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Jacqueline Bos
Allens Arthur Robinson

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ANTITRUST TREATMENT OF CARTELS: A COMPARATIVE SURVEY OF COMPETITION LAW EXEMPTIONS IN THE UNITED STATES, THE EUROPEAN UNION, AUSTRALIA AND JAPAN

JACQUELINE BOS*

I. INTRODUCTION

Country borders no longer present a challenge to modern day price fixers or boycott cartels. Vitamin manufacturing cartels, graphite electrode price fixers and lysine manufacturers are recent examples of colluders that have expanded to the four corners of the globe. Antitrust laws, however, have not always expanded to follow their targets. The increase in international trade combined with the pervasive influence on antitrust policies of international organizations such as Asia-Pacific Economic Cooperation (APEC), the World Trade Organization (WTO), and the Organisation for Economic Cooperation and Development (OECD) makes a comparative look at the treatment of competition policy by individual nations increasingly significant. This Article considers how four major jurisdictions delineate what conduct they treat strictly, what conduct is subject to a competition test,¹ and how they treat pro-competitive conduct.²

This Article compares four jurisdictional approaches to anticompetitive behavior: (1) the U.S. “rule of reason” approach,³ (2) the multifaceted

* LL.B., BEc, BJS, Australian National University. Senior Associate, Allens Arthur Robinson, Melbourne, Australia. Currently on secondment to Nagashima Ohno & Tsunematsu, Tokyo, Japan. Adapted from a paper presented at the APEC Competition Policy and Economic Development Conference held by The Institute of Comparative Law in Japan, Chuo University, Tokyo, Japan, July 5-9, 2001.

1. A competition test refers to a proscription of conduct that affects competition in some manner. For example, the Australian Trade Practices Act 1974 prohibits agreements that substantially lessen competition. The Japanese Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade prohibits unreasonable restraints of trade.

2. If conduct is pro-competitive, its net effect on competition is positive. For example, a joint venture between two competitors may reduce competition and thus lead to higher prices. However, if there are tremendous efficiencies resulting from the joint venture that can be passed on to consumers in the form of lower prices, the conduct may be pro-competitive.

3. The rule of reason analysis is essentially a method for determining exactly what the broad, sweeping words of Section 1 of the Sherman Act do not include on the grounds of reasonableness. See Sherman Act § 1, 15 U.S.C. § 1 (1994 & Supp. V 1999). Historically, there have been two primary streams of rule of reason analysis. This Article will refer to them as (i) the “ancillary restraints”

flexible approach under the Treaty Establishing the European Community,⁴ (3) the relatively strict Australian per se illegality approach, and (4) the less-developed antimonopoly regime in Japan. While each of the jurisdictions evaluated in this Article regulates unjustifiable cartelization, the distinction between the regimes becomes more apparent through a thorough analysis of each jurisdiction's cartelization exemptions. A comparison of the per se prohibitions in the antitrust regimes in Australia, the European Union, Japan and the United States reveals five major components of, and exemptions within, the antitrust analysis: strict liability, pro-competitive agreements, ancillary agreements, other exemptions and enforcement.

A. *Strict Liability*

Each jurisdiction treats cartels very seriously and each maintains some form of strict, or “per se,” liability,⁵ although the scope of each per se prohibition differs. Each jurisdiction prohibits, to a varying degree, boycott conduct,⁶ price fixing agreements,⁷ resale price maintenance,⁸ and third-line forcing.⁹ However, competition laws exclude conduct considered to be in the public interest from per se liability through exemptions that vary in each jurisdiction. In its broadest definition, the term “exemptions” includes a rule of reason approach in which various circumstances may be taken into account to allow beneficial conduct to prevail over the legislation.

doctrine, and (ii) the “pro-competitive conduct” doctrine. In the most recent case to apply the rule of reason analysis, the Ninth Circuit adopted a hybrid of these two approaches. *See Cal. Dental Ass’n v. F.T.C.*, 224 F.3d 942 (9th Cir. 2000).

4. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, O.J. (C 340) 3 (1997) [hereinafter EC TREATY].

5. “Per se” liability refers to conduct that is strictly illegal without any consideration of its effect (or lack thereof) on competition, markets, or any other relevant factors. *See discussion infra* Part IV.A.

6. “Boycott conduct” in antitrust law refers to agreements between competitors to limit their supply to a third party. This includes agreements to either allocate markets to a particular competitor(s) or not to supply to or acquire anything from another party.

7. Price fixing agreements include agreements that fix discounts, rebates, and commissions.

8. “Resale price maintenance” concerns the practice whereby a manufacturer or wholesaler either requires a retailer to sell products at or above a certain price level, or terminates the supply to a retailer because the retailer has discounted the price of the manufacturer’s product.

9. “Third-line forcing” is the practice of offering products on the condition that the customer simultaneously purchase the products of another supplier. For example, a bank may offer a mortgage on the condition that the customer obtain insurance from a certain insurance company. In such a case, it is likely that the bank will receive a commission from the insurance company for the referral.

B. Agreements That Have a Pro-Competitive Effect

In Australia and Europe, companies must complete the formal *ex ante* clearance process before the law will exempt any pro-competitive conduct. In the United States, however, a rule of reason approach allows courts to determine that the challenged conduct does not breach the Sherman Act if it is pro-competitive. Some commentators argue that Japan follows the approach of the United States,¹⁰ while others argue a similar rule of reason doctrine exists in both the European Union and Australia. Anticompetition regimes in both Japan and the United States do not provide for formal pre-clearance of conduct. The U.S. system allows parties to engage in conduct that appears to be anticompetitive but that actually contains net pro-competitive effects. This system provides businesses in the United States with the flexibility to continue their business practices without the intervention associated with the clearance processes. The drawback is that U.S. businesses do not have the comfort and assurance offered by the formal clearance systems of the European Union and Australia.

C. Ancillary Agreements

U.S. courts and the European Commission also follow a second rule of reason doctrine whereby they will determine that no breach of the antitrust laws has occurred with regard to otherwise anticompetitive agreements that are merely ancillary to a legitimate agreement. Neither U.S. nor E.U. legislation expressly state this practice, which has evolved entirely through case law. In Australia, the Trade Practices Act 1974 (T.P.A.) permits price agreements (but not other per se offenses) that are ancillary to formal joint venture arrangements, which offers a level of surety that the U.S. and E.U. systems do not. In comparison, the T.P.A. offers broader protection to legitimate joint ventures, yet offers no protection to any other competitors who make legitimate joint arrangements that do not qualify as joint ventures unless formal authorization has been obtained. The Japanese regime is still undeveloped with regard to ancillary restraints, but it is arguable that this is because the Japanese Fair Trade Commission (JFTC) has ignored cases in the past that are not obvious examples of cartelization, thereby creating an informal exemption for agreements that fall short of being hardcore in nature.

10. See discussion *infra* Part IV.A.1.

D. Other Exemptions

Of all four jurisdictions, the European Union maintains the greatest range of exemptions. In addition to exempting ancillary restraints and pro-competitive conduct, the EC Treaty contains express exemptions for crisis cartels. Finally, the E.U.'s *de minimis* doctrine allows inconsequential conduct to continue unquestioned.¹¹ The other three jurisdictions also have provisions for government-mandated conduct, but Japan has been reducing the nature of its other exemptions and, in 2000, revoked its equivalent of crisis cartel exemptions. In addition, the Australian T.P.A. expressly exempts the operations of liner cargo shipping cartels.¹² All four jurisdictions currently possess some level of exemption for conduct related to intellectual property.¹³

E. Vigorous Enforcement

Despite the different approaches of the four jurisdictions, recognized cartels suffer a similar fate under each. Each jurisdiction views price and boycott cartels with suspicion and will allow the cartels to survive only in the rare situations where they produce considerable public benefits or are highly pro-competitive—both extremely rare situations. The rationale attributed to the different levels of approaches is the different priority that each jurisdiction places on price fixing conduct. Until 1970, Japan did not prosecute price cartels. The European Union has a “market overview” role, thus leaving the details to each of its member states, which results in less of a need for vigorous enforcement. The United States always has recognized the importance of antitrust laws (although Chicago School economists have been very influential in the last twenty years). Australia has started to treat competition policy more seriously since the National Competition Policy Review commenced in 1995. Douglas Rosenthal and Mitsuo Matsushita point out that “the differences between the United States, Europe, and Japan begin to look more like differences in degree than kind . . . when one parses different specific indicators of the commitment to competition.”¹⁴

11. The *de minimis* doctrine stipulates that agreements that affect less than 10% of the relevant market (for horizontal restraints) and less than 15% of the market (for vertical restraints) are not subject to the EC Treaty. See *Commission Notice on Agreements of Minor Importance Which Do Not Appreciably Restrict Competition Under Article 81(1) of the Treaty Establishing the European Community* (de minimis), 2001 O.J. (C 368) 7 [hereinafter *Commission Notice*].

12. Trade Practices Act, 1974, Part X (Austl.).

13. Australia currently is reviewing this exemption.

14. Douglas E. Rosenthal & Mitsuo Matsushita, *Competition in Japan and the West: Can the Approaches be Reconciled?*, in *GLOBAL COMPETITION POLICY* 318 (Edward M. Graham & J. David

II. LEGISLATION

A. *United States*

The United States regulates cartels in Section 1 of the Sherman Act and Section 3 of the Clayton Act. Both sections are broad, and as I will discuss, are subject to varying interpretations by U.S. courts.

1. *The Sherman Act*

Section 1 of the Sherman Act declares that “[E]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.”¹⁵

2. *The Clayton Act*

Section 3 of the Clayton Act states:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods . . . or fix a price charged . . . where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.¹⁶

Price fixing and boycott cases hold that unreasonable or unjustifiable price fixing, boycotting, or resale price maintenance that is not ancillary is per se illegal. The United States adopts a rule of reason approach, but does not have statutory exemption or authorization provisions. In addition, the U.S. Department of Justice (DOJ) will offer parties engaging in particular forms of conduct a comfort letter indicating that the DOJ does not intend to take action against such parties with regard to such conduct. Comfort letters generally contain qualifying phrases such as “in the absence of extenuating circumstances . . .” and do not provide protection from prosecution by private litigants or state regulators.

Richardson eds., 1997).

15. 15 U.S.C. § 1 (1994 & Supp. V 1999).

16. Clayton Act, ch. 323, § 3, 38 Stat. 731 (1914) (current version at 15 U.S.C. § 14 (1994 & Supp. V 1999)).

B. European Union

1. EC Treaty

Article 81 of the EC Treaty states:

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

any agreement or category of agreements between undertakings;

any decision or category of decisions by associations of undertakings;

any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.¹⁷

The EC Treaty applies only to agreements that may affect trade between the member states of the European Union. The EC Treaty has been interpreted to hold that price fixing and boycott conduct are per se illegal.¹⁸

The E.U. system includes exemptions in the form of: (1) declarations or formal exemptions of particular conduct that meets the public benefit tests outlined in Article 81(3) of the EC Treaty; (2) a *de minimis* doctrine that mandates that inconsequential restraints (agreements that affect less than 10% of the horizontal market and 15% of the vertical market) do not breach the EC Treaty; and 3) a form of rule of reason analysis, such that ancillary restraints do not violate the EC Treaty.¹⁹ Many parties also rely on an informal clearance in the form of a comfort letter from the European Commission, stating that particular conduct will not breach the EC Treaty and that the Commission will not take subsequent action against the cartel.²⁰

C. Australia

1. Trade Practices Act 1974 Part IV

- a. Section 45: prohibits boycott conduct (per se illegality) and horizontal agreements that substantially lessen competition;²¹
- b. Section 45A: deems that price fixing agreements between competitors substantially lessen competition (per se illegality);²²
- c. Section 46: prohibits misuses of market power;²³
- d. Section 47: prohibits vertical agreements that substantially lessen competition;²⁴
- e. Section 47(6): prohibits third-line forcing (per se illegality);²⁵

17. EC Treaty art. 81, 1997 O.J. (C 340) 3.

18. See Competition Rules Relating to Horizontal Cooperation Agreements, 2000 O.J. (C118) [hereinafter Competition Rules].

19. Commission Notice, 2001 O.J. (C 368) 7.

20. For examples of comfort letters, see COMFORT LETTERS 1999, at <http://europa.eu.int/comm/competition/antitrust/closed/en/comfor99.html>.

21. Trade Practices Act, 1974, § 45 (Austl.)

22. *Id.* § 45A.

23. *Id.* § 46.

24. *Id.* § 47.

25. *Id.* § 47(6).

- f. Section 48: prohibits resale price maintenance (per se illegality);²⁶
- g. Section 50: prohibits mergers that substantially lessen competition.

Price fixing, boycott conduct, third-line forcing and resale price maintenance are per se violations of the T.P.A. Horizontal and vertical agreements (other than per se offenses) and mergers violate the T.P.A. if they breach a competition test.²⁷ The T.P.A. also includes an exemption from the price fixing prohibition of Section 45A for conduct performed pursuant to joint venture arrangements.²⁸ In addition, as discussed later in further detail, other exemptions include conduct expressly authorized by legislation,²⁹ conduct engaged in by international liner cargo shipping cartels,³⁰ and conduct or agreements that the Australian Competition and Consumer Commission (ACCC)³¹ authorizes on public benefit grounds.³²

D. Japan

1. *The Antimonopoly Law of 1947*

Section 3 of the Japanese Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (“Antimonopoly Law”) states that “[n]o entrepreneur shall effect private monopolization or [an] unreasonable restraint of trade.”³³ Section 2(6) defines an unreasonable restraint of trade as:

[S]uch business activities, by which any entrepreneur, by contract, agreement or any other concerted actions . . . with other entrepreneurs, mutually restrict or conduct their business activities in such a manner as to fix, maintain, or increase prices, or to limit production, technology, products, facilities, or customers or suppliers, thereby

26. *Id.* § 48.

27. *Id.* § 50.

28. *See id.* § 45A(2).

29. *See id.* § 51(1).

30. *See id.* Part X.

31. Such a decision is subject to an appeal and possible final decision by the Australian Competition Tribunal, a quasi-judicial body comprised of industrial, economic, and legal experts.

32. Trade Practices Act, 1974, § 88 (Austl.).

33. *Shiteki Dokusen no Kinshi Oyobi Kosei Torihiki no Kakuho ni Kansuru Horitsu* [Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade], Act No. 54 of Apr. 14, 1947, § 3 [hereinafter Antimonopoly Law], reprinted in HIROSHI IYORI & AKINORI UESUGI, *THE ANTIMONOPOLY LAWS AND POLICIES OF JAPAN* app. A, at 387 (1994).

causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.³⁴

The relevant elements within are:

- (1) Concerted activities among enterprises that
- (2) Mutually restrict their business activities by
- (3) Fixing prices and limiting production and/or the terms of business
- (4) Which causes, contrary to the public interest,
- (5) A substantial restraint of trade in any particular field of trade.

There is a debate as to whether Japan treats price fixing and boycott conduct as per se offenses.³⁵ That there is a debate surrounding whether Japan would adopt a rule of reason approach as the “public interest” term in the Antimonopoly Law implies that Japan should take factors other than just competition considerations into account in applying the Antimonopoly Law.

The Antimonopoly Law exempts particular categories of cartels that the JFTC authorizes under separate legislation.³⁶ As the statutory exemptions continue to decrease within the competition law scheme, the JFTC is prepared to consider factors other than the pure effects of competition when examining potential breaches of Antimonopoly Law.

III. OBJECTIVES OF THE LAWS OF EACH JURISDICTION

Competition to increase sales or maximize profits almost invariably will lead to a more efficient allocation of resources, and will encourage producers or retailers to provide better service, quality, and value, as well as lower prices. Competition therefore may be an incentive for producers to research better technology or develop more efficient business methods. For each country, competitive domestic industries may advance ahead of equivalent

34. *Id.* § 2(6).

35. It is interesting to note that the Antimonopoly Law imposed by the occupation forces in 1947 included strict per se illegal standards, which were relaxed in the 1953 amendments. However, Mitsuo Matsushita argues that, on the basis of the *Petroleum Cartel* cases, per se illegality can be made out in the current regime. MITSUO MATSUSHITA & JOHN D. DAVIS, INTRODUCTION TO JAPANESE ANTIMONOPOLY LAW 41 (1990). See also *Japan v. Idemitsu Kosan, K.K.*, 985 Hanrei Jiho 3 (Tokyo High Court, Sept. 26, 1980); *Japan v. Petroleum Ass'n*, 983 Hanrei Jiho 22 (Tokyo High Court, Sept. 26, 1980).

36. The relevant Antimonopoly Law sections and exemptions include Sections 23 (Acts Under Intellectual Property Rights), 24 (Acts of Cooperatives), and 24-2 (Resale Price Maintenance Contracts). Former Sections 24-3 and 24-4, relating to depression cartels and rationalization cartels, were abolished in 1999. Japan abolished Section 21 (natural monopolies) in 2000.

foreign industries, and the associated competitive advantages can increase exports and improve global recognition. A conspiracy to fix prices can approximate the effect of monopolization by setting prices above levels expected in a competitive market and it therefore is treated harshly by the Antimonopoly Law. Monopoly profit-level pricing does not merely transfer wealth from the consumer to the producer. It also has an associated deadweight loss because consumers purchase less than they would if the prices were competitive.

Globalization considerations play a role in the goals of each jurisdiction. In addition to enhancing efficiency and protecting small players, a major goal of the EC Treaty is to create a single European market.³⁷ In addition, each member state of the European Union has its own antitrust laws, which may politically constrain the European Commission to restrict its operations to purely market-wide conduct.

Australia recently embraced the benefits of competition policy and strengthened its competition regime, enforcement and penalties.³⁸ Japan also is increasing its enforcement of the Antimonopoly Law and has reduced the number of available exemptions (although a cynic might say that this is the result of external pressure starting with the Structural Impediments Initiative talks with the United States in the early 1990s). This is in line with the original goals of the Antimonopoly Law, including the removal of domestic trade barriers that stifle both new market entrants and the opening of distribution and supply networks in Japan. The occupying forces after World War II wanted to remove Japanese trade barriers to open up the Japanese market by allowing foreign companies to compete.

The United States has enforced its antitrust legislation vigorously and consistently, but arguably has the weakest per se illegality regime of the four jurisdictions. This may reflect the strength of the Chicago School's influence in the United States over the last twenty years, which has narrowed the scope of the antitrust laws. An additional factor in the erosion of the per se regime in the United States is the cost to U.S. courts of having to adjudicate a rule of reason that takes longer than simply condemning the conduct for its mere occurrence. A similar logic would apply to the introduction of exemption systems that rely on parties to notify regulators of the parties' potentially

37. PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT CASES AND MATERIALS* 892 (2d ed. 1998).

38. For example, in 1994, Australia increased the maximum fines for breach of the competition provisions of the T.P.A. from five hundred thousand dollars to ten million dollars per offense. In 1995, Australia extended the reach of the T.P.A. to cover a wider range of businesses, including professional occupations. The ACCC's powers have been enhanced by increases to both its investigative powers and ability to accept enforceable undertakings.

anticompetitive conduct. Such systems avoid the costs of having to both adjudicate all potential breaches in court and monitor industries to find potential breaches.

IV. TREATMENT OF ELEMENTS OF CARTELS

A. *Per Se Basis*

Collaboration of competitors is the oldest and most notorious way to create or consolidate economic power. When all significant competitors join together to eliminate their natural rivalry on price or other important terms of trade, they form the most offensive of all devices to trump the market – the cartel . . . Price fixing deadens the central nervous system of competition. It creates inefficiencies. It is illegal [in the United States] *per se*.³⁹

Each jurisdiction treats *per se* offenses such as price cartels, boycotts, and resale price maintenance with varying degrees of strictness. However, “naked restraints,” or blatant price fixing agreements or cartels without pro-competitive or efficiency justifications, would be illegal in all jurisdictions. The U.S. Federal Trade Commission (FTC)/DOJ Antitrust Guidelines for Collaborations Among Competitors offers a useful explanation of the “*per se*” treatment:

Certain types of agreements are so likely to harm competition and to have no significant procompetitive benefits that they do not warrant the time and expense required for particularized inquiry into their effects. Once identified, such agreements are challenged as *per se* unlawful.⁴⁰

This position applies in all four jurisdictions. The difference in the four jurisdictions lies in the scope of the *per se* illegality of an offense.

Both the U.S. and European regimes simultaneously consider the competition aspects of an arrangement and the associated public benefits to

39. Eleanor M. Fox, *Competitors' Collaboration—A Methodology for Analysis*, 5 ANTITRUST 19 (1990).

40. FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 3 (2000), available at <http://www.ftc.gov/os/2000/04/ftcdoguidelines.pdf> [hereinafter FTC/DOJ GUIDELINES]. See also *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982) (stating that the anticompetitive potential inherent in all price fixing agreements justifies their facial invalidation even if pro-competitive justifications are offered for some).

determine whether the given party breached the respective antitrust legislation. In contrast, the Australian competition regime first looks at whether the competition issues lead to a breach and then separately considers whether any exemptions exist. The United States, Japan, and the European Union will allow conduct that benefits the public and justifies any anticompetitive effects, but in Australia, unless previously cleared, the public benefit of particular conduct generally is irrelevant in determining a breach of the T.P.A. It is debatable as to which side of the line Japan falls on. However, the Antimonopoly Law expressly mentions “public interest” and there may be cases where this will temper any per se illegality.

Although the two concepts are not entirely distinguishable, competition and public benefits are considered separately in this Article. This Article does not specify the elements or various forms of per se offenses, but rather focuses on how and where regulators draw the line between what constitutes a per se offense and what conduct is subject to a normal competition test.

1. United States

Although Congress does not use the term “per se” in the U.S. legislation, if read literally, the legislation condemns all agreements relating to trade as per se illegal.⁴¹ The U.S. Supreme Court clearly indicates that hardcore and naked price fixing, resale price maintenance, tying, and boycotts such as market sharing are per se illegal.⁴² Although the Court warned of the evils of price fixing back in 1898,⁴³ the case most often cited on this issue is *United States v. Trenton Potteries*,⁴⁴ in which the District Court for the Southern

41. Because all agreements restrain trade in some way, all agreements appear to fall within the purview of the Sherman Act. However, the U.S. Supreme Court overturned this view as early as 1897. See *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290 (1897). In a subsequent case, *United States v. Joint-Traffic Association*, 171 U.S. 505, 568 (1898), Justice Peckham stated that “[an] agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the Act, although the agreement may indirectly and remotely affect that commerce.” This reasoning forms the basis of the rule of reason approach. See generally PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* 637-42 (1978 & Supp. 1986) (discussing the history and background of the rule of reason and per se approaches in the United States).

42. See *Cont’l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 n.16 (1977); *F.T.C. v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 432-36 (1990). See also FTC/DOJ GUIDELINES, *supra* note 40, at 8.

43. See *Joint-Traffic Ass’n*, 171 U.S. 505 (1898).

44. *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927), *cited with approval* in *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 212 (1940). “[T]his Court sustained a conviction under the Sherman Act where the jury was charged that an agreement on the part of the

District of New York instructed the jury to ignore the reasonableness of both the prices and good intentions of the combining units. The Court stated that:

The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices . . . Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government . . . the burden of ascertaining . . . whether it has become unreasonable . . .⁴⁵

However, the extent of the development of the rule of reason approach raises questions as to whether there is in fact a per se illegality doctrine in the United States. While all price fixing is per se illegal in Australia, price fixing is only per se illegal in the United States if it is unreasonable. Based on this apparent inconsistency, Robert Bork argued that per se illegality does not exist in the United States, stating that “[t]he persistent refusal of courts to honor the literal terms of the per se rules against price-fixing . . . demonstrates a deep-seated though somewhat inarticulate sense that those rules, as usually stated, are inadequate.”⁴⁶ U.S. courts do not clearly distinguish the per se and rule of reason analyses as the other three jurisdictions do.

2. *European Union*

The words of the EC Treaty do not explicitly state that any of the offenses listed in Article 81(1) are per se offenses, and in fact do not apply to agreements that do not affect trade between E.U. member states. A mere limitation on competition between parties is insufficient to constitute a

members of a combination, controlling a substantial part of an industry, upon the prices which the members are to charge for their commodity is in itself an unreasonable restraint of trade without regard to the reasonableness of the prices or the good intentions of the combining units.” *Id.*

45. *Trenton Potteries*, 273 U.S. at 397. Modern case law has also made it clear that boycotts and price fixing are per se illegal. *Cont'l T.V., Inc.*, 433 U.S. at 50 n.16, cited in James T. Halverson, *The Future of Horizontal Restraints Analysis*, 57 ANTITRUST L.J. 33, 35 (1988).

46. Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 777 (1965). See also *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), in which Judge Bork implies that the per se concept does not exist. Martin Louis considers this to be the case, at least with regard to trademarks. Martin B. Louis, *Restraints Ancillary to Joint Ventures and Licensing Agreements: Do Sealy and Topco Logically Survive Sylvania and Broadcast Music?* 66 VA. L. REV. 879 (1980).

breach. However, in effect, the EC Treaty treats price fixing and boycott conduct more strictly. The European Commission's Guidelines on the Applicability of Article 81 of the EC Treaty state:

In some cases the nature of a cooperation indicates from the outset the applicability of Article 81(1). This is the case for agreements that have as their object a restriction of competition by means of price fixing, output limitation or sharing of markets or customers. These agreements are presumed to have negative market effects. It is therefore not necessary to examine their actual effects on competition and the market in order to establish that they fall within Article 81(1).⁴⁷

3. *Australia*

In Australia, the basis of the per se nature of the price fixing offense is legislative. Section 45A of the T.P.A. deems that any agreement that has either the purpose or effect of fixing, controlling, or maintaining prices is a breach of the proscription against agreements that substantially lessen competition.⁴⁸ Boycott conduct (Section 45), resale price maintenance (Section 48), and third-line forcing (Section 47(6)) are all per se illegal under the T.P.A. However, as in the United States, debate arises as to both how far these prohibitions extend and what conduct constitutes an offense in violation of the T.P.A. For example, the language of the price fixing legislation in Section 45A indicates that there must be more than just an agreement as to prices. The standard in that section requires fixing, controlling, or maintenance of such prices.⁴⁹ Boycott conduct is only offensive if the purpose of the conduct is anticompetitive, regardless of the actual effect.

4. *Japan*

To date, the JFTC has aimed its enforcement at clear-cut price fixing where there is no question that the conduct unreasonably restrained trade and nobody has questioned the existence of per se liability. The words of the Antimonopoly Law do not imply that per se liability exists, but Mitsuo

47. Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements, 2001 O.J. (C3) 2, ¶ 17 [hereinafter Horizontal Guidelines]. *See also* The Quinine Cartel Cases (Case 41/69, ACF Chemieforma NV v. Comm'n, 1970 E.C.R. 661; Case 44/69, Buchler v. Comm'n, 1970 E.C.R. 733; and Case 45/69, Boehringer Mannheim v. Comm'n, 1980 E.C.R. 769).

48. Trade Practices Act, 1974, § 45A (Austl.).

49. *Id.*

Matsushita argues that price fixing is in fact per se illegal, despite the clear words of the Antimonopoly Law requiring an *unreasonable* restraint of trade.⁵⁰ Hiroshi Iyori and Akinori Uesugi support this view and state that, with regard to cartels that fall under Section 3 of the Antimonopoly Law, “alleged conducts are objectionable in themselves because cartel agreements or acts to exclude or control other entrepreneurs are involved.”⁵¹ The JFTC argues that an “unreasonable restraint of trade” is synonymous with the word “cartel” and therefore the Antimonopoly Law prohibits all cartels.⁵² In addition, the JFTC argues that the Antimonopoly Law implicitly states that, as soon as firms form a cartel agreement, there is an unreasonable restraint of competition.

5. *A Comparison of Per Se Approaches in Each Jurisdiction*

The major difference between jurisdiction and approaches is evident in the flexible approach that the U.S., E.U., and Japanese legislation provide to regulators, which is in contrast to the strict per se rules in the Australian T.P.A. While the U.S. DOJ and the European Commission debate whether particular conduct falls outside the reach of the per se liability criteria, Australian courts take a stricter view and do not allow per se illegal conduct to escape the reach of the T.P.A. unless other legislation expressly exempts such conduct. All jurisdictions allow some conduct that otherwise may fall under the price fixing prohibitions; however, the method of determining this varies between jurisdictions. These differences are evident in the way that each jurisdiction adopts public benefit and efficiency considerations and treats ancillary restraints and systems for other exemptions. In particular, different results arise based on each regulatory agency’s different level of enthusiasm to prosecute in accordance with the goals of its country’s antitrust legislation.

B. *Consideration of Public Benefits and Efficiency*

Antitrust laws involve human interference with market processes. The associated risk of human error may lead to a sub-optimal result if a misjudged regulation exacerbates any problems associated with the particular market failure that the regulation attempts to correct. Accordingly, it is

50. See MATSUSHITA & DAVIS, *supra* note 35, at 41.

51. IYORI & UESUGI, *supra* note 33, at 71.

52. Mitsuo Matsushita, *The Antimonopoly Law of Japan*, in GLOBAL COMPETITION POLICY, *supra* note 14, at 170-72.

important that antitrust laws are as unobtrusive as possible and do not impact market transactions that ultimately will lead to public benefits. The consideration of whether an agreement results in public benefits to the extent that the public interest should allow such an agreement to stand is of great importance in all four jurisdictions, although the treatment varies in each.

Australia and the European Union maintain formal exemption, or “pre-clearance,” systems. Australia’s “authorisation”⁵³ system requires a decision from the ACCC prior to engaging in particular conduct that is otherwise at risk of breaching the T.P.A. The E.U. “declaration”⁵⁴ system requires pre-notification of such conduct. After notifying the European Commission of particular conduct, the parties may engage in the conduct until the Commission issues a decision. From that point on, the parties must follow the instructions of the Commission’s decision. The authorization and declaration systems do not apply retrospectively. Any conduct parties engage in prior to the grant of an exemption in Australia or lodgment of notification in the European Union is a breach, regardless of whether the grant or notification would exempt the same conduct. In the United States, such conduct is likely to escape prosecution under the rule of reason approach.

There are several differences between the Australian and European pre-clearance systems. The Australian “authorisation” system is valid only with respect to those named in the application, whereas the European exemptions may apply to a particular type of industry or conduct. Examples of the European exemptions include the new exemptions for all horizontal or vertical restraints that meet certain criteria (e.g. a market share of less than 30%) and the recent exemption for all motor vehicle distribution agreements, subject to certain conditions. Only after the ACCC grants authorization does it become valid. In contrast, a “declaration” issued by the European Commission provides an exemption from the time the parties notify the Commission until the Commission issues its decision. The European system allows for the Commission to issue decisions quickly if necessary, whereas the Australian authorization process has no streamlining mechanism in place. Both systems are transparent and allow public consultation and commentary as well as draft decisions and appeals to higher authorities.

In contrast to these *ex ante* systems, the United States adopts a rule of reason approach by which the FTC considers the public benefits arising from

53. Trade Practices Act, 1974, § 88 (Austl.). Note that the Trade Practices Act also allows notification, a less onerous process, for exclusive dealing. *Id.* § 93.

54. EC Treaty, *supra* note 4, art. 81(3). It is also appropriate in some circumstances to obtain an “informal” clearance from Directorate-General IV (DGIV) to the effect that particular conduct does not breach the EC Treaty.

particular conduct in determining whether a breach has occurred. The U.S. system does not allow for prior clearance of conduct, but it takes into account similar factors when considering whether a breach has occurred. In Australia there is a strict delineation of the competition analysis and the consideration of the public benefits in relation to certain conduct. In stark contrast, the United States expressly considers the public benefits in determining whether the particular offense fits within its antitrust laws.

1. U.S. Consideration of Public Benefit: Rule of Reason Approach

“Rule of reason” is the term given to the approach adopted by U.S. courts in which they take public benefits or other relevant considerations into account when determining whether particular conduct breaches the broad test of the Sherman Act, which states that “every combination . . . in restraint of trade . . . is illegal.”⁵⁵ The rule of reason approach is a method for determining exactly what is not included, on the grounds of reasonableness, in this broad, sweeping test. The discussion in this section focuses on the rule of reason approach as it relates to pro-competitive conduct and ancillary restraints, as well as the hybrid approach.

The pro-competitive conduct doctrine of the rule of reason analysis in the United States originated in the U.S. Supreme Court’s decision in *Board of Trade of Chicago v. United States*.⁵⁶ Justice Brandeis stated that:

Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. *The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition* or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.⁵⁷

55. 15 U.S.C. § 1 (2001).

56. 246 U.S. 231 (1918).

57. *Id.* at 238 (emphasis added).

The FTC/DOJ Guidelines adopt this reasoning:

If, however, participants in an efficiency-enhancing integration of economic activity enter into an agreement that is reasonably related to the integration and reasonably necessary to achieve its procompetitive benefits, the Agencies analyze the agreement under the rule of reason, even if it is of a type that might otherwise be considered per se illegal.⁵⁸

Essentially, the pro-competitive conduct doctrine involves U.S. courts making a full market analysis to determine whether the questioned conduct creates public benefits, efficiencies, or a pro-competitive result that should allow the conduct to stand. The court applied this approach as recently as 1982 in *Arizona v. Maricopa County Medical Society*.⁵⁹ However, there has been some debate as to whether this approach is correct, and the courts have had problems reconciling this approach with the ancillary restraints doctrine and the strict per se approach.⁶⁰ The confusion of U.S. courts with regard to the interaction of the three approaches arguably arises as a result of traditional attempts to treat them as being mutually exclusive. In contrast, the European Union and Australia separate consideration of the competition into an initial step and then examine other elements such as public benefits arising from such conduct in a separate step. However, the recent U.S. Supreme Court and Ninth Circuit decisions in *California Dental Association v. Federal Trade Commission*⁶¹ may create a hybrid approach that rationalizes the coexistence of all three doctrines.

Arguments exist that one can find an approach similar to that of the United States in Australia and the European Union outside the formal clearance procedures, and that Japan also is adopting a rule of reason approach similar to that in the United States.

58. FTC/DOJ GUIDELINES, *supra* note 40, at 8.

59. 457 U.S. 332 (1982).

60. Despite the contrast with *Maricopa*, which reinforced the Australian style of strict and broad-reaching per se liability for price fixing, the Supreme Court's view in *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), that there is room for consideration of pro-competitive or efficiency considerations in determining whether conduct falls within the per se realm appears to prevail.

61. *Cal. Dental Ass'n v. F.T.C.*, 128 F.3d 720 (9th Cir. 1997), *vacated by* 526 U.S. 756 (1999), *remanded to* 224 F.3d 942 (9th Cir. 2000).

2. Japan

The JFTC and many commentators take the conservative view that the term “public interest” in the Antimonopoly Law is synonymous with a “restraint of competition,” and therefore any agreement in restraint of competition goes against the public interest and thus renders the words of the Antimonopoly Law virtually irrelevant. While this view is somewhat popular in Japan, recently the basis for a move to a more flexible approach has emerged and the JFTC has relaxed its stance to adapt to the fact that Japan has abolished many of the previous statutory exemptions that covered conduct that benefited the public. There are some indications that in the future Japan may follow the U.S. pro-competitive conduct doctrine because modern Japanese decisions such as the *Petroleum Cartel* cases⁶² have hinted that there may be room for the exemption of agreements that are pro-competitive.⁶³ The *Petroleum Cartel* court held that the term “public interest” generally refers to free trade, but it made the available exemption very narrow. This view is gaining more support in light of the JFTC’s attitude toward relaxing its strict policy of ignoring public benefit issues. Certainly, the Japanese Federation of Economic Organizations, the *Keidanren*, argues that “public interest” is much broader than the term “restraint of competition” and includes a variety of factors such as consumer interest and the Japanese economy’s growth and stability.⁶⁴ In other words, “substantial restraints of trade” are generally illegal, but the JFTC may exempt them if they are necessary to achieve a legitimate purpose that outweighs the advantage of maintaining competition.⁶⁵

The *Keidanren*’s view of “public interest” has merit given the fact that the words expressly exist in the Antimonopoly Law. If considered in light of the treatment and common understanding of that term in the other three jurisdictions, it parallels the Australian and E.U. considerations of these words used in the formal clearance systems, as well as the U.S. adoption of the term in the rule of reason consideration. In fact, in the United States, the European Union, and Australia the concept of “public interest” is virtually unlimited and can include efficiency, industry rationalization, increased employment opportunities, increased exports, and environmental issues.⁶⁶

62. Japan v. Idemitsu Kosan, K.K., 985 Hanrei Jiho 3 (Tokyo High Court, Sept. 26, 1980); Japan v. Petroleum Ass’n, 983 Hanrei Jiho 22 (Tokyo High Court, Sept. 26, 1980).

63. See CCH INT’L, JAPAN BUS. L. GUIDE para. 32,004 (1993).

64. Matsushita, *supra* note 52, at 172.

65. MITSUO MATSUSHITA, INTERNATIONAL TRADE AND COMPETITION LAW IN JAPAN 96-98 (1993).

66. See AUSTL. COMPETITION AND CONSUMER COMM’N, GUIDE TO AUTHORISATIONS AND

However, a very high level of public benefit is necessary to justify price fixing agreements in all three of these jurisdictions, although there are examples of such in each jurisdiction.

In addition, it appears that there is room for a rule of reason argument if one examines the words of the Antimonopoly Law closely. The words of the Antimonopoly Law, which makes only “undue” offenses illegal, seem to imply a reasonableness requirement. However, the JFTC likely will argue that any substantial restraint of competition will be either unreasonable or undue, thereby removing this avenue for reasonableness analysis. This argument raises the question of why the word “undue” was included in the Antimonopoly Law in the first place.

3. *A Pro-Competitive Conduct Rule of Reason in the European Union?*

In addition to considering public benefits through the declaration process specified in the EC Treaty, Paul Craig and Gráinne de Búrca argue that while the European Court of Justice (ECJ) has not employed the language of the rule of reason, there is evidence of a balancing of the pro- and anticompetitive effects of an agreement in its judgment,⁶⁷ although it appears that the ECJ does not always share the enthusiasm of U.S. courts. In *Societe Technique Miniere v. Maschinenbau Ulm GmbH*⁶⁸ and *L.C. Nungesser KG & Kurt Eisele v. E.C. Commission*,⁶⁹ the ECJ found that the coordinated actions of competitors did not breach the EC Treaty due to the net pro-competitive effects of the conduct. However, the ECJ did not expressly attribute its decision to this reasoning nor acknowledge that it was adopting a rule of reason approach.

4. *A Pro-Competitive Conduct Rule of Reason in Australia?*

Despite the common assumption that Australia does not adopt the pro-competitive conduct rule of reason, and even though only minimal judicial consideration of T.P.A. Section 45A exists, there are cases and commentary that one may characterize as a form of rule of reason analysis. Stephen Corones comments that:

NOTIFICATIONS 19-21 (1995), available at http://www.accc.gov.au/pubs/Publications/Business_general/AuthNotif/Authguid.pdf (providing a list of recognized public benefits).

67. CRAIG & DE BÚRCA, *supra* note 37, at 913.

68. *Societe Technique Miniere v. Maschinenbau Ulm GmbH*, Case 56/65, [1966] E.C.R. 235, [1966] 5 C.M.L.R. 357.

69. *L.C. Nungesser KG & Kurt Eisele v. E.C. Comm'n*, Case 258/78, [1982] E.C.R. 2015, [1983] 1 C.M.L.R. 278.

In Australia the courts apply a truncated rule of reason rather than a comprehensive rule of reason. The Australian rule of reason is confined to measuring the effect of conduct on competition in a market on a “with and without” basis. They do not take into account whether the conduct gives rise to production efficiencies and attempt to balance those cost savings against the consumer welfare loss associated with the lessening of competition. Such a comprehensive rule of reason analysis is conducted in Australia by the Commission and the Tribunal pursuant to the authorisation process.⁷⁰

However, it is arguable that the Australian regime goes further than just comparing the level of competition that would exist in the absence of an agreement with the level of competition if the ACCC allows the agreement to proceed. There are three sources of evidence for this assertion.

First, in some monopolization (or to use the term in the T.P.A., “misuse of market power”) cases, courts considered efficiency as a justification for particular monopolistic conduct.⁷¹ The ACCC itself has asserted that it will take efficiency considerations into account in some cases. For example, it will consider efficiency when considering whether a merger will lessen competition substantially.⁷²

Second, Australian scholars have read a rule of reason type approach into the words of the highly regarded Justice Lockhart in *Radio 2UE Sydney Pty. Ltd v. Stereo FM Pty. Ltd.*⁷³ In *Radio 2UE Sydney*, Lockhart hinted at the existence of a “pro-competitive conduct rule of reason” with the following statement: “Nor in my view was s. 45A introduced by Parliament to make arrangements unlawful which affect price by improving competition.”⁷⁴ Justice Lockhart did not take this reasoning any further, but it is apparent that he ultimately decided the case along the lines of an ancillary restraints-style rule of reason doctrine.

Third, although not directly related to the pro-competitive conduct rule of reason doctrine, one important role of the U.S. and E.U. rule of reason analysis is to exclude conduct that should be covered by the per se

70. STEPHEN CORONES, *COMPETITION LAW IN AUSTRALIA* 45 (2d ed. 1999).

71. *See* *Melway Publishing Pty. Ltd. v. Robert Hicks Pty. Ltd.* [2001] HCA 13 (Austl.). *See also* Frances Hanks & Philip Williams, *Implications of the Decision of the High Court in Queensland Wire*, 17 MELB. U. L. REV. 437, 446 (1990) (describing the fact that the High Court “explained [Section 46 of the Trade Practices Act] in a way that corresponds quite closely to the interpretation given by courts in the United States to s. 2 of the Sherman Act” over the last decade).

72. *See* AUSTL. COMPETITION AND CONSUMER COMM’N, *MERGER GUIDELINES* ¶¶ 5.171-5.174 (1999).

73. *Radio 2UE Sydney Pty. Ltd. v. Stereo FM Pty. Ltd.* (1982) 44 A.L.R. 557.

74. *Id.*

exemption. In this regard, some parallels can be seen in two Australian cases, *Radio 2UE Sydney*⁷⁵ and *Trade Parties Commission v. Service Station Association Ltd.*⁷⁶ For a breach to occur, the T.P.A. requires a “fixing, controlling or maintaining” of prices, rather than merely a discussion about prices.

On appeal, in confirming Justice Lockhart’s judgment in *Radio 2UE Sydney*, the Full Federal Court stated that:

In our view the word “fixing” in s. 45A takes colour from its general context and from the words used with it – “controlling or maintaining” and not every determination of a price, following discussion between competitors, will amount to a price “fixing”. There must, we believe, be an element of intention or likelihood to affect price competition before price “fixing” can be established . . .

When two or more competitors agree to sell a joint package of goods or services, at a price agreed between them, in addition to the goods or services which they ordinarily sell in competition with each other and with others, the necessary provision for arriving at a price for those goods or services is not, in our opinion, a provision for fixing, controlling or maintaining prices within the meaning of s. 45A. This is certainly true in those cases where the individual competitors are entirely free to fix the price of their ingredient of the package and to change it at any time. We believe that proposition would still be correct without that proviso, but we do not need to reach a concluded opinion on that point in this case.⁷⁷

The Full Federal Court’s logic shows a parallel with the U.S. rule of reason approach of using rule of reason analysis as a definitional tool to delineate where the line between per se illegality and acceptable conduct lies. It is simplistic to consider the words “per se” and therefore consider that all price agreements are prohibited, but a closer examination of the T.P.A. reveals a requirement that the agreement go further than a mere price discussion. The T.P.A. requires that there be an agreement to fix, control, or maintain prices.

Australian courts have not considered this issue since *Radio 2UE Sydney*.⁷⁸ It remains to be seen whether Australian courts will choose to

75. *Id.*

76. *Trade Parties Comm’n v. Service Station Ass’n Ltd.* (1993) 116 A.L.R. 643.

77. *Radio 2UE Sydney Pty. Ltd. v. Stereo FM Pty. Ltd.* (1983) 48 A.L.R. 361.

78. The Federal Court of Australia considered Section 45 of the Trade Practices Act again most recently in *Austl. Competition and Consumer Comm’n v. CC (NSW) Pty. Ltd.*, (1999) 92 F.C.R. 375.

follow the lead provided in *Radio 2UE Sydney* in analyzing price fixing conduct with a rule of reason approach, or whether they will revert to following the strict words of the T.P.A.

C. Consideration of Ancillary Restraints

Ancillary restraints are small and inconsequential agreements that are a necessary part of a larger scheme. The jurisdictions all appear to recognize at some level that if agreements assist in reaching a worthier goal, the jurisdictions should not treat them as per se offenses.

1. United States

In *United States v. Addyston Pipe & Steel Co.*,⁷⁹ Judge Taft used a two-step approach to determine whether the conduct of all the parties involved amounted to a restraint of trade in breach of section 1 of the Sherman Act. He first asked whether the essential purpose of the contract was legitimate and pro-competitive.⁸⁰ If not, he said, the rule of per se illegality applied because the contract was a naked restraint.⁸¹ However, if the main purpose was legitimate and the restraint was necessary, but an ancillary measure was necessary to give effect to the main purpose, then the ancillary restraint would not be a breach if it were no wider than necessary to give effect to the main purpose.⁸²

In *Rothery Storage & Van Co. v. Atlas Van Lines*, Judge Bork said:

To be ancillary, and hence exempt from the *per se* rule, an agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction. The ancillary restraint is subordinate and collateral in the sense that it serves to make the main transaction more effective in accomplishing its purpose. Of course, the restraint imposed must be related to the efficiency sought to be achieved. If it is so broad that part of the restraint suppresses competition without creating efficiency, the restraint is, to that extent, not ancillary. Taft [in

However, in that case, Justice Lindgren noted that the Full Federal Court did not have to consider the issue of whether Justice Lockhart was correct in stating that a price fixing arrangement with a net advantageous effect on competition would not constitute a contravention of the price fixing provision. Lindgren's commentary on *Radio 2UE Sydney* merely repeated the words of the legislation, which also state that any agreement that controls prices is an offense regardless of its effect on competition.

79. 85 F. 271 (6th Cir. 1898).

80. *Id.* at 282.

81. *Id.*

82. *Id.* at 282-83.

Addyston Pipe] added the further obvious qualification that even restraints ancillary in form are illegal if they are part of a general plan to gain monopoly control of a market.⁸³

The U.S. legislative prohibitions are subject to the principle in *Maricopa*⁸⁴ that does not allow an ancillary restraint to stand if it is not a necessary part of the transaction, or if there is a less restrictive manner by which the parties can obtain the same result. The ancillary restraints rule of reason doctrine also is known as the “quick look” approach, reflecting the fact that the courts do not have to engage in the full market analysis involved in determining whether particular conduct possesses the net public benefits used in the pro-competitive conduct rule of reason doctrine.

2. Australia

In *Radio 2UE Sydney*, Justice Lockhart adopted reasoning analogous to the ancillary restraints rule of reason doctrine to determine that a price agreement between two radio stations selling a joint advertising package did not violate Section 45A of the T.P.A. He stated:

My approach to the construction and operation of s. 45A is generally in accord with the approach taken by the courts of the United States of America in decisions under the Sherman Act. They reflect the concern of those courts to carefully consider the relevant conduct before characterizing it as an arrangement in restraint of price competition and they distinguish between arrangements which directly or indirectly restrain price competition and those which merely incidentally affect it.⁸⁵

Many critics have argued that Lockhart’s judgment was incorrect because it ignored the fact that the T.P.A. makes any price fixing a per se offense, regardless of whether it is an ancillary or primary purpose of the agreement.⁸⁶

It is interesting to note that Section 45A(2) of the T.P.A. contains an express exemption for joint venture agreements that allows price agreements between competitors relating to their joint venture operations.⁸⁷ However, the ACCC still will scrutinize the joint venture and the agreement to determine

83. 792 F.2d 210, 224 (D.C. Cir. 1986) (emphasis added) (citations omitted).

84. *Arizona v. Maricopa County Med. Soc’y*, 457 U.S. 332 (1982).

85. *Radio 2UE Sydney Pty. Ltd. v. Stereo FM Pty. Ltd.* (1982) 44 A.L.R. 557 (citations omitted).

86. See Leonard S. Vary, *Price Fixing: Flawed Past, Uncertain Future*, 3 TRADE PRACTICES L.J. 126, 130-31 (1995).

87. Trade Practices Act, 1974, § 45A(2) (Austl.).

whether the arrangement substantially lessens competition. Accordingly, in Australia, competitors are able to set prices for their joint product. However, the ACCC's test is less strict than the per se test for agreements that fix prices. Of course, the T.P.A. does not extend the price fixing exemption to activities of the joint venture parties that they conduct individually when they are in competition with each other. There is no requirement that parties pre-notify the ACCC in such a case, and although a declaration that particular conduct is exempted is available from the court,⁸⁸ parties usually rely on the Section 45A(2) exemption without such confirmation. Thus, for clear-cut cases, the result of a challenge to a restraint ancillary to a joint venture in Australia would be similar to that in the United States, the European Union, and Japan.

3. *European Union*

The European Union adopts a similar logic to the U.S. ancillary restraints doctrine. The European Commission's Competition Rules Relating to Horizontal Cooperation Agreements state that:

[C]ooperation agreements that have the object to restrict competition by means of price-fixing, output-limitation or sharing of markets or customers . . . are considered to be the most harmful, because they directly interfere with the outcome of the competitive process. Price fixing and output-limitation directly lead to customers paying higher prices or not receiving the desired quantities . . . They are therefore almost always prohibited.

This does, however, not apply if such a provision is necessary for the functioning of an otherwise non-restrictive or exemptable agreement.⁸⁹

This statement reflects the reasoning of the ECJ in *Remia BV and Verenigde Bedrijven Nutricia BV v. Commission*⁹⁰ and *Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgalis*,⁹¹ which commentators have explained as allowing pricing agreements on the grounds that the

88. *Id.* § 163A.

89. Competition Rules, *supra* note 18, ¶¶ 24-25.

90. Case 42/84, *Remia BV & Verenigde Bedrijven Nutricia BV v. Comm'n*, [1985] E.C.R. 2545, [1987] 1 C.M.L.R. 1.

91. Case 161/84, *Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgalis*, [1986] E.C.R. 353, [1986] 1 C.M.L.R. 414.

restrictions were objectively necessary for the success of the otherwise legitimate agreements.⁹²

The European Commission policy with regard to joint ventures mirrors the exemption in Section 45A(2) of the T.P.A., including the fact that the European Commission will consider joint venture arrangements with regard to their effect on competition, rather than providing the strict per se treatment for price agreements made in isolation. Although not expressly stated in the EC Treaty, the European Commission's Horizontal Guidelines state that the per se characterization of price fixing agreements does not apply if the price fixing provision is necessarily an otherwise non-restrictive or exemptable agreement. Discussing production joint ventures, the European Commission stated that:

It is inherent to the functioning of such a joint venture that decisions on output and prices are taken jointly by the parties . . . In this case, the inclusion of provisions on prices or output does not automatically cause the agreement to fall under Article 81(1). The provisions on prices or output will have to be assessed together with the other effects of the joint venture on the market [following the framework described in the Competition Rules] to determine the applicability of Article 81(1).⁹³

In *Re Finnish Paper Mills Association*, the European Commission issued a notice stating that it did not intend to take action against the joint sales organization because there was no appreciable effect on trade between E.U. member states.⁹⁴

4. Japan

The Japanese policy for dealing with ancillary restraints presently is unclear, notwithstanding the fact that the JFTC has prosecuted only hardcore cartels. The Antimonopoly Law expressly exempts agreements created by trade associations,⁹⁵ but this exemption does not extend to the setting of prices.

92. CRAIG & DE BÚRCA, *supra* note 37, at 913-14.

93. Horizontal Guidelines, *supra* note 47, ¶ 25 n.18.

94. *Re Finnish Paper Mills Ass'n*, [1989] 4 C.M.L.R. 413.

95. *See* Antimonopoly Law § 24.

D. The “Hybrid” Rule of Reason Approach in the United States

The pro-competitive conduct and ancillary restraints rule of reason doctrines have caused confusion in U.S. courts, which seemingly cannot decide whether to apply one of these two doctrines or, as the U.S. Supreme Court did in *Maricopa*, revert back to a strict per se analysis.⁹⁶ The latest rule of reason case in the United States, *California Dental Association v. Federal Trade Commission*, attempted to unify the approaches, and many consider it to be the approach that courts will adopt in the future.⁹⁷

California Dental requires the use of a “sliding scale” approach, with reference to the “circumstances, details and logic of a restraint,”⁹⁸ to determine whether to adopt an abbreviated rule of reason analysis (the ancillary restraints doctrine) or a full market analysis to determine the existence of pro-competitive results. The Ninth Circuit held on remand that:

The rule-of-reason analysis consists of three components: (1) the persons or entities to the agreement intend to harm or restrain competition; (2) an actual injury to competition occurs; and (3) the restraint is unreasonable as determined by balancing the restraint and any justifications or pro-competitive effects of the restraint.⁹⁹

Edward Brunet summarizes how courts now use the two per se rules in the United States, a view that appears to be consistent with *California Dental*:

The Court’s shift to economic analysis of a restraint now authorizes a threshold examination or quick look at an alleged restraint. If the restraint is clearly anticompetitive, a *per se* approach is appropriate. Conversely, if the restraint appears necessary to achieve a procompetitive result, then a more complete rule of reason inquiry is in order. Although sometimes citing the cumbersome balancing approach to the rule of reason, the Court, in fact, seems to be using the old *Addyston Pipe* doctrine of ancillary restraints. A rule of reason trial now focuses on whether the alleged restraint was an essential or necessary feature to a procompetitive plan. In short, the rule of reason trial is quite similar to the facial examination. Each emphasizes

96. *Arizona v. Maricopa County Med. Soc’y*, 457 U.S. 332 (1982).

97. *Cal. Dental Ass’n v. F.T.C.*, 128 F.3d 720 (9th Cir. 1997), *vacated by* 526 U.S. 756 (1999), *remanded to* 224 F.3d 942 (9th Cir. 2000).

98. *Cal. Dental Ass’n*, 526 U.S. 756, 780-81 (1999).

99. *Cal. Dental Ass’n*, 224 F.3d 942, 947 (9th Cir. 2000) (quoting *American Ad Mgmt. v. GTE Corp.*, 92 F.3d 781, 789 (9th Cir. 1996)).

competitive impact and each seeks a restraint no more broadly anticompetitive than necessary.¹⁰⁰

This uniform approach provides the option of looking at both ancillary restraints and the pro-competitive effects to determine whether the conduct should be subject to per se liability. Hence, it brings U.S. antitrust law further in line with the approach of the European Union (and in a limited way, Australia), as it allows for the coexistence of all three doctrines. If an agreement is merely an ancillary restraint, or if it results in a net pro-competitive effect and there is no other way to produce such a result, there is no reason to exclude the consideration of either doctrine.

The distinction established in this Article between the ancillary restraints and pro-competitive conduct doctrines is somewhat artificial because U.S. courts often will consider that a pro-competitive ancillary restraint is easily justified and therefore may consider them together. However, until now, courts have adopted either one doctrine or the other but have been unable to reconcile the two, thereby causing confusion. However, the outlook for the rule of reason approach in the United States is positive in light of *California Dental*.

V. EVALUATION OF THE VARIOUS APPROACHES TO PRO-COMPETITIVE CONDUCT AND ANCILLARY RESTRAINTS

The pro-competitive conduct rule of reason doctrine in the United States and Japan is similar to the Australian authorization and European declaration processes in its consideration of whether one can justify particular conduct either on the grounds of the net pro-competitive effect or because such conduct provides an efficient outcome for the community when one considers it in its entirety. The primary difference is that the Australian and European pre-clearance systems require formal applications before parties may engage in particular conduct, while the U.S. and Japanese systems consider conduct only after its actual occurrence.

There are obvious advantages that the Australian and European pre-clearance systems provide. From a national perspective, it is less costly to administer a formal pre-clearance system than to persistently challenge conduct in courts of law. In addition, companies seeking to engage in conduct that is either pro-competitive or efficient for the economy as a

100. Edward Brunet, *Streamlining Antitrust Litigation by "Facial Examination" of Restraints: The Burger Court and the Per Se-Rule of Reason Distinction*, 60 WASH. L. REV. 1, 27 (1984) (emphasis added).

whole, but that risks breaching competition legislation, can rest easy knowing that once they have pre-clearance the competition legislation protects their conduct. The drawback of the rule of reason consideration of public benefits is that parties do not have the security to engage in particular conduct, as they cannot second guess whether the government or a court will consider their conduct to fall within the safe zone.

However, there are also many drawbacks to pre-clearance systems. The pre-clearance process is public, expensive, and very time consuming. In Australia the authorization process generally takes at least six months, and it can take more than two years for the ACCC to issue a final decision.¹⁰¹ The European Commission clearance decision in *Re Finnish Paper Mills Association*¹⁰² took eight years, and the granting of an exemption in *Re United International Pictures* took seven.¹⁰³ This is more of a problem in Australia than the European Union because authorization is not valid until the ACCC makes its final decision. In the European Union, the parties to the agreement are able to engage in the conduct from the time that they notify the European Commission until the European Commission makes its decision, thus placing a longer decision period in the applicant's favor. Nonetheless, applicants will not want to make major investment decisions that the European Commission ultimately may reverse if it decides not to grant an exemption or clearance.

The public nature of the pre-clearance process, including the fact that it both involves providing the jurisdictional regulator with intimate details of the applicant's business operations and allows competitors, customers and relevant industry bodies to provide information, deters businesses from using the process. Often the regulator can impose, as a pre-condition to the grant of authorization or an exemption, conditions that are not directly related to the immediate conduct. The burden of dealing with the regulator can be quite high because the applicant often must prove its case to not only the regulator but to an appellate body as well. In addition, the legal fees vastly overshadow the authorization application fees of approximately US\$4,000.

Given the justification for both having a flexible approach to the regulation of agreements that may have public benefits and allowing exemptions to strict regulations such as per se illegal price fixing provisions,

101. For an example of the lengthy authorisation determination process, see AUSTL. COMPETITION & CONSUMER COMM'N, APPLICATION FOR AUTHORISATION: CSR LIMITED A50016 (1997), available at http://www.accc.gov.au/pubreg/s89_95/DOCS/a50016.pdf (showing how CSR Ltd. lodged its Application for Authorisation with the ACCC in August 1995, but did not receive an Authorisation Determination until October 1997).

102. *Re Finnish Paper Mills Ass'n*, [1989] 4 C.M.L.R. 413.

103. *Re United International Pictures*, [1990] 4 C.M.L.R. 749.

it seems logical to have at least some recognition of agreements that lead to net public benefits. Japan, despite inclusion of the term “public interest” in the Antimonopoly Law, appears to be the only jurisdiction without an established system for recognizing such public benefits. Accordingly, Japan would benefit from following the *Keidanren* view that the Antimonopoly Law may exempt “substantial restraints of trade” if they serve a legitimate social purpose, which reflects the U.S. rule of reason approach. If Japan follows the U.S. approach, it will be useful for Japan to have the benefit of hindsight of the confusion experienced by the United States, and consequently to adopt a hybrid method similar to the European approach where the three elements of the rule of reason doctrine—per se illegality, treatment of public benefits, and treatment of ancillary restraints—can coexist.

Although the European Union, Australia, and the United States legally allow for some acceptance of ancillary restraints, in practice results may vary. In addition, Japanese treatment of ancillary restraints presently is unclear. In Australia, without authorization, the ACCC limits the treatment of ancillary restraints to agreements carried out pursuant to joint venture agreements. However, while this is the example most often used, there are other situations in which competitors may have looser alliances that will not qualify strictly as a joint venture. In such a case, an ancillary agreement likely would be accepted in the United States and the European Union but not in Australia.

On the other hand, there are situations in which the Australian system provides more leniency to parties acting together. The Australian system exempts any agreements carried out pursuant to a joint venture, regardless of whether it is merely ancillary or a major function of the agreement. In the United States and the European Union, it is unlikely that regulators would allow a price agreement that was not merely ancillary to the joint venture. Eleanor Fox stated:

If a transaction is a legitimate joint venture (to share risks and talents and to get new or cheaper goods to market) but it also has anticompetitive risks, one would balance procompetitive and efficiency properties against anticompetitive and inefficiency properties. Then, if there is an obvious less restrictive course that would minimize anticompetitive potentials, the client would be advised to take it.¹⁰⁴

104. Fox, *supra* note 39, at 20.

However, despite the administrative difficulties associated with both applying for and obtaining a formal exemption under the Australian or European systems, the fact that the United States considers hardcore price agreements or cartels to be highly suspect and less likely to attract the rule of reason analysis indicates that it may be nearly impossible to engage in per se conduct either in the U.S. or Japanese systems. Fox further argues that:

[T]he more suspect the restraint, the more likely it is that the court will dispense with proof of purpose, power, and effect, or that it will require a strong justification, such as: The restraint is necessary or important to bring goods to market efficiently, in order to eliminate a free rider problem or for other reasons.¹⁰⁵

Australia and the European Union possess similar requirements of strong public benefits before they will authorize pure price agreements.¹⁰⁶

There are examples in each jurisdiction of price fixing and boycott arrangements that received some form of exemption. In particular, the European Union, Australia, and the United States treat agreements that create new products with some leniency. In *Broadcast Music Inc. v. Columbia Broadcasting System, Inc.*,¹⁰⁷ involving a suit against the American Society of Composers, Authors and Publishers (ASCAP), respondent Columbia Broadcasting alleged that the policy of issuing blanket licenses, instead of specific work licenses, at set fees constituted price fixing. The Supreme Court held that the setting of prices was not a naked restraint of fees, but rather an ancillary component of the licensing.¹⁰⁸ The Court held that the set fees enabled the blanket licenses to be effective.¹⁰⁹ *Broadcast Music* emphasized that the licenses made available a product that would not exist otherwise. Similarly, in *Remia*, the European Commission determined that there was no breach of the EC Treaty when an agreement restrained competition that would not have existed without the agreement.¹¹⁰ In addition, in *Radio 2UE Sydney* in Australia, one factor that contributed to the court's finding that the parties did not breach the T.P.A. was that the parties were producing with a competitor a new product that would not have existed otherwise, and that the parties to the agreement were still free to set their individual prices.¹¹¹ Japan previously allowed agreements like the

105. *Id.* (internal citations omitted).

106. See EUR. COMM'N, XXIVTH REPORT ON COMPETITION POLICY 1994, at 97 (1995).

107. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979).

108. *Id.*

109. *Id.*

110. Case 42/84, [1985] E.C.R. 2545, [1987] 1 C.M.L.R.1.

111. (1982) 44 A.L.R. 557.

“Designated Bidding Systems,” which the JFTC listed as providing many benefits to the public (including allowing small firms to have equal access to publicly funded projects and avoid excessive competition), but since the Structural Impediments Initiative talks with the United States in 1988, the JFTC promised to strictly enforce the Antimonopoly Law against bid rigging in all industries.¹¹²

VI. OTHER EXEMPTIONS

The E.U. regime provides two unique conditional exemptions for crisis cartels, which are defined as “rationalization cartels in which there is chronic industry overcapacity.”¹¹³ Similar exemptions—for recession (*fukyo*) and rationalization (*gorika*) cartels conditional on JFTC approval¹¹⁴—existed in the Antimonopoly Law until 1999. In addition, the Japanese Ministry of Economy, Trade and Industry (METI) often requests notification of conduct by industry participants in conformity with its administrative guidance obligations. However, unless the JFTC expressly exempts arrangements in accordance with Sections 21 through 24 of the Antimonopoly Law, the JFTC will challenge them.¹¹⁵ The JFTC steadily has decreased the number of available exemptions for cartels, from a high of 1,079 in 1965 to the current low of 40.¹¹⁶ In contrast, the T.P.A. expressly allows any conduct that Australian legislation expressly exempts from the T.P.A., although the Australian government is following the Japanese trend of reducing the number of legislative exemptions and tightening the Section 51(1) test.¹¹⁷ U.S. antitrust law does not apply where express government exemptions exist.¹¹⁸

112. IYORI & UESUGI, *supra* note 33, at 90.

113. Eleanor M. Fox, *US and EU Competition Law: A Comparison*, in GLOBAL COMPETITION POLICY, *supra* note 14, at 342.

114. See John O. Haley, *Japanese Antitrust Enforcement: Implications for United States Trade*, 18 N. KY. L. REV. 335, 345 (1991).

115. See JAPAN FAIR TRADE COMM’N, *The Antimonopoly Act Guidelines Concerning Administrative Guidance* (1994), available at <http://www.apecp.org.tw/doc/Japan/Decision/administ.html>.

116. IYORI & UESUGI, *supra* note 33, at 359.

117. Trade Practices Act, 1974, § 51(1) (Austl.). Legislation that provides exemptions from the Trade Practices Act is subject to a national competition policy review every three years in which an independent body must provide a report to the effect that the benefits from the restrictive legislation outweigh the anticompetitive effects.

118. See CARL KAYSEN & DONALD F. TURNER, *ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS* 189-213 (1959).

A. Guidelines, No Action Letters and Safety Zones

Each jurisdiction provides guidelines on their individual enforcement approaches in particular industries and with respect to types of agreements. The U.S., E.U., and ACCC guidelines delineate safety zones, specifying thresholds beneath which the regulatory body is unlikely to take action. The guidelines describe other conditions and circumstances in which the regulatory body is unlikely to either be aggressive or take action. Although these guidelines provide some certainty to businesses, and many parties rely on them, it is unlikely that these broadly worded guidelines would bind the conduct of the regulatory bodies in an extreme situation. In addition, the guidelines do not bind private litigants who have rights to prosecute under the relevant antitrust legislation.

The regulatory bodies in all four jurisdictions offer informal guidance and will provide “no action” or “comfort” letters indicating that they do not intend to take any action with regard to the particular conduct of the requesting parties. However, no action letters suffer from the same flaws as the representations made in the guidelines. Accordingly, they could never successfully take the place of either a formal exemption system or the rule of reason approach. In contrast, European Commission no action letters form legitimate exemptions for parties specified in guidelines pursuant to Article 81(3) of the EC Treaty. In Japan, the JFTC has enforcement power and the ability to make its own recommendations, which may give its guidelines a more binding effect than guidelines in the other three jurisdictions.

B. Intellectual Property

All four jurisdictions possess some form of intellectual property exemptions. The U.S. DOJ created a safety zone for intellectual property, stating that:

Absent extraordinary circumstances, the Agencies will not challenge a restraint in an intellectual property licensing arrangement if (1) the restraint is not facially anti-competitive and (2) the licensor and its licensees collectively account for no more than twenty percent of each relevant market . . .¹¹⁹

119. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 4.3 (Apr. 6, 1995), available at <http://www.usdoj.gov/atr/public/guidelines/ipguide.htm>.

The European Union exempts pure patent and know-how licensing agreements under Article 81(3) of the EC Treaty when certain requirements are met. In Japan and Australia, Section 23 of the Antimonopoly Law and Section 51(3) of the T.P.A. provide certain intellectual property exemptions,¹²⁰ although the Australian government is in the process of reviewing Section 51(3) to determine whether it should continue to exist.

In addition, the E.U.'s *de minimis* doctrine is unique, and in some ways contrary, to the per se doctrine that applies to price fixing. An agreement will escape detection under EC Treaty Article 81(1) if it does not have an appreciable impact on either competition or interstate trade. The European Commission clarified this by stating that it currently interpreted Article 81(1) to refer to either horizontal agreements where the aggregate market share of the parties does not exceed 10%, or vertical agreements with a market share of 15%, where the aggregate turnover does not exceed 300 million Euro.¹²¹

An exemption that exists in the Japanese Antimonopoly Law arises from a loophole in the legislation. The extraterritoriality clauses do not capture purely foreign entities that neither have assets nor conduct business in Japan.

C. Regulatory Enthusiasm

One major difference between the jurisdictional approaches that is not technically an exemption but that provides a similar (although less predictable) result relates not to the law but to the regulatory body's enthusiasm in pursuing price cartels. All four jurisdictions regulate hardcore cartels, but the European Commission's insufficient investigative staff renders it unable to take on cases with the same devotion of the United States.¹²² In addition, the European Commission has political considerations in balancing its goals to ensure that the goals of a single market are not undermined by private collaboration with its reluctance to interfere with domestic issues of E.U. member states.¹²³ On the other hand, U.S. antitrust law allows courts to award damages against blatant offenders. Both U.S. and Japanese legislation provide criminal sanctions for antitrust offenses, including jail sentences.

120. See JAPAN FAIR TRADE COMM'N, GUIDELINES FOR PATENT AND KNOW-HOW LICENSING AGREEMENTS (1999), available at <http://www.jftc.go.jp/e-page/guideli/patent99.htm> (last visited Mar. 1, 2002); TRADE PRACTICES COMM'N, APPLICATION OF THE TRADE PRACTICES ACT TO INTELLECTUAL PROPERTY 11-13 (1991), available at <http://www.accc.gov.au/fs-pubs.htm>.

121. Commission Notice, 2001 O.J. (C 368) 7.

122. Fox, *supra* note 113, at 353.

123. CRAIG & DE BÚRCA, *supra* note 37, at 892.

Between 1950 and 1970, Japan did not take on any bid rigging cases but has seen a steadily increasing number of price cartel cases ever since.¹²⁴ The Structural Impediments Initiative talks, in which the United States encouraged Japan to take stronger action against anticompetitive conduct, motivated Japan, which now is very active in the area.¹²⁵

VII. CONCLUSION

One can distill antitrust regulation in the United States, Japan, the European Union and Australia down to a single principle: price fixing and boycott conduct are harmful but the jurisdictions should allow public benefits and pro-competitive conduct to continue. However, it is apparent that the four jurisdictions use different methods to determine what conduct is criminal and what conduct will have positive results.

In Australia and the European Union, pre-clearance systems exist through which parties can obtain authorization or declaration for proposed conduct that is in the public interest. This approach has many strengths, including the fact that parties have security in their business and the regulation is transparent and more likely to be uniform. On the other hand, for parties to have the aforementioned business security, the pre-clearance process requires that they engage in significant administrative measures to obtain pre-clearance, including the revelation of business strategies and secrets to the regulators. The U.S. system contrasts with the Australian system in its rule of reason approach. The rule of reason takes two forms, as some courts allow conduct that has a net pro-competitive effect to continue while other courts focus on whether the restraint is ancillary to a larger operation that possesses net public benefits. In addition, recent U.S. case law has adopted a hybrid between both existing rule of reason approaches.

It is possible to see elements in the exemption systems of the European Union, Australia, and Japan that have an effect similar to that of the two U.S. rule of reason approaches. The Japanese exemption system is still not perfectly clear because the Antimonopoly Law cases are less developed than the cases in the other three jurisdictions. However, the JFTC has taken a conservative approach in its enforcement, and the *Keidanren* has argued that the Antimonopoly Law does not extend to substantial restraints of trade that serve a legitimate social purpose, a view that has some support from Japanese courts. The rule of reason system, as opposed to a pre-clearance

124. See Antimonopoly Regulations, 4 DOING BUSINESS IN JAPAN, Part IX § 3.06[4] (Zentaro Kitagawa ed., 2001).

125. IYORI & UESUGI, *supra* note 33, at 90.

system, is useful for industry because if a party believes that a court will clear its conduct, it can commence business immediately without having to go through the timely and expensive pre-clearance procedures required in Australia and the European Union. The downside of the rule of reason approach is that it lacks the surety that comes with pre-clearance. All four jurisdictions delineate “safety zones,” or non-binding thresholds beneath which they are unlikely to prosecute conduct. In addition, all four jurisdictions have other exemptions, including exemptions for conduct related to intellectual property, conduct that other jurisdictions expressly authorize, and conduct that meets the *de minimis* doctrine criteria.

It appears that all four jurisdictions are gravitating toward stricter enforcement, which keeps with the growing awareness of competition law across the globe. However, given the different policy considerations that underlie these approaches together with the fact that the systems appear to meet the needs of each jurisdiction, it is unlikely that any of the four jurisdictions will amend their competition laws to co-align with the competition laws of any of the other jurisdictions. This seems to imply that a push for a global approach to competition policy would be a slow, if not impossible, process.