The Three Body Problem

– Extraterritoriality, Comity and Cooperation in Competition Law

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Abstract

The three body problem in physics concerns the challenge of accurately calculating the interaction of three different bodies (e.g. planets). Examples include the motion of the Moon around the Earth as disturbed by the action of the Sun, or the movement of one planet around the Sun as disturbed by the action of another planet. Three body systems are chaotic, and despite centuries of work there is no general solution to this problem.

Understanding the extraterritorial effect of competition law raises challenges akin to the three body problem: while primarily governed by one dominant gravitational pull (a country's rules on the scope of its competition law), in practice the extraterritorial effect of competition law is affected by other forces (in particular, international comity and cooperation against a common epistemic background). This means that a thorough analysis of extra-territorial effects requires us to look not only at legal/formal structures concerning the scope of a country's law, but must also take into account 'informal' mechanisms– e.g., comity (i.e. unilateral self-restraint and tolerance on the part of the affected jurisdictions), cooperation (i.e. extra-legal mechanisms to coordinate between potentially conflicting legal regimes) and epistemic communities (i.e. relations between competition specialists) – that impact how law is applied in practice.

This paper reviews how these three concepts operate in practice in the context of (EU) competition law. It will argue that, as with the traditional three body problem, no purely legal and formal conceptual framework can explain how competition law is applied extra-jurisdictionally. The best we can is to approximate such a point through increasingly sophisticated application of three partially overlapping legal doctrines – extra-jurisdictional reach, international comity, and international cooperation – against a common epistemic background shared by the global (and regional) competition communities.

1. Introduction

Globalisation is generally associated with an increase in competition, as businesses reach beyond their borders to offer goods and services to new markets. This is broadly beneficial for consumers and market efficiency, since widening a market to include new firms will set in motion competitive processes that force firms to become more efficient and to innovate. Openness to foreign competition has been observed in many cases to impose productivity discipline on domestic firms, to the benefit of consumers.[1]

An important tool to protect competition – both foreign and domestic – is competition law and policy. Around the world, competition authorities are mandated to enforce their own laws and

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[1] OECD (2017), OECD Business and Finance Outlook 2017 (OECD Publishing, Paris), p. 144.

protect domestic consumers from anticompetitive conduct. As more and more competition regimes are established and become operational across the globe (currently there are more than 130), the likelihood increases of business conduct being caught by more than a single set of competition rules enforced by multiple agencies.

As a result of globalisation, companies are increasingly active in multiple countries. Similarly, anti-competitive practices of enterprises are increasingly international in scope. According to recent data:

- Cross-border mergers accounted for 47% of all global mergers in terms of value and 36% in terms of volume in 2017;[2]
- More than half cartel cases investigated by the European Commission nowadays involve an extraterritorial dimension.[3]
- 240 cross-border cartels were detected and fined between 1990 and 2015.
- Total sales affected by cross-border cartels from 1990 to 2015 (and hence in injury to customers) were approximately USD 7.5 trillion. Assuming an overcharge of 20% of sales on average, this would amount to USD 1.5 trillion in rents extracted and passed on as a direct injury to consumers.[4]

However, even as business practices become more international, competition enforcement remains a primarily domestic concern. For instance, the proportion of mergers notified to the European Commission that occurred in only one country declined from 25% in 2004 to 14% in 2013. During the same period, the proportion of mergers involving non-EU companies increased from 36% to 58%. And yet, merger control remains a purely national competence, subject to national legal standards that, at least on paper, take no account of the impact of an agency's decisions beyond a country's borders. The same legal principles govern antitrust enforcement.

In other words, the national scope of competition laws and agencies' jurisdiction does not match the increasingly international nature of business activity. Potentially anticompetitive conduct can be caught by different competition authorities, each applying its jurisdictional tests (i.e. each authority assesses whether the conduct can produce harmful effects in their territory, and whether these effects are sufficiently important to merit enforcement), competition rules (which determine whether the conduct or transaction is lawful or not), and remedial powers (including powers to impose prohibitions against a conduct, or injunctions on businesses to follow a course of action). As a result, multiple competition authorities can review and intervene against the same business conduct or transaction – and may adopt different, and even contradictory decisions and remedies. For example, the same conduct may have different effects in different jurisdictions, leading to different

[2] See OECD (2019) Developments in international co-operation in competition cases since 2014: monitoring the implementation of the Recommendation of the Council concerning International Co-Operation on Competition Investigations and Proceedings'.

[3] Adrian Bradley 'Extraterritoriality and Cooperation in Competition Policy' p. 37, in George Papaconstantinou and Jean Pisani-Ferry (Eds) Global Governance: Demise or Transformation? (EUI, 2019).

[4] J.M. Connor (2016), "Cartel Overcharges", Research in Law and Economics, vol. 26. The average overcharge for the cross-border fined cartels in the Private International Cartels Database, for which this data was available, was approximately 20.5%. Overcharge amounts were available for 84 of the 240 cartels. Further, and as noted in OECD Business and Finance Outlook 2017 (OECD Publishing, Paris), p. 72: "*this likely understates the total amount, as cartel conduct that ceased as a result of commitment decisions, where no fines were levied, is not included. Furthermore, average overcharges have been estimated in some studies to exceed 50% of sales.*"

assessments of its lawfulness even when the applicable legal standards are substantively similar. Should the effects of a conduct be similar across jurisdictions, the legal standards to assess its lawfulness may nonetheless vary from place to place, again leading to different decisions.[5] Further, even when jurisdictions arrive at similar conclusions regarding the lawfulness of a given conduct or transaction, there is still a risk that they may adopt different remedies.[6]

The possibility of arriving at different enforcement decisions and imposing potentially conflicting remedies is the natural consequence of lack of alignment of substantive competition standards and different market conditions across territories. With more than 130 competition regimes worldwide and ever-increasing cross border business activity, the potential for enforcement inconsistency and system friction is apparent. Addressing this potential for friction has been a focal point of public authorities in recent decades—from early unilateral policies, through enhanced bilateral cooperation, regional, and multinational negotiations – even as the proliferation of competition regimes has been celebrated.[7]

This paper will focus on the age-old question of whether (and when, and how) competition law can stretch to acts carried abroad.[8] On its own, this is a straightforward legal question concerning the jurisdictional scope of competition law. However, this is not the sole focus of this paper. Instead, I am interested in how competition law applies to foreign anticompetitive conduct in practice, beyond purely legal constraints.

As the attentive reader may have inferred from the short discussion above, the answer to this question will be affected not only by the scope of a jurisdiction's competition law but also by how that jurisdiction interacts with other competition regimes. This interaction can take two forms. First, a jurisdiction may exercise self-restraint, perhaps in the expectation that other jurisdictions will act in a similar fashion. This self-restraint is technically called 'comity'. Second, jurisdictions may interact with one another to align their behaviours, enhance the effectiveness of their enforcement activities and defuse potential conflicts. This set of behaviours typically falls under the 'international cooperation' umbrella.

The argument I will be making is that these three concepts – jurisdictional scope, comity and international cooperation – interact with one another in unpredictable ways, making it extremely hard, if not outright impossible, to develop a general conceptual legal framework of competition law enforcement across borders. The best we can do is to approximate such a framework through the increasingly sophisticated application of three partially overlapping legal doctrines – extra-jurisdictional reach, international comity, and international cooperation – by members of a global community that shares a number of values and ideas concerning competition law.

An apposite metaphor for this state of affairs can be borrowed from physics. The three body problem in physics concerns the problem of accurately calculating the interaction of three different bodies on one another. For example, the impact of the Sun on the gravitational relationship between the Earth and the Moon has been called "the main problem of lunar theory", and been studied extensively with a variety of methods beginning with Newton. After centuries, this three-

[5] E.g. for an overview of substantive differences between EU and US competition law, see Douglas H. Ginsburg & John M. Taladay 'The Enduring Vitality of Comity in a Globalized World' (2017) GEO. MASON L. REV. 24:1069, p. 1071-1074.

[6] OECD (2017) The Extraterritorial Reach of Competition Remedies DAF/COMP/WP3(2017)4, p. 8.

[7] Ariel Ezrachi 'Sponge' Journal of Antitrust Enforcement (2016) 1, p. 23.

[8] Giorgio Monti 'EU Competition Law in a Global Context' *in* Dennis Patterson and Anna Sodersen (eds.)*A Companion to European Union Law and International Law* (Wiley Blackwell, 2016) 315, p. 315.

body problem still has no complete analytic solution in closed form. While it may be solved through successive approximations, the intervention of a third body can lead to unpredictable, 'chaotic' behaviour that is impossible to predict accurately.[9]

It is submitted that the same mechanisms can be observed as regards cross-border competition enforcement. Whereas one major force may be able to broadly explain the system (in this case, the jurisdictional scope of competition law), allowing us to broadly predict the form that cross-border competition enforcement will take, the interaction of this force with two other doctrines with their own logics (e.g. comity and international cooperation) against a common background (e.g. global or regional epistemic communities of competition professionals) means that it is impossible to find a single correct answer to how this enforcement will occur in every case.

The argument will be developed as follows. The next section will review the law on the (extra-)jurisdictional scope of competition law. Section III will look at doctrines of international comity, while section IV will describe efforts concerning international cooperation. Finally, section V will bring these three elements together. This section will argue that legal tests (e.g. on the jurisdictional scope of competition law) and informal arrangements (such as mechanisms of international cooperation) are unable on their own to explain how different competition regimes get along. At the same time, it will be argued that the very fluidity of each of the factors makes it impossible to derive detailed rules explaining or governing the international competition system. In the end, what we have is a system that is a work-in-progress, as each relevant factor, and the interaction between them, evolve.

2. Extraterritoriality

2.1. Subject-matter and Enforcement Jurisdiction

A necessary, but not sufficient, requirement for a competition authority to investigate business conducts or review mergers is that its domestic competition law grants it jurisdiction over them. Theoretically, it would be possible for competition laws to apply to business conduct wherever it may occur. In practice, the jurisdictional reach of the domestic competition law is limited by two public international law principles.[10]The first principle is subject-matter (legislative) jurisdiction, which governs the right which States and entities like the EU enjoy to make their laws applicable to the activities, relations or status of persons, and to the interests of persons in property. The second principle is enforcement jurisdiction, i.e. the power to induce, compel compliance or punish non-compliance with a jurisdiction's laws through, for example, the imposition of fines or other penalties.

Enforcement jurisdiction may involve the use of coercive power: for instance, property may be attached in order to secure the payment of a fine.[11] There is general agreement that enforcement jurisdiction is inherently territorial in scope. For example, while the CJEU does not

[9] See Stanton J Peale 'Celestial Mechanics – The three body problem' in Encyclopaedia Britannica' (2006), available at www.britannica.com (accessed on 5 February 2020).

[10] See OECD (2017) The Extraterritorial Reach of Competition Remedies DAF/COMP/WP3(2017)4, p. 4-5.

[11] Richard Whish, David Bailey (2015), "The international dimension of competition law" in Competition Law (8th edition), Oxford University Press, paragraph 12.04; Butterworths Competition Law Service, Division XII Extra-territoriality ,para. 2.

object to orders being made against foreign undertakings,[12] it is recognised by both the Commission and the CJEU that it would not be possible actually to enforce the order in the territory of a foreign State, even if it is possible to seize any assets present within the EU.[13]

Since the principles governing enforcement jurisdiction are fairly straightforward, debates about extraterritoriality focus mainly on subject-matter jurisdiction, in particular how far beyond territorial jurisdiction it might extend.[14]

2.2 Thresholds for Subject-Matter Jurisdiction

States normally exercise subject-matter jurisdiction on two bases: a state has full authority to lay down general or individual rules applicable to conduct within its territory (the "territoriality" principle) and to its citizens and companies (the "nationality" principle). The territoriality principle, in particular, has two dimensions: a positive (the right to assert jurisdiction within the territory) and a negative (the obligation not to assert jurisdiction beyond domestic boundaries, so as not to interfere with the territory and sovereignty of other states) one.[15]

The territoriality and nationality principles are usually sufficient to establish the jurisdiction of a State over any activity which engages its interest. In some cases, however, these bases of jurisdiction will not clearly allow the State to act, and the State may seek to rely on some other jurisdictional principle.

Two main alternative bases have been invoked to assert jurisdiction: the economic entity doctrine or the effects doctrine.

- The *economic entity doctrine* asserts that where one company is under the control of another, the subsidiaries' acts may be imputed to its parent. Accordingly, acts within the EU of a subsidiary of a non-EU foreign parent may be treated as acts of that parent within the EU, giving the EU authorities jurisdiction over it. In this way, it may be said that the economic entity doctrine operates by bringing acts by foreign entities of a corporate group present in Europe within the scope of the territoriality principle.
- Under the *effect's doctrine*, jurisdictions can legitimately take enforcement action against conduct that is deemed unlawful under their domestic rules but is carried out outside their territory by non-nationals, as long as it produces effects within their territory.[16] The extraterritorial application of antitrust laws on the basis of the effects doctrine is by now widely

[12] E.g. Cases 6, 7/73 *Commercial Solvents v EC Commission* [1974] ECR 223, [1974] 1 CMLR 30

[13] *Butterworths' Competition Law Service*, Division XII Extra-territoriality.

[14] However, there have also been some debates about the correct scope of enforcement jurisdiction, particularly as regards fine calculations – see Pieter Huizing, 'Fining Foreign Effects: A New Frontier of Extraterritorial Cartel Enforcement in Europe?' (2017) World Competition 40(3) 365; Pieter J F Huizing '*InnoLux v AU Optronics*: comparing territorial limits to EU and US public enforcement of the LCD cartel' (2018) Journal of Antitrust Enforcement 6(2) 231.

[15] Maher M. Dabbah *The Unilateral Option: Extraterritorial Assertion of Jurisdiction, International and Comparative Competition Law* (2010, Cambridge University Press), p.420.

[16] The doctrine finds its source in the judgment of the Permanent Court of International Justice in *SS Lotus (France v Turkey)* (1927) PCIJ ser A, no 10.

accepted. There seems to be a transatlantic consensus that effects have to be 'foreseeable, substantial and direct/immediate'.[17]

Much of the debate concerning the jurisdictional scope of competition law has focused on the effects' doctrine. The reason for this is that, even as it can be understood as an extension of the territoriality principle, one of its consequences is that the laws of more than one country where effects are felt may apply when a particular conduct has a cross-border dimension.[18] This, in turn, allows for the conflicts and tensions in competition enforcement we mentioned earlier.

2.3 The Effects' Doctrine and Competition Law

The US courts pioneered the use of the effects' doctrine for competition law.[19] The debate about the jurisdictional reach of the U.S. Sherman Act, in particular, has been ongoing for many decades.[20.] In 1945, the U.S. Court of Appeals for the Second Circuit ruled in *Alcoa* that the Sherman Act reaches conduct causing intended effects within the United States; and that a state can impose liability even upon foreign persons for conduct outside its borders that has consequences within its territory.[21]

However, the Second Circuit Court in *Alcoa* left unclear how substantial an effect must be in order to trigger the subject-matter jurisdiction of US law, and the nature of the requisite effect.[22] This lack of clarity has allowed different interpretations of this rule and, at times. It has also led, in reaction to the perceived overreach of U.S. antitrust laws and civil litigation, to many countries adopting blocking and claw-back statues[23] – some of which are still in place.[24]

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[17] Florian Wagner-von Papp 'Competition Law and Extraterritoriality' in Ariel Ezrachi (ed.) *Research Handbook on International Competition Law* (Edward Elgar, 2012), p. 57-58.

[18] OECD (2017) The Extraterritorial Reach of Competition Remedies DAF/COMP/WP3(2017)4, p. 5.

[19] See *United States v Aluminium Co of America*, 148 F.2d 416 (2d Cir. 1945) ("Alcoa"); *Hartford Fire v California* 509 U.S. 764, 795-796 (1993); *Hoffmann-La Roche v Empagran*, 542 U.S. 155, 165 (2004); US Department of Justice & Federal Trade Commission Antitrust Guidelines for International Enforcement and Cooperation, 13 January 2017, Section 3, https://www.ftc.gov/public-statements/2017/01/antitrust-guidelines-internationalenforcement-cooperation-issued-us (last accessed 5 March 2017).

[20] OECD (2015), Roundtable on Cartels Involving Intermediate Goods, Background Paper; OECD (2017) The Extraterritorial Reach of Competition Remedies DAF/COMP/WP3(2017)4, p. 5-6.

[21] *United States v Aluminium Co of America*, 148 F.2d 416 (2d Cir. 1945) ("Alcoa");

[22] Mark S. Popofsky. "Extraterritoriality in U.S. Jurisprudence", in 3 Issues in Competition Law and Policy 2417 (ABA Section of Antitrust Law 2008), p. 2422.

[23] Examples of countries that passed blocking statutes include South Africa, Australia, France, UK and Canada. *See* W. L Fugate *Foreign Commerce and the Antitrust Laws* (5th edition), Aspen Publishers (1996), p. 279ff; Gary Born *International Civil Litigation in United States Courts* (1996, Kluwer Law International), p. 587ff; Popofsky (2008), p. 2423 and the judgments referred to therein.

[24] See French law 68-678 of 26 July 1968 (the "French Blocking Statute"). This statute prohibits any communication of economic, commercial, industrial, financial, or technical documents or information to be used as evidence in legal proceedings outside of France, subject to mechanisms afforded under international agreements or treaties such as The Hague Evidence Convention. Violations are criminally punishable by fines up to €18.000 for individuals and €90.000 for legal entities, and/or up to six months' imprisonment.

Likewise, in the UK, see The Protection of Trading Interests Act 1980 not only assigns powers to the Secretary of State to prohibit disclosure of evidence in certain cases, but also includes a claw-back provision. Under s. 6, 'qualifying defendants', i.e. British citizens or companies and persons carrying on business in the

Given this lack of clarity, it is clear that the extra-territorial reach of the Sherman Act is expansive – but it has not been applied as freely much as one might expect, in large measure because the US exercised self-restraint. In 1982, the U.S. Congress passed the Foreign Trade Antitrust Improvements Act (FTAIA), regulating the Sherman Act's reach with respect to conduct involving trade or non-import commerce with foreign nations. While the FTAIA still subjects conduct involving U.S. import trade or commerce to the Sherman Act, it excludes jurisdiction over non-import foreign trade or commerce unless it has a "*direct, substantial, and reasonable effect*" on U.S. domestic, import, or export commerce, and such effect gives rise to a claim under the Sherman Act. The U.S. Supreme Court also ruled in *Hartford Fire* that US antitrust law applies "*to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States*"[25.] The FTAIA and *Hartford Fire* tests thus qualify the effects required to establish US antitrust jurisdiction, setting a threshold above trivial effects.

While the US was reigning in the jurisdictional scope of its antitrust rules, many countries around the world adopted a similar approach to the extraterritorial reach of their competition laws. The effects' doctrine was developed in the U.S. when not many other jurisdictions had competition laws. As competition acts were adopted around the world, US rules informed the jurisdictional limits of these laws. Thus, countries such as Australia, Japan and Korea rely on domestic effects to establish jurisdiction over a harmful conduct;[26] and the "*direct, substantial and reasonable effects*" requirement, with some differences in wording or intensity, is accepted by most jurisdictions as setting the limit for extraterritorial application of their competition laws.[27]

The EU has slowly inched its way towards a broadly similar approach. The text of Articles 101 and 102 TFEU say nothing on the question of their jurisdictional scope. Until recently, the CJEU had endorsed an 'implementation' test, which can be understood as a straightforward application of the territoriality principle – i.e. jurisdiction over conduct taking place within the EU's territory. In *Woodpulp*, the CJEU distinguished between the place of formation of an illegal agreement to fix prices and the place of its implementation. While the producers were located, and entered into the pricing agreements, outside the EU, they sold the cartelised product to customers within it. The CJEU ruled that the implementation of the agreement could be provide the European Commission with jurisdiction to take up the case.[28] The Court has also applied the potentially more expansive single economic entity doctrine, under which the court has been willing to go beyond

UK who have paid (whether voluntarily or by execution levied against their property) an amount on account of a multiple damages award, either to the plaintiff or to a co-defendant, are entitled to a remedy. The remedy is that the qualifying defendant has an absolute right, under s 6(2), to recover the non-compensatory portion of any damages paid by him from the plaintiff by an action in the UK courts. According to s 6(5) the British court must entertain the action for recovery even if the person against whom the action is brought is not within the jurisdiction of the court.

[25] *Hartford Fire Ins. v. California* (91-1111), 509 U.S. 764 (1993).

[26] OECD (2017) The Extraterritorial Reach of Competition Remedies DAF/COMP/WP3(2017)4, p. 6.

[27] OECD (2015), Roundtable on Cartels Involving Intermediate Goods, www.oecd.org/daf/competition/cartels-involving-intermediate-goods.htm

[28] Joined Cases 89/85, *A. Ahlström Osakeyhtiö and Others v Commission* [1988] ECR 5193, para. 11-23 (*Woodpulp*).

the legal façade of the separate legal personalities of parent and subsidiary companies and to say that, in reality, parent and subsidiary formed one economic entity – which is present in the EU.[29]

On the other hand, the EU's approach to the effects' doctrine was not set out clearly until recently. A very early case seemed timidly to endorse an effects'-based approach.[30] However, in subsequent case law the Court of Justice avoided taking a clear position on the validity of such a principle.[31] The lower courts, however, eventually adopted a 'qualified effects' test. In *Gencor*, after the Commission blocked a merger between the South African interests of two companies, the General Court confirmed the EU's extraterritorial jurisdiction whenever *"it is foreseeable that a proposed concentration between undertakings established outside the Community will have an immediate and substantial effect within the Community*".[32] Even more recently,[33] the General Court applied the qualified effects' approach to cartel activity, in the context of the power cables cartel.[34]

In 2017, the CJEU finally expressly adopted a qualified effects test in *Intel*.[35] The question for the court in this case was whether the European Commission had competences to sanction an abuse of a dominant position by Intel consisting of making payments to computer manufacturers outside the EU in return for them not supplying computers with competing chips in the EU. This was a factual scenario that, as Advocate-General Wahl suggested, was difficult to reconcile with the application of the implementation doctrine.[36] However, in its judgment the CJEU the Court accepted, with little discussion, the principle that the qualified effects test applied because the test was aimed at *'preventing conduct which, while not adopted within the EU, has anticompetitive effects liable to have an impact on the European Union market'*, citing *Gencor* approvingly. The CJEU accepted the General Court's findings that the effects were: (i) substantial, on the basis that Intel's foreclosure strategy, viewed as a whole, affected a significant part of the world market; (ii)

[29] Case C-48/69 *ICI Ltd v EC Commission* [1972] ECR 619, [1972] CMLR 557 (*Dyestuffs*). The court came to the conclusion that Geigy, Sandoz and ICI, three non-EU undertakings, had participated in illegal price fixing within the EU through the medium of subsidiary companies located in the EU and under their control.

[30] Case C-22/71 *Béguelin Import* EU:C:1971:113.

[31] Luca Prete 'On Implementation and Effects: The Recent Case-law on the Territorial (or Extraterritorial?) Application of EU Competition Rules' (2018) Journal of European Competition Law & Practice. 9(8) 487, p. 489.

[32] Case T-102/96 *Gencor Ltd v Commission of the European Communities* ECLI:EU:T:1999:65 para 90-92.

[33] Case T-422/14 *Viscas v. European Commission* EU:T:2018:446 ('Viscas'); Case T-441/14 *Brugg Kabel AG and Kabelwerke Brugg AG Holding v.European Commission*, EU:T:2018:453 ('Brugg');Case T-447/14 *NKT Verwaltungs GmbH, formerly nkt cables GmbH and NKT A/S, formerly NKT Holding A/S v. European Commission*, EU:T:2018:443 ('*NKT*') (collectively referred to as 'Power Cables'). This judgment was issued after the *Intel* decision by the CJEU.

[34] The Court found the effects of the cartel in the EU, including in relation to projects for the installation of power cables outside the EU, to be: (i) foreseeable, in that there were 'probable effects' of the cartel on competition within the EU; (ii) immediate, because direct influence on the supply of high and extra high voltage power cables in the EU was 'the object of the various meetings and contacts'; and (iii) substantial, in view of the number and size of the producers participating in the cartel, which accounted for almost all of the market, the broad range of products affected by the various agreements, the gravity of the practices in question, as well as the significant duration (over ten years). See Omar Shah, Christina Renner and Leonidas Theodosiou 'Intel, iiyama, power cables: A Revolution in the Treatment of Territoriality and Jurisdiction in EU Competition Law' (2019) Journal of European Competition Law & Practice 10(2) 80 p. 82.

[35] Case C-413/14 P *Intel v Commission* ECLI:EU:C:2017:632, para. 45.

[36] Opinion by Advocate General Wahl Case C-413/14 P, *Intel v Commission* ECLI:EU:C:2016:788, paras. 291-293.

immediate, on the basis that Intel's conduct sought and was capable of inducing computer manufacturers to delay the launch of an AMD-based product globally including in the EU while '*weakening [Intel's] sole significant competitor by foreclosing it from the most important sales channels*'; and (iii) foreseeable, since Intel could foresee and indeed intended to make an AMD-based computer model unavailable globally, including in the EU, and to thereby weaken AMD.[37] The CJEU further stated that, when determining whether the qualified effects doctrine applies, regard has to be had to the conduct 'viewed as a whole'; and that, to be foreseeable that the conduct complained of would have the requisite effect in the EU, it would be sufficient that the conduct would have 'probable effects'.[38]

While the CJEU only adopted the qualified effects test explicitly in *Intel*, it can be argued that EU institutions have been applying EU competition law extraterritorially as if the qualified effects test were the law of the land for decades. This was achieved in myriad ways. It occurred through the explicit application of an effects test, as the Commission, the General Court and various Advocates General have done.[39] The European courts have also applied other jurisdictional tests expansively – e.g. by employing the single economic entity principle[40] and an expansive implementation test[41] – which, while notionally based on the territoriality principle and theoretically narrower than the effects doctrine, has never in its practical application been more restrictive than the effects doctrine would have been. The qualifications of the effects test – that effects must be "direct, substantial and foreseeable" – have so far not proved to be a high hurdle, either. [42]

[37] Case T-286/09 *Intel v Commission*, ECLI:EU:T:2014:547, paras. 279-295. See Omar Shah, Christina Renner and Leonidas Theodosiou 'Intel, iiyama, power cables: A Revolution in the Treatment of Territoriality and Jurisdiction in EU Competition Law' (2019) Journal of European Competition Law & Practice. 10(2), 80 p. 82.

[38] Case C-413/14 P *Intel v Commission* ECLI:EU:C:2017:632, paras.46-51. Luca Prete 'On Implementation and Effects: The Recent Case-law on the Territorial (or Extraterritorial?) Application of EU Competition Rules' (2018) Journal of European Competition Law & Practice. 9(8) 487, p. 491, notes that it is yet to be clarified how strictly the qualified effects criterion is to be applied.

[39] Case T-286/09 *Intel v Commission*, ECLI:EU:T:2014:547, paras. 231–258: opinion by Advocate General Wahl in CJEU, case C-413/14 P, *Intel v Commission* ECLI:EU:C:2016:788, paras. 294–305. See previously Commission Decision 69/243/EEC, OJ 1969 L 195/11 (Dyestuffs); Advocate General Mayras's opinion in CJEU, case 48/69, *ICI v Commission*, ECLI:EU:C:1972:32, paras. 688–691; Commission Decision 85/202/EC OJ 1985 L 85/1, para. 79 (*Woodpulp*); Advocate General Darmon's Opinion in Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/*85 Ahlström v Commission*, ECLI:EU:C:1988:258, para. 7 et seq.; *obite*r in Case T-91/11 *InnoLux v Commission* ECLI:EU:T:2014:92, para. 62, finding that the implementation test was satisfied in the case at hand; see also opinion of Advocate General Wathelet in Case C-231/14 P *InnoLux v Commission* ECLI:EU:C:2015:292, who, however, considered the effects not sufficiently direct in the component case in question; the Court eventually did not consider the question to be relevant.

[40] Case 48/69 *Imperial Chemical Industries Ltd. v Commission* ECLI:EU:C:1972:70.

[41] Joined cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, *Ahlström v Commission* ECLI:EU:C:1988:447, paras. 16–18 ("*Wood Pulp I*")

[42] Florian Wagner-von Papp 'Competition Law in EU Free Trade and Cooperation Agreements (and What the UK Can Expect After Brexit)' available at https://ssrn.com/abstract=2961721, p. 9-10.

2.4. How important are Legal Constraints on Subject-Matter Jurisdiction?

An assertive application of the bases for subject-matter jurisdiction – and particularly the effect's doctrine – may have a significantly expansive impact in competition law. Some consensus has emerged in relation to norms governing the enforcement of competition law, and almost all jurisdictions rely on the qualified effects test to establish jurisdiction over foreign conduct, meaning that they are able to review foreign conduct that causes domestic harm, and impose remedial measures against it.[43] However, the legitimacy of each of these doctrines in public international law is somewhat controversial, even if they are accepted by the competition community. After all, full reliance on these expansive doctrines would necessarily lead to tensions between states and overlaps in enforcement. And even in the competition context, it has been argued that existing legal jurisdictional tests have virtually no screening power; and that what constraints enforcement in practice is the prosecutorial discretion exercised by competition authorities, the legal and practical difficulty of gathering evidence (and, to a lesser degree, enforcing decisions) against foreign conduct, and the ability to remedy solely the domestic effects of anticompetitive practices.[44]

What this reflects is the subject-jurisdictional scope of competition law – and the legal debates concerning the rules and principles governing jurisdiction – are not phenomena taking place in a vacuum. Instead, they are applied and discussed in light of doctrines and practices that influence them. Such practices can be adopted voluntarily or reflect informal arrangements to ensure coordination of enforcement efforts. We now turn to them.

3. Comity

3.1 Analytical Distinctions

Parallel systems of unilateral extraterritorial enforcement can lead to overlaps – and overlaps can lead to tensions.[45] Despite this, parallel competition enforcement typically does not raise problems. Consider the thousands of merger reviews that have taken place simultaneously in numerous jurisdictions, or how international cartels are prosecuted and sanctioned in several jurisdictions in parallel. Regardless, the cumulative application of multiple competition regimes to the same conduct can have negative effects, such as forum hopping, divergent results, duplicate sanctions and the misallocation of administrative resources.[46] And tensions may arise. Merger control in one country can prohibit a merger that can have pro-competitive effects in others. Antitrust enforcement by one country against certain agreements entered into in another can undermine efficiency-enhancing arrangements in the latter and lead to tensions arising from perceived interference in a country's sovereignty.

Comity and other reciprocal commitments can help ensure that policies in one jurisdiction do not advertently or inadvertently impact the competitive environment in others. Comity "*reflects*

[43] OECD (2017) Executive Summary of Roundtable on The Extraterritorial Reach of Competition Remedies DAF/COMP/WP3/M(2017)2/ANN1, p. 2.

[44] Florian Wagner-von Papp 'Competition Law and Extraterritoriality' in Ariel Ezrachi (ed.), *Research Handbook on International Competition Law* (Edward Elgar, 2012).

[45] Andrew T. Guzman 'Competition law and cooperation: Possible strategies' *in* Andrew Guzman A (ed.) *Cooperation, comity, and competition policy* (2010, OUP), p. 345–362; Andrew T. Guzman 'The case for international antitrust' (2004) Berkeley Journal of International Law 22(3) 355.

[46] Damien Geradin, Marc Reysen and David Henry 'Extraterritoriality, Comity and Cooperation in EU Competition Law' in Andrew T. Guzman *Cooperation, Comity, and Competition Policy* (2010, OUP), p. 29-30.

the broad concept of respect among co-equal sovereign nations and plays a role in determining 'the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation."[47] The OECD has described how, for over 100 years, public international law has acknowledged comity as a means of tempering the effects of the unilateral assertion of extraterritorial jurisdiction. From this perspective, comity is the "*international legal principle whereby a country agrees to take other countries' important interests into account while conducting its law enforcement activities*".[48] Despite these invocations of the concept by members of the international competition community, the meaning of comity for competition law remains under-theorised, at least outside the US.

Comity is a creature of international and private international law, not competition law. Comity was originally developed in the Netherlands in late 17th Century, in tandem with the development of the principle of absolute territorial sovereignty of states and concomitant discussions regarding choice of law and the appropriateness of applying law extraterritorially. In this context, the doctrine held that, in a context where states enjoyed absolute territorial sovereignty and where people in the State's territory are subject to its jurisdiction, comity should ensure the reciprocal respect and mutual recognition by sovereigns of each other's' laws and judgments.[49]

Since then, the meaning of comity has been enriched. Generally speaking, comity can be stronger or weaker, and more or less institutionalised.[50] Comity can also be negative or positive. Negative comity corresponds to unilateral restraint. Positive comity consists in asking and relying on another authority to provide assistance. Under it, one jurisdiction may ask its counterpart in another to country to undertake enforcement activities in order to remedy allegedly anti-competitive conduct occurring in the latter jurisdiction that is substantially and adversely affecting the interests of the requesting country. In practice, positive comity has been associated with active cooperation, and will be discussed in the next section.

It is the negative form of comity that most interests us here. Negative comity requires an authority *that has prima facie competence to act under its laws* voluntarily to refrain from intervening if that would lead to a conflict with another jurisdiction. Unlike the formal and informal cooperation arrangements that typically govern positive comity, negative comity acts as a consideration in construing the legal tests that govern the (extra-)jurisdictional scope of competition law, as well as in prioritising certain cases or imposing certain types of remedies.

Indeed, references to 'international comity' typically occur when discussing self-restraints to the exercise of subject-matter jurisdiction over foreign conduct that produces substantial domestic effects – i.e. over which a country or competition authority has jurisdiction.[51] In circumstances where one country has jurisdiction over certain business conduct, comity nonetheless requires that country to take other countries' important interests into account when pursuing its law enforcement activities,

[47] U.S. Department of Justice and Federal Trade Commission 'Antitrust Enforcement Guidelines for International Operations' § 3.2 (1995); and the new U.S. Department of Justice and Federal Trade Commission 'Antitrust Guidelines for International Enforcement and Cooperation' § 4.1 (2017).

[48] OECD (2014) International Co-Operation in Competition Law Enforcement, p. 8.

[49] Hessel E. Yntema 'The Comity Doctrine' (1966) Michigan Law Review 65(1) 9.

[50] Adrian Bradley 'Extraterritoriality and Cooperation in Competition Policy' p. 39, in George Papaconstantinou and Jean Pisani-Ferry (Eds) Global Governance: Demise or Transformation? (EUI, 2019).

[51] OECD (2017) The Extraterritorial Reach of Competition Remedies DAF/COMP/WP3(2017)4, p. 14-15.

in return for their doing the same.[52] In other words, negative or traditional comity involves abstaining from starting an enforcement procedure to avoid entering into conflict with another country's priorities or imposing remedies that can interfere with a country's sovereignty.[53]

3.2. Comity and the limits of Subject-Matter Jurisdiction

The most thorough discussions of negative comity as regards competition law can be found in the U.S., where the principle operated as a principle of legal construction, and hence had the ability to limit the scope of subject-matter jurisdiction itself. In the T*imberlane* case, the Ninth Circuit Court of Appeals established comity requirements for competition law enforcement.[54] In particular, this court held that U.S. courts could refuse to apply the Sherman Act to conduct occurring outside the U.S. borders unless *'the interests of, and links to, the United States—including the magnitude of the effects on American foreign commerce—are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority*'. In doing so, the Ninth Circuit articulated a jurisdictional rule of reasonableness that weighed domestic versus foreign interests when deciding whether a court should exercise jurisdiction.[55]

As already mentioned above, subsequently the U.S. Congress passed the 1982 Foreign Trade Antitrust Improvements Act (FTAIA). FTAIA regulates the Sherman Act's reach with respect to conduct involving trade or non-import commerce with foreign nations by establishing a two-part test for applying U.S antitrust law extraterritorially. In particular, in such circumstances the court is required to: (i) consider whether the conduct has a direct, substantial, and reasonably foreseeable effect on U.S. commerce; and (ii) determine whether the conduct gives rise to a claim under the Sherman Act. The adoption of FTAIA blurred the role of *Timberlane*'s balancing test. Had comity been superseded by FTAIA, or did balancing still have a role?

The matter appeared to be resolved by the Supreme Court's decision in *Hartford Fire,* which held that comity considerations do not bar Sherman Act claims against foreign defendants when the foreign conduct produces a substantial effect in the United States.[56] The Supreme Court therefore seemed to consider that FTAIA narrowed the application of international comity considerations while broadening the application of the substantial effects test.

However, following Hartford *Fire* a circuit split emerged between the Fifth and Second Circuits about the interpretation of FTAIAs requirement that the conduct must give rise to a claim

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[52] OECD (2014) Recommendation concerning International Co-operation on Competition Investigations and Proceedings OECD/LEGAL/0408.

[53] Even though negative comity concerns do not typically arise as regards enforcement jurisdiction – since the principles governing enforcement jurisdiction are perceived to provide sufficient constraints to its exercise – some competition law remedies have been criticised for restricting business conduct in multiple jurisdictions, or even across the world. See, for example, the remedy imposed by the Korean competition authority against Qualcomm - KFTC's decision of 20 January 2017 (Qualcomm), Case number 2015Sigam2118, translated by the American Consumer Institute Center for Citizen Research, www.theamericanconsumer.org/wp-content/uploads/2017/03/2017-01-20_KFTC-Decision_2017-0-25.pdf - and the international tension that it created as discussed in OECD (2017) The Extraterritorial Reach of Competition Remedies DAF/COMP/WP3(2017)4, p. 21-22.

[54] *Timberlane Lumber Co. v. Bank of Am*., 549 F.2d 597, 613 (9th Cir. 1976)

[55] The court's understanding of comity in *Timberlane* largely followed the Second Restatement of Foreign Relations, which was extended in the Third Restatement. See Douglas H. Ginsburg & John M. Taladay 'The Enduring Vitality of Comity in a Globalized World' (2017) GEO. MASON L. REV. 24:1069, p. 1082.

[56] *Hartford Fire Co*. 509 U.S. 770, at 798-99.

under the Sherman Act in order for US antitrust rules to have extraterritorial effect. At bottom, the question concerned what type of nexus between the injury – that is, the anticompetitive effect leading to loss – and the United States is required by FTAIA.[57]

The Supreme Court address this split in a case where foreign plaintiffs had bought vitamins from foreign defendant-cartelists in foreign transactions.[58] The Court relied, *inter alia*, upon principles of comity to interpret the FTAIA as excluding from the Sherman Act's reach an "*independently caused foreign injury*". While the Supreme Court rejected a *Timberlane*-like case-by-case comity balancing as unworkable, it took into account comity considerations in a more summary form, namely by interpreting restrictively the ambiguous language in the FTAIA that the direct, substantial, and foreseeable domestic effect must 'give rise to a claim under the provisions of this Act'. The foreign plaintiffs claimed that because other customers had purchased goods from cartel members in the US, the domestic effect had given rise to 'a' claim (namely by these domestic customers). Citing comity concerns, in particular interference with foreign leniency programmes and with the remedial mix in foreign jurisdictions, the Supreme Court rejected this interpretation of the ambiguous FTAIA language, and held that 'a claim' did not mean 'any claim', but 'the plaintiff's claim', at least to the extent that the foreign purchasers' claims were 'wholly independent' from the domestic effects. In doing so, the Supreme Court has been seen as having returned towards international comity principles.[59]

3.3 Comity, Prioritisation and Enforcement

Beyond its ability to constrain subject-matter jurisdiction, comity is particularly relevant for competition enforcement in practice. The principle of comity has, in the past, been discussed and relied on mainly in terms of its application to enforcement co-operation in cross-border cartel cases – in particular, to ensure that international cartel enforcement is conducted in a manner that balances policy and enforcement differences among the countries involved. Of course, comity principles can also play a pivotal role as regards abusive practices, particularly when the substantive laws that govern unilateral conduct by businesses with market power differ across jurisdictions.

The FTC and DOJ 2017 Antitrust Guidelines for International Enforcement and Cooperation state that "*In enforcing the federal antitrust laws, the Agencies consider international comity. (…)* '*A decision to take an investigative step or to prosecute an antitrust action under the federal antitrust laws represents a determination that the importance of antitrust enforcement outweighs any relevant foreign policy concerns*.' The Guidelines then go on to identify a number of considerations relevant to determining whether to start an investigation in light of comity. These include: '*the existence of a purpose to affect or an actual effect on U.S. commerce; the significance and foreseeability of the effects of the anticompetitive conduct on the United States; the degree of conflict with a foreign jurisdiction's law or articulated policy; the extent to which the enforcement activities of another*

[57] Compare *Den Norske Stats Oljeselskap As v. Heeremac VOF*., 241 F.3d 420, 427-28 (5th Cir. 2001) (finding no jurisdiction existed because the injury did not "give rise' to [plaintiff's] (domestic) antitrust claim"), with *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 399-400 (2d Cir. 2002) (concluding that a domestic injury is not required in order to meet the "'give rise'" requirement).

[58] *F. Hoffmann-La Roche Ltd. v. Empagran S.A.* 542 U.S. 155, 159 (2004).

[59] See Douglas H. Ginsburg & John M. Taladay 'The Enduring Vitality of Comity in a Globalized World' (2017) GEO. MASON L. REV. 24:1069, p. 1084-1085.

jurisdiction, including remedies resulting from those enforcement activities, may be affected; and the effectiveness of foreign enforcement as compared to U.S. enforcement.' [60]

The OECD has recently set out that: '*Authorities should consider comity and tailor their enforcement actions to minimise conflicts, taking into account not only hard conflicts of laws but also another sovereign country's choices in regulating its own domestic commerce. (…) If businesses are required to follow the law of all jurisdictions where their conduct may have an effect, the most restrictive jurisdiction would de facto set the rules of global commerce. Businesses should be able principally to observe the law and policy choices of domestic jurisdictions in which they operate, while, at the same time, competition authorities should respect the law and policy choices of foreign jurisdictions where these do not undermine their own competition laws. Thus, extraterritorial remedies should be exceptional and imposed only when a domestic remedy cannot cure the majority of the harm*.'[61]

In short, an agency may abstain from bringing a case when it has concluded that its interests are protected by another jurisdiction's actions, and act only if it believes that domestic consumers are not protected adequately. Remedies should avoid unwarranted extraterritoriality, so as to allow other countries to decide how to regulate their own markets.[62]

4. International Cooperation

Outside the US, most references to comity in competition law focus on its positive dimension – i.e. cooperative engagements. Enhanced regulatory and enforcement co-operation is key to ensure effective competition enforcement as the volume of cross-border economic activities continues to rise. International cooperation is also important to ensure the effectiveness of enforcement acts falling within one's subject-matter jurisdiction. For example, without a territorial link the European Commission cannot take formal steps to demand documents or hear witnesses based on the powers it has. The best it can do is act through diplomatic channels.[63]

International cooperation is also essential to avoid externalities flowing from increasing(ly effective) competition enforcement. For example, leniency applicants have to comply with multiple leniency regimes which are broadly similar to each other, but differ ever so slightly with regard to details such as the rules on markers, on finalising the marker, on the information required, etc. Conflicting leniency conditions may lead would-be applicants to be unable to obtain leniency across all relevant jurisdictions – and to evaluate whether the overall expected sanctions and costs of applying for leniency are acceptable before deciding whether to apply for leniency.[64] This has, reputedly, led to a decrease in the recent number of leniency applications, which could be avoided if there were increased levels of cooperation and regulatory alignment.[65]

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[60] U.S. Department of Justice and Federal Trade Commission 'Antitrust Enforcement Guidelines for International Operations' § 4.1, at 27-28 (2017).

[61] OECD (2017) Executive Summary of Roundtable on The Extraterritorial Reach of Competition Remedies DAF/COMP/WP3/M(2017)2/ANN1, p. 2.

[62] James F. Rill and Jana I. Seidl 'A commitment to convergence' Mlex (17 February 2017).

[63] Giorgio Monti 'EU Competition Law in a Global Context' *in* Dennis Patterson and Anna Sodersen (eds.) *A Companion to European Union Law and International Law* (Wiley Blackwell, 2016) 315, p. 319.

[64] Florian Wagner-von Papp 'Competition Law in EU Free Trade and Cooperation Agreements (and What the UK Can Expect After Brexit)' available at https://ssrn.com/abstract=2961721, p. 18.

[65] See http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=887029&siteid=190&rdir=1, 10 May 2017: "*The pace of leniency applications related to international cartels appears to be slowing, competition*

In short, the legal and *de facto* limits to the exercise of extraterritorial subject-matter and enforcement jurisdiction, and the overlaps created by the proliferation of unilaterally enforceable competition regimes in a globalised world, create a need for international cooperation – which are often predicated on agreements put in place to that effect.

4. 1. Bilateral and Multilateral International Cooperation

International cooperation agreements serve to strengthen the scope and degree of inter-agency co-operation. These agreements are generally signed on a bilateral basis by: (i) two jurisdictions (inter-governmental agreements[66]), and (ii) two agencies (inter-agency arrangements)[67].[68]

Historically, formal coordination mechanisms in respect of international antitrust have tended to revolve around free trade agreements (FTAs) between countries. There are good reasons for this, as FTAs provide a *via media* between utopic and politically unfeasible global regulatory regimes and a Hobbesian world of competing sovereigns. FTAs are thus preferred means not only to promote trade, but also to articulate regulatory responses between countries in the face of increased cross-border economic activity – the very goal of international cooperation. An OECD review of 267 FTAs included in the WTO's Regional Trade Agreements (RTA) database[69] found that an increasing number of FTAs — 90 percent of the agreements currently in force (from ~60 percent before 1990) — devote specific provisions or even entire chapters to competition-related matters.[70]

At the same time, one can also discern a trend for competition authorities, rather than governments, entering into co-operation agreements. Complying with obligations under FTAs, building on separate initiatives of the respective governments or even acting on their own initiative, competition agencies have concluded numerous co-operation agreements to provide mutual technical assistance, notify enforcement proceedings that may have an impact on a party's territory, exchange information, locate and secure evidence and witnesses, and ensure positive and negative

officials from Brazil, Japan, the EU and the US said today. This might be due to the burden and costs associated with filings in multiple jurisdictions, they said, adding that agencies should do more to target their investigations and coordinate witness interviews and document requests."

[66] OECD Inventory Of International Co-Operation Agreements On Competition (between governments), www.oecd.org/daf/competition/inventory-competition-agreements.htm

[67] OECD Inventory Of International Co-Operation Agreements Between Competition Agencies (MoUs), www.oecd.org/competition/inventory-competition-agency-mous.htm

[68] OECD (2017) The Extraterritorial Reach of Competition Remedies DAF/COMP/WP3(2017)4, p. 17-18.

[69] This database references the 283 FTAs (excluding agreements setting up customs unions or genuine regional organizations such as MERCOSUR or the Caribbean Community and Common Market [CARICOM]) that have either been notified, or for which an early announcement has been made, to the WTO as of 1 July 2019. The sample used included only 267 of these 283 FTAs. The reasons for this discrepancy are two-fold. First, the sample excludes three FTAs that we could not be retrieved online (Chile-Vietnam; Iceland-Faroe Islands; and the Pan Arab Free Trade Area [PAFTA]). Second, the FTAs between the Central American countries (Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua), on the one hand, and Panama and Chile, on the other, were counted as two (rather than ten) agreements. Likewise, separate agreements for trades in goods and trades in services between the same parties were counted together.

[70] François-Charles Laprévote 'Competition Policy within the Context of Free Trade Agreements' (2019) DAF/COMP/GF(2019)5, p. 5.

comity.[71] The number of bilateral co-operation agreements between competition authorities has grown in recent years, in tandem with the increasing number of competition regimes around the world and of cross-border economic activity. The OECD's inventory of international co-operation agreements between competition agencies – which only goes to 2017 – contains 145 Memoranda of Understanding, in addition to a number of cooperation agreements between governments.[72] The EU provides a good example of the proliferation of these arrangements. The Commission has entered into specific agreements or understandings regarding competition law with the U.S. (1991 and 1998), Canada (1999), Japan (2003), Brazil (2009), China (revised in 2019, following institutional changes in China), the Republic of Korea (2009), the Russian Federation (2011), India (2013), Switzerland (2014), South Africa (2016) and Mexico (2018).[73] The U.S. has entered into bilateral cooperation arrangements with Germany (1976), Australia (1982 and 1999), the European Union (1991 and 1998), Canada (1995, 2004 and 2014), Israel (1999), Japan (1999), Brazil (1999), Mexico (2000), Russia (2009), Chile (2011), China (2011), India (2012) Colombia (2014), Korea (2015) and Peru (2016).[74]

Cooperation arrangements vary in their content and strength. For example, only a limited number of agreements further authorise a competition agency to request another agency's co-operation to eliminate a specific anti-competitive practice which originates from the latter's territory.[75] Instead, these instruments are typically limited to narrower co-operation and co-ordination provisions. Cooperation arrangements often include notification requirements, typically a duty to inform the other party of relevant enforcement activities in the field of competition law. While exchange of information requirements are typically also provided in cooperation agreements, these requirements tend to be limited to non-confidential and/or public information, or to apply only to the extent permitted by the parties' respective domestic law. Cooperation arrangements that permit the systematic sharing of confidential information for investigatory purposes are relatively rare. In its stead, informal, piecemeal methods have developed, namely waivers provided by companies that allow information sharing, such as for merger cases or applications for leniency from prosecution for anticompetitive conduct.[76]

4.2 Regional Arrangements

The increasing proliferation of competition law and policy at national level has created a need for effective regional co-operation on competition, which over the years has resulted in a number of regional competition agreements. These regional competition agreements generally

[71] Id., p. 23-24.

[72] OECD Inventory Of International Co-Operation Agreements Between Competition Agencies (MoUs), www.oecd.org/competition/inventory-competition-agency-mous.htm; and OECD Inventory Of International Co-Operation Agreements On Competition (between governments), www.oecd.org/daf/competition/inventory-competition-agreements.htm.

[73] https://ec.europa.eu/competition/international/bilateral/, accessed on 15 July 2020.

[74] See Antitrust Cooperation Agreements, DEP'T OF JUSTICE, www.justice.gov/atr/antitrust-cooperation-agreements (accessed 8 June 2020).

[75] François-Charles Laprévote 'Competition Policy within the Context of Free Trade Agreements'(2019) DAF/COMP/GF(2019)5, p. 23.

[76] Regardless of the reason for this lack of systematic confidential information sharing (including legislative limitations and differing procedural safeguards), it may be hampering efforts to prevent, detect and punish cross-border cartels – see OECD (2017), OECD Business and Finance Outlook 2017 (OECD Publishing, Paris), p. 147.

offer deeper levels of integration and a higher degree of co-operation on competition enforcement than bilateral agreements. They provide a platform for enabling regional convergence; can spur the adoption of competition laws in a region or their improvement over time; may facilitate regional information exchanges for the enforcement of cross-border competition cases; and contribute to building the capacity of younger authorities.[77]

The best-known example of a regional competition arrangement is the European Competition Network (ECN). In Europe, both the European Commission and the Member States can apply EU competition rules. In effect, from 2004 to 2014 over 85% of all decisions applying EU competition rules were adopted by national competition authorities.[78] To ensure coherence in enforcement, Regulation 1/2003 created the ECN, which is based on a system of parallel competences between national and regional authorities. This Regulation also establishes flexible work-sharing rules to let the best placed authority handle a case – usually the authority of the most affected territory, if this authority is able to bring the entire infringement to an end. Parallel action by more authorities may be appropriate where an agreement or practice has substantial effects on competition in their respective territories and the action of a single authority would not be sufficient to bring the entire infringement to an end and/or to sanction it adequately. If anticompetitive agreements or practices have effects on competition in more than three member states, the Commission is deemed well-placed to take up the case. Remedies can also be discussed and co-ordinated through the ECN. In this way, the ECN provides a vehicle for EU member states' competition agencies and the European Commission to co-operate, enabling them to align enforcement actions and adopt measures against cross-border infringements in a coordinated way.

This system was reinforced in 2019 by means of Directive 2019/1.[79] This Directive seeks to ensure that national competition authorities have the appropriate enforcement tools in order to bring about a genuine common competition enforcement area within the EU. To that end, the Directive provides for minimum guarantees and standards so that national administrative competition authorities can be fully effective. These minimum guarantees and standards concern independence; adequate financial, human, technical and technological resources; and minimum enforcement and fining powers for applying competition law.

Regional arrangements for the enforcement of competition law are not limited to Europe, however. They can also be found in the Americas,[80] in Africa[81] and in Asia[82]. However, many differences exist in their implementation. Some evidence suggests that the deeper the level of

[77] OECD (2018) Regional Competition Agreements: Benefits And Challenges DAF/COMP/GF(2018)5, p. 4.

[78] https://ec.europa.eu/competition/antitrust/nca.html

[79] Directive 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market OJ L 11, 14.1.2019, p. 3–33.

[80] E.g. the Andean Community, MERCOSUR or CARICOM – the Caribbean Community.

[81] E.g. CEMAC – the Central African Economic and Monetary Community, COMESA – Common Market for Eastern and Southern Africa, EAC – East African Community, ECOWAS - (CEDEAO) Economic Union of West African States and WAEMU (UEMOA) – West African Economic and Monetary Union.

[82] Eurasian Economic Union or ASEAN.

regional economic integration that parties aim to achieve, the more detailed and far-reaching the competition provisions included in the respective agreements will be.[83]

The OECD has identified four models of 'regional integration' as regards competition. The first is the "Regional Referee" model, under which investigations of regional infringements are pursued at the national level by each relevant national competition authority, but the regional competition authority coordinates the investigation and has exclusive original jurisdiction to adopt decisions. An example of this can be found in MERCOSUR, where the Committee for the Defence of Competition, together with the Trade Commission of the MERCOSUR, is responsible for applying the regional competition provisions and has exclusive original jurisdiction to adopt decisions about potential cross-border anti-competitive practices. Another model is 'Two-Tiered', under which there are two independently operating levels: the regional competition authority has exclusive original jurisdiction over regional cases, while national authorities have exclusive jurisdiction over national cases. Examples of this include CEMAC – the Central African Economic and Monetary Community, and CARICOM – the Caribbean Community. A third model adopts 'Joint Enforcement', under which both national and regional authorities apply regional competition provisions in their respective competition cases (national and regional cases) – the paradigmatic example of which is the EU under the ECN system described above. Finally, there is also a 'One-Tier' Model, where the regional competition authority investigates and takes decisions on national and regional competition cases, while national competition authorities play a purely supporting role. An example of this is the WAEMU (UEMOA) – West African Economic and Monetary Union.[84]

4.3 Alignment through international standards organizations

Competition authorities can also pursue practical alternatives to formal cooperation mechanisms when pursuing internationally consistent and effective competition law enforcement. Promoting improved informal investigation coordination and a common approach to emerging issues can be more effective than formal arrangements in achieving meaningful international cooperation. As a result, competition authorities benefit from having *fora* to share experiences and interact outside of formal investigation proceedings. International fora, including UNCTAD, the International Competition Network and the OECD Competition Committee have been leveraged to this effect. They provide opportunities for informal interactions and sharing of experiences, which have substantial value in terms of encouraging a common approach to competition principles and finding solutions to challenges requiring multijurisdictional cooperation.

While many additional opportunities remain, international co-operation in competition enforcement has been a success. In many respects, there is broad agreement about the core concepts and design of competition legislation. Standing competition *fora* also promote meaningful discussions of the substantive differences among jurisdictions and enable the

[83] Lucian Cernat 'Eager to Ink, but Ready to Act? RTA Proliferation and International Cooperation on Competition Policy'. (2005) in Philippe Brusick, Ana María Alvarez & Lucian Cernat (eds.), *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* " (2005, UNCTAD) p. 16–17, examines 300 Regional Trade Agreements and find that there is a direct correlation between the level of economic integration and inclusion of competition related provisions.

[84] OECD (2018) Regional Competition Agreements: Benefits And Challenges DAF/COMP/GF(2018)5, p. 7-11.

identification of areas of convergence.[85] Further co-operation is necessary, however, in terms of the application of concepts, addressing legislative barriers to co-operation and dealing with emerging issues in markets.[86]

4.4 Informal Cooperation

It follows from the above that there are many formalised mechanisms to promote international cooperation. Yet, while important, such mechanisms do not tell the whole story of international cooperation. A recent joint ICN/OECD survey found that the majority of enforcement co-operation can occur informally or within existing legal frameworks, and that the development of trust and relationships between authorities is crucial to improve the prospects and quality of enforcement cooperation.[87] In cross-border enforcement cases, informal co-operation may include activities such as keeping each other informed of the progress of cases of mutual interest, discussions on investigation strategies, exchanges of public information, sharing leads and comparing authorities' approaches to an issue in a case. Even in the absence of formal co-operation agreements, informal co-operation may enable the co-ordination of surprise inspections.[88]

Many of the key types of co-operation valued by their authority can be largely achieved through informal co-operation. In effect, many competition authorities note that informal cooperation is often the most frequent and useful form of co-operation, because it can occur without burdensome formal processes, such as formal information or assistance requests, and can occur more easily at case-handler level. [89]

5. The Three Body Problem – Is this as good as it gets?

The analysis above identified three main factors that influence the extra-jurisdictional scope of competition law in practice. An attentive reader will have no doubt noted that, while the sections flowed logically from one to another, they had very little overlap. This reflects the terms of the debate as found in the literature. Each factor is usually taken on its own, autonomously and independently from the others.

Naturally, the legal test governing the jurisdictional scope of a country's competition law is the dominant element in any analysis of the extraterritorial reach of competition law. This is the only factor which is exclusively legal/formal; and, from a domestic law point of view, it is arguably the sole relevant criterion for establishing whether a country has jurisdiction over a certain business conduct. After all, challenges to the validity of individual enforcement decisions will typically challenge whether a case fell within the jurisdiction of a competition authority of court, not whether principles of comity or international cooperation have been followed. Further, the legal test to determine subject-matter jurisdiction sets a necessary threshold for competition enforcement to

[85] OECD (2017) Executive Summary of Roundtable on The Extraterritorial Reach of Competition Remedies DAF/COMP/WP3/M(2017)2/ANN1, p. 3.

[86] OECD (2017), OECD Business and Finance Outlook 2017 (OECD Publishing, Paris), p. 149.

[87] OECD and ICN (2020) 'International Enforcement Co-operation', section 3.2.4 (forthcoming).

[88] An example is the co-ordinated investigation carried out by the Competition Commission of South Africa (CCSA) together with the EU and the US DoJ in 2007 in relation to a cartel involving freight forwarding companies. The three authorities conducted simultaneous raids.

[89] OECD and ICN (2020) 'International Enforcement Co-operation', section 4.1.1 (forthcoming).

occur. If this test is not met, then other non-legal factors do not matter, and the debate on their role becomes moot.

In line with this approach, some have argued that only the internal, domestic perspective matters for discussions about extra-territoriality. From this perspective, negative comity only matters, if at all, as a consideration in construing the legal tests that govern the (extra-)jurisdictional scope of competition law; and bi-, pluri- and multilateral approaches operate mainly as a complement to fill gaps and inform purely domestic legal assessments.[90]

This may well be right from a purely legal-formal perspective, even though this will obviously depend on the specific rules of each jurisdiction. However, in practice – and, particularly, in any attempt to understand how extra-jurisdictional competition enforcement occurs in practice – the devil is in the complementary details that go beyond legal rules on subject-matter jurisdiction. After all, merely relying on rules governing subject-matter jurisdiction can give rise to multiple overlapping jurisdictions in respect of one and the same conduct. That, in turn, can precipitate forum shopping (or forum hopping), particularly where only some jurisdictions adopt flexible approaches on extraterritoriality.[91] Expansive approaches to jurisdiction can result in parallel proceedings, conflicts of law, divergent outcomes on the same facts, and potentially multiple fines and/or awards for damages in respect of one and the same conduct, together with the potentially material political risk associated with asserting jurisdiction over foreign conduct.[92] Territorial limits, including unilaterally adopted jurisdictional rules and extraterritorial limits on remedies, can only be a second-best efficient solution to the problems created by multiple and diverse laws.[93] In the absence of cooperation and effective coordination among those responsible for enforcement of the competition laws worldwide, the simultaneous application of various national competition rules is still likely to give rise to conflicts and tensions, and to a number of significant negative externalities for international competition law. Importantly, what one observes in the real world is that instruments to manage these conflicts and tensions abound – and have significant practical implications on how cross-border cases and mergers are investigated and decided. As such, an approach that looks at extra-territoriality by focusing solely on domestic/formal/legal rules governing subject-matter jurisdiction is bound to be incomplete.

Similar objections can be levelled at an interpretation of negative comity that sees it as being limited to construing legal tests regarding subject-matter jurisdiction. First, and as discussed

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[90] Florian Wagner-von Papp 'Competition Law and Extraterritoriality' in Ariel Ezrachi (ed.), Research Handbook on International Competition Law (Edward Elgar, 2012), p. 23-24.

[91] This may be particularly problematic as regards private enforcement, where no exercise of discretion as regards prioritisation and enforcement may be allowed. We discussed above how the US courts incorporated elements of negative comity into its legal assessment of the jurisdictional scope of the Sherman Act and FTAIA, following complaints about the expansive interpretation of such scope previously. On the other hand, some countries where private competition enforcement is more recent seem to be adopting expansive interpretations of their own. For example, the UK Court of Appeal recently held that it may, in principle, award damages in respect of cartel conduct that has taken placed entirely outside the EU for an infringement of EU competition law – see *iiyama (UK) Ltd and others v. Samsung Electronics Co Ltd and others* [2018] EWCA Civ 220; [2018] 4 C.M.L.R. 23.

[92] Omar Shah, Christina Renner and Leonidas Theodosiou 'Intel, iiyama, power cables: A Revolution in the Treatment of Territoriality and Jurisdiction in EU Competition Law' (2019) Journal of European Competition Law & Practice. 10(2), 80 p. 84-85,87.

[93] Koren Wong-Ervin, Bruce H. Kobayashi, Douglas H. Ginsburg, and Joshua D. Wright 'Extra-Jurisdictional Remedies Involving Patent Licensing' https://ssrn.com/abstract=2870505, p. 4-5, accessed on 20 January 2017.

above, negative comity also operates as an informal mechanism of self-constraint on the part of public authorities within the scope of their subject-matter jurisdiction – and, within that scope, independently of the applicable legal test of subject-matter jurisdiction. Second, and relatedly, it is impossible to understand the operation of negative comity from a purely domestic standpoint, since it is predicated on the international interaction of different sovereigns, and in particular in expectations of reciprocal exercises of self-restraint on their part.

In effect, establishing subject-matter jurisdiction is not sufficient to understand whether enforcement is likely to occur in practice, or under what terms. While jurisdictional tests adopt an internal/domestic perspective that builds on purely legal constraints, both comity and cooperation require one to take into account external/international concerns. To understand how enforcement occurs in practice in an increasingly transnational context, one needs to consider these more informal constraints imposed by comity and international cooperation on competition enforcement and practice. The result is an apparently stable system – indeed, from a purely domestic legal perspective, a fully regulated system – that is nonetheless unpredictable to external observers whenever individual cases have an international dimension.

At the other extreme, one can find (normative) arguments for adopting a purely external/international perspective. From this standpoint, international cooperation and coordination should ultimately lead to a global/multilateral competition law regime in which the current externalities between jurisdictions are internalised through agreement on international standards and/or enforcement institutions. It is true that a global competition authority would require a large-number multilateral agreement that would establishing rules compatible with all involved states' sovereignty claims. However, it would be optimal for enforcement in theory, though the cost and methods of doing so remain open questions.[94]

Yet, such moves towards a global competition law have, with the exception of some isolated and mostly sector-specific provisions, largely failed. [95] In particular, there have been repeated attempts to bring competition matters into the WTO multilateral trading system. The first of these was Chapter V in the Havana Charter for an International Trade Organization (ITO), the precursor to the WTO. Chapter V provided disciplines on a range of restrictive business practices, including provisions for dispute settlement. The general policy was to mandate all members to take appropriate measures to prevent business practices affecting international trade which restrain competition, limit market access or foster monopolistic control. Section 46 also listed various types of business practices that restrict competition.[96]

The ITO and the proposed disciplines in the Havana Charter never came into existence. However, efforts to incorporate competition policy and enforcement into a multilateral legal framework continued to take place in the context of discussions under the GATT system. In 1996, WTO members established a Working Group on the Interaction between Trade and Competition Policy (WGTCP) to study the interaction between trade and competition policy. After years of work, the majority of WTO Members rejected launching negotiations on a multilateral framework

[94] Adrian Bradley 'Extraterritoriality and Cooperation in Competition Policy' p. 39, in George Papaconstantinou and Jean Pisani-Ferry (Eds) Global Governance: Demise or Transformation? (EUI, 2019).

[95] Florian Wagner-von Papp 'Competition Law in EU Free Trade and Cooperation Agreements (and What the UK Can Expect After Brexit)' available at https://ssrn.com/abstract=2961721, p. 18-19.

[96] The practices include: price-fixing and fixing terms or conditions of purchase, sale or lease of product; excluding, allocating, or dividing enterprises from market or business activity; discrimination against particular enterprises; limiting production or fixing production quotas; preventing development or application of technology or invention; extending the use of intellectual property rights.

on competition policy at the fifth WTO Ministerial Conference in Cancun, Mexico, in September 2003. In the subsequent official meeting of the General Council, the WTO members decided that no further work would be undertaken toward negotiations on competition, as part of the so-called "July package" of 2004.[97]

The political feasibility of global competition approaches seems minuscule. Sovereign nations are not going to defer to the assessment of another nation's authority on the lawfulness of business conduct affecting their territory. Further, it should be noted that, despite the undoubted practical benefits of a 'world government' type of approach, it is not clear that a more centralised approach would be desirable even in theory. Among other things, a centralised regime would be less able to take local circumstances or preferences into account, and could lead to an ossification of the law, which would be problematic in an area of law as dynamic as competition law.

Given these limitations, a 'lead jurisdiction' approach has been aired as an alternative. This approach would eliminate overlaps and would avoid many of the drawbacks of centralisation. The mutual recognition of decisions by competition authorities has been identified as an opportunity to reduce the burden on investigators and enhance consistency. Possible approaches to promote this include: promoting positive comity in competition enforcement actions (e.g. competition authorities considering requests by other countries to open an investigation with respect to potential anticompetitive conduct); relying on a finding of guilt in other jurisdictions while calculating local damages; and the organisation of multi-authority investigations with a single authority designated as "lead authority." This approach could, in particular, assist smaller, less well-resourced competition authorities in enforcing their competition laws. However, this approach faces significant practical and legal feasibility challenges.[98] In practice, it seems unlikely that 'lead jurisdiction' will be adopted outside the scope of wider efforts to promote economic integration, as reviewed in our discussion of regional arrangements above.

Realistically, then, the coordination of multiple competition law regimes needs to thread a middle way that builds both on self-restraint on the part of countries (undoubtedly in the expectation that it will be reciprocated), and on international cooperation mechanisms. Such an approach can result in a system of international cooperation that combines the advantages of a decentralised approach with the benefits of reducing overall complexity in competition enforcement.[99] An interesting analytical framework to understand how this middle way operates in practice has recently been developed by Von Papp. Building on the current regime of bi- and multilateral trade agreements, he argues that:

"*The intermediate path between pure unilateral enforcement and a centralised global enforcer consists in unilateral enforcement tempered by cooperation and coordination of enforcement activities. Regional cooperation leads to internally relatively homogeneous clusters, and reduces complexity on the global scale. The extremely close cooperation in such regional cooperation agreements is supplemented by a second layer of reciprocal cooperation links, which are characterised by a slightly lower but still high degree of internal homogeneity, and accordingly cooperation that does not go quite as far as the one in the central region. As we move in concentric*

[97] Hyo-young Lee 'Applying Competition Policy to Optimize International Trade Rules' Korea Institute for International Economic Policy (KIEP) Staff Paper 2017/01 (February 2017) , p. 6-8.

[98] OECD (2017) Business and Finance Outlook, p. 148.

[99] Florian Wagner-von Papp 'Competition Law in EU Free Trade and Cooperation Agreements (and What the UK Can Expect After Brexit)' available at https://ssrn.com/abstract=2961721, p. 18-19.

circles further away from the centre, heterogeneity of competitive conditions or interests increases and the depth of cooperation decreases."[100]

A focus on "concentrical circles of international cooperation" can have great explanatory power to describe the patchwork of rules governing cross-border competition enforcement and merger control. In effect, – and particularly if one starts from within an integrated trade zone – one can observe a set of concentric circles with intense cooperation at the centre that eliminates internal gaps and overlaps to the greatest possible degree, followed by gradually decreasing circles of cooperation with other areas of the world in which the competitive conditions and interests are not as homogeneous. This creates a global network of nodes and links that would, while not eliminating gaps and overlaps, arguably reduces them to a manageable level.[101]

Underlying these concentrical circles, one can find a common substratum regarding the need for competition law and the form and goals of competition rules. These are apparent in the work of international organisations – particularly the OECD, the ICN and UNCTAD – which foster the adoption of common standards and promote the existence of a transnational competition community. It is also apparent on how competition agencies perceive informal cooperation to be as, if not more important than formal mechanisms. This is only possible because all these players belong to an epistemic community, i.e. a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area.[102]

The basic assumptions of this community are, it is submitted, as important as the other factors we have discussed so far in this paper. However, they are strikingly ignored in discussions by members of that very community. The importance of epistemic communities to the convergence of competition law has been convincingly demonstrated in the past.[103] Such communities are typically formed through systems of similar training (professional training), and the creation of channels for the exchange of information, ideas, solutions and arguments concerning competition law and its application (socialisation). The competition community (e.g. agency officials, lawyers, economists, academics) form an epistemic community that enjoy similar training, socialise in multiple venues – including in *fora* organised by international organisations – and share a number of common assumptions, such as that competition is beneficial, helping to promote economic growth and welfare; that markets should be regulated to ensure they are fair; or that competition enforcement should be free from political interference and driven by economic criteria.[104] The existence of such an epistemic community brings together those in the field and adds order to competition law and policy globally, including through international and transnational bodies.[105]

The existence of this community, and of sub-communities within it, likely plays a very important role in avoiding conflicts and tensions, and in achieving consistency and coherence in

[100] Id., p. 2.

[101] Id., p. 2.

[102] Peter Haas 'Introduction: Epistemic communities and international policy coordination' (1992) International Organization 46(1) 1, p. 3.

[103] Frans van Waarden and Michaela Drahos 'Courts and (epistemic) communities in the convergence of competition policies' (2002) European Public Policy 9(6).

[104] Id., p. 929; Stephen Wilks 'Agencies, Networks, Discourses and the Trajectory of European Competition Enforcement'(2007) European Competition Journal 437, p. 440-443; Christopher Townley *A Framework for European Competition Law: Co-ordinated Diversity* (Hart, 2018), p. 105.

[105] Id., p. 154-155.

practice. Differences within this epistemic community – caused by commonalities in background and training and closer contacts between some members – can also go some way towards explaining why certain regions and members of this community share more similarities and enjoy closer relations between themselves than with those belonging to 'circles' further afield. It is even likely that personal relations between members of this community play an important role in ensuring the smooth coexistence of multiple competition regimes.

Taking into account of an international epistemic community formed around competition law is important for two reasons. First, it allows us to identify a *substratum* to discussions regarding the various factors governing the application of competition law to cross-border business conduct. It even provides the grammar in which we have these conversations, and is a necessary element in understanding how these apparently disparate factors gel together and interact with one another. Second, the existence and type of this epistemic community – and its manifold subdivisions – inserts an additional layer to an already complex system. In doing so, a focus on epistemic communities lends force to arguments that informal arrangements play an important role in the cross-border coordination and enforcement of competition law in a way that makes it extremely difficult fully to explain how the international competition system operates in every instance, even if one were to agree on general principles that broadly govern it. Or, as a physician would put it, the three-body problem is only the simpler version of the *n*-body problem, and the outcomes of such systems are always hard if not impossible to predict.

6. Conclusion

In the end, we are left with a number of different factors that govern the practice of an international competition community as regards cross-border anticompetitive practices and concomitant enforcement procedures. This paper identified a number of these factors – rules on subject-scope and enforcement jurisdiction; rules on comity; mechanisms of international cooperation; the functioning of epistemic competition communities – and pointed out that they are linked by a set of amorphous, tacit rules that allow us to speak of a global competition community and govern how these factors interact with one another.

At the same time, this paper has shown that these factors are continuously evolving – even those factors that one would expect to be more stable, such as legal tests governing subject-matter jurisdiction. The result is a flexible, evolving environment that governs competition practice around the world. While we are able to discern the main principles governing this environment, the very fluidity of the various factors at play and of the way in which they interact preclude the adoption of mechanistic or deterministic explanations. The outcome is a system (and community) that seems to operate rather well, but where surprising conflicts and tensions may arise from time to time in unpredictable manners. It is submitted we should not be surprised or disappointed by this. After all, it is in the nature of dynamic environments and communities to be works in progress.