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Towards a Global Competition Order

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Ideas on Liberty

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Henning Klodt

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Ideas on Liberty

Towards a Global Competition Order

Henning Klodt

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I. Introduction

With the ongoing globalisation, markets and companies are increasingly transcending national borders. It therefore seems logical to let economic policy follow this trend and to let it reach international dimensions, too. While international coordination and cooperation have moved high up on the economic policy agenda, it is still difficult to exactly identify the areas that qualify for international coordination and to determine the appropriate extent of coordination.

The turbulences on international financial markets offer a case in point for the diverging viewpoints. For many observers they are proof for the pressing need for internationally coordinated measures to curb speculation in foreign exchange markets. Others point out that countries in crisis have hesitated to devaluate excessively high exchange rates only because they hoped to obtain international financial aid. These observers believe that the problem is not a dearth, but a surfeit of international political coordination. Equally contentious is the debate about several other issues, for example, international competition policy – the topic of this paper.

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Since the global wave of megamergers that started in the mid-1990s and has reshaped the corporate structure of entire industries, international competition policy is without doubt one of the most crucial issues of a global political order. The motives at work behind the merger wave, its effects on corporate structures, and its impact on global competition are discussed in Chapter II. We will elaborate the hypothesis that in many sectors the merger wave is of no consequence in terms of competition policy, as the growth of relevant markets outpaces that of companies in times of globalisation. While competition is certainly threatened in sub-sectors, this is not reason enough for an international competition policy, as government rules and regulations – national or international – are not always conducive to competition.

Chapter III discusses the criteria essential to the discussion on international policy coordination and where international competition policy should fit in. As a next step we analyse 22 case studies of international competition (Chapter IV) in terms of whether the cooperation currently practised between national competition authorities will suffice to secure long-term competition in the age of globalisation. Chapter V explains why a global competition order can be considered a logical consequence of the international trading order and proposes a strategy to implement it at the political level. Chapter VI summarises the economic policy conclusions of this study in ten propositions. Excerpts from important documents on international competition policy have been included as appendices.

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II. Globalisation and Competition

Does globalisation intensify competition because multinational firms worldwide intrude in national markets that were once protected? Or does globalisation jeopardise worldwide competition by fostering international megamergers? This question cannot be evaded if we are to provide a sound rationale for the necessity of a global competition order.

1. The Effects of Foreign Direct Investment on Competition

When global trade and investment flows outstrip global production, the international division of labour and the economic integration of domestic economies are intensified. Without doubt the past decades have witnessed this process of globalisation, the main catalyst being foreign direct investment (FDI). While global production and trade have increased roughly threefold since 1982, FDI has increased more than 20 times (Table 1).[1]

1 The FDI of capital exporting countries (capital outflows) shown in Table 1 is not always compatible with the capital inflows of host countries due to problems of statistic compilation.

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TABLE 1: Indicators of the Globalisation of the World Economy

	1982	1990	2000	2002
Gross domestic product (billion $)	10805	21672	31895	32227
1982 = 100	100	201	295	298
Export of goods and services (billion $)	2053	4300	7036	7838
1982 = 100	100	209	343	382
FDI (capital outflows) (billion $)	28	242	1150	647
1982 = 100	100	864	4107	2311

Source: UNCTAD (2001).

The data on FDI show a distinct peak in 2002 and a sharp decline thereafter. As will be explained below, this development basically reflects the stock market bubble of 2000. Therefore, the data for 2000 should not be overvalued. More important is the long-term trend which clearly indicates that FDI is much more dynamic than world output and world trade. FDI can thus be regarded as the major driver of globalisation.

While FDI plays a pivotal role in the so-called locational competition debate especially in Germany, this is true of other countries as well. It is often argued that the attraction of a location for internationally mobile investors shows up not least in the FDI balance.

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A negative balance, as was the case in Germany for many years, is often interpreted as an indication of international investors turning their backs on the country concerned, thereby compelling it to introduce fundamental reforms and enhance locational attraction.

The debate in Germany changed course only when Vodafone bought Mannesmann AG in 2000 for the record price of US $ 186 billion; for that year, the traditional deficit in the German FDI balance showed a healthy surplus. This turnaround was in no way celebrated as a success of German location policy, fuelling instead a discussion about how more stringent takeover regulations and similar measures could prevent a sell-out of German business.

In the public, evaluating the inflow level of foreign direct investment as a sign of the strength or weakness of one's own location is closely linked to the decision on whether the foreign capital will be used to build new production capacities (greenfield investment) or to buy local enterprises. Until the Vodafone/Mannesmann merger, the combatants had apparently been under the impression that foreign direct investments were essentially greenfield investments, implying that each direct investment from abroad would increase production and create more employment in Germany while German direct investment overseas would translate into the export of jobs.

We will not go into the details of this discussion here (for more information, see Klodt and Maurer 1996; Klodt 1999).

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Within the scope of this paper it is more important that the competition policy implications of FDI be clearly differentiated according to whether it occurs in the form of greenfield investments or mergers.

As a rule, greenfield investments will probably boost competition in the pertinent target region, as the number of suppliers in this market would rise and enhance the capacity of supply. In contrast, the competitive effects of cross-border mergers are more difficult to assess. If, for example, a large foreign bank buys a smaller German bank and uses it as a bridgehead for the German market, there is a definite increase in competition, which is largely influenced by the large local banks. On the other hand, if a foreign retail firm buys several domestic retail chains, it has a debilitating effect on competition. In other words, advancing globalisation could certainly curb competition although it usually (particularly as a result of the physical expansion of the relevant markets) has a pro-competitive effect.

It is not easy to assess the proportion of mergers in FDI in terms of statistics mainly because FDI is recorded within the framework of the balance of payments statistics while merger statistics are usually based on the announcements of the companies concerned.[2] There are discrepancies especially

2 For more information on the different problems of statistical demarcation, see UNCTAD (2000), p. 105.

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when the purchase of companies is at least partially financed in foreign capital markets. If, for example, Vodafone had financed the purchase of Mannesmann exclusively with loans from German commercial banks (which was not the case), there would have been absolutely no evidence of this merger in the German FDI balance.[3]

The United States, however, provides specially prepared data on FDI making it possible to establish the proportion of mergers. The data clearly show that FDI flows are dominated by merger activities, the relative weight of which has increased greatly over time (Table 2). Unfortunately, the distinction between Greenfield investment and mergers and acquisitions is not reported regularly. Therefore, no information for the years since 1999 is available.

A comparison between the global FDI development and the development of cross-border mergers reinforces this impression (Graph 1). As already mentioned, these databases are very different and thus the difference between these series cannot be equated with global greenfield investments. However, the similar trend followed by the two time series makes it amply clear that the development of FDI is greatly influenced by international merger activities.

3 Even then the merger would, however, have been recorded in the statistics of FDI stocks, as this is based on the companies' balance data. Klodt (1999) discusses the extent to which the rate of flow and stock changes in the different FDI statistics differ from each other.

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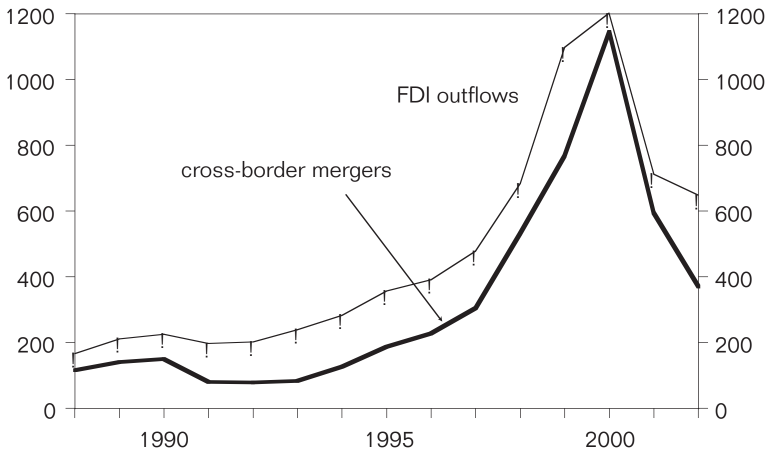
TABLE 2: Foreign Direct Investments in the United States by Type of Investment

	Total investments	Greenfield investments		Mergers and acquisitions	
	Billion $	Billion $	Percentage	Billion $	Percentage
1980	12.2	3.2	26.3	9.0	73.7
1981	23.2	5.1	21.8	18.2	78.2
1982	10.8	4.3	39.3	6.6	60.7
1983	8.1	3.2	40.1	4.8	59.9
1984	15.2	3.4	22.1	11.8	77.9
1985	23.1	3.0	13.1	20.1	86.9
1986	39.2	7.7	19.7	31.4	80.3
1987	40.3	6.4	15.8	33.9	84.2
1988	72.7	78.0	10.8	64.9	89.2
1989	71.2	11.5	16.1	59.7	83.9
1990	65.9	10.6	16.1	55.3	83.9
1991	25.5	7.7	30.3	17.8	69.7
1992	15.3	4.7	30.8	10.6	69.2
1993	26.2	4.5	17.0	21.8	83.0
1994	45.6	6.9	15.1	38.8	84.9
1995	57.2	10.0	17.5	47.0	82.5
1996	79.9	11.2	14.0	68.7	86.0
1997	69.7	9.0	12.9	60.7	87.1
1998	201.0	20.3	10.1	180.7	89.9

Source: UNCTAD (2000), p. 249.

For an accurate assessment of the consequences of globalisation for competition intensity in highly developed national economies and the global economy as a whole, we must study the background of the current merger waves.

GRAPH 1: Worldwide FDI (Capital Outflows) and Cross-border Mergers (billion US $)



Source: UNCTAD (2003).

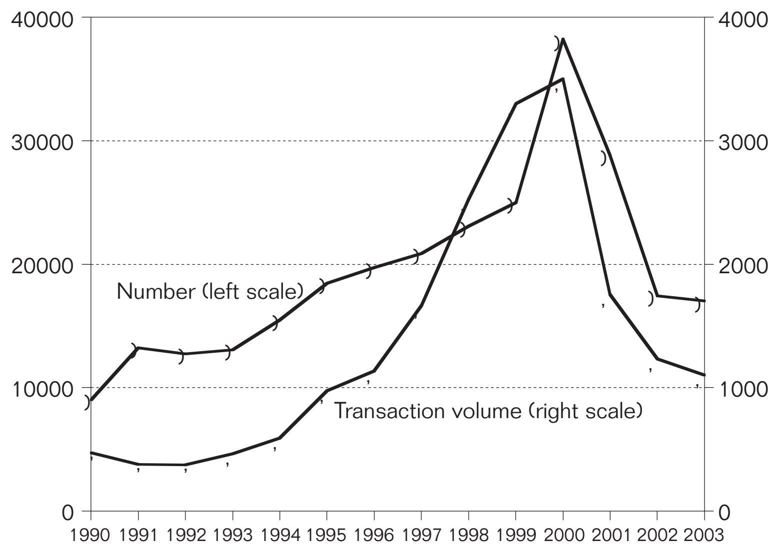
2. Global Merger Waves

In 2000, the number of mergers and acquisitions worldwide was three times higher than in 1990; the transaction volume has in fact increased twelvefold (Graph 2)[4]. It is true that many mergers were financed by stock swaps, which meant that their transaction volumes were grossly overvalued for a while because of the speculative bubble on the stock markets. This wave has subsided, but both the total number and

4 The data for 2003 are own estimates based on the results for the first half of the year.

the transaction volume still exceed the level of the first half of the 1990s. and several prominent deals of the recent past (J. P. Morgan Chase/Bank One; Sanofi/Aventis) have demonstrated that the business of mergers and acquisitions has not expired. Most observers agree that the current levels of transaction numbers and volumes are below the long-term trend and that a recovery of the world economy will probably bring about also a recovery in mergers and acquisition activities.

GRAPH 2: Number and Volume (billion US $) of Worldwide Mergers and Acquisitions



Source: Thomson Financial Securities Data (consecutive years).

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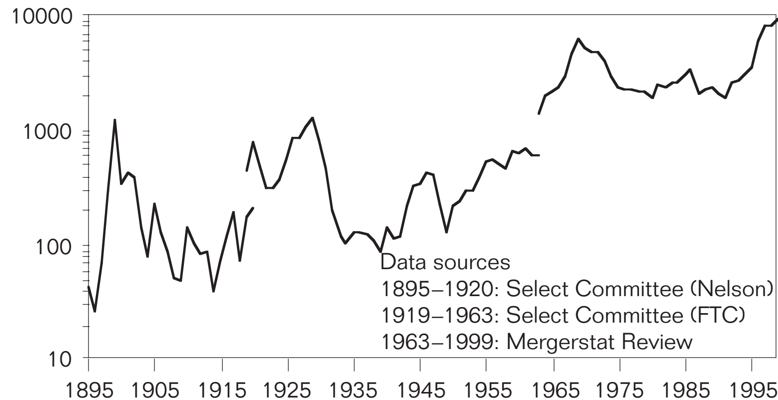
Merger waves, each with its own special features, had also occurred in earlier years. They were always caused by exogenous shocks, triggered for example by technological developments or by sudden changes in political parameters. As these shocks never impact equally on all sectors, various merger waves show clearly defined sectoral priorities that change from wave to wave. Andrade et al. (2001) illustrate how the branch structure of merger activities in the US was influenced by the shock of raw material prices in the 1970s, by microelectronics in the 1980s, and by deregulation policies in the 1990s.

The theory of exogenous, branch-specific shocks as the causes of merger waves also holds true of earlier periods, as will be briefly outlined in the following pages. However, it is not easy to identify earlier merger waves with watertight statistics, as worldwide systematic merger statistics were introduced only recently. For the European Union, for example, the corresponding time series start only in the late 1980s when the Community established its own merger control. However, for West Germany – that has known merger control since the cartel amendment of 1973 – data has been available since the mid-1960s.

For longer time series, however, one must refer to US data, as merger control was introduced there as early as 1905 and in preparation for merger control merger statistics were being compiled by the end of the nineteenth century. Taking this data as a basis and allowing for several breaks in the

time series due to the range of sources, five merger waves can be identified in the last 100 years (Graph 3).

GRAPH 3: Number of Mergers and Acquisitions in the United States



Source: Select Committee on Small Business (1962); Mergerstat Review (consecutive years).

– The first wave covered the period 1897 through 1904. It was basically a response to the Industrial Revolution in which the widespread use of steam enabled high returns to scale in heavy industry. The wave led to the creation of large industrial trusts that even today continue to shape the old economy in the US and elsewhere. This first wave was characterised mainly by horizontal merger activities, which were halted by the passing of the Sherman and Clayton Acts. According to these acts,

mergers could be prohibited if they resulted in disproportionate market power.[5]

– The second wave started around 1920 and continued until 1929. As the Clayton Act had clamped down on horizontal mergers, this period was dominated by vertical and conglomerate mergers. New priority sectors included the railway and energy sectors, where the existence of track and electricity networks favoured concentration.

– The third wave lasted from 1965 through 1975. It was dominated by attempts to achieve economies of scale through industrial mass production in consumer goods industries, and to diversify the range of products by purchasing additional companies from other markets. In the wake of this wave, merger control in the US was further tightened (Hart-Scott-Rodino Antitrust Improvements Act of 1976) and merger control was introduced in Germany for the first time ever under the second cartel law amendment of 1973.

– The fourth wave that occurred from 1984 to 1988 was demonstrably weaker in the US than in Europe where – in anticipation of the single market – erstwhile national companies were converted into and expanded to become

5 For an overview of US competition law: cf., for example, Schmidt (2001), p. 249 ff.

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European companies. The outcome of this wave, in terms of competition policy, was that the EU passed a regulation on merger control in 1989 (effective since 21 September 1990). The catchword of this merger wave was synergy – to be ushered in by integrating the production sectors with similar or related technologies. Accordingly, the sectoral priority was in technology-intensive branches.

– The fifth wave that started in 1995 is characterised by the catchwords globalisation and deregulation. As markets grow in the course of globalisation, corporate structures follow suit. In times of deregulation, hitherto shielded national monopolies are thrown open to international competition and, through the targeted purchase of foreign suppliers, companies can gain an immediate foothold in foreign markets. The priority sectors of the ongoing merger wave are to be found, on one hand, where globalised markets have a special significance (for example in the automobile or pharmaceutical industries) and on the other, where deregulation has radically changed the political framework (especially in telecommunications and utilities).

Globalisation is fuelled mainly by modern information and communication technologies (ICTs) that have made it considerably easier and cheaper to establish and organise company mergers that span the world. Even the recent deregulation policy has been influenced to a large degree by ICTs,

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at least in the telecommunications sector, as they are increasingly eroding traditional monopolies of the public providers of postal and telecommunications services. A dual technological shock manifested in globalisation and deregulation could definitely be identified as a decisive factor that unleashed the fifth merger wave.

This technological shock is also considered crucial to the shift to the New Economy, generally believed to have started in the mid-1990s – coinciding exactly with the start of the fifth merger wave. Various empirical analyses have shown that macroeconomic production has made rapid progress ever since, especially in the US, fuelled mainly by the spread of modern ICTs. (For an overview of literature on this subject, see Jorgenson [2001].)

The factors leading to and the contexts of the current merger wave can therefore also be analysed from a different perspective, i. e. based on the question whether and to what extent technological change brings about a change in optimal corporate structures and whether the ongoing merger activities genuinely help realise these optimal structures. This aspect of competition is the subject of the following chapter.

3. Changes in Corporate Structures

When corporate structures change, market structures and competitive conditions usually follow suit. The future role of

competition policy and the extent to which this role will shift from the national to the international level therefore depend not least on corporate structure development. This, in turn, is greatly influenced by the wave of megamergers discussed above and by ICT-induced changes.

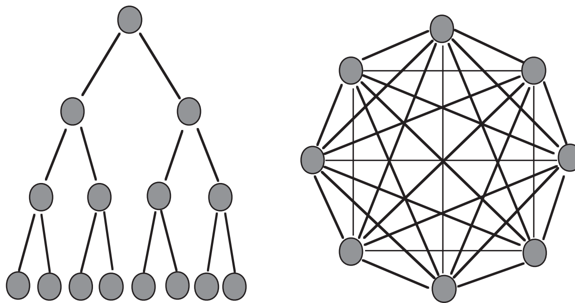
At first glance, progress in ICT and megamergers seem to contradict to each other. According to the transaction cost approach developed by Coase (1937) and Williamson (1973), companies exist mainly because the costs of coordinating economic activities via the market are prohibitive. If, however, the introduction of ICTs brings about a tangible alleviation of transaction costs, more business activities may be managed via the market and less within the hierarchical structure of companies. Companies should therefore aim to split up into smaller, independently functioning units rather than merge to form larger and larger units. According to the traditional theory of market forms (Heuss 1965), we can then reckon with more intense competition.

This line of argument can be better comprehended with the help of the information channels required to organise production processes within hierarchies on the one side and within networks on the other (Graph 4).

On the left is an organisational diagram of a hierarchically structured company employing eight directly productive workers (lowest level) and their supervisors. It is presumed that a person in charge can supervise two workers at a time,

which means that a total of seven supervisors are necessary for the hierarchy to function. On the right is a company that is fully networked, in which each production worker communicates with everybody. In the ideal scenario, there is no need for supervisors but for an inordinate increase in the number of information channels.

GRAPH 4: Communication Costs in Hierarchies and in Networks



Of course this description is extremely schematised but it demonstrates that saving ICT costs is the main advantage of hierarchical organisation forms, while networked organisations have lower management overheads. If the relative price of ICT services falls, there should be a trend towards replacing large, hierarchical companies with smaller, networked production units.

The basic features of such a change can be clearly observed in corporate structures. Purely functional forms of organisations are being replaced by product- or customer-oriented

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forms; middle management is being made leaner to flatten hierarchies; individual parts of companies are becoming profit centres; and outsourcing is being increasingly resorted to (Picot et al. 1998). Outsourcing, in particular, is also reflected in the overall macroeconomic calculations, which illustrate the rise in the intermediate input quota (Table 3).[6]

TABLE 3: Intermediate Input Quota (a) in Germany (b) (%)

	In current prices		In prices of 1995	
	1993	2003	1993	2003
Manufacturing, mining, construction	49.0	64.1	59.3	64.9
Business enterprise sector (b)	47.6	49.5	46.8	55.0

(a) Intermediate inputs as a proportion of production value; (b) All sectors without the state and private non-profit organisations.

Source: *Statistisches Bundesamt* (German Statistical Office) (2004); the author's own calculations.

On the other hand, the transition to the New Economy brings with it new types of economies of scale, which played subordinate role in the old economy. First, there is the reputation of the suppliers that is gaining in importance as a competitive factor (see, for example, Shapiro and Varian 1999). This is because the goods produced in highly developed

6 Further indicators of the growing importance of outsourcing are to be found in Feenstra (1998).

economies are becoming more and more like experience goods, making it difficult for buyers to judge their quality by inspecting them prior to purchase.[7]

Under these circumstances it is not enough for a company to offer a product with the right price and quality, if is to hold its own in competition. Indeed, it is far more important for the company to gain the customer's trust. In this respect, large companies have a competitive advantage if they can succeed in extending the reputation acquired for a certain product to their entire range of products. Expecting to achieve returns to scale when using their own reputation can therefore be an important motive for companies to go in for mergers.

It can be assumed that this merger motive will carry considerable weight in the New Economy. The changeover to the New Economy primarily means that information goods gain importance as input factors. Ousting old branches of business and replacing them with new ones is not the focus of this structural change; the focus is on replacing traditional products by information-intensive ones. While the degree of the process may vary from branch to branch, all branches of the economy are ultimately covered (Klodt 2001). The greater the information-intensity of a product, the more likely it is to resemble an experience good and the more crucial

7 Nelson (1970) introduced the categories of 'experience goods' and 'inspection goods' into the literature.

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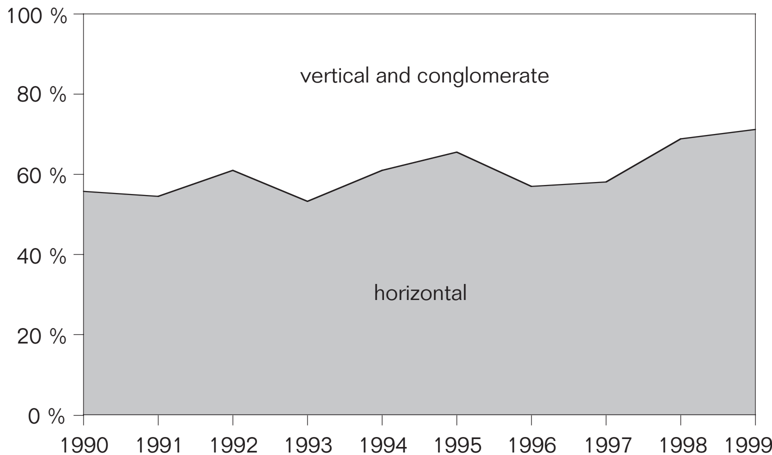
becomes the reputation of the supplier.[8] Within a company, the reputation of an established branch name is like a public good that can be used by different branches of the company without any rivalry between them. Other examples of company-specific public goods are the results of research and development or the development of performance-oriented management methods. The structural transition to the New Economy is infusing importance into all these activities. The greater the similarity between various company units, the greater is the potential for returns to scale in all these sectors – this argument mainly serves to explain horizontal mergers. In fact, there is a perceptible increase in the proportion of horizontal mergers to the total number of cross-border mergers (Graph 5).

The literature on the theory of foreign trade has long recognised the importance of firm-specific public goods. Helpman (1984) and Markusen (1984), for example, had already worked out how the common use of so-called headquarter services in a company's domestic and foreign operations can develop into an important motive behind the creation of multinational companies. While in this and subsequent

8 There can be additional economies of scale in the new economy, for example, from the aggregation advantages as a consequence of bundling (Bakos and Brynjolfsson 1999). These advantages are the outcomes of the combined supply of several information goods (e. g. a software package). This strategy is not open to niche suppliers with a limited range of products.

works (see, for example, Markusen and Venables 1995), the spotlight was mainly on explaining FDI, they also made significant contributions towards explaining horizontal mergers.

GRAPH 5: Vertical, Conglomerate, and Horizontal Mergers as Proportions of Worldwide Cross-border Mergers (%)



Source: UNCTAD (2000)

Some catchwords that have been on everybody's lips in the wake of the current merger wave appear in a new light when viewed from this perspective. Striving for 'world market leadership' could be translated into exploiting returns to scale in the presence of firm-specific public goods, while 'concentration on core competence' could reflect the transition from hierarchical to network-like production forms.

4. Consequences for Global Competition

In terms of competition policy, the growing integration of the global economy is, firstly, comparable to a physical expansion of the relevant markets whereby competition is intensified, ceteris paribus. When physical distances lose importance and national borders become more porous, what were once ‘national champions’ enter into the fray with the champions from other countries and their market power declines.

The most recent merger wave in particular, which for its part is a response to globalisation, has been responsible for the growth not only of relevant markets but also of companies themselves. While the primary pro-competitive effects of globalisation are no doubt weakened, they are certainly not completely eliminated per se. For the global economy as a whole, the combined balance of globalisation and the merger wave should serve to intensify competition.

The scenario in sub-sectors may, however, be different, essentially because globalisation and technological change are especially in favour of horizontal mergers. As discussed, the significance of horizontal mergers has been boosted, mainly by the growing importance of firm-specific public goods. The dominance of horizontal mergers in the most recent merger wave is increasingly highlighting the problem of market dominance – a problem that was of secondary importance in the conglomerate mergers of earlier waves.

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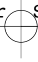
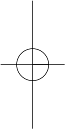
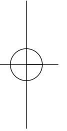
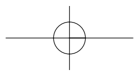
Hence competition policy still faces challenges, despite globalisation. Indeed, because of globalisation, it must increasingly adopt a global perspective, i.e. its coming to a halt at national borders must itself come to a halt. Nevertheless, it is not easy to determine how a global competition policy should be designed to effectively secure global competition without placing bureaucratic impediments. The following Chapter discusses some basic concepts of international policy coordination, which should not be overlooked in our drive towards a global competitive order.









III. Some Basic Concepts: International Spillovers and Systems Competition

1. Criteria for International Policy Coordination

International policy coordination is an obscure and, at times, rather ambiguous term. Coordination can be used only for the exchange of information between governments, can be used to coordinate economic policy objectives, or can encompass the implementation of joint policy measures conducted by various states right up to the partial surrender of national sovereignty rights and the transfer of these rights to supranational institutions (Cooper, 1985).

There are two theoretical points of departure that need to be considered when developing concepts for international policy coordination. The first is to be found in public choice literature, which, inter alia, discusses the normative reasons for sets of rules that apply to market economy systems. Brennan and Buchanan (1985) with their major work, *The Reason of Rules,* can be called representatives of this literature. They comprehensively explain why, in the words of Thomas Hobbes, life without societal rules would be “solitary, poor, nasty, brutish and brief”.[9] In line with this reasoning, a globalised economy needs global rules for the political order.

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The second point of departure is game theory, which explains, among other things, the conditions under which cooperation offers economic advantages. It also identifies the conditions that facilitate or hamper the development of cooperative behaviour. A milestone in the literature on this subject is *The Evolution of Cooperation* (Axelrod 1984).

Neither theory, however, deals explicitly with the international coordination of national policies. The set of rules discussed by Brennan and Buchanan refers exclusively to the autonomous central state that is independent of other states and does not even have internal federal structures.[10] Even the game theory does not usually differentiate between different hierarchies of players – a characteristic feature of the combined effect of national and supranational politics. Nevertheless, these theories can provide clues about what should be the focus of concepts for international regulatory rules. This is explained here through two examples.

9 This had already been said by Thomas Hobbes, whose *Leviathan,* written in 1651, can be considered the primordial cell, as it were, of public choice literature.

10 The same is true for the rest of public choice literature. Only with regard to public goods does the theory of fiscal federalism come up with concepts on how tasks should be divided across different state levels in an economically viable manner. (A good overview is to be found in the collection of essays by Oates [1977].)

Example 1: Road traffic

Brennen and Buchanan (1985) illustrate the necessity of regulatory rules by taking the example of road traffic. For traffic to function smoothly, it is necessary to have a general regulation that stipulates whether we must drive on the right or the left of the road. This example can be transposed to the international level. Let us imagine that before the invention and popularisation of the automobile or even before the introduction of the horse-cart and ox-cart, a world transport minister could have decided on which of the world's roads people could drive on the right and on which, on the left. While he may have decided in favour of driving on the right or on the left, he would certainly have prescribed the same kind of traffic for all countries, as different transport systems have absolutely no advantages in macroeconomic terms; instead, costs are incurred in transfers from one system to another.

Let us further presume that the same world transport minister had the authority to lay down speed limits on different types of roads all over the world. A wise minister would refrain from exercising this power and would leave this decision to national transport ministers, because traffic conditions in different countries allow for different speeds and the adjustment costs when crossing borders and having to observe other rules are so low as to be negligible. Moreover, the preferences of citizens with regard to the trade-off between speed and safety may also differ from country to country. In this case there is little advantage to be gained from having an international rule, which would unnecessarily restrict country-specific regulation.

Finally, let us assume that motor vehicles were identified as one of the important causes of global climate change and the world transport minister were authorised to stipulate the worldwide deployment of emission-reducing technologies. However, with different technologies available, he would not be fully

aware of the various cost–benefit ratios and the potential of each technology would be uncertain. The world transport minister would be faced with a difficult decision: on the one hand, it would seem that he should intervene, as individual national transport ministers could hardly be expected to implement on their own climate protection measures, the benefits of which would be shared by all countries while the costs would be borne by that country alone. On the other hand, by stipulating the wrong technology or imposing far too restrictive emission conditions, he could unnecessarily harm existing and future prosperity. There can apparently be no ideal international transport policy as long as the questions of the optimal climate protection technology are not adequately clarified.

The example of road traffic may seem a rather contrived portrayal of the problem of international policy coordination. After all, nobody will want to claim in all seriousness that there is a pressing need for an international convention to determine whether we should have right-hand or left-hand drive. There is, however, definitely one transport sector in which all these deliberations are relevant – international maritime traffic.[11]

Example 2: Maritime traffic

In the past centuries, serious accidents have occurred repeatedly on the high seas, as there have been no generally accepted collision prevention rules (CPR).

11 It should be added here that there is an urgent need for international air traffic to be coordinated in order to avoid a repetition of accidents like the one over Bodensee, Germany, in 2002.

Maritime traffic regulations were passed only at the beginning of the 20th century and were recognised by all seafaring nations as binding international law in international waters. Rules were laid down for the prevention of collision, essentially following the system of right-hand drive. Furthermore, there were rules for lights and hooting, which considerably reduced the danger of misunderstanding between ships on the high seas. These rules, also called the CPR, have apparently proved to be so effective that they have had to be only marginally modified and supplemented throughout the 20th century.

The fact that the maritime traffic regulation is primarily used to intervene in matters where all the parties involved stand to benefit from international coordination has contributed in a major way to its viability. It does not curtail what is called the 'Freedom of Traffic on the High Seas' any more than is absolutely necessary and is a prime example of international policy coordination that contributes towards increasing world prosperity.

In contrast, it is extremely difficult to achieve internationally binding rules for maritime traffic on issues such as environmental protection, work safety, or safety of technical operations. While several agreements on the safety of maritime traffic have been agreed upon within the framework of the International Maritime Organisation, which has more than 140 members, several observers believe that the regulations are still inadequate, particularly when dealing with large accidents like the Torrey Canyon *(south-west England, 1967), the* Amoco Cadiz *(Brittany, 1978) or the* Exxon Valdez *(Alaska, 1989). Besides, ship owners often comply with different or even contradictory safety conditions and must undergo inspections conducted by different national institutions that cause unnecessary costs (Böhme and Sichelschmidt, 1995). There is definitely a need here for internationally uniform rules but because of the uncertainties on the best drafting of these rules, a consensus has yet to be reached.*

Common to both examples is the fact that international coordination of rules can add to prosperity when rules laid down (or not laid down) in one jurisdiction can have implications for the economic subjects of another jurisdiction. Simply put, rules regarding driving on the right or left become an international problem only when drivers from different areas with different laws happen to meet.

The same is true for other policy areas. Environmental damage fuels the need for international action only if the environmental policy of a country cannot prevent emissions from crossing the border. The failure of Japan's banking supervision becomes part of the international agenda only if it threatens the functioning of the capital markets of other countries. And competition policy assumes international dimensions only when the producers of a country monopolistically exploit the consumers of another country. This and other cross-border implications of a country's sets of rules are described as *international spillovers* in the following chapters.

Another conclusion can be derived from these examples. International policy coordination encounters acute problems if there is uncertainty about the efficacy of various rules in containing international spillovers and about the dynamic implications of laying down certain rules. This is a well-known problem in the field of technical norms and standards. In the absence of national norms, there is danger of incompatible standards being established side by side. Historical examples include the British Standard Whitworth thread (inches)

for British screws that cannot be used by European metric spanners or the existence of both PAL and SECAM colour televisions systems that for a long time made it difficult for viewers in central and eastern Europe to receive western television programmes. A topical example is that of mobile telephony in the US. While it is theoretically based on the same GSM Standard as used in Europe, it uses a different frequency, making American and European terminals incompatible.

This problem would be resolved if a superior authority were given the power to set an internationally binding, uniform standard or at least to ensure that the different standards are compatible with each other. However, the danger here is that the supranational authority responsible for norms may decide in favour of the wrong standard and impede technological progress in the long run.

International regulatory policy faces a similar dilemma. If it refrains completely from setting internationally binding rules, international spillovers could cause substantial welfare losses. If, on the other hand, it intervenes with stringent regulations in areas where there is considerable uncertainty regarding the optimal form of laying down rules and where there is great innovation, it hinders institutional competition between different sets of rules and the emergence of new, better ones.

In terms of the *systems competition,* which, after all, builds on Friedrich A. von Hayek (1945, 1968), the creation of a body

of legislation is interpreted as an evolutionary process in which 'competition as a of discovery procedure' plays a pivotal role in conceiving an optimal set of rules. If, for example, we have to decide between systems of inflexible or flexible exchange rates as being more advantageous in macroeconomic terms, the question cannot be answered solely on the basis of theoretical deliberations. The experience of the Bretton Woods system, or of floating, supply us with important information that helps us take decisions regarding international regulations governing the world's exchange markets.

Whether or not an international set of rules fosters prosperity depends not only on the extent of the international spillover but also on the extent to which it requires systems competition to obtain the information required for drafting an optimal set of rules. As with the technical standards already discussed, here too we can apply this rule of thumb – international rules hamper systems competition as a process of discovery much more if there is uncertainty about the optimal rules. Simply put, systems competition has nothing more to discover in the CPR governing international maritime traffic and everything speaks in favour of uniform rules at the international level. In contrast, safety rules for large tankers are not as clear-cut.

The discussion so far yields that the primary goal of international policy coordination must be to curb international spillovers without impeding systems competition any more than necessary. The following criteria can be derived.

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Criterion 1: Welfare gains resulting from uniform international rules can be expected in the presence of strong international spillovers. From this perspective, it does not matter whether the international rules have been stipulated by a supranational authority or agreed upon multilaterally by national authorities. On the other hand, in areas where there are few international spillovers, there are no substantial advantages to be gained from the standardisation of rules; instead there are disadvantages, as the differences between national and regional technologies and preferences are not sufficiently accounted for.

Criterion 2: In areas where there is uncertainty about which rules are most effective in curbing spillovers and about the nature of their dynamic impacts on their respective environments, there is the danger of setting non-optimal rules and causing unexpected welfare losses. The rules should not be specified any more than is necessary to achieve the goal, namely regulating, so as to neither block alternative remedies nor obstruct ongoing evolutionary development of rules through international systems competition.

According to this scheme, all policy areas can be analysed in terms of whether and to what extent they require international coordination. The following discussion concentrates on an area that deserves special attention due to the current wave of international megamergers – international competition policy.

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2. Cooperation or Coordination in Competition Policy?

In theory, there should be no doubt that when companies put restraints on competition, they cause international spillovers. If, for example, several companies decide to form a price cartel, it has an adverse effect not only on the customers in their respective countries but also on the customers in the countries to which these companies export. As international trade becomes increasingly interwoven, the potential significance of such spillovers also gains weight.[12]

The same applies to mergers and acquisitions. If the companies involved consequently enjoy dominant market positions, it is at the cost of their customers in all the countries that import their products, not only those where the companies are located. This can also retard the business of other companies if the merged companies succeed in setting up

12 This assessment is contested by Röller and Wey (2002). As the basis of their argument, they present a model in which the competition authorities in different countries pursue identical competition policy goals but, because the situation varies from country to country, the relevant markets they have in mind are different and therefore their decisions on cross-border merger cases differ. The authors show that such conflicts over market demarcations tend to diminish in importance as globalisation advances and the market in question increasingly becomes a world market. While this line of argument is logical in itself, it completely bypasses reality. In actual fact, international conflicts pertaining to cartel law are not about the demarcation of the relevant market but about the different competition policy goals that have been excluded by the authors on assumption.

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barriers to prevent market access or in pursuing predatory competition.

At the end of the day, we should not lose sight of the adverse effects on the dynamic functions of competition. If cartels or mergers weaken the technological dynamics of the branch concerned, they have a debilitating effect on the growth and employment prospects of the branch, not only in the countries where the concerned companies are located. In an increasingly globalised economy, international spillovers caused by restraints on competition can occur in a number of ways and, therefore, in terms of international policy coordination, we can consider Criterion 1 fulfilled.

We must differentiate between the diverse instruments of competition policy before we can apply Criterion 2. There is general consensus on the fact that classic price and quantity cartels are impediments to competition. There is no need for an international systems competition in which different national competition policies would compete and help us to establish whether such hardcore cartels could not perhaps foster competition after all. In other words, Criterion 2 does not speak against an international set of rules that would prohibit hardcore cartels with cross-border impacts.

The situation is not quite as clear in the case of cartels that go hand in hand with certain restraints on competition but are also expected to have micro- and macroeconomic efficiency gains. Examples include rationalisation cartels or cartel agreements on the exchange of research and develop-

ment results. Both German and European competition laws allow such agreements to be untied from the general cartel legislation.

In German law, this matter is under ministerial permission, while in European law it is part of the cartel proceedings in the European Commission (EC). However, the scientific and the political community differ on the conditions under which these agreements can be decoupled from the general law. If such cartel regulations were also to be internationally standardised, the systems competition between the cartel laws of different countries and regions could suffer a setback in its function as a process of discovery.

We should also differentiate when evaluating mergers in terms of competition policy. There is little doubt that competition policy should prevent horizontal mergers that create or enhance a dominant market position, regardless of whether they occur in the national or international framework. Even the argument that the negative effects of such mergers on competition are more than balanced out by the gains of rationalisation is unconvincing. The task of competition policy is solely to ensure the freedom of competition that is a value in itself. It is more difficult, however, to assess the conditions under which competition is restrained by vertical or conglomerate mergers. Eliminating institutional competition between the different rules of national competition policies could hinder the evolution and development of an optimal competition policy in the long term.

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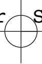
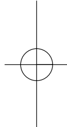
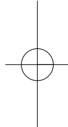
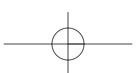
All in all, Criterion 1 advocates the establishment of a global competition order to avoid international spillovers caused by restraints on competition. Criterion 2, on the other hand, suggests setting only minimum rules in which there are no serious uncertainties about the optimal competition policy. The focus should therefore be on combating hardcore cartels (particularly price cartels, market-sharing cartels, and export cartels) and horizontal mergers that create or enhance market dominance. Furthermore, international competition rules should be applied exclusively to cases related to cross-border spillovers. No country should be denied the right of tolerating restraints on competition that has impacts solely within its borders even if it ultimately harms itself in doing so.

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IV. Case Studies on International Competition Policy

Public discourse on a global competitive order often assumes the absence of any existing competition policy that reaches beyond national borders (or the borders of the EU). "Our cannons fire only as far as Aachen", said the then president of the German Cartel Office, Wolfgang Kartte, in the 1980s, as efforts to prove that mineral oil companies were forming price-fixing cartels for motor vehicle petrol failed yet again. If Kartte's assessment were true, there would indeed be a pressing need for action, as market integration between highly developed countries has intensified so much with globalisation that hardly any competition-restraining measure affects only individual countries.

In reality, the cannons of national competition policy already reach far beyond national borders. This will be explained in the following sections. In terms of economic policy, the relevant question is not whether cross-border restraints on competition should be followed by a control on competition policy, but whether, by subjecting transnational behaviour to national law, competition in the world markets can be effectively secured on a permanent basis or it needs to be supplemented by international competition rules. This forms the

true core of the controversy surrounding international competition policy.[13]

Advocates of the status quo point out that even today it is not very difficult to use national competition policy to get a grip on competition restraints that originate in other countries but have implications for domestic markets. In contrast to many other areas of legislation where the territoriality principle is valid, competition law is dominated essentially by the so-called effects doctrine. According to the effects doctrine, competition authorities can take action against all kinds of restraints on competition that have implications for competition in the respective domestic markets, irrespective of the country where the anti-competitive practice originated.

Whether the effects doctrine really does offer a sound foundation to counteract cross-border restraints on competition, is analysed on the basis of 22 case studies that are documented in the literature on competition law (Table 4). The

13 For a concise portrayal of the counterargument, see Möschel (1999) and Wolf (1999). See also Monopolkommission (Monopolies Commission) (1998, p. 35 ff, p. 425 ff; 2000, p. 429), Hauser and Schöne (1994), and Freytag and Zimmermann (1998) as opponents as well as Immenga (1995; 2000), Basedow (1998) and Evenett (2002) as proponents of international competition rules. Hoekman and Mavroides point out that an international competition authority could especially benefit poor countries which face capacity constraints in their own attempts to fight anticompetitive behaviour of firms located in foreign jurisdictions.

effects doctrine was first enforced by the US in the pathbreaking decision taken by the US Supreme Court in the *Alcoa case* (No. 1 in Table 4). In 1945, the court banned a quota cartel that had been formed by various foreign companies in Switzerland for the US aluminium market. The prohibition of cartels laid down by the Sherman Act which, until then, had only been used for domestic cartels, was applied to this foreign cartel. In doing so, the court laid the foundation stone for the international validity of national competition law (Scherer and Ross 1990, p. 453 ff.). The Commission of the European Communities also adopted the effects doctrine quite early. In the 1969 *dyestuffs* case (No. 3), where the final decision was taken by the European Court of Justice (ECJ) in 1972, the Commission imposed fines on Swedish and British members of a price cartel even though Sweden and Great Britain were not members of the EU at the time. The ECJ was initially reluctant to follow this route. Even in 1988, in the *wood pulp* case (No. 10), which concerned the prohibition of a price cartel formed by companies located exclusively in third countries, the ECJ continued to formally uphold the principle of territoriality. However, it finally endorsed the EC's decision to impose a ban, thus implicitly acknowledging the effects doctrine (Behrens 1993).

The German Cartel Office (GCO) has also adopted the effects doctrine. The *organic pigments* case (No. 4) concluded by the German Supreme Court in 1979 broke new ground. It was to be made mandatory in Germany to give notification of a merger between two US companies. In the *Bayer/Firestone*

case (No. 5) settled in 1980 by the Berlin Court of Appeal, the GCO based its decision on the effects doctrine and blocked the merger of two French subsidiaries of multinational firms. And finally, the decision taken by the GCO in the *Philip Morris/Rothmans* case (No. 7), when it banned the merger between a US and a British-South African concern. This decision initially amused the public, as it was obvious that the two large international firms would not be deterred from their merger by the harassing competition policy fire coming from Germany. However, at least the involved firms were not amused any longer when realising that they would have to pay high fines on their cigarette sales in the German market if they ignored the German decision. The GCO eventually succeeded in making Rothmans split from a German subsidiary leaving the market shares in the German cigarette market largely unaffected by the merger.

This of course means that the arm of the national competition watchdogs certainly extends beyond national borders. The effects doctrine is being increasingly used in the application of competition law at the international level; it is even being increasingly accepted by countries that do not have a national competition policy of their own (Basedow 1998, p. 21).

While the strict application of the effects doctrine can help resolve international competition policy disputes, it can itself trigger international conflicts.

TABLE 4: Selected Competition Law Cases with Reference to the Effects Doctrine

No.	Year	Case	Decision-making body	Decision
1	1945	Alcoa	US Supreme Court	Prohibition of a quota cartel of foreign aluminium manufacturersformed in Switzerland (US authorities use the effects doctrine for the first time.)
2	1970	Ciba/ Geigy	US DoJ[e]	Conditions imposed for the merger of two Swiss companies
3	1972	Dyestuffs	ECJ[a]	Fines imposed on price cartel members from third countries
4	1979	Organic pigments	BGH[b]	Mandatory notification of merger between two American companies in Germany
5	1980	Bayer/ Firestone	KG Berlin[c]	German Cartel Office prohibits merger of French subsidiaries and American companies
6	1981	Uranium cartel	FTC[d]	Entitlement of US authorities to investigate non-US price cartels abroad
7	1983	Philip Morris/ Rothmans	KG Berlin	German Cartel Office prohibits merger of an American and a South African company

Table 4 (continued):

No.	Year	Case	Decision-making body	Decision
8	1985	IBM	US DoJ	Conditions imposed by the European Union (EU) regarding the disclosure of product standards contested
9	1985	Laker Airways	FTC	British airline files complaint in US court against predatory competition pursued by airlines from third countries
10	1988	Wood pulp	ECJ	The European Commission prohibits an export cartel of companies from third countries
11	1990	Mérieux/ Connaught	FTC	Conditional approval for mergers of companies from third countries
12	1991	de Havilland/ ATR	EC[f]	Ban on merger of a Canadian and a French company
13	1993	Hartford Fire Insurance	US Supreme Court	Priority given to American competition rules over British ones in business relations between American and British companies
14	1994	Fax paper	Canadian Bureau of Competition Policy/ US DoJ	Investigations by Canadian authorities in the US and US authorities in Canada to uncover a price cartel

Table 4 (continued):

No.	Year	Case	Decision-making body	Decision
15	1994	Plastic dishes	Canadian Bureau of Competition Policy/ US DoJ	Investigations by Canadian authorities in the US and US authorities in Canada to uncover a price cartel
16	1995	British Telecom/ MCI	EC	Market-sharing cartel of British and American companies prohibited
17	1996	Kimberley Clark/Scott Paper	EC	Merger of US companies subject to European merger control
18	1996	British Airways/ American Airlines	US Department of Trans-portation	Opening up the British market for US airlines as precondition for permission to form a strategic alliance with British participation
19	1997	Boeing/ McDonnell Douglas	EC	Conditional approval for merger of US companies that had already been passed by the FTC without conditions
20	1998	World-com/MCI	EC/ US DoJ	Conditional approval for merger of US companies
21	2000	Air Liquide/ BOC	FTC	Prohibition of a French–British merger that had already been allowed to proceed by the EC

Table 4 (continued):

No.	Year	Case	Decision-making body	Decision
22	2001	GE/ Honeywell	EC	Prohibition of the US merger already allowed to proceed by US authorities

a European Court of Justice.
b German Supreme Court (Bundesgerichtshof).
c Court of Appeal in Berlin (Kammergericht Berlin).
d Federal Trade Commission (United States).
e United States Department of Justice.
f European Commission.

Source: Compiled by the author from various sources.

If, for example, American competition authorities approve of the merger of two American companies while European authorities take a critical view, there could be friction between American and European competition law (extended to include North America by the effects doctrine).

This is exactly what happened in the merger of the two American aircraft manufacturers Boeing and McDonnell Douglas (No. 19), which had been unconditionally approved in 1997 by the Federal Trade Commission (FTC). It was obvious that the merger would consolidate Boeing's market dominance not only in Europe but also in the US itself in the long term. In all probability, industrial policy motives were behind the FTC's magnanimous decision in allowing this merger to proceed. The intention was to create an advantage for the US industry vis-à-vis the European Airbus industry, particularly

as the American industry thought that state subsidies placed Airbus at a distinct advantage.

The EC actively opposed the merger but finally could not prevent it. While it would have been able to prohibit the merger and impose a penalty of 10 % of the total turnover of the newly formed company involved, it would have run the risk of a far-reaching trade conflict with the US. Thus it was content with some minor compromises. For example, Boeing surrendered its exclusive contract with Delta Airlines and American Airlines so that this clientele was once again available to the Airbus industry (Stehn 1997).[14]

The most recent conflict case that created a storm was the ban imposed by the EU Commission on 3 July 2001 on the merger between General Electric (GE) and Honeywell (No. 22). In spring 2001, the US Department of Justice and the FTC had already unconditionally approved this merger. The different ways in which the EU and US authorities assessed the effects of this merger on competition was influenced mainly by their assessment of the so-called 'bundling advantages'. GE has a dominant position in the market for large aircraft engines (as well as aircraft financing through leasing), while Honeywell dominates the world market in air electronics (avionics). While the EU Commission argued that a

14 While it cannot be discounted that EU opposition to the merger was also motivated by industrial policy, yet "just because Airbus was a European favorite did not mean that the merger was not anti-competitive" (Fox 1998, p. 32). See also Evenett (2002).

merger of these market-dominant positions would dilute competition, the US authorities pointed to the fact that in each individual sub-market, the share of the market would remain unaffected by the merger.[15] However, some observers suspected that the Commission's decision in the GE/ Honeywell case was really payback for the previous year's prohibition of a merger between a French and a British industrial gas manufacturer (Air Liquide/BOC; No. 21).

For an external observer, it is not easy to assess the actual role played by conflicts between government authorities in international competition policy. On the surface, each party involved will be careful not to jeopardise the impression of consensus, to prevent an escalation of possible contentious issues in competition policy and to avoid diplomatic complications that would make it even more difficult to resolve the technical differences. While these efforts on the part of the national competition authorities are understandable, they can also lead us to draw the wrong economic-policy conclusions, namely, if the consensus on show for the outside world makes people believe that the competition policy being practised is completely free of problems.

Relations between the European and US competition authorities stress the importance of mutual trust-based cooperation. Such a cooperation is based on an agreement

15 For a detailed description of the US position in this case, see Priest and Romani (2001).

dating back to 1991 in which both sides agree to commit themselves to a policy of comity.[16] Negative comity means that national authorities exercise restraint when pursuing their activities if these could impact on the activities of competition authorities in other countries. Positive comity, on the other hand, goes one step further. It provides for the mutual exchange of non-confidential information and allows the competition authorities of another country to request additional investigations to be carried out by domestic authorities.

While the 1991 agreement essentially rests on negative comity, there are also strains of a positive comity. In another agreement signed in 1998, however, positive comity is demonstrably enhanced (excerpts reproduced in Appendix 2). From now on competition authorities are obliged to practise positive comity if the pertinent restraints on competition do not infringe the rights of their own countries.

Nevertheless, the agreements on comity are naturally built into the respective national legal systems. For example, the US government will not be able to give the EU Commission cause to adopt coercive measures against European companies if merger proceedings based on European law have not been initiated against these companies. Consequently, the US–EU agreement has hitherto been used mainly to

16 Excerpts from the text of this agreement that was approved by the Council of Ministers in 1995 are reproduced in Appendix 1.

exchange information that is already available with the relevant authorities, while the option of conducting additional investigations at the request of foreign competition authorities has not yet been used.

To be able to judge whether greater international cooperation in the sense of positive comity could effectively control national competition policy conflicts, the cases in Table 4 have been rearranged according to how much conflict potential they offer and how these conflicts have been – or could have been – resolved (Table 5). Two often-cited examples from the first column in the Table are the cases of fax paper and plastic dishes (Nos. 14 and 15). In both cases, intensive cooperation between Canadian and American competition authorities uncovered price cartels that would have gone virtually unnoticed had there been isolated national procedures. Another prime example is the cooperation between Europe and the US in investigating a British-American cartel (British Telecom/MCI; No. 16) and a merger of two American companies (Kimberley Clark/Scott; No. 17). Table 5 therefore lists these five cases as cases where possible international conflicts have been resolved through cooperation based on positive comity.

This set also includes the merger of Worldcom/MCI (No. 20), wherein European and American competition authorities apparently cooperated in a particularly exemplary manner. The real problem with the merger between these two telecommunication companies was their strong positions in

the Internet business. The merger would have increased their market share in Internet access and connectivity by 50 %. As the Internet knows no national borders, this growth in market power would have had anti-competitive effects both in the US and Europe. This was a common concern for the EC and the US Department of Justice.

TABLE 5: International Conflict Potential in Selected Competition Law Cases (a)

Resolved through cooperation		Could have been resolved through cooperation	
14	Fax paper	4	Organic pigments
15	Plastic dishes	6	Uranium cartel
16	British Telecom/MCI		
17	Kimberley Clark/Scott		
20	Worldcom/MCI		
Conflicting national legislation		**Conflicting industrial policy**	
1	Alcoa	5	Bayer/Firestone
2	Ciba/Geigy	8	Philip Morris/Rothmans
3	Dyestuffs	8	IBM
9	Laker Airways	12	de Havilland/ATR
10	Wood pulp	18	British Airways/American Airlines
11	Mérieux/Connaught	19	Boeing/McDonnell Douglas
13	Hartford Fire Insurance	21	Air Liquide/BOC
22	GE/Honeywell		

(a) The numbers correspond to those in Table 4.

Source: Compiled by the author, based on Table 4.

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The case was ultimately settled by the EC compelling MCI to sell its Internet business. With the American Department of Justice soon endorsing this decision, MCI sold its Internet business to the rival company Cable & Wireless for US $ 1.75 billion. Whether the case of Worldcom/MCI can actually be considered a good example of the conflict resolution potential of bilateral cooperation, is, however, open to doubt. There can basically be no talk of an international conflict that could have been resolved through positive comity, as there was no conflict at all.

The cases of organic pigments (No. 4) and the uranium cartel (No. 6) yield more information. The international conflicts that arose there could have been avoided had both sides practised comity. In the case of organic pigments, the GCO insisted that notification be given of an American merger in Germany, citing the effects doctrine. It was difficult to bring the US government around to accepting the fact that German cartel law had a bearing on American companies. Had the US-EU agreement on the mutual application of competition law already been in effect at the time, this case could certainly have been resolved through consensus. The same is true of the uranium cartel case in which the investigations undertaken by the US authorities against a price cartel of foreign uranium suppliers in the US market were blocked by the governments of Canada, South Africa, Australia, France, and – above all – Great Britain (Großmann et al. 1998, p. 157; Rishikesh 1991).

Even the US-EU agreement would certainly not have given the American authorities the right to conduct their own investigations on European territory (as they did attempt to do in this case). The American side would, however, have had the opportunity of requesting the European authorities, under positive comity, to conduct relevant investigations. Hence, the two cases mentioned have been included in the column of international conflicts (Table 5) that could have been resolved through better cooperation.

However, comity comes to naught if national antitrust regulations are contradictory, leaving the concerned competition authorities with no option but to take decisions that differ from each other. Cases in this category include the Alcoa (No. 1) and Ciba/Geigy (No. 2) cases, both about market behaviour permitted under Swiss law but prohibited by American law. The same applies to the dyestuffs case (No. 3), which revolved around an export cartel. To US competition authorities it seemed perfectly legal for American companies to be involved in this venture but in Europe – the destination of the export cartel – this constituted an infringement of the rules of competition laid down in the EEC treaty. From the American perspective, since the companies in question were not at fault, the US authorities could not have practised comity on behalf of the European competition watchdogs. The same goes for the wood pulp case, also about an export cartel involving US companies.

The Laker Airways case (No. 9) also developed into an international conflict. When this British airline that had attracted

considerable attention in the early 1980s by offering very economical transatlantic flights went bankrupt, the liquidator maintained that Laker had been exposed to predatory pricing by various foreign airline companies that had lowered their own prices in response to Laker's policy. The complaint was filed in an American court, as British law had no provision for proceedings against predatory pricing. While the US court claimed jurisdiction – as there were many US citizens among the passengers affected by the price distortions – the British government prohibited the Laker representatives per temporary injunction from making material available for the legal proceedings in the US (Rishikesh 1991). This conflict continued for years, occasionally involving even the British House of Lords. Comity alone would not have sufficed to resolve the issue, as the actual conflict was about whether predatory pricing should be prohibited or not.

A particularly bitter conflict in this category was the Hartford Fire Insurance case (No. 13). The US Supreme Court did not allow this British reinsurance company to include certain contractual conditions for contracts concluded in Great Britain, which were permissible under British law but prohibited by American law. The official argument of the Supreme Court was that there was no 'true conflict', because the pertinent contractual conditions were not prohibited by British law neither were they mandatory. According to the court, it was perfectly possible for Hartford Fire Insurance to follow both British and American law if it agreed to abide by

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the court ruling in the US. Behind this decision lies the obvious claim of the American side to apply American competition law unconditionally even if it clashed with the competition law of other countries. Here too, it is unlikely that the matter could have been resolved through greater mutual cooperation (Großman 1998, p. 157f; Basedow 1998, p. 25).

The attempt to unilaterally implement American legal norms also led to an international conflict in the case of Mérieux/ Connaught (No. 11). The FTC imposed a number of conditions on this merger between a French and a Canadian company – conditions that had not been discussed at the outset with either the French or the Canadian government. Only after massive protests from the Canadian side, did the FTC include the condition that the merging companies were also obliged to coordinate their actions with the Canadian authorities (Fox and Pietowski 1997; Waverman 1993). All the concluded comity agreements notwithstanding, even in the most recent GE/Honeywell case (No. 22), the US authorities were extremely reluctant to strike a compromise between their own and foreign legal norms. They even took an open stand against the effects doctrine by denying – in principle – European authorities the right to interfere in mergers between US companies.[17]

17 US senator Ernest Hollings considered the EU's prohibition of mergers as an impermissible "interference in America's domestic affairs" (*Financial Times Germany,* 2 July 2001, p. 27).

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In some respects, the conflict in the Philip Morris/Rothmans case (No. 8) can also be attributed to divergent industrial policy objectives. It was only too obvious that the restraints on competition resulting from this merger would have implications for the European, especially German, cigarette markets. The fact that British and American authorities initially approved this merger unconditionally was probably influenced not least by their beliefs that the market positions of their own companies would be strengthened at the cost of German rivals and, ultimately, German consumers. Similar industrial policy motives could be ascribed to the EC in the Air Liquide/BOC case (No. 21), as the market-dominating position with regard to industrial gases would have also, and especially, been at the expense of American rivals.

Finally, comity is completely ineffectual in cases where the government authorities of different countries are in agreement on the competition policy assessment of the respective case, but pursue different industrial policy goals. These cases are listed in Table 5 in the category on the bottom right. For example, in the *Bayer/Firestone* case (No. 5), the GCO was unsuccessful in its attempts to counteract the industrial policy goals of the French government as was the EC in the Boeing/McDonnell Douglas case (No. 19), with regard to the industrial policy objectives of the American government.[18] However, the EC was able to prevent the merger of de Havilland/ATR (No. 12) even though the Canadian and US sides had approved it for reasons of a sustained industrial policy.[19] From this perspective, the ministerial permis-

sion of the German cartel law poses a serious hurdle to the international coordination of competition policy, as it explicitly does not judge merger cases according to competition criteria.

Occasional cases confirm that some mergers may be not detrimental to competition, yet are prohibited on industrial policy grounds. Such mergers, however, do not usually occur in the country of the prohibition authorities but abroad. The classic example is the strategic alliance between British Airways and American Airlines (No. 18), sanctioned by the British government. The reservations expressed by the US authorities were motivated by industrial policy, as it tried to tie in its approval of this alliance with the condition that American airlines should have unrestricted access to Heathrow Airport. The efforts of the British government to enforce the principle of open skies for British airline companies in American airports – as a countermove – was categorically rejected by the American side. While the latter could not eventually prevent the emergence of the strategic alliance, this

18 The Bayer/Firestone decision taken by the German Cartel Office was repealed in 1980 by the Berlin Court of Appeal; error of procedure served as the official reason but the main reason was probably the fear of international conflicts arising between the German and French governments (see Großmann *et al.,* 1998, p. 155).

19 The de Havilland/ATR case was the first one in which a merger was prohibited under the EU merger control regulation, which came into effect in 1989.

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case is a particularly good illustration of how bitter international antitrust conflicts can get.

It is not easy to categorise the case of IBM (No. 8) in which the EC tried to make it mandatory for IBM to announce the new product standards for its computers well in time in Europe thus allowing European manufacturers of periphery devices enough preparatory time to adapt their own products to these standards and bring them out on the market. IBM was to be prevented from extending its dominance of the computer market in Europe to include peripheries. This decision was opposed not only by the company itself but also by the US Department of Justice, which had already examined the charges and concluded that IBM could not be expected to fulfil this condition given the fierce competition in the US market.

The conflict was ultimately resolved through a compromise dominated by the American side (Rishikesh 1991). It can be presumed that the US government had based its decision on the possible industrial policy disadvantage for the American economy in the event of a weakening of IBM's market position in the European periphery market.

Taken overall, the cases documented in Tables 4 and 5 cannot claim to be representative as their selection has been determined to a large extent by the information available in relevant literature. Nevertheless, they highlight the fact that international antitrust conflicts are not just hypothetical but

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concrete political reality. The more serious the conflict, the less justified the confidence in international cooperation as a mechanism for conflict resolution. Competition policy has to be internationalised but this cannot be achieved only through greater cooperation across national competition authorities. It calls for coordination by a superior, supranational authority.

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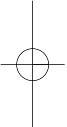

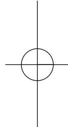

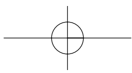

V. Competition Policy – an Increasingly Necessary Complement of Trade Policy

1. From GATT to TRAPs

In addition to the competition policy argument discussed above that advocates an international competition policy, there is also the trade policy argument. The core of this argument comprises the increased overlapping and amalgamation of issues related to competition policy and trade policy. Classic trade policy focusing on dismantling tariffs and other border barriers to international trade is gradually losing importance. Today, most relevant trade barriers are to be found far behind the border, inside the respective countries, i. e. in the national markets (behind-the-border practices). Whether or not a country is open to international competition is determined less and less by trade barriers at the border and more and more by the openness of national markets to both domestic and foreign suppliers. While this is particularly true of services, it also applies to industrial goods that require the physical presence of the supplier in the respective country for successful market penetration (Fox 1997, Bagwell, Staiger 2001).

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This shift in emphasis has long been recognised in international trade policy, which is why such behind-the-border practices headed the agenda at the Uruguay Round (1986) of the GATT (General Agreement on Tariffs and Trade), where, for the first time, attempts were made within the GATT framework to get a grip on trade barriers that do not originate at the border but within the country in question (Ostry 1995). For example, the fact that international trade in services depends essentially on the foreign subsidiaries' freedom of establishment led to negotiations being taken up on the GATS (General Agreement on Trade and Services). Freedom of establishment, in turn, requires freedom from discrimination with regard to investment in foreign markets. Thus, the so-called TRIMs (Trade-Related Investment Measures) were also on the agenda in the Uruguay Round. Finally, a joint agreement on the mutual recognition of trade protection rights was concluded – the TRIPs (Trade-Related Intellectual Property Rights) Agreement, which can be considered the greatest breakthrough of the Uruguay Round. For the first time, it was possible to have a sustained impact on a country's market regulations through international trade policy.

However, the Uruguay Round was merely a beginning and the fact that the negotiations continued for eight years – relatively long in comparison to other GATT rounds – proves how difficult it is to achieve international consensus by applying trade policy to behind-the-border practices. With more questions being posed than answered during the Uruguay

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Round, GATS, TRIMs, and TRIPs will doubtless be on the agenda once again in the coming trade rounds. To prepare for this prospect, a Working Group on the Interaction Between Trade and Competition Policy was formed during the World Trade Organization (WTO) conference in Singapore in 1996 (Appendix 3).

Also a new slogan has already been coined: TRAPs (Trade-Related Antitrust Principles). However, it would be illusory to expect quick results. As is the case with other behind-the-border practices, the difficulty lies mainly in the fact that far deeper inroads must be made into national policies – and, therefore, also into national sovereignty rights – than is done when trade barriers are dismantled at the border (Langhammer 1999; Hauser 2002).

However, the stand – taken mainly by the EU – to launch intensive negotiations on TRAPs as early as November 2001, when the next world trade round began in Doha, was not implemented. While this subject was not completely taken off the Doha agenda, it is clearly not the focus of the negotiations and no meaningful agreement can be expected.[20] In August 2004, the WTO partner countries approved a framework agreement proposed by the WTO secretariat, which basically concentrates on agriculture and tariffs on manufacturing goods. The 'Singapore topic' of competition

20 See Appendix 4 for the relevant passages from the Doha Ministerial Declaration.

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policy – alongside with the 'Singapore topics' investment policy and public procurement – was postponed to future WTO rounds. Furthermore, the time schedule for completing the Doha round has been postponed from December 2004 to December 2005 (Wade 2004).

In the long run, the WTO will hardly be able to sidestep issues of competition policy. The growing relevance of these issues in trade policy is primarily the outcome of a fundamental global change in production structures – a change that can be described with the term "deindustrialisation". As often assumed, deindustrialisation is not a simple matter of replacing industrial goods with services; it is much more a question of services being pressed forward in all segments of the economy (Klodt, Maurer, and Schimmelpfennig 1997). For example, if one purchases a personal computer today, the value of the software required is often much more than that of the hardware. The industrial product and the services have merged to form an inseparable whole, whereby a greater intensity of services usually goes hand-in-hand with a superior product. The success of a modern industrial product in foreign markets depends increasingly on the extent to which an effective sales network can be set up in the target country, customer-oriented after-sales service can be offered, and product design can be coordinated with the suppliers of complementary products. If one wants to export a machine tool from Germany to the US, the chances of success are limited if this machine cannot be integrated into the CAM or CIM systems common in the export destination.

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And Scottish tea biscuits can be exported to Germany only if the manufacturer has access to the Green Dot[21] system, else he will be struck off the list of retailers.

Obviously, it is not enough to overcome customs and similar barriers at the border to be able to enter foreign markets. It is becoming increasingly important to gain a foothold on the other side of the border, i. e. within the markets of the country concerned. Serious hurdles to market access there can adversely affect international trade. The cause does not lie in trade policy but in the low intensity of competition in national markets. The separation between trade and competition policy is becoming increasingly blurred.[22] The international trade order must be flanked and complemented by an international competition order if we are to uphold a liberal world trade order.

Just how reluctant national governments are to guarantee freedom of competition at the international level in addition to the freedom to trade is illustrated by the fact that there is virtually no ban anywhere on export cartels, not even in countries where cartels in the domestic market are subject

21 Green Dot or *Grüner Punkt* is a small symbol on packages to indicate that the producer has paid for the products to be recycled by the national reprocessing institution.

22 For several examples of international cartels and other private-sector restraints on competition that also curb freedom to trade, see Wolff (1995).

to strict monitoring.[23] Furthermore, trade policy makes active use of voluntary export restraints, systematic market arrangements, fair market value agreements, voluntary import expansions, and other agreements that in the final analysis are nothing but international price and quota cartels through and through.

Anti-dumping is becoming a major weak point of international trade policy.[24] Aided by anti-dumping tariffs, various members of the WTO are setting up more and more trade barriers against unpopular rivals (see, for example, Siebert and Klodt 1999, p. 130). In terms of trade policy, all prices fixed below average costs comprise dumping, while the theory of industrial economics and competition policy have long acknowledged that in markets with learning curve effects, for example, it may be a pro-competitive prerequisite to tolerate the business losses incurred in the introduction of new products into the market, if technologically older products

23 In Germany, export cartels were exempted from the overall prohibition of cartels. This was abolished only in 1998 by the sixth Antitrust Act Amendment. European competition law does not have any ruling on the matter but, following the decision of the European Court of Justice in the Bulk Oil/Sun International case of 1986, pure export cartels must be regarded as compatible with EU law (Cf. Basedow, 1998, p. 28).

24 Dumping refers to a pricing policy that sets prices in foreign markets below a certain reference price. In trade policy, the reference price is taken to be the price demanded within the country, border costs or average costs, each adjusted to include transport costs. For details of each, see Gottfried Haberler (1970), p. 218 ff.

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are to be successfully replaced and learning costs are to reduce future costs. Competition policy, therefore, makes a careful distinction between 'pro-competition' and 'anti-competition' dumping. The anti-dumping clause in trade policy would therefore make it imperative to have a consistent national and international competition policy and fill a sensitive loophole in the existing body of WTO legislation (Messerlin 1994; Hoekman and Mavroides 1996; Hoekman 1997).

In competition policy terms there are loopholes in the GATS and TRIPs agreements too:

- In the words of Basedow (1998, p.45), the GATS agreement only has an "embryonic and incomplete regulation of competition policy issues." The only area in which the negotiating partners are in agreement refers to the existence of other kinds of behaviour besides monopoly abuse that can hinder competition and, consequently, the trade in services. The different types of behaviour and how they should be handled in trade and competition policy terms are completely open issues.
- There is a similar situation in TRIPs. According to Article 8, paragraph 2 of this agreement, right holders may prevent the misuse of protected rights, but no agreement has been reached on the criteria to identify such misuse of protected rights. This loophole is a serious impediment to the efficacy of the TRIPs agreement, as member countries can more or less arbitrarily claim that certain measures ini-

tiated against foreign holders of protected rights would serve to prevent misuse.

From the above discussion, we can conclude that international trade policy that is generally known to enjoy considerable importance will be increasingly eroded without the support of competition policy. To this extent, the establishment of an international competition policy can be considered a logical and necessary consequence of trade policy[25], this being the first reason why the WTO should provide the appropriate institutional framework for an international competition policy. The following section provides the second reason.

2. Passing the Buck and a Step-by-step Plan

Over the past years and decades, a number of attempts have been made to formulate an independent international competition policy. In this context, one of the most comprehensive approaches was Chapter 5 of the Havana Charter of 1948, which was, however, never ratified (see Appendix 5). Various attempts were also made under the United Nations and the Organisation for Economic Co-operation and Development (OECD) to lay down binding rules for

25 Basedow (2000) also follows this line of argument. Gerhardt (2001) makes a plea in favour of making the WTO the focal point of an international competitive order.

multinational corporate behaviour; neither were these developed further into a proper competition policy. In the 1990s, a group of renowned international experts at Munich's Max Planck Institute for International Law elaborated a new concept that was presented to the public in July 1993 as the *Draft International Antitrust Code.*[26]

The authors of the Code allowed themselves to be guided by a number of pioneering principles.

- National competition authorities are committed to grant competition equal importance – whether in national or international markets – when taking their decisions.
- The parties to the contract agree on certain minimum standards of competition policy.
- Use of the international rules of competition is limited to effective cross-border restraints on competition.
- An international competition agency is established and granted the right to file a complaint in the courts of the country concerned, if international rules that have been contractually agreed upon are either not applied by national governments or are breached.

The reaction to this proposal from Munich was shaped mainly by the impression that, while the Code may proclaim the

26 The complete text is reproduced, *inter alia,* as an appendix to Fikentscher (1994).

right objectives in principle, it was far too ambitious and this made its implementation completely unrealistic (Hauser and Schoene 1994; Freytag and Zimmermann 1998; Trebilcock 1998). This discussion, in which the Institute for World Economics also took part at the time (Klodt 1995), need not be taken up here again.[27] We will instead put forward some deliberations on institutional approaches that can enhance the possibilities of ushering in an international competition policy.

In economic terms, the basic problem in implementing an international competition policy lies in the fact that the freedom to compete in the world markets is an international public good, which benefits even those countries that do not contribute towards drafting the policy. The public good is ultimately 'produced' by the willingness of the individual countries to surrender part of their authority related to domestic competition policy in favour of an international one. The quality of the public good is hardly influenced by whether *all* or *almost all* the countries have helped in producing it. Each individual country is tempted to be a free rider and to believe that other countries will consolidate competition freedom in the world markets once competition policy competencies have been transferred to a supranational institution without

27 A brief comment: The option of filing a complaint in national courts appears to be particularly remarkable and innovative. In contrast, the concept of adopting rules on divestiture in an international agreement seems far-fetched, as such rules so far exist only in US competition law.

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the country in question itself being subject to the international competition policy.[28]

Naturally, it can be argued that it does make a considerable difference to the quality of the public good – freedom of competition in world markets – if large countries, for example the US, have been involved in its production or not. However, even large countries have the incentive to behave as free riders. They still have the option of deciding from case to case whether they want to apply their national competition policy instruments to promote freedom of competition in international markets. Submission to an international competition policy means that they would surrender this freedom of choice.

For sovereign national governments to sign an international agreement, they must be offered a 'club' good that can only be used by those countries that are members of the club.[29] A club good of this kind can be the recourse to the WTO's dispute settlement mechanisms. The WTO has many years of experience in settling international trade conflicts and it

28 International climate policy faces a similar problem: Eliminating greenhouse gases will ultimately benefit all countries even though each individual country needs to make only a small contribution towards reducing the greenhouse effect. This is one of the main reasons why it seems rather unrealistic today to believe that countries will adhere to the Kyoto Protocol.

29 On the differences between public goods and club goods cf., for example, Cornes and Sandler (1986).

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would not require much for these experiences to be transposed to antitrust conflicts.[30]

It can be assumed that many governments would be only too willing to comply with the arbitration awards of such a conflict resolution centre, especially in cases where competition policy conflicts are based on different industrial policy objectives of the opposing parties. Empirical literature on industrial policy has repeatedly shown that national governments do not usually pursue industrial policy objectives in their own interest, but act under pressure from private stakeholders. Especially when elections are imminent, governments find it difficult to withstand this pressure even if they reduce the prospects of macroeconomic growth by yielding to these vested interests and adversely affect their chances of being re-elected in the long run. If at that point the buck can be passed to a supranational body, then a policy that is also in line with the goals of the national governments can be implemented, but this cannot be done by these governments alone in the face of opposition by national interest groups.[31]

The option of extending the WTO dispute settlement procedure to antitrust cases has been discussed at length in relevant literature (Graham and Richardson 1997; Hoekman

30 Whether the WTO Secretariat would have to be extended to include a competition policy department or whether this department should be called the ‘World Cartel Office’ or the ‘International Competition Agency’ seems to be of secondary importance.

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1997; Monopolkommission 1998; Immenga 2000; Basedow 2000, Hoekman and Mavroides 2000). However, the extent to which the option of resorting to this instrument could increase acceptance of material and international competition rules has yet to be analysed. Until now, this has hardly been perceived as the decisive lever that can be used to persuade national governments to give up sovereignty rights in favour of a supranational competition policy agency. If our basic assumption – that national policies opposed to competition are more in line with the objectives of interest groups than with the government's own goals – is true, then this principle of passing the buck could actually help to overcome the free-rider problem in international competition policy.

To consolidate international competition, it is by no means essential that all the WTO partner countries agree to abide by the dispute settlement mechanism with regard to competition issues. An overwhelming majority of international mergers takes place between a few industrial countries. Developing countries hardly appear on the scene, even less as buyers. A promising first step towards establishing an international competition policy could be an agreement on

31 European Union subsidies are also monitored according to the passing-the-buck principle. The competition watchdogs in Brussels have repeatedly succeeded in firmly pushing back national subsidy programmes, imposed under the pressure of national stakeholders. In doing so, they have rendered a good service not only to competition in inner-Community trade but also to the respective governments.

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settling competition policy conflicts by the EU, operating under the umbrella of the WTO with, for example, the US and other countries with which the EU has bilateral cooperation agreements with regard to cartel law. For this, the club members must agree on a few competition policy principles, which could be drafted with the aid of reference points offered by the Draft International Antitrust Code. Moreover, the competition policy club must be constituted as an open club within the WTO, allowing other countries to join at any time provided they are willing to abide by the club's competition policy statutes.

The founding of the International Competition Network (ICN) in New York in October 2001 can be seen as a first step in this direction (see Appendix 7). The founding members of the ICN include the competition authorities from 11 OECD countries, the EU, and two black African countries; competition authorities from other countries can join at any time (Wolf 2002; Devellennis and Kiriazis 2002). The ICN organizes annual conferences for senior anti-trust officials to promote cooperation and convergence in international competition policy. On its latest conference, held in Seoul in 2004, it adopted a set of recommended practices for the review of multi-jurisdictional mergers and agreed upon establishing a cartel working group which intends to prepare a manual which would summarise successful investigation techniques (Roebling 2004). Of course, this is well behind a true international competition policy, but it can at least be regarded as a promising first step.

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The often-cited argument that competition policy goals should not be pursued within the framework of the WTO as one can expect fierce resistance from the US, does not hold water here, as it was, after all, the US that never perceived its competition policy as an isolated cartel policy but as a comprehensive anti-trust policy. There has been merger control in the US under the Sherman Act since 1904, while a comparable control in Germany was not introduced until 1973 and in the EU, until 1989. Therefore, it is not unrealistic to expect certain corrections to be made in the coming years to the course pursued by the U.S.

Even the objection that it is futile to discuss international competition policy as long as most countries do not even have individual national competition policies, is unconvincing. It may have been justified once upon a time but today, national competition law is in force in as many as 123 countries (Table 6). The years listed in the Table bear witness to the dramatic rise in the number of such countries, especially in the 1990s.

The possibility of intense international negotiations over competition rules having strong repercussions at the national level should not be underestimated. Countries without competition laws of their own will become more aware of the problem and, therefore, more willing to reform. This process could be actively promoted if competition policy were to be incorporated into the WTO's *Trade Policy Review Mechanism.* Within this framework, the WTO submits regular reports on

trade policies of partner countries, thereby creating transparency in terms of shortcomings at the national level and enhancing improvement options at international level.

TABLE 6: Countries with their Own National Competition Law (June 2000)

Africa	
Algeria (1995)	Mauritania (1991, 1999)
Egypt[a]	Mauritius (1980, 1999)
Ethiopia[a]	Namibia[a]
Benin[a]	Niger (1992)
Botswana[a]	Rwanda[a]
Ivory Coast (1978, 1991)	Zambia (1994, 1998)
Gabon (1989)	Senegal (1994)
Ghana[a]	Zimbabwe (1996, 1999)
Cameroon[b]	South Africa (1955, 1998, 1999)
Kenya (1988)	Sudana
Lesotho[a]	Chad[a]
Malawi (1998)	Tunisia (1991)
Mali (1997)	United Republic of Tanzania (1994)
Morocco (1999)	Central African Republic (1994)
Asia and the Pacific	
Azerbaijan[b]	Mongolia[b]
Bahrain[b]	Pakistan (1970)
China (1993)	Philippines (1992)
Fiji (1993)	Republic of Korea (1980)
Georgia (1996)	Saudi Arabia[a]
India (1969)	Sri Lanka (1987)
Indonesia (1999)	Taiwan (1992, 1999)
Iran[a]	Tajikistan (1993)
Yemen[a]	Thailand (1979, 1999)

Table 6 (continued):

Asia and the Pacific	
Kazakhstan (1999)	Turkey (1994, 1998)
Kyrgyzstan (1994)	Turkmenistan (1993)
Lebanon (1967)	Uzbekistan (1992, 1996)
Malaysia[a]	Vietnam[a]
Malta (1994)	
Central and Eastern Europe	
Albania (1995)	Poland (1990)
Belarus (1992)	Republic of Moldavia (1992)
Bosnia and Herzegovina[a]	Romania (1991, 1996)
Bulgaria (1991, 1998)	Russian Federation (1991, 1995, 2000)
Estonia (1993, 1998)	Slovakia (1991, 1994, 1998)
Yugoslavia (1996	Slovenia (1993, 1998)
Croatia (1995)	Czech Republic (1991, 1993)
Latvia (1991, 1993, 1998)	Ukraine (1992, 1996, 1998)
Lithuania (1992, 1999)	Hungary (1984, 1990, 1996)
Macedonia[b]	
Developed countries	
Australia (1974)	Liechtenstein (1992, 1995)
Belgium (1991, 1999)	Luxembourg (1970, 1981)
Denmark (1997)	New Zealand (1986)
Germany (1957, 1998)	Netherlands (1997)
Finland (1992, 1998)	Norway (1993)
France (1986, 1995)	Austria (1988, 1993, 1999)
Greece (1977, 1995)	Portugal (1993)
Ireland (1978, 1991, 1996)	Sweden (1993)
Iceland (1993)	Switzerland (1962, 1985, 1995, 2000)
Israel (1959, 1988, 1989)	Spain (1989, 1996, 1999)

Table 6 (continued):

Developed countries	
Italy (1990)	United Kingdom (1973,1994,1998)
Japan (1947, 1998)	United States (1890, 1976)
Canada (1986, 1999)	
Latin America and the Caribbean	
Argentina (1923,1980,1999)	Jamaica (1993)
Barbados[a]	Colombia (1959, 1992, 1998
Bolivia[a]	Cuba[a]
Brazil (1962, 1990, 1998)	Mexico (1992, 1998)
Chile (1959, 1973, 1980)	Nicaragua[a]
Costa Rica (1994)	Panama (1996, 1999)
Dominican Republic[a]	Paraguay (1997)
Ecuador[a]	Peru (1991)
El Salvador[a]	Trinidad and Tobago[a]
Guatemala[a]	Uruguay[a]
Honduras[a]	Venezuela (1973, 1992, 1996)

a Competition law under preparation.
b Year not available

Source: UNCTAD (2001), p. 151.

Finally, the lack of a nationally valid legal norm in no way prevents a country from becoming party to international agreements on competition policy. This has already been demonstrated by Belgium, the Netherlands, and the Scandinavian countries that introduced a national competition policy only after their accession to the EU, i. e. after they had adopted the EU competition law.

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The relative insignificance of competition issues in the Doha Round should not detract from the fact that the subject is being discussed – more intensively than ever before – at many other levels, including the OECD, UNCTAD, APEC, EFTA, FTAA or OAS. It is beyond the scope of this study to portray all these initiatives in detail, but the fact remains that the ongoing international discussion has gathered momentum, which should be exploited if we want to advance towards a global competition order.

A well-developed global competitive order cannot be created overnight. But, "if you can't do everything, you should not be allowed to get away with doing nothing", says Bertolt Brecht. There would be much to gain if a core group of countries came together to form an open club and accepted the following step-by-step plan for a period of three to five years:

1. Incorporation of competition policy into the WTO's *Trade Policy Review Mechanism* (for all WTO partner countries).

2. Elaboration of *international competition rules* by a core group (club) of countries with well-developed national competition laws.

3. Commitment by the club countries to *notify* a club secretariat of decisions taken by their national competition authorities related to measures concerning the international competition rules agreed upon.

4. Establishment of an *international competition agency* under the umbrella of the WTO, to resort to the dispute resolution

mechanism of the WTO to settle international competition policy conflicts.

It would probably be difficult to equip the agency with its own instruments to impose sanctions. For this reason, it must be capable of initiating national sanction measures. An option here would be the agency's *right of action* in national courts, proposed by the Draft International Antitrust Code.

To maintain subsidiarity, the agency should act only if *commissioned* to do so. The right to commission should not be confined only to the competition authorities of the club countries but be extended to private economic subjects from these countries, if they are directly and currently affected by the restrictions on competition. Petitions from third countries should not be entertained, so that there are enough incentives for them to join the club.

The basic idea underlying this step-by-step plan is, on one hand, to give priority to the WTO where international competition policy belongs for the sake of complementing trade policy), and, on the other, to let countries with adequate experience in national competition law be responsible for the design of the plan. This would help overcome institutional hurdles and prevent international competition rules from being watered down.

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VI. Ten Propositions for a Global Competition Order

1. With the ongoing integration of the world markets, competition policy is increasingly assuming international dimensions. Neither national nor supranational competition authorities can escape this trend.

2. The process of globalisation tends to foster competition but this positive trend is – at least partially – nullified by international megamergers. Therefore, current merger activities must be accompanied by critical competition policy as they are dominated by horizontal mergers, which can be particularly detrimental to competition.

3. In principle, international policy coordination should focus on curbing international spillovers. To avoid unnecessarily hampering the discovery process of international systems competition, it should be limited to setting minimum rules, i. e. it should follow the principle of subsidiarity.

4. In consequence, the global competition order should initially concentrate on prohibiting hardcore cartels (including export cartels) and on controlling horizontal megamergers. A newly created global competition order

should not oust but rather supplement national competition orders.

5. Even today, it is possible to effectively counter international restraints on competition by applying the effects doctrine and through comity practised by the national competition authorities. In view of the rise in international conflict cases in competition policy, this cooperation-based solution is, however, increasingly reaching its limits.

6. Cooperation between national competition authorities is of no use when resolving conflicts, if the conflicts arise from conflicting competition policy norms or divergent policies pursued by the countries involved. As our assessment of the 22 case studies shows, such conflicts are becoming increasingly frequent and bitter.

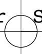
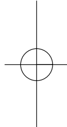
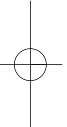
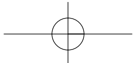
7. It is becoming increasingly difficult to separate issues of trade policy from those of competition policy due to the change in production and market structures in the course of deindustrialisation. Although TRAPs only play a secondary role in the Doha round of negotiations, the WTO will hardly be able to circumvent the issue of competition policy in the future.

8. As the discussions about the German ministerial permission illustrates, the implementation of national competition policy is often stalled by opposition from local stakeholders. National governments could consequently be more than willing to surrender their competition policy

competencies to a supranational conflict resolution body, as the latter would be more prepared and capable of accepting the responsibility of being the custodian of competition.

9. In institutional terms, a global competition order should be established at the WTO, as this organisation has many years of experience in settling international disputes. However, the very first goal should not be to make it mandatory for all WTO partner countries to accept a global competition order, as this would cause considerable delay in concluding substantial agreements. Instead, an open club under the umbrella of the WTO should be established. The initial members could be the EU, the US, and a few other WTO partner countries with well-developed national competition policies. All other countries should be entitled to join at any time if they accept the rules of the club.

10. All in all, there should be no doubt that a global competition order is a logical follow-up to economic globalisation. A binding step-by-step plan that has the approval of all parties should help pave the way in this direction.

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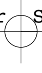

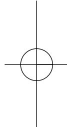

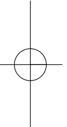

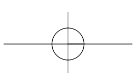

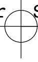
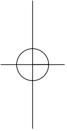
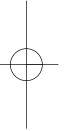
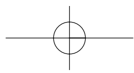

Appendices: Excerpts from Documents on International Competition Policy

Appendix 1: Agreement between the Government of the United States of America and the Commission of the European Union on the Application of their Competition Laws (Excerpt)

Art. I: Purpose and Definitions

1. The purpose of this Agreement is to promote cooperation and coordination and lessen the possibility or impact of differences between the Parties in the application of their competition laws.

Art. II: Notification

2. Each Party shall notify the other whenever its competition authorities become aware that their enforcement activities may affect important interests of the other Party.

5. Each Party shall also notify the other whenever its competition authorities intervene or otherwise participate in a regulatory or judicial proceeding that does not arise from

its enforcement activities, of the issues addressed in the intervention or participation may affect the other Party´s important interests. Notification under the paragraph shall only apply to:

(a) regulatory or judicial proceedings that are public;

(b) intervention or participation that is public and pursuant to formal procedures;

and

(c) in the case of regulatory proceedings in the United States,
only proceedings before federal agencies.
Notification shall be made at the time of the intervention or participation or as soon thereafter as possible.

6. Notifications under this Article shall include sufficient information to permit an initial evaluation by the recipient Party of any effects on its interests.

Art. III: Exchange of Information

1. The Parties agree that it is in their common interest to share information that will (a) facilitate effective application of their respective competition laws, or (b) promote better understanding by them of economic conditions and theories relevant of their competition authorities' enforcement activities and interventions or participation of the kind described in Article II (5).

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Art. IV: Cooperation and Coordination in Enforcement Activities

1. The competition authorities of each Party will render assistance to the competition authorities of the other Party in their enforcement activities, to the extent compatible with the assisting Party's laws and important interests, and within its reasonably available resources.

Art. VI: Avoidance of Conflicts over Enforcement Activities

Within the framework of its own laws and to the extent compatible with its important interests, each Party will seek, at all stages in its enforcement activities, to take into account the important interests of the other Party. Each Party shall consider important interests of the other Party in decisions as to whether or not to initiate an investigation or proceeding, the scope of an investigation or proceeding, the nature of the remedies or penalties sought, and in other ways, as appropriate.

Art. IX: Existing Law

Nothing in this Agreement shall be interpreted in a manner inconsistent with the existing laws, or as requiring any change in the laws, of the United States of America or the European Communities or of their respective States or Member States.

DONE at Washington, in duplicate, this twenty-third day of September, 1991, in the English language.

For the Commission of the European Communities

For the Government of the United States of America

Appendix 2 – Agreement between the European Communities and the United States on the Application of the Principles of Positive Comity in the Implementation of their Competition Laws (Excerpt)

Scope and Purpose of this Agreement

1. This Agreement applies where a party satisfies the other that there is reason to believe that the following circumstances are present:

(a) Anticompetitive activities are occurring in whole or in substantial part in the territory of one of the Parties and are adversely affecting the interests of the other Party; and

(b) The activities in question are impermissible under the competition laws of the Party in the territory of which the activities are occurring.

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2. The purposes of the Agreement are to:

(a) Help ensure that trade and investment flows between the Parties and competition and consumer welfare within the territories of the Parties are not impeded by anticompetitive activities for which the competition laws of one or both Parties can provide a remedy, and

(b) Establish cooperative procedures to achieve the most effective and efficient enforcement of competition law, whereby the competition authorities of each Party will normally avoid allocating enforcement resources to dealing with anticompetitive activities that occur principally in and are directed principally towards the other Party's territory, where the competition authorities of the other Party are able and prepared to examine and take effective sanctions under their law to deal with those activities.

Article III

Positive Comity

The competition authorities of a Requesting Party may request the competition authorities of a Requested Party to investigate and, if warranted, to remedy anticompetitive activities in accordance with the Requested Party's competition laws. Such a request may be made regardless of whether the activities also violate the Requesting Party's competition laws, and regardless of whether the competition

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authorities of the Requesting Party have commenced or contemplate taking enforcement activities under their own competition laws.

DONE at Washington and Brussels, in duplicate, in the English language.

For the European Community (signature, 3/6/98)

For the European Coal and Steel Community (signature, 4/6/98)

For the Government of the United States of America (signature, 4/6/98)

Appendix 3 – WTO Ministerial Conference: Singapore Ministerial Declaration, 13 December 1996 (Excerpt)

Investment and Competition

20. Having regard to the existing WTO provisions on matters related to investment and competition policy and the built-in agenda in these areas, including under the TRIMs Agreement, and on the understanding that the work undertaken shall not prejudge whether negotiations will be initiated in the future, we also agree to:

- establish a working group to examine the relationship between trade and investment; and

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- establish a working group to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that merit further consideration in the WTO framework.

These groups shall draw upon each other's work if necessary and also draw upon and be without prejudice to the work in UNCTAD and other appropriate intergovernmental fora. As regards UNCTAD, we welcome the work under way as provided for in the Midrand Declaration and the contribution it can make to the understanding of issues. In the conduct of the work of the working groups, we encourage with the above organizations to make the best use of available resources and to ensure that the development dimension is taken fully into account. The General Council will keep the work of each body under review, and will determine after two years how the work of each body should proceed. It is clearly understood that future negotiations, if any, regarding multilateral disciplines in these areas, will take place only after an explicit consensus decision is taken among WTO Members regarding such negotiations.

Appendix 4 – WTO Ministerial Conference: Doha Ministerial Declaration, 14 November 2001 (Excerpt)

Interaction between Trade and Competition Policy

23. Recognizing the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 24, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations.

24. We recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.

25. In the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them.

Appendix 5 – Havana Charter for an International Trade Organization, 24 March 1948 (Excerpt)

Chapter V: Restricted Business Practices

Article 46

General Policy towards Restrictive Business Practices

1. Each Member shall take appropriate measures and shall co-operate with the Organization to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster

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monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other objectives set forth in Article 1.

3. The practices referred to in paragraph 2 are the following:

   (a) fixing prices, terms or conditions to be observed in dealing with others in the purchase, sale or lease of any product;

   (b) excluding enterprises from, or allocating or dividing, any territorial market or field of business activity, or allocating customers, or fixing sales quotas or purchase quotas;

   (c) discriminating against particular enterprises;

   (d) limiting production or fixing production quotas;

   (e) preventing by agreement the development or application of technology or invention whether patented or unpatented;

   (f) extending the use of rights under patents, trade marks or copyrights granted by any Member to matters which, according to its laws and regulations, are not within the scope of such grants, or to products or conditions of production, use or sale which are likewise not the subjects of such grants;

(g) any similar practices which the Organization may declare, by a majority of two-thirds of the Members present and voting, to be restrictive business practices.

Article 50

Obligations of Members

1. Each Member shall take all possible measures by legislation or otherwise, in accordance with its constitution or system of law and economic organization, to ensure, within its jurisdiction, that private and public commercial enterprises do not engage in practices which are as specified in paragraphs 2 and 3 of Article 46 and have the effect indicated in paragraph 1 of that Article, and it shall assist the Organization in preventing these practices.

Appendix 6 – International Antitrust Code Working Group: Draft International Antitrust Code (Excerpt)

Art. 3: Scope of Application and Jurisdiction

Sec. 1: Scope of Application

(a) The Agreement shall be applicable to all restraints of competition in the sense of this Agreement affecting at least two Parties to the Agreement.

(b) A Party to the Agreement is affected whenever there are economic effects in its territory or otherwise on its commerce, or private persons nationals of this Party, or undertakings having their main commercial establishment on the territory of the Party, are initiators or victims of a restraint of competition.

Art. 4: Horizontal Restraints

Sec. 1: Agreements, understandings and concerted practice (hereafter "agreements") between or among competitors that fix prices, divide customers or territories, or assign quotas are illegal.

Sec. 2: Other agreements between or among competitors are illegal, if they unreasonably restrict competition.

Art. 5: Vertical Restraints (Distribution Strategies)

Sec. 2: Certain distribution strategies are conclusively presumed to prevent, restrict or distort competition unreasonably and are illegal, namely:

1. Distribution strategies that aid in the enforcement of a producer or distributor cartel.

2. Distribution strategies fixing a resale price or price level.

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Art. 11: Appraisal of Concentrations

Sec. 1: Power to Impede Effective Competition

(a) A concentration which creates or increases the power of one or more undertakings concerned, either separately or jointly, to impede effective competition in the relevant market, shall be prohibited by the National Antitrust Authority.

Art. 13: Restructuring

Sec. 1: Restructuring Order

If in non-competitive, highly concentrated markets the market structure induces persistent abuses involving the exercise of significant market power adversely affecting at least one other Party the National Antitrust Authority shall order the restructuring of the undertaking. The order must be preceded by sectoral investigations, to which the National Antitrust Authority must be empowered by national law.

Art. 17: National Antitrust Authorities

Sec. 1: Institution of National Antitrust Authorities (NAA)

(a) Each Party to the Agreement shall establish a national antitrust authority for its own territory. Within regional economic organisations, being themselves Party to the Agreement, a centralized antitrust authority and persisting national antitrust authorities of member states shall

be understood equally as national antitrust in the sense of this Agreement.

Art. 19: The International Antitrust Authority

Sec. 1: Institution of the International Antitrust Authority (IAA)

(a) The CONTRACTING PARTIES shall establish an International Antitrust Authority and agree on a Statute of the Authority. The International Antitrust Authority shall be headed by a President and International Antitrust Council. The International Antitrust Authority shall operate within the institutional framework of the GATT (WTO).

Sec. 2: Powers of the International Antitrust Authority

Without prejudice to other provisions in this Agreement the International Antitrust Authority shall have the following powers:

(b) The International Antitrust Authority has a right to bring actions against national antitrust authorities in individual cases or groups of cases before national law courts, whenever a national antitrust authority refuses to take appropriate measures against individual restraints of competition.

(c) The International Antitrust Authority has a right to use private persons and undertakings as alleged parties or initiators of a restraint of competition before national law

courts asking for injunctions against the execution of the restraint.

(d) The International Antitrust Authority has a right of national appeal even when it is not a party to the case but under the same conditions as parties to the case.

Appendix 7 – International Competition Network: Memorandum on the Founding and Working of the International Competition Network (Excerpt)

Mission and Activities of ICN

The International Competition Network ("ICN") will be a project-oriented, consensus-based, informal network of antitrust agencies from developed and developing countries that will address antitrust enforcement and policy issues of common interest and formulate proposals for procedural and substantive convergence through a results-oriented agenda and structure.

ICN will encourage the dissemination of antitrust experience and best practices, promote the advocacy role of antitrust agencies and seek to facilitate international cooperation.

ICN's activities will take place on voluntary basis and rely on the high level of goodwill and cooperation among those juris-

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dictions involved. ICN will build on the many excellent contacts that already exist among the organisations concerned.

The work of ICN will be project-driven. During its regularly scheduled meetings, ICN will decide which projects it will pursue and will adopt a work plan for each project.

ICN is not intended to replace or coordinate the work of other organizations, nor will it exercise any rule-making function.

ICN will provide the opportunity for its members to maintain regular contacts, in particular by means of annual conferences and progress meeting.

Where ICN reaches consensus on recommendations arising from the projects, it will be left to the individual antitrust agencies to decide whether and how to implement the recommendations, through unilateral, bilateral or multilateral arrangements, as appropriate.

Membership of ICN

Members are national 1. multinational competition agencies entrusted with the enforcement of antitrust laws.

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