these included the European Commission, France, Germany, Ireland, Spain and the United Kingdom. As to the non-EU transaction, the authorities in Australia, Brazil, Canada, New Zealand, Republic of South Africa, Sweden, Switzerland and the United States were involved.

In the European Union, the European Commission dealt with the case under articles 85 and 86 of the EEC Treaty since it predated the coming into force of European merger control. Under article 86 of the EEC Treaty, the Commission found the transaction to be an abuse of a market dominating position and ordered divestiture of Gillette's equity and debt interests in Eemland. In addition, the Commission found that agreements relating to the geographical separation of the Wilkinson trademark between the Community and neighbouring countries constituted a breach of article 85 (1) of the EEC Treaty.

In France, the case was dealt with under French merger law and led in March 1993 to a Ministerial decree of the Ministère de l'Economie, des Finances, et du Budget, following investigations by the Conseil de la Concurrence, prohibiting Gillette from influencing the distribution of Wilkinson shaving products in France. As in other countries, appeals were withdrawn in consequence of Gillette's disposal of Eemland's Wilkinson Sword business in March 1993.

In Germany, the Federal Cartel Office prohibited the acquisition of 22.9 per cent of the non-voting participation by Gillette in Eemland, as well as the additional agreements, because the transaction constituted a merger in terms of the acquisition of a competitively significant influence on Wilkinson which would have led to a market dominating position close to a monopoly. Appeal proceedings were likewise withdrawn following Gillette's disposition of Eemland's Wilkinson Sword business in March 1993.

In Ireland, the Irish Fair Trade Commission came to the conclusion that the European transaction did not constitute a merger within the meaning of Irish merger law and terminated proceedings.

In Spain, the case was investigated by the Tribunal de Defensa de la Competencia, following a complaint by Warner Lambert's Spanish subsidiary, under the aspect of a possible abuse of a market dominating position. The Spanish authority came to the conclusion that Gillette was dominating but that there was no abuse, and terminated the investigation.

In the United Kingdom, the European transaction was investigated under British merger control and monopoly law by the Office of Fair Trading and the Mergers and Monopolies Commission. Investigations were terminated following Gillette's disposal of Eemland's Wilkinson Sword business in March 1993.

In Australia, the Trade Practices Commission instituted proceedings against Gillette, alleging breach of Section 50 of the Australian Trade Practices Act. Upon appeal by Gillette, the Australian Federal Court held that the Commission had established a prima facie case that the acquisition breached this provision.

In Brazil, investigations ended with the approval of the acquisition of the Brazilian Wilkinson Sword business by Gillette.

In Canada, the Bureau of Competition Policy accepted an undertaking that Gillette would not take over the Wilkinson Sword business pending the Bureau's investigation. The Bureau closed the investigation when Gillette transferred Wilkinson Sword's Canadian business to Eemland's Wilkinson Sword GmbH subsidiary acquired by Warner Lambert in March 1993.

In New Zealand, the Commerce Commission cleared the proposed acquisition of Wilkinson Sword's wet shaving business in the country by Gillette (New Zealand).

In the Republic of South Africa, the Competition Board investigated the transaction but took no action, because the Wilkinson Sword business in this country continued to be owned by a South African company.

In Sweden, the Competition Ombudsman's investigation led to the conclusion that the effects of the transaction on the Swedish market were minimal and that there was no base for a prohibition order.

In Switzerland, the Cartel Commission closed investigations in February 1991, holding that Gillette's acquisition of the Wilkinson Sword business in Switzerland did not have any negative social or commercial effects in the country and that there was no evidence that Gillette was trying to inflict any kind of restraint of competition.

In the United States, the Antitrust Division of the Department of Justice initiated proceedings to enjoin the transaction as it constituted a concentration violating Section 7 of the Clayton Act by substantially lessening competition in the wet shaving products market. Later, the case was settled by consent decree after the recession of the contract for the acquisition and Gillette's acceptance of certain obligations contained in the decree concerning its influence over Eemland's Wilkinson Sword.

Cooperation among most of the countries investigating the transaction has taken place on various occasions, at various levels and different degrees. Cooperation was generally felt to be useful, although some countries expressed regret that no confidential information could be supplied in this context.

(c) Commentary

The case illustrates particularly well the problems which can arise in international cases owing to the fact that they may reflect competitive effects in many countries and consequently entail just as many competition proceedings under different laws. For the enterprises concerned as well as for the administrations involved, such cases may imply an extremely costly operation in terms of human and financial resources. Obviously, these problems would not exist if such cases could be dealt with under one law by one authority. As no such law or authority exists, close cooperation by competition authorities appears to be in the interest of both the participating firms and the competition authorities involved. Such cooperation has, at least to some extent, in fact taken place under the OECD Recommendation on Cooperation in competition cases and under bilateral cooperation agreements in force between some of the OECD member States. In terms of the Set, the merger appears to meet the criteria of Section D.4. (c).

11. Zahnradfabrik Friedrichshafen/Allison 17/

(a) Facts

The German firm Zahnradfabrik Friedrichshafen, a producer of, among others, automatic transmissions for trucks and buses over 6 tons and power shift transmissions for construction vehicles, intended to acquire the Allison Transmission Division of General Motors, a United States firm. On the German market for automatic transmissions, Zahnradfabrik Friedrichshafen held a leading position, accounting for about 55 per cent of the market, followed by Allison with a market share of about 25 per cent. On the European market, the combined market share of both firms would have been over 75 per cent. On the market for power shift transmissions for construction vehicles, market shares were even higher.

(b) Action

The competition authorities of the United States and Germany held that the proposed merger would be anticompetitive in terms of Section 7 of the Clayton Act and of Section 24 (1) of the German Act against Restraints of Competition. In its assessment, the German Federal Cartel Office held that the merger would have reinforced already existing dominant positions in Germany in both relevant product markets. It also held that it would have created a firm which would have been far ahead of its competitors on the world market because of the range of the products it could offer, its technical competence, and the density of its service and distribution network. Both authorities challenged the merger project under each country’s respective national legislation. The project was withdrawn by the participants after the German Federal Cartel Office had issued a formal prohibition order, but before the Antitrust Division of the Department of Justice of the United States had come to a final decision.

(c) Commentary

The case illustrates, like case 10, that international mergers often cause competition problems in more than one country and that consequently cooperation between the competition authorities of the countries concerned may be in the interest of both the authorities and the participating firms, as such cooperation may reduce the risk of conflicting decisions and of conflicting requirements imposed on the firms. For the authorities involved, such cooperation may lead to a fuller and more realistic understanding of the transaction, even if only part of the information received as a result of this cooperation may be legally relevant under national law. In terms of the Set, the merger project appears to come under Section D.4.

II. Conclusions

The cases briefly described and commented on above raise some important substantive and procedural issues in regard to international restraints of competition.

1. Vigorous enforcement of national or regional competition laws, as referred to in the Set in Section E.1, may in itself have positive competitive effects not only on the territory of the enforcing jurisdiction, but also in other countries, including developing countries, and sometimes even worldwide. Secondary effects in other countries, corresponding to the aims of Section E.4. of the Set, are illustrated especially by cases 1, 7, 9 and 11. It is noteworthy that beneficial effects materialize most clearly in cases involving horizontal restraints of competition by arrangement or merger. There seems to be little controversy as to the negative impact of international horizontal restraints of competition, especially of hard-core arrangements such as price fixing, market allocation and bid-rigging referred to under Section D.3. of the Set, and consequently about the desirability of forcefully prosecuting such cases under national or regional laws. Probably this is at present the only definable area where a consensus on competitive substance exists, that is a consensus that hard-core horizontal restraints are at the centre of competitive concerns 18/ and that they should be eliminated to the extent possible. This consensus is reflected in a strong worldwide trend to adopt and reform competition laws so as to allow legal action also in developing countries and in countries in Central and Eastern Europe in transition towards genuine market economies.

Although there appears to be a process of convergence under way, differences in philosophy and law are still quite substantial in many areas. There is as yet no consensus as to what a comprehensive, optimal competition law should look like, for instance in such areas as vertical restraints, merger control and abuse control over dominant firms. In these fields, basic philosophies and laws not only still differ considerably from country to country, but also differ over time within individual countries themselves. This is illustrated, for instance, in comparing enforcement policies in the United States in the areas of vertical restraints and merger control at the end of the 1970s and today. The risk that vague compromise language would be the result of any attempt, if at all successful, at formulating a comprehensive law appears to be great in this light. Any such law would not, therefore, provide a practicable basis for implementation. Moreover, a comprehensive set of sufficiently precise competition rules, even if achievable, might turn out to be too rigid to respond to the different economic and competitive situations in which countries currently find themselves. This may be an even more relevant aspect for developing countries and countries in transition which are now undergoing far-reaching changes.

Comparable differences of legal treatment or changes of law or enforcement policy do not seem to exist in the treatment of hard-core restraints among competitors in any of the jurisdictions with longer experience in competition law enforcement, even if there are differences in sanctions. In the light of this fact it might be worthwhile giving consideration to a more modest initiative for a binding international agreement to outlaw hard-core horizontal restraints, which are the only type of private restraints of competition to be close to being universally accepted as highly detrimental to international trade and development. Such an agreement would prohibit all arrangements and concerted practices between competing enterprises that fix prices, allocate customers or territories, assign quotas or rig bids. It could be formulated in relatively clear and precise terms, thereby avoiding the general and vague - at times even contradictory - language of more comprehensive instruments.

Although vigorous deterrence of horizontal hard-core arrangements between competitors through the enforcement of national and regional competition laws may remain the most important means to protect competition internationally, such a limited but binding international agreement could benefit countries in various ways. Primarily, it would help smaller countries, in particular developing countries, with limited or no experience in competition law enforcement; because such countries, because of their resource limitations, their relatively smaller markets, possible lacunae in competition policy frameworks, and their weaker bargaining positions vis-à-vis transnational corporations, are often less able to solve their competition problems solely by vigorously enforcing national law. Effective national enforcement of competition law depends not only on adequate legislation, which is certainly indispensable if not in all circumstances a prerequisite, but also on the interest that transnationals have in the market of the country concerned. It will not have escaped notice that the successfully solved international cases described above were all handled by authorities of developed countries, while the two cases studied where less than satisfactory solutions were reached were those of developing countries. A binding international agreement outlawing hard-core horizontal restraints of competition could both facilitate the establishment of jurisdiction of a country which is the target of an international cartel and at the same time increase the willingness of other countries to assist such a country in its proceedings by cooperating, for example, in investigations. Some of the difficulties encountered by the Pakistani Competition Authority in the electrolytic tinplate case (case 3) for instance, could possibly have been eliminated or at least mitigated by such an agreement.

Another advantage of an international agreement outlawing hard-core restraints between competitors would be that it could serve, once it has been successfully applied, as the basis for more ambitious initiatives to create gradually a more comprehensive substantive international competition law. In addition, it could encourage countries to repeal import and export cartel exemptions under their national laws, which are incompatible with generally accepted competition principles, and thereby lead to the elimination of traditional "beggar-my-neighbour" competition policies which are still widespread. Multilateral repeal of export and import cartel exemptions and coverage of such restraints by an internationally binding agreement outlawing hard-core horizontal arrangements would not exclude cooperation in the areas of import and export activities where such cooperation either does not negatively affect competition or qualifies for another regular exemption under national or regional law, for instance concerning small and medium-sized enterprises.

2. The European shipping conference cases (cases 1 and 7) and the Hartford Fire Insurance case (case 5) raise additional substantive issues. First, the fact that governmental measures formed an integral element for some of the restrictions in question in the shipping conference cases, and that these measures were found to have caused anticompetitive effects on the trade of some African countries, confirms the general experience that competition policies in a narrow sense do not guarantee competitive markets and optimal economic performance. While governmental measures are neither the object of the Set, nor, in general, the object of national or regional competition laws (one important exception is the law of the European Union which allows action to be taken against governmental measures qualifying as "state aids" within the meaning of articles 92 ff of the EEC Treaty which thus incorporates such action into the EU competition law), both developed and developing countries should be aware that all other policies must to the extent possible be in conformity with the basic principles of a market economy if the full benefit of a competitive system is to be achieved; and that governmental restraints of competition can do as much damage as private restraints. Restraints to competition should be permitted only when they are indispensable for clearly overriding public policy purposes such as the protection of human life and health, of the environment, or of national security, and in each case only to the extent necessary. Secondly, in the European shipping conference cases, governmental measures not covered as such by national competition laws, or by the Set, were petitioned by private participants foreign to these authorities. There appear to be no internationally recognized standards to deal with such petitioning of foreign Governments to take measures supporting private restraints of competition. The position of the European Commission in this case was obviously based on the assumption that the immunity of foreign governmental measures petitioned by private parties did not prevent the prosecution of these parties for the petitioning itself and for activities in implementation of these measures. It does not seem clear, however, whether other jurisdictions, for instance that of the United States, would deal with such a situation in the same way. According to the Antitrust Guidelines for International Operations, 19/ the United States competition authorities intend to apply the Noerr-Pennington doctrine 20/ also to the petitioning of foreign government entities. According to this doctrine, efforts to obtain or influence action by governmental entities in the United States are immune from application of the Sherman Act, even if the intent or effect of that effort is to restrain or monopolize competition. Different standards as to the treatment of petitioning of foreign Governments may obviously distort competition, disadvantage competitors *vis-à-vis* others and reduce the willingness of competition authorities to cooperate in international cases involving foreign competition authorities not applying the same standards. For these reasons, the issue might merit further discussion.

The Hartford Fire Insurance case (case 5) raises questions as to the criteria to be used in regard to international comity advocating restraint and moderation in the exercise of jurisdiction in international cases *vis-à-vis* foreign defendants when such jurisdiction has been established under the generally, although not universally accepted, "effects doctrine". The Court’s majority drew a narrow line, stating that a precondition for comity considerations was true conflict between national and foreign law and that such conflict did not exist when a person subject to regulation by two nations can comply with both. Although the Court’s decision accorded with previous decisions of the European Commission, it has been criticized by, among others, the Court’s minority, as not taking sufficiently into account consideration of international comity, as being overly assertive, and as creating risks of further international conflict. On the one hand, taking the approach propounded by the Court and the European Commission would appear to benefit effective enforcement of national and regional laws and thus to reinforce the most effective current means to protect competition also in international cases. On the other hand, some countries may feel reluctant to abide by the same criteria, so that, like the petitioning of foreign Governments, competitors may be disadvantaged *vis-à-vis* others and competition authorities discouraged from cooperating with their foreign counterparts. The absence of internationally accepted standards may justify further discussion of this issue also.

3. Forceful implementation of national or regional laws often encounters, as illustrated especially by cases 3, 8 and 10, difficulties connected with information and evidence. Case 10 shows, in particular, the substantial burden to be carried by enterprises in complex international merger cases subject to, at times, very divergent formal and substantive standards under different legislation claiming jurisdiction over the same transaction, as well as the difficulties of enforcement authorities and courts to establish in a reasonable time a realistic picture of the transaction to be assessed.

Case 3 shows that when the relevant information is located outside the country, competition authorities may be discouraged from prosecuting a suspected violation even if there is strong circumstantial evidence that the law had been breached. Multilateral instruments such as the OECD Recommendation on Cooperation and the Hague Convention on Evidence have apparently been of limited value in solving such problems. The Hague Convention, in particular, does not allow speedy proceedings, does not apply to criminal cases and has not been used in competition cases by major jurisdictions such as the United States and the European Union. The provisions of the Set relating to possibilities of supplying, obtaining and making available information on restraints of competition seem to have played no role in any of the cases cited. The Set contains a number of provisions dealing with different aspects of supplying and obtaining information useful or necessary for the formulation and effective enforcement of competition legislation. 21/ On various occasions, dissatisfaction with the implementation of the relevant operational provisions of the Set has been expressed by different groups of countries. The reasons for insufficient implementation may be manifold although their relative importance is far from clear. One of the major reasons for the relative ineffectiveness of some rules may be the still substantial differences in basic competition philosophies while another may be the fact that the rules are general and not specific. Hence the proposal to discuss more precise and more ambitious cooperation instruments in relation to particular restraints of trade, especially hard core cartels, merits serious consideration.

There is obviously a need for closer cooperation in terms of strengthening information exchange and consultation and cooperation in enforcement at bilateral, regional and multilateral levels in many areas of competition law and policy. This is illustrated by the cases cited above and by the fact that the number of bilateral cooperation agreements has substantially increased in recent years. Likewise, it is increasingly understood that information-sharing and mutual assistance may considerably improve the conditions for both competition authorities and enterprises. Cooperation would often benefit competition authorities in enforcing their national or regional law by facilitating and speeding up the collection of relevant information. At the same time, such cooperation would lessen the burden on enterprises in terms of costs and executive time. In some international cases, enterprises have to deal with two or more, and at times, like in case 10, with many jurisdictions. Cooperation could help to avoid duplication of effort by both authorities and enterprises. Data collected by one authority could be useful for another, even if no confidentiality issues were involved. It may be argued, however, that in the new age of internationalization, in order to continue to operate effectively, countries need to agree to share confidential information, subject to rules effectively protecting legitimate interests of the business community, as provided for in Section E.5. of the Set.

4. Although certain aspects mentioned above are valid in many or perhaps all fields of competition law, rapid, simultaneous and practical progress in all areas of potential cooperation seems to be almost as improbable as simultaneous progress on substantive rules. This does not mean that progress in terms of intensified cooperation in the field of merger control and other areas would necessarily depend on convergence of substantive law in these areas; the differences remaining would seem to call for a differentiated approach. Agreement on cooperation appears to be attainable in the area of hard-core horizontal arrangements between competitors. As there is general agreement that price-fixing, market-allocating and collusive-tendering cartels are to be deterred, willingness to cooperate is likely to be greater in this area than in any other field of competition law. If, in particular, such restraints could be outlawed by a binding international agreement, as suggested above, willingness to cooperate fully in this area would be even greater. In addition, before engaging in a process of formulating more precise substantive rules in other areas, it would be helpful, for instance in the field of merger control, where case 10 is particularly instructive, if each competition authority investigating an international case would notify every other competition authority known or understood to be investigating, or likely to investigate, the same transaction or part of it. Such information might then lead to the transmission of publicly available and useful information to foreign counterparts of an investigating authority and even, where practical, to assistance in obtaining such information. In principle, such intensified international cooperation could also be envisaged in regard to vertical restraints which are still treated differently under many legislative jurisdictions, and to control of abuse by market dominating enterprises, where the distinction between procompetitive and abusive conduct is often extremely difficult even in one jurisdiction, and where philosophies of countries differ even more. Reviewing the Set’s provisions on the exchange of information and on international cooperation with a view to differentiating between different types of restraints and to formulating the provisions more precisely may also merit further consideration.

Notes

1/ Commission of the European Communities, decision of 1 April 1992, see OJ 1992 L 134/1, and Commission of the European Communities, XXIInd Report on Competition Policy 1992, pp. 98 ff.

2/ United States District Court, District of Massachusetts, Criminal No. 94-10176 NMG 15 U.S.C. § 1 (14 July 1994).

3/ Federal Court of Canada (Trial Division) T-1643-94 (12 July 1994).

4/ In a news release of 20 February 1995, the Director of Investigation and Research of the Canadian Bureau of Competition Policy stated explicitly: "The success of the first phase of this case illustrates how in the new global economy cooperation between competition law agencies is essential in ensuring strong enforcement of the Competition Act."

5/ Collusive Tendering (UNCTAD TD/B/RBP/12/Rev.2, paras. 89 ff) based on information submitted by the Government of Pakistan.

6/ United States v. Pilkington Plc, 59 Fed. Reg. 30604 (14 June 1994).

7/ 113 S.Ct. 2891. CCH Trade Cases § 70,280 (28 June 1993).

8/ See Joseph P. Griffin, EC and U.S. Extraterritoriality: Activism and Cooperation, in 1993 Fordham Corporate Law Institute, p. 43 ff.

9/ See United States v. Microsoft Corp., No. 94-1564 LFO, 15 July 1994, and Antitrust and Trade Regulation Report of 21 July 1994.

10/ Commission of the European Communities, decision of 23 December 1992, see OJ 1993 L 34/20 and Commission of the European Communities, XXIInd Report on Competition Policy 1992, p. 100 ff.

11/ See "Corporate behaviour in restraint of trade in goods and services in Pakistan", consultant report prepared for the UNCTAD secretariat by A. Riaz (UNCTAD/ITP/96), December 1991.

12/ See "Annual Report of the Monopolies Control Authority", Islamabad, 1991.

13/ See Federal Cartel Office, Activity Report for the Years 1983/1984, p. 94 ff., and Activity Report for the Years 1985/1986, p. 83.

14/ See Federal Cartel Office, Activity Report for the Years 1989/1990, p. 65 ff. See also Special Report, German Monopolies Commission, Zusammenschlußvorhaben der MAN Aktiengesellschaft und der Gebrüder Sulzer Aktiengesellschaft, 1991.

15/ See Federal Cartel Office, Activity Report for the Years 1991/1992, p. 95.

16/ For a comprehensive description of action taken in various jurisdictions, see OECD, "Merger Cases in the Real World - A Study of Merger Control Procedures", 1994, pp. 66 ff.

17/ See Federal Cartel Office, Activity Report for the Years 1993/1994, p. 237. See also Wirtschaft und Wettbewerb (1993) WuW/E BKartA 2521 ff.

18/ The OECD "Interim Report on Convergence in Competition Policies", June 1994, Annex para. 25, states, for instance, "That there is a strong consensus on hard core cartels such as price fixing, output restraints, market division, customer allocation and bid-rigging which are prohibited outright in almost all OECD Member countries".

19/ Issued by the United States Department of Justice and the Federal Trade Commission, April 1995, at 3.34, p. 27 f.

20/ See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers of America v. Pennington, 381 U.S. 657 (1965).

21/ See, in particular, Sections C.3., D.2. and E.5. to 9. of the Set.
