REKABET KURUMU

Lisansüstü Tez Serisi No: 22

INTERNATIONALIZATION OF COMPETITION: IS CONVERGENCE OF COMPETITION LEGISLATION ENOUGH TO DEAL WITH INTERNATIONAL ANTICOMPETITIVE PRACTICES?

Lerzan KAYIHAN ÜNAL

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ANKARA 2013

İlk Baskı, Kasım 2014
Rekabet Kurumu - Ankara

First Edition, November 2014
The Turkish Competition Authority - Ankara

Bu çalışma, Orta Doğu Teknik Üniversitesinde, Doç. Dr. Sanem BAYKAL (Jüri Başkanı), Doç. Dr. Sevilay KAHRAMAN (Tez Danışmanı, Üye), Doç. Dr. Aylin EGE (Üye), Doç. Dr. Oktay TANRISEVER (Üye), Doç. Dr. Şule GÜNEŞ'den (Üye) oluşan tez jürisi tarafından 04/09/2013 tarihinde kabul edilen "Rekabetin Uluslararasılaşması: Ulusal Rekabet Mevzuatlarının Birbirine Uyumu Uluslararası Nitelikteki Rekabet İhlalleri İle Mücadelede Yeterli Midir?" başlıklı doktora tezidir.

This study is the doctoral dissertation titled "Internationalization of Competition: Is Convergence of Competition Legislation Enough to Deal with International Anticompetitive Practices?" which was accepted at the Middle East Technical University on 04.09.2013, by the dissertation committee consisting of Assoc. Prof. Dr. Sanem BAYKAL (Chair), Assoc. Prof. Dr. Sevilay KAHRAMAN (Advisor, Member), Assoc. Prof. Dr. Aylin EGE (Member), Assoc. Prof. Dr. Oktay TANRISEVER (Member) and Assoc. Prof. Dr. Şule GÜNEŞ (Member).

Basımcı / *Printer:*
EFLATUN Basım Dağıtım Yayıncılık Dan. Yat. ve Tic. Ltd. Şti.
Vedat Dalokay Caddesi, Ulubey Sokak, No: 6/2, GOP, Çankaya/Ankara, Türkiye
Tel : (+90) 312 442 52 10 • **www.efilyayinevi.com**

YAYIN NO
PUBLICATION NO
0309

To My Lovely Family,

My Precious Parents,

My Beloved Daughter Irmak, and

My Dear Husband Selçuk…

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ACKNOWLEDGMENTS

Finishing this thesis was like a dream to me. It has never been realized without the assistance of many people. First and foremost, I am profoundly grateful to my supervisor Assoc. Prof. Dr. Sevilay KAHRAMAN for her invaluable guidance, support, and endless encouragements throughout this entire journey. I have always felt her strong backing. I particularly owe special thanks to her suggestions to improve both the theoretical and the main arguments of my study. A very special tribute goes to Assoc. Prof. Dr. Aylin EGE for her innovative comments and ideas to refine the structure of my study. Her suggestions have always been inspirational in the realization of my thesis. Without her support, this thesis would have never come to an end. I also want to express my great appreciation to Assoc. Prof. Dr. Oktay TANRISEVER for his crucial contribution and sound support throughout this whole journey. He was instrumental in directing me to match up the theoretical and practical background of this study. In addition to all these pecularities, I was a lucky student because these three wonderful people were always there whenever I consulted for their wisdom and guidance.

I also would like to thank to Assoc. Prof. Dr. Şule GÜNEŞ and Assoc. Prof. Dr. Sanem BAYKAL for their academic contribution to broaden my horizon in the finalization of this study.

This thesis does not only contain academic substance, but also many practical aspects which I was able to collect throughout my career in the international competition. Starting from Ankara at the Turkish Competition Authority, passing through the UN corridors in Geneva, the OECD headquarters in Paris while attending the ICN projects, and working as an International Fellow at the US Federal Trade Commission, NERO Office in NYC, I was fortunate enough to accumulate invaluable experience which triggered the starting point of this thesis. While working particularly in the UNCTAD and the US Federal Trade Commission, I much benefitted from the ideas and thoughts of my international colleagues. I am not in a position to count them all. My hearthfelt thanks go to each and every of them for their valuable insights for becoming who I am today.

Finally, I would like to thank to my lovely family, without whom I would never be here. In the first place, I am grateful to my dear mother Turkan who always supported me not only during this entire journey, but throughout my whole life. I am proud of being her daughter. I also want to thank my father Alaaddin who

guided me with his wisdom. He is the solid backbone of our family. I especially cherish the presence of my beloved daughter Irmak who is the reason of my life and always cheered me up during the most difficult times. Needless to say, I wish to thank to my husband Selçuk who saw the seed of starting a PhD at the first place. He is the one who cares for us from here until eternity.

ABSTRACT

INTERNATIONALIZATION OF COMPETITION: IS CONVERGENCE OF COMPETITION LEGISLATION ENOUGH TO DEAL WITH INTERNATIONAL ANTICOMPETITIVE PRACTICES?

The purpose of this study is to examine the right approach to deal with the internationalization of competition law and policy. The study particularly questions whether convergence of competition legislation of nations as a strategy is enough to deal with the international anticompetitive practices in the absence of a global competition regime. This search surely involves the increased and enhanced cooperation efforts in between and among states. The internationalization of competition law and policy stems from the necessity to fill the gap in between the domestic competition regimes and the international business activities. In this context, this study refers to a three level analysis; the venue search for international competition matters at the multilateral level, the unilateral application of competition legislation, and the bilateral and regional cooperation efforts. All these three levels together compose the internationalization process itself. To this end, this study argues that a global competition regime can be achieved if only grounded on a good understanding of the process of the internationalization of competition law and policy. Indeed, the nature of this inquiry necessitates new insights from other disciplines. Thereof, this study displays that particularly international relations theories would shed a light on the conceptualization of the internationalization process in question.

Keywords: competition law and policy, convergence, globalization, governance, internationalization.

ÖZ

REKABETİN ULUSLARARASILAŞMASI: ULUSAL REKABET MEVZUATLARININ BİRBİRİNE UYUMU ULUSLARARASI NİTELİKTEKİ REKABET İHLALLERİ İLE MÜCADELEDE YETERLİ MİDİR?

Bu çalışmanın amacı rekabet hukuku ve politikasının uluslararasılaşma sürecini çözümlemeye yönelik doğru yöntemi incelemektir. Çalışma özellikle, küresel nitelikte bir rekabet rejiminin yokluğunda, bir strateji olarak ülkelerin rekabet mevzuatlarının birbirine uyumunun uluslararası nitelikteki rekabet ihlalleri ile mücadelede yeterli olup olmadığını sorgulamaktadır. Bu araştırma tabiatıyla ülkeler arasında artan ve gelişen işbirliği çalışmalarını da içermektedir. Rekabet hukuku ve politikasının uluslararasılaşması, ulusal rekabet rejimleri ile iş dünyasının uluslararası nitelikteki faaliyetleri arasında ortaya çıkan boşluğun doldurulmasına ilişkin ihtiyaçtan kaynaklanmaktadır. Bu çerçevede çalışma üç seviyeli bir analizi kapsamaktadır; bunlar uluslararası rekabet konularının çok taraflı seviyede ele alınabileceği yetkili makama dair araştırma, rekabet mevzuatının tek taraflı olarak ülke dışı uygulaması ile ikili ve bölgesel işbirliği çabalarıdır. Bahsedilen bu üç seviyeli değerlendirme uluslararasılaşma sürecinin kendisini oluşturmaktadır. Çalışma küresel rekabet rejiminin ancak adı geçen uluslararasılaşma sürecinin iyi bir şekilde anlaşılmasıyla başarılabileceğini savunmaktadır. İşte bu sebepten bu çalışma doğası gereği farklı disiplinlerin katkısını gerektirmektedir. Çalışma, özellikle uluslararası ilişkiler teorilerinin uluslararasılaşma sürecini kavramsallaştırma yolunda yeni bir yol açabileceğini göstermektedir.

Anahtar Kelimeler: rekabet hukuku ve politikası, uyum/yakınsama, küreselleşme, yönetişim, uluslarasılaşma

LIST OF ABBREVIATIONS

CARICOM	Caribbean Community Secretariat
COMESA	Common Market for Eastern and Southern Africa
Court of Justice	Court of Justice of the EU
DOJ	US Antitrust Division of the Department of Justice
EFTA	European Free Trade Association
EU	European Union
FAS	Federal Antimonopoly Service of the Russian Federation
FTAIA	Foreign Trade Antitrust Improvements Act
FTC	Federal Trade Commission
GATT	General Agreements on Tariffs and Trade
GC	European General Court
IBRD	International Bank for Reconstruction and Development
ICN	International Competition Network
IGOs	Intergovernmental Organizations
IMF	International Monetary Fund
ITO	International Trade Organization
MERCOSUR	Common Market of the South
MLATs	Mutual Legal Assistance Treaties
NAFTA	North American Free Trade Agreement
NGAs	Non-Governmental Advisors
NGOs	Non-Governmental Organizations
OECD	Organization for Economic Co-operation and Development
SACU	Southern African Customs Union
RTAs	Regional Trade Agreements
TCA	Turkish Competition Authority
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
US	United States
WAEMU	West African Economic and Monetary Union
WTO	World Trade Organization

CHAPTER 1

INTRODUCTION

Competition law and policy has grown in an amazing way in recent years in response to the changes in political thinking and economic behaviour that have taken place all around the world. In this regard, dramatic changes occurred in the world economy in a relatively short period of time. Not long ago the world was divided between capitalist and communist systems and the latter composed of those countries with state-run economies. Particularly, with the end of Cold War in 1989, a transition period has started with a shift towards more market oriented mechanisms while domestic markets have been increasingly opened to foreign trade and investment. This trend can be observed not only in the former Soviet states, but also in other socialist states such as China and Vietnam. The same trend also continues in developing democracies like India, and even in already industrialized states of Europe where there has been a further reliance on the market oriented results.

Adherence to a belief in the market economy led to the increasing importance of competition policy and the introduction of competition laws around the world. This is because, on the basis of neoliberal economic theory, states which prefer market economy[1] consider that free market economic system brings the greatest benefits to the society (Jones and Sufrin 2008, 2).

Competition law and competition policy are indeed two different terms.[2] Competition law is a body of legal rules and standards attempting to promote competition within the markets by regulating cartels, abuse of dominant position, and anticompetitive mergers.[3] It provides stability and incentives for investments which enable competition to flourish. It also provides conduct norms for markets (Gerber 2010, 3) so that there is level playing field for all. Competition policy, however, is

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[1] In a free market economy, national competition law exists to protect competition where the allocation of resources is determined by supply and demand.

[2] This study refers to the concepts of competition law and competition policy separately or together while discussing the internationalization of competition law and policy as a process depending on the context. This matter is being discussed in section 3.1 of this study in detail.

[3] Indeed, state aid is another policy area next to cartels, abuse of dominant position and mergers, which is being covered by some jurisdictions. The EU competition legislation in particular, covers state aid control policies in addition to the antitrust rules. In this respect, it includes rules and procedures for fighting anticompetitive behaviour by firms (restrictive agreements between undertakings and abuse of dominant position), rules for monitoring mergers and acquisitions as well as rules for preventing governments from granting state aid distorting competition in the internal market. However, it is not within the scope of the present study to cover state aid issues which can be defined as an advantage in any form and conferred on a selective basis to undertakings by national public authorities.

a broader concept than competition law. It describes the way in which governments take measures to promote competitive market structures and behaviour (Jones and Sufrin 2008, 2). Therefore, it is not only about the formulation and enforcement of the relevant legislation, but also about competition advocacy[4] practices.

In our day, globalization of markets is everywhere. Markets transcend national boundaries and transform into global markets. In this global world, the world's economies are more interlinked and interdependent (Fingleton 2011, 174) than ever before in which competition law and policy has become a subject of increasing interest. Under the influence of the increased economic globalization, this interest has multiplied the number of national competition regimes that has started to proliferate after the end of Cold War. In a globalized market place restrictions on competition, and abusive conduct may originate outside a nation's borders, and the mergers and acquisitions might have influences in more than one jurisdiction. All these developments weakened the distinction between the domestic and the international in competition law and policy further. Consequently, competition laws regulating anticompetitive activity remain national, whereas the subject of the law turns into an international one. This creates tensions especially in between the business and the law enforcers.

Today most national legal systems have competition laws. Even though specific goals or implementing practices might differ, and the intensity of political and cultural support behind these laws might vary from one country to another, all nations agree on the underlying goal of combating restraints on competition as the shared characteristic. For global markets, however, there is no competition law that can perform these functions (Gerber 2010, 4). Likewise, with the rising volume of cross-border economic interactions, and as a result of the increasing possibilities for cross-border anticompetitive activity, states started to seek ways to internationalize their law and policy on competition. This study considers that the enforcement of national competition law vis-à-vis cross-border anticompetitive practices is a dilemma while studying the internationalization of competition law and policy. This dilemma simply stems from the fact that there is no global competition regime to regulate the inconsistencies arising from anticompetitive conduct at the international level, and the sole assistance of national laws are not enough to tackle this matter.

Within this context, the aim of this study is to examine the right approach to deal with the internationalization of competition law and policy. The

[4] ICN defines competition advocacy as "those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition" in its 2002 Report on Advocacy and Competition Policy, p.25.

internationalization of competition law and policy represents a highly topical issue. During this query, the study particularly questions whether convergence of competition legislation as a strategy is enough to deal with the international anticompetitive practices in the absence of a global competition regime. This quest would surely involve increased and enhanced cooperation efforts in between and among states. In fact, in addition to the internationalization of competition law and policy under the global economic interdependence, there have been many attempts to establish a global competition regime in the past. The internationalization of competition law and policy stems from the necessity to fill the gap in between the domestic competition regimes and the international business activities in the absence of a global competition regime. From this standpoint, this study refers to a three level analysis; firstly the historical background of venue search for international competition matters at the multilateral level, secondly the unilateral application of competition legislation, and thirdly bilateral and regional cooperation efforts constitute these three levels. With another saying, the attempts of nation-states at the unilateral, bilateral/regional and multilateral levels to tackle international anticompetitive practices all together compose the internationalization process itself. To this end, this study argues that a global competition regime can be achieved if only grounded on a good understanding of the process of the internationalization of competition law and policy.

For this purpose, at the very beginning it is important to understand whether the internationalization of competition as a process is a matter of law, economics or politics (or all), and what should its focus of direction be. Needless to say, the internationalization of competition law and policy is subject to political influence mainly from states and undertakings. Equally, however, it is also under the influence of economic changes that have taken place in the global markets. Therefore, this study claims that the nature of this inquiry necessitates new insights from other disciplines. In doing so, it seems that a good understanding of the internationalization of competition law and policy requires the adoption of an interdisciplinary approach.

In this regard, this study is of the opinion that international relations as a discipline, and notably the theories of international relations as a conceptual framework is the anticipated instrument to understand the internationalization of competition law and policy as a whole. Hence, this study claims that the internationalization of competition law and policy from an international relations theories point of view is an understudied, but promising area. In this study, the international relations theories would be used as a tool to construct an open link and dialogue by bringing this topical process to the attention of scholars and practioners by constituting an approach on which further work, academic or otherwise, can be built upon in the future.

The proliferation of competition laws around the world reflect an almost global consensus on the benefits of free and competitive markets. This trend, however brings along concerns about inconsistent enforcement given the effects of the increased economic globalization on the markets, and as a result it leads to a new trend which reflects itself in the necessity to harmonize competition laws globally. Moreover, the inadequacy of the unilateral, bilateral and multilateral attempts of the countries to cope with the international anticompetitive practices have been supporting the harmonization of competition legislation as an alternative strategy in recent years. The term used for such harmonization in competition terminology is convergence.

Convergence[5] simply means rapprochement of competition legislation among the national antitrust agencies both on substantive and procedural grounds. Substantive convergence (Cheng 2012, 439) refers to harmonization of substantive competition law principles, that is the standard for the legality of various modes of business conduct while procedural convergence (Cheng 2012, 439) refers to harmonization of procedural rules that apply in competition cases. So far, the significant international procedural convergence has been witnessed in the area of merger review. In other areas of competition law, the applicable procedural rules tend to follow the general civil or criminal laws of the home jurisdiction. Proponents of convergence are most notably the United States (US), the European Union (EU), and a host of international organizations or bodies, such as the OECD, UNCTAD and the International Competition Network (ICN). These long-established jurisdictions have attempted to build a consensus on various substantive and procedural aspects of competition law and encouraged jurisdictions to converge around the so called international best practices in the absence of a global competition regime. They sought to handle the internationalization process of competition law and policy through convergence. Substantive and procedural convergence in competition law enforcement is a gradual process which is accepted as a solution for the national law versus international anticompetitive practices dilemma. In this vein, convergence constitutes a very important development step in this internationalization process.

Convergence efforts reflects itself often in the form of best practices for a given subject area of competition law. These best practices are generally based on the experiences of the prominent states who are determining the substance of these documents. In addition, they are prepared under the auspices of the international organizations or bodies. They were born in the form of recommendations, guidelines, discussion papers or reports. The general expectation (Cheng 2012, 434) behind all these soft nature work is that the countries which are in the process of adopting or amending national competition laws would incorporate

[5] See Chapter 3, section 3.3. of this study for a detailed discussion on the concept of convergence.

those best practices, and by this way harmonize and converge their legislation and enforcement towards the competition law practices of these long established jurisdictions.

Convergence as an approach accepts the existing jurisdictional mechanism and expects a gradual alignment of national competition regimes. Convergence has been widely supported and led by the developed world players, especially by the US and the EU. The choice for convergence as a strategy was made deliberately in lieu of a possible establishment of a formal and binding multilateral regime under an already established structure such as the World Trade Organization (WTO) in the absence of a global competition regime. To this end, the US and the EU supported the establishment of the ICN in 2001. ICN is definitely an important milestone to discuss and understand the convergence efforts of the international competition community in the internationalization of competition law and policy. Among other goals, the ICN promotes greater convergence of the competition legislation (first and foremost the substantive convergence) worldwide in spite of its informal founding structure. What ICN advocates is more of a voluntary nature convergence in the absence of a formal, binding international agreements or treaties. However, the ICN itself is aware of the fact that where convergence is not possible, identifying the nature and sources of divergence and respecting rather different rationale, or to put it more openly, talking about informed divergence (Fingleton 2009, 1) seems to be a rational pluralist choice for the agendas of the competition agencies.

This study is organized as follows. Following this brief introduction, **Chapter 2** introduces neorealism and neoliberal institutionalism debate as the two prominent international relations theories with an aim to offer insights into the internationalization of competition law and policy process. The study argues that the debate between neorealism and neoliberalism is essentially helpful due to its state-institution approach and its position against the concept of cooperation. This debate certainly addresses issues of cooperation for the state-institution relations. Chapter then turns into the concept of governance which is particularly relevant for the analysis of international competition issues.

Chapter 3 starts with definition of the concept of convergence, which constitutes the main argument of this study. Then, it provides an overview of the history of international antitrust practices. It began with the League of Nations after the World War I, continued with the attempts evolved around the Havana Charter following the World War II. Finally, it focused on the developments of the Cold War period until today. This overview explores the stalled attempts to achieve a global competition regime. In this respect, it focuses on international institutions namely the WTO, the Organization for Economic Cooperation and Development (OECD) and the United Nations Conference on Trade and

Devlopment (UNCTAD) which dealt with or still dealing with the antitrust matters. It also examines the rise of the virtual network ICN in the last decade which is solely dedicated to competition law enforcement.

Chapter 4 focuses on the national limitations that are present before the global reach of the antitrust laws by focusing on the extraterritorial application of competition laws, i.e. the unilateral application of competition laws. Particularly, the territorial perspective of competition law enforcement is the core feature which shapes and limits international cooperation and convergence of competition laws. By default, domestic competition regimes are empowered to protect competition and consumer welfare in their own national markets, from domestic or international activities. This territorial perspective is of paramount significance in a global economy. While competition, and thereof anticompetitive practices become increasingly transnational, enforcement remains domestic in nature. Chapter 4 further examines the way extraterritoriality used in the US and the EU by focusing on the case law and its development over the years.

Based on the premise that problems related to the internationalization of competition law cannot be solved with the sole existence of extraterritoriality, **Chapter 5** discusses bilateral cooperation agreements and other regional efforts to cope with the challenges arising from the internationalization process. Bilateral cooperation suggests a kind of transition from a historical reliance on unilateral approaches and extraterritoriality principle to a cooperative bilateralism focusing on the dispute prevention between the practices of competition agencies. So, the Chapter offers reflections from prominent case studies on bilateral efforts as a response to this shortcoming. It focuses particularly on the EU-US Bilateral Cooperation Agreement. In the debate over the development of the internationalization of competition law and policy, both the US and the EU competition regimes are fundamental for a number of reasons. First of all, both of these regimes have been applied for a long time. The US law is older than hundred years whereas the regime of the EU is more than fifty years old. Secondly, both have helped to shape the competition cultures and norms of nations deeply and thoroughly. Thirdly, it is also believed that the bilateral efforts of the US and the EU would help to increase and promote multilateral cooperation endeavors of the competition policy area.

Chapter 6 reaches the conclusion that international competition continues to exist in the absence of a global competition regime. Lack of a global competition regime forced states to cooperate while leading them towards a deeper policy coordination in the face of globalization. Thus, actual achievements in the internationalization of competition can be explained on the basis of the neo-neo debate, meanwhile it necessitates the insights from the governance studies especially in the aftermath of the Cold War. Neoliberalism emphasizes the role

of international institutions and their ability to foster cooperation. However, globalization has started to present new policy challenges for domestic and international politics. In fact globalization leads to policy convergence while the extent of policy convergence is determined by the ability of states to cooperate and their ability to agree on norms of governance. Thus, Chapter concludes that global competition regime lacks elements of governance, and that currently convergence of competition law is a desirable strategy for nation-states, but yet it is also not enough to solve the dilemma of internationalization of competition law and policy.

CHAPTER 2

UNDERSTANDING THE PROBLEMS OF INTERNATIONAL COOPERATION: THE NEO-NEO DEBATE AND BEYOND

This Chapter aims to present a theoretical framework for understanding and explaining the internationalization of competition law and policy which is concurrently both a cooperative and a contentious matter. Competition law and policy is about regulating the markets. Understanding competition law and policy in global markets necessitates an understanding of the global economy. Understanding global economy requires knowledge of economics and politics. It also requires ability to bring together all this knowledge with an aim to analyze and understand the internationalization process better. In the absence of a global competition regime, understanding the issues and challenges about the international cooperation is of utmost importance for the international competition community as a beginning. To this end, theories are valuable tools to enhance our understanding of world politics, world economy and the role and place of the competition law and policy.

At this point, this study claims that internationalization of competition law and policy needs to be treated from a different angle. Despite the fact that areas such as legal, economic, comparative law, political science and sociology are all important theoretical approaches in explaining the global economy and the international markets, this study argues that theories of international relations are central, above all others, to the analysis carried out herein. This is because

> whenever you are faced with…a problem you have to resort to theories. A theory is not simply some grand formal model with hypotheses and assumptions. Rather, a theory is a kind of simplifying device that allows you to decide which facts matter and which do not (Baylis et.al. 2011, 3).

Additionally, international relations theories act as facilitators in understanding and explaining events and other phenomenon in world economy, associated policies and practices. For this study, this incident is the internationalization of competition law and policy. In this respect, the mainstream debates of international relations theories are indispensable instruments for understanding and analyzing the process of internationalization of competition law and policy. As argued by Gerber (2010, 8), first of all, theory allows abstraction. Second, theory can be used to identify complex effects that are exposed to rapid change that are otherwise, even if not impossible, difficult to identify. Third, theory identifies incentives for anticompetitive conduct and thus directs norm setting and implementation strategies. Fourth, theory can also be used to recognize, analyze

and sometimes even to quantify the potential costs of those strategies. Last but not least, theoretical analysis offers tools that can be used to understand the issues involved in a more effective manner while providing language to discuss, follow, and share information in productive ways (Gerber 2010, 8).

The Chapter starts with the basics of realism and liberalism. However, it is important to note that each theory or paradigm has many strands. In this regard, it is more meaningful for the sake of this study to focus on neorealism and neoliberalism[6] due to the latter's particular interest in international cooperation, international institutions and political economy. Neo-liberalism is also termed as neoliberal institutionalism or the institutional theory in the academic world (Lamy 2011, 117). Meanwhile, in the policy world neorealism refers to the promotion of free-trade or open markets, and the Western democratic values and institutions. Accordingly, as neorealism argues the financial and political institutions created after the World War II have survived and provided the foundation for current political and economic power arrangements (Lamy 2011, 117). Therefore, during the quest for explaining the relevance between the international relations theories and the internationalization of competition law and policy, first and foremost the Chapter addresses the debate between neo-realism and neo-liberalism, or the so called neo-neo debate.

The neo-neo debate is in essence a debate about the role of international institutions and cooperation in the globalizing world economy. Indeed, neorealism and neoliberalism are two of the most influential approaches to international relations theory (Powell 1994, 313). It is also a debate about the future role and effectiveness of international institutions and the possibilities of cooperation. Neorealism dominates the world of security issues while neoliberals focus on the matters of political economy. According to neorealism, neoliberals are too optimistic about the possibilities of cooperation among states. Neoliberals counteract that all states have mutual interests and thus gain from cooperation. Both neorealism and neoliberalism examines the state, capital markets and the status quo. Particularly the process of globalization have forced both neorealist and neoliberal thinkers to consider similar issues and address new challenges to international order. Both of these theories attempt to give a better explanation to the behaviour of states and the nature of international politics (Lamy 2011, 183-184).

This study claims that with the assistance of international relations theories one can explain different ways of organization of international institutions as well as behavior of nation states during the quest for understanding the internationalization of competition law and policy. For this study, realizing the relation between the nation-states and the institutions is as important as knowing

[6] Neorealism and neoliberalism are the progenies of realism and liberalism respectively.

how to promote and support cooperation among the nations in the absence of an international regime on competition. This study argues that such an explanation can be provided by the debate between neorealism and neoliberalism and the approach of governance whenever necessary. The neo-neo debate and its stance against international cooperation, relative gains and globalization are quite significant to better understand and explain the internationalization process of competition in today's global economic world. This is mainly because the relations between the state, international institutions, and international cooperation are very important concepts in the analysis carried out in this study. Eventually, the Chapter explores the notion of governance to bring a new insight to the internationalization process in question.

2.1. International Relations Theories in the Aftermath of World War II

In the twentieth century, and particularly after the end of the World War II, the debate between realism and liberal institutionalism greatly affected the world politics. Since the mid-1980s, the debate between neorealism and neoliberalism has started to dominate the international relations realm. Neorealism and neoliberalism are the progeny of realism and liberalism. Understanding the similarities and differences between neo-realism and neoliberalism is as important as understanding the debate's grass roots in terms of this study.

2.1.1. Realism

Realism became the dominant approach in international relations after the end of World War II. Realism has been at the heart of the study of international relations theory following the Hans Morgenthau's book *Politics Among Nations*, first published in 1948. Then and now many scholars found realist theory to be a useful framework in order to investigate politics. Indeed, realism has been the dominant way of explaining world politics in the last hundred years (Baylis et.al. 2011, 4). Additionally, realism was considered as the dominant theoretical tradition during the Cold War period (Walt 1998, 31). This is because realist theory addresses the key questions in international relations such as: "What are the causes of conflict and war among nations?" and "What are the conditions and obstacles for cooperation and peace among nations?".

Realism is not a single theory, and realist thought evolved particularly throughout the Cold War. Classical realists such as Morgenthau and Reinhold Neibuhr believed that states were like human beings with an innate nature to dominate others that has led them to fight wars (Walt 1998, 31). Given the fact that realism is such an old and well-established theory, it is still not easy to give an exact definition of it. Therefore, it is of vital importance to review the core elements of realism in terms of this study, which are statism, survival and self-help. These core elements are also called **"**three Ss" of realism. Although three Ss do not represent the whole realism, they are vital due to their relevance to

the main argument in this study. In fact, these elements exist in the work of both classical realists and neorealists, such as Thucydides and Kenneth Waltz (Dunne and Schmidt 2011, 93). The three Ss constitute the fundamental unit of political analysis in the realist paradigm.

For realists, sovereign states are the main actors in world politics. States think strategically about how to survive in the international system, that is they are unitary, rational agents. Statism views states not only as the key actors in world politics but also as being legitimate representative of the collective will of the people in the making and enforcement of law. Outside the boundaries of a state, anarchy exists. States in anarchy often fail to cooperate even in the face of common interests, international institutions affect the prospects for cooperation but only marginally (Dunne and Schmidt 2011, 93). For realists, states are the only actors that really matter and they do not recognize a higher power over the states. For them, the second important element in the three Ss model is survival. Survival is held to be a precondition for attaining all other goals for states whether this involves conquest or independence (Dunne and Schmidt 2011, 94). At this point, the third element ultimately comes into scene is self-help. Since there is no sovereign global body or government above the nation-state level, the world politics is considered as a self-help system by the realists**.** With another saying, self-help is the principle of action in an anarchical system where there is no global government. Self-help implies that each state is responsible for ensuring its own well-being and survival rather than entrusting on another actor or international institution (Dunne and Schmidt 2011, 95).

2.1.2. Liberalism

Liberalism has been regarded as the historic alternative to realism. Liberalism seeks to project values of order, justice, liberty, and toleration into the international relations while realism considers international system as an anarchic structure shaping the motives and actions of the states. In the twentieth century, liberal thinking influenced policy makers and public opinion in a number of Western states after the World War I. This era which had been under the influence of liberal thinking is called idealism in the international relations theories. Idealists believed that warfare was unnecessary and unsuitable for settling disputes between states (Dunne 2011, 102-103) because warfare would threaten each side's prosperity (Walt 1998, 32). There was a brief revival of liberal thoughts at the end of World War II with the formation of the United Nations (UN), but this did not continue in the shade of Cold War.

The World War I shifted liberal thinking towards a belief that peace is not a natural condition but is one that shall be constructed in the international system. In this context, the League of Nations experience which was created on idealist grounds was totally unsuccessful when the US decided not to join the institution

that it had created. The language of liberalism became more pragmatic in the aftermath of the World War II. In the case of the UN, there was an increase in awareness among the framers of the UN Charter of the need for a consensus between the great powers in order for enforcement action (Dunne 2011, 106).

Despite the tendency of many scholars in viewing liberalism as a theory of government, the explicit connection between liberalism as a political and economic theory and liberalism as an international theory has become increasingly apparent in time. Liberals consider states like individuals. The identity of the state, whether war prone or tolerant and peaceful, determines its outward orientation. Liberals see an additional parallelism between individuals and sovereign states. According to them, all states are accorded certain natural rights like the generalized right to non-intervention in their domestic affairs. They further think that the ideas originated inside a liberal state can be extended to international realm through institutions. Domestic and international institutions are required to protect and nurture these values (Dunne 2011, 106). Proponents of this thought argued that international institutions could help overcome selfish state behaviour particularly by encouraging states to leave aside immediate gains for the greater benefits of cooperation (Walt 1998, 32).

Another important advancements of liberalism in the early post-war period is its approach towards the state's inability to cope with modernization. A pioneer integration theorist David Mitrany claimed that transnational cooperation was required to solve the common problems. He believed that cooperation in one sector would lead governments to extend the range of collaboration across sectors. When the states are embedded in an integration process, it would be too costly to withdrawn from it (Dunne 2011, 106).

During the late 1960s and throughout the 1970s, it began to be argued that the nature of international politics and the structure of the international system was undergoing a transformation. It was claimed, in particular, that the division between international and domestic politics was breaking down. And as a consequence, not only the boundaries separating states were dissolving, but also international politics was becoming domesticated in the process. Stemming from the positive benefits of the transnational cooperation argument, a new generation of scholars including Keohane and Nye argued that centrality of other actors such as interest groups, transnational corporations, and international non-governmental organizations had to be taken into consideration as well in this analysis. These developments were associated specifically with the evolution of transnationalism and interdependence and the scholars who focused on these features of the international system were called pluralists (Dunne 2011, 106; Little 1996, 66). Despite being a new concept, transnationalism phenomenon remained as an underdeveloped concept in the international relations theories.

Hence, the most important contribution of this pluralist period was its elaboration of interdependence. Due to the spread of capitalism and the creation of a global culture pluralist scholars recognized a growing interconnectedness in which changes in one part of the system have direct and indirect consequences for the rest of the system (Dunne 2011, 106). While providing the foundations for a new approach to the study of international politics, this emerging school of thought was seen simultaneously to be mounting a significant attack on realism, widely considered to provide the dominant perspective on international relations (Little 1996, 67).

2.1.3. Neorealism

Mid twentieth century realists or classical realists such as Morgenthau and Carr, by putting a premium on human nature, believed that anarchy could be soothed by wise leadership and the pursuit of national interest through ways that are compatible with the international order (Dunne 2011, 89). Classical realists concluded that acting purely on the basis of power and self-interest without taking into consideration of any moral and ethical principles would result in self-defeating policies (Dunne 2011, 93). However, this approach was not enough in providing a casual account of the world in 1970s which is characterized by new developments on the intertwined issues such as international political economy, transnationalism, and increased international interdependence. Thus, towards the end of 1970s, realism was evolved into neorealism or the so called structural realism with the attempts of some realists who tried to redefine realism. Realists believed that states in anarchy often fail to cooperate even in the face of common interests. Realists argued that international institutions affect the prospects for cooperation but only marginally. Neorealism or structural realism is one version of neorealism and divides into two variants (Dunne 2011, 93). On one side, there are those who argue that states are security maximizers (defensive realism), and on the other side there are those who argue that states are power maximizers (offensive realism) (Dunne 2011, 93).

Being a proponent of defensive realism and the founder of neorealism, Waltz claimed that international politics was essentially a struggle for power and this was not a result of human nature (Waltz 1979, 93). This view is contrary to classical view which asserted that security seeking nature of states was the end result of human nature. Waltz ignored human nature and focused on the effects of the international system in totality. He attempted to set out a theory of international politics similar to microeconomics. He argued that states in the international system were like firms in a domestic economy and they had the same fundamental interest which was to survive. Waltz (1979, 93) asserted that "internationally, the environment of states' actions, or the structure of their system, is set by the fact that some states prefer survival over other ends obtainable in

the short run and act with relative efficiency to achieve that end". By this way, defensive realists attempted to explain the effects of the structure as a whole without denying the importance of unit level (state level) analysis. Waltz defined the structure by the ordering principle of international system in which he holds the idea that anarchy leads to a logic of self-help (Dunne 2011, 91). Waltz kept certain features of realism like anarchy, and self-help mechanism of international politics and distribution of capabilities across units, which are similar sovereign states (Dunne 2011, 92). Hence, Waltz attempted to create a new theory of international politics. This is because Waltz by introducing the notion of structure into the international system, tried to develop a very comprehensive definition of the international system. By this way, Waltz aimed at being more scientific, structural and systematic concerning the international system.

Waltz also examined the ways in which the structure of the international system limits cooperation. Initially, the condition of insecurity, that is the uncertainty of each state's future intentions and actions works against their cooperation. A state concerns about a division of possible gains that might favor others more than itself (Dunne 2011, 105). Furthermore, a state is concerned about becoming dependent on others through other means such as trade and economy, and therefore prefers to limit its cooperation with other states (Dunne 2011, 106). Last but not least, states curb themselves willingly from situations of increased dependence (Dunne 2011, 107).

2.1.4. Neoliberal Institutionalism (Liberal Institutionalism)

As explained above and elsewhere, international relations theory has been dominated by realism and its progenies at least since World War II. Neoliberal institutionalism, however, is considered by many scholars including Grieco to present the most convincing challenge to realism and neorealism. From a realist point of view, international anarchy increases competition and conflict among states and limits the willingness of states to cooperate even when they share common interests. Realist theory also argues that international institutions are inadequate to mitigate anarchy's binding effects on inter-state cooperation. Neoliberals argue that realism and neorealism present a pessimistic analysis of the prospects for international cooperation and of the capabilities of international institutions (Grieco 1988, 485).

According to neoliberal institutionalism, state is not a unitary actor. There are other actors and multiple channels that are interrelated to each other which are interstate, transgovernmental, and transnational actors/relations. According to Firieden (2000, 10), the liberal market emphasizes how both the market and the politics are environments in which all parties can benefit via entering into voluntary exchanges with each other. Additionally, the world system is composed of interdependence among actors instead of an anarchic system. All actors in the

world system gain from cooperation, and last but not least market relations lead to positive outcomes for all parties (Firieden 2000, 10).

Liberal institutionalism has appeared in three successive periods; functionalist integration theory in the 1940s and early 1950s, neofunctionalist regional integration theory in the 1950s and 1960s, and interdependence theory in the 1970s (Baldwin 1993, 116). All of the three versions rejected realism's remarks about states and its gloomy understanding of world politics. They particularly argued that international institutions can help states cooperate. Thus, compared to realism, these earlier versions of liberal institutionalism offered a more hopeful presumption for international cooperation and a more optimistic assessment of the capacity of institutions to help states achieve it (Baldwin 1993, 116).

Alongside these developments, the literature on the the EU was pioneered by Ernst B. Haas[7]. Haas focused on how economic interdependence affected arrangements for governance (Keohane 2002, 2). All these theories claim that creation of integrated communities to promote economic growth and or respond to regional problems are the ways to peace and prosperity. Then comes the period of transnationalism and complex interdependence theories which can be attributed to the work of Keohane and Nye in 1970s. In the 1970s, Keohane and Nye built together a theory to explain the notion of complex interdependence. Complex interdependence is considered as an ideal type for analyzing situations of multiple transnational issues and contacts in which force is not a useful instrument of policy (Keohane and Nye 1977, 23-24). Further, theorists in these camps defined interdependence more broadly in a way to encompass strategic issues involving not only force but also economic issues. In their analysis, interdependence is frequently asymmetrical and highly political. Keohane and Nye claimed that asymmetries in interdependence generate power resources for states, as well as for non-state actors. Together they attempted to establish a theory of institutions in the form of international organization model of regime change.[8]

Simply, neoliberal institutionalist scholars Keohane and Nye argued that the world had become pluralistic in terms of number of actors getting involved in international interactions. Additionally, they claim that these actors had become more dependent to each other. Complex interdependence theorists viewed the world based on the following four characteristics (Lamy 2011, 121). First, there is an increasing amount of linkage among states and non-state actors. Second, the

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[7] Haas shared his views in his 1958 dated book *Uniting For Europe Political, Social, and Economic Forces*, 1950-1957.

[8] In *Power and Interdependence* (Keohane and Nye 1977), Keohane and Nye elaborated on the complex interdependence theory and applied it to fifty years of history (1920–1970) in two issue-areas (oceans and money).

new agenda of international issues do not make a distinction in between high and low politics. Third, there are multiple channels for interaction among actors across national boundaries. Fourth, there is a decline in the efficacy of the military force.

In the 1980s, the research agenda of neoliberals moved from attempts to describe the phenomena of interdependence and international regimes to closer analysis of the conditions under which countries cooperate (Keohane 2002, 29). In fact, neoliberal institutionalism shares most of the neorealist assumptions. Neoliberal institutionalism does not claim that states are always highly constrained by international institutions. Nor does it claim that states ignore the effects of their actions on the wealth or power of other states. Neoliberal institutionalism, however, in the words of Keohane (1989, 2), argues that state actions depend on prevailing institutional arrangements to a considerable degree, which has an impact on the flow of information and opportunities to negotiate, the ability of governments to monitor others' compliance and to implement their own commitments, and the prevailing expectations about the solidity of international agreements.

Neoliberal institutionalism does not assert that international arrangements or agreements are easy to make or to keep, indeed they assume the contrary. Similar to neorealist assumptions, states are the main actors in the interpretations of neoliberal institutionalism. What they do claim, however, is that the ability of states to communicate and cooperate depends on human constructed institutions, which differ historically and across issues, in nature and in strength (Keohane 1989, 2). To this end, the adherents of neoliberal institutionalism consider institutions as the intermediary instruments to achieve cooperation among the actors of the international system. Currently, neoliberal theorists are focusing their research on issues of global governance and the creation and maintenance of institutions related with the managing processes of globalization (Lamy 2011, 121).

2.2. Contemporary Mainstream Approaches: The Neo-Neo Debate

Neorealism and neoliberalism are two mainstream approaches in international relations theories. Neorealism and neoliberalism share an epistemology. Among other things, they have collided over the role of institutions and cooperation in the international system. They both start from the assumption that the absence of a sovereign authority that can make and enforce binding agreements creates opportunities for states to advance their interest in a unilateral fashion, and makes it important but difficult for states to cooperate with one another (Jervis 1999, 43). Hence, they do not offer completely different images of international politics. Jervis (1999, 43) states that there is not much of a gap in between these two theories. In this regard, he quotes (1999, 43) Keohane and Martin who claim that "for better or worse institutional theory is a half-sibling of neorealism". Hence,

each of them is a school of thought that provides a perspective about world politics. Thereof, it would be truism to argue that the debate between neorealism and neoliberalism is not a contentious one but rather a complementary one. Neorealists focus on the security issues and are interested in power and survival issues while neoliberals divert their work more on political economy matters and concerned with institutions and cooperation (Lamy 2011, 117).

A very important contribution to the neo-neo debate in fact has arisen in mid 1990s with the studies of John Mearsheimer on one hand, and Richard Keohane and Lisa Martin on the other. Mearsheimer, attempted to examine the claim whether institutions really matter. To this end, he tried to show the weaknesses of liberal institutionalism. Mearsheimer asserted that the instutionalist theories were severely flawed and had minimal influence on state behaviour (Mearsheimer 1995, 7). Keohane and Martin, being proponents of neoliberal institutionalism in their reply that Mearsheimer's version of realism had serious defects (Keohane and Martin 1995, 39). From a neoliberal institutionalism perspective, realism was rather narrow and limited in explaining state behaviour. In this context, it would be wise to argue that the liberal institutionalism tried to evolve realism rather than to challenge it. Nevertheless, the debate concerning the division of the subject matter is an important one for the neo-neo debate which has shown itself in the security versus political economy separation. This separation has actually been discussed extensively in between Mearsheimer (1995, 26), and Keohane and Martin (1995, 42-22) in their respective studies.

Neorealism asserts that neoliberal institutionalism largely ignores security issues and concentrates instead on economic and to a lesser extent environmental issues (Mearsheimer 1995, 26). Neorealists claim that international politics can be divided into two realms as security and political economy, and that the liberal institutionalism mainly applies to the latter rather than the former. Increased cooperation in economic and environmental realms is presumed to reduce the likelihood of war according to liberal institutionalism, although they did not provide any explanation with respect to how this could be done (Mearsheimer 1995, 15-16).

Neoinstitutionalists scholars Keohane and Martin claimed that although Mearsheimer, and thus neorealism, provides an admirable summary of several aspects of institutionalism, his version of institutionalist argument requires correction. According to Keohane and Martin (1995, 43), the assertion that the international politics can be divided into two realms as security and political economy was not a predominant view of institutionalism and cannot be accepted. Keohane and Martin (1995, 43) further argued that Mearsheimer's claim in this respect was quite surprising, especially with respect to his attention and great support to Kenneth Oye. A major argument of Oye (1986, 22) was that

institutionalist theory can be applied to both the security and the political economy issues. Although it is true that there is no clean line in between these two realms, the neat dividing line of Mearsheimer against the subject area of neorealism and neoliberalism is not acceptable (Keohane and Nye 1985, 43). As evidence to this, Keohane and Martin (1985, 43) quotes Axelrod and Keohane who put forward that

> It has often been noted that military-security issues display more of the characteristics associated with anarchy than do political ones…political-economic relationships are typically more institutionalised than military-security ones. This does not mean, however, that analysis of these two sets of issues requires two separate analytical frameworks. Indeed, one of the major purposes of the present collection is to show that a single framework can throw light on both (Axelrod and Keohane 1986, 236).

In spite of this debate concerning to what extent neorealism and neoliberalism studies two different worlds, it is truism to claim that both neorealism and neoliberalism focus on similar questions and share many assumptions about actors, values, and other issues in the international system. Against this backlog and in line with the main argument of this study, the following sections review the attitude of the neo-neo debate on issues of cooperation, relative gains and globalization.

2.2.1. Neo-Neo Debate and International Cooperation

The study of cooperation has been a continuous task of many scholars (Mearsheimer 1995, 5-49; Keohane and Martin 1995, 39-51; Jervis 1999, 42-63) including those from neorealism and neoliberalism. Scholars of neorealism and neoliberalism both agree on the assumption that international system is anarchic. Further, they both accept that there is no common authority to enforce any rules or laws constraining the behaviour of states or other actors. Moreover, they both think that anarchy encourages states to act in a unilateral way and to promote self-help behaviour. Thus, cooperation becomes more difficult to achieve in such circumstances (Lamy 2011, 122-123).

According to neorealism, anarchy puts constraints on foreign policy and that neoliberals minimize the importance of survival as the goal of each state. While neoliberalism claims that neorealism minimizes the importance of international interdependence, globalization and regimes, neorealism argues that international cooperation would not happen unless states make it happen because international cooperation is hard to achieve, difficult to maintain and depends on the state power (Lamy 2011, 122-123). Thus, neorealist perspective is considered to be more pessimistic due to its conception of the world as a much competitive and conflictive place. Meanwhile, neoliberalism also recognizes a competitive world

but it considers opportunities for cooperation in the areas of mutual interest as a mitigating factor to diminish the effects of the anarchic environment (Lamy 2011, 122-123).

In neorealism, the international system is portrayed as a brutal arena where states look for opportunities to take advantage of each other, and therefore do not have much reason to trust each other. According to Mearsheimer who is a leading advocate of offensive realism, states fear to cooperate because international relations system is not a constant state of war, but it is a state of relentless security competition among great powers on the anarchy of the international system, with the possibility of war always at the background. Thus, institutions have minimal influence on state behavior (Mearsheimer 1995, 9-11). Despite this explanation, states do frequently cooperate in this competitive world with an aim to maximize their powers. Likewise, Donnelly (2000, 148) challenges this realist claim by asserting that states do form institutions because they are not capable of reaching the same results on their own. Donnelly (2000, 148) continues his remarks by asking why powerful states would bother with norms and institutions, which enmesh them in constraining rules and procedures, if they could achieve the same results independently. This is indeed an important issue as it demonstrates why states choose to cooperate in various areas such as security, economics, trade, and development.

Additionally, from a neoliberal perspective, institutions make it possible for states to cooperate in mutually beneficial ways by reducing the costs of making and enforcing agreements[9] in a given subject over a particular matter. If rules can be agreed upon to cover situations of a particular sort in the future, there would be no need not to hold negotiations in every case. By providing order and predictability, norms and institutions allow states to behave differently, even if all this means that they are able to pursue a wider range of interests in a greater variety of circumstances (Donnelly 2000, 148). Despite this, institutions rarely engage in centralized enforcement of agreements, and they do reinforce practices of reciprocity, which provide incentives for governments to keep their own commitments to ensure that others do so as well. Therefore, even powerful states have an interest, most of the time, in following the rules of well-established international institutions, since general conformity to rules makes the behavior of other states more predictable. Yet interdependence has raised new questions about how these institutions themselves are governed (Keohane 2001, 28). Against this backlog, it can be argued that states are no longer sole actors of international relations and international institutions would definitely have influences in world affairs.

[9] This is what economists refer as transaction costs.

2.2.2. Neo-Neo Debate and Relative Gains

Neorealism and neoliberalism which are the contemporary approaches of international relations, compete with each other in seeking to realize how the anarchical context of the international system prevents joint action among states that are otherwise share common interests and how states overcome these impediments and achieve cooperation (Grieco et.al. 1993, 729). Neoliberals argue that in the face of international anarchy, states that come across mixed interests often fail to cooperate because they are tempted to cheat or afraid of being cheated. They further argue that cheating problem can be solved if states create international institutions that help them to work with another on the basis of strategies foreseeing conditional cooperation. Neorealists emphasize that international cooperation is possible but it is more difficult to achieve and maintain than the neoliberals argue. Neorealists suggest that anarchy impedes cooperation not only because of the cheating problems[10], but especially because this leads states to be concerned on the grounds that one could get a better deal from the arrangement (Grieco et.al. 1993, 729).

In this regard, a few neorealist scholars like Grieco, Snidal and Powell as well as a number of political economists[11] such as Gilpin, Krasner, Larson focus on the concepts of relative and absolute gains. They all have discussed the inhibiting effect of relative gains on cooperation in international affairs. The debate has centered itself on Joseph Grieco's argument that states are more concerned about relative than absolute gains which creates difficulties in reaching at international cooperation.

At the outset, Grieco claims that states are interested in increasing their power and influence (absolute gains) and, thus will cooperate with other states and actors in the system to increase their capabilities. Yet, states are also concerned with how much power and influence other states might achieve (relative gains) in any cooperative endeavor (Lamy 2011, 119). Indeed, the problem of relative gains versus absolute gains divides neoliberal institutionalism and neorealism. Neoliberal institutionalism assumes that states focus primarily on absolute gains and emphasizes the prospects for cooperation. Whether cooperation results in relative gains or loss is not very important in neoliberal institutionalism as long as it brings an absolute gain. Neorealism, however, argues that states are largely concerned with relative gains in any cooperative engagement (Grieco 1988, 485) and emphasizes the prospects for conflict. In the anarchy of international

[10] As mentioned above, concerns about cheating is another factor that hinders cooperation among states according to realists. States are often reluctant to enter into cooperative agreements for their fear that the other side will cheat on the agreement and gain a relative advantage or an upper hand. Neorealism shares the view that states sometimes cooperate or operate through institutions, however to a limited extent (Gilpin 2000, 9).

[11] For a detailed analysis please see Snidal (1991, 701-726).

politics relative gains are more important than absolute gains (Powell 1991, 1303).

Grieco, Snidal and Powell claim that the concepts of relative gains and absolute gains are inhibiting factors to cooperation. Grieco often criticizes others of not being comprehensive enough to handle the matter. It has been shown by Snidal that relative gains are unlikely to have much impact on cooperation if the potential absolute gains from cooperation are substantial, or in any context involving more than two states. This debate also made distributional and bargaining issues more salient. But if the debate becomes one of whether relative gains matter, then one needs to ask under what conditions such distributional conflicts are severe. Liberal institutionalism argues that distributional conflict may render institutions more important. Especially in complex situations involving many states, international institutions can step in to provide constructed focal points that make cooperative outcomes prominent (Grieco et.al. 1993, 729-730; Snidal 1991, 703; Powell 1991, 1306).

As this differentiation shows neorealism holds the view that states are concerned with both absolute and relative gains and the basic question that necessitates special attention is how gains are distributed, meaning that who (which states) will gain more from cooperation rather than whether all parties gain from cooperation. Neoliberals argue that cooperation does not work when either states fail to follow the rules or cheat to secure their national interests. Neorealism, on the other hand, claims that there are two barriers to international cooperation. These are cheating and relative gains of other actors. Neorealists furthermore states that when states fail to comply with rules that would encourage cooperation, other states might give up multilateral activity and start acting in a unilateral fashion (Lamy 2011, 119).

According to the critics, liberal institutionalist theory largely ignores relative gains concerns. To this end, offensive realists like Mearsheimer and Grieco argue that liberal institutionalism assumes states to focus exclusively on absolute gains (Mearsheimer 1995, 19). Liberal institutionalists, on the other hand, suggests that it is important to understand the great variation to the extent to which relative gains matter (Keohane and Martin 1995, 44-46). According to neoliberalism, realists interpret relative gains in a way to show that states will not cooperate with one another if each suspects that its potential partners are gaining from cooperation more than itself. Thus, neoliberals try to show that from a liberal institutionalist perspective, institutions provide valuable information, and information about the distribution of gains from cooperation that may be especially valuable if the relative-gains logic is correct (Keohane and Martin 1995, 45-46). Pursuant to neorealists, neoliberal institutionalism does not directly address the important question of how to prevent war, but focuses instead on explaining why economic

and/or environmental cooperation among states is more likely than realists recognize. Therefore, neorealism is of the opinion that neoliberalism largely ignores security issues and concentrates instead on economic and to a lesser extent environmental issues (Mearsheimer 1995, 15-16).

Gilpin, who is a leading international political economy scholar, focused on the inhibiting characteristic of relative gains much carefully than liberal scholars of political economy. Neoliberals argued that the significance of absolute gains are more important than the analysis foreseen in Grieco's approach. Neoliberals furthermore think that Grieco has overstated the significance of relative gains. However, Gilpin (2000, 9) believed states had always been sensitive to the relative gains. In this context, Gilpin (2000, 9) stated that:

> The importance of absolute gains versus relative gains in state calculations is actually highly dependent upon the circumstances in which a specific trade-off occurs. While it may be true that states can never be totally unconcerned about the distributive consequences of economic activities for their relative wealth and power, they frequently do, largely for security reasons, ignore this concern in their dealings with others…Modern nation-states are extremely concerned about the consequences of international economic activities for the distribution of economic gains. Over time, the unequal distribution of these gains will inevitably change the international balance of economic and military power, and thus will affect national security. For this reason states have always been very sensitive to the effects of the international economy on relative rates of economic growth.

Keohane (1984, 135) argued that institutions perform important tasks for states based on the shared interests, thus enable them to cooperate. In this vein, Keohane presented a theory of international institutions based on the rationalist theory, in particular economic theories of the firm and of imperfect markets. Keohane especially recognized that institutions reduce the costs of making, monitoring, and enforcing rules, in other words the transaction costs, then provide information, and facilitate the making of credible commitments. According to this theory, the principal guarantors of compliance with commitments are reciprocity (including both threats of retaliation and promises of reciprocal cooperation), and reputation. Liberal institutionalists sometimes assert that institutions are an important cause of international stability. As argued by some, if there is a strong causal link between institutions and economic cooperation, it would be relatively easy to take the next step and link cooperation with peace. Moreover, institutions that facilitate cooperation do not coerce what states should do but instead they help governments to pursue their interests through cooperation (Keohane 1984,

235). Therefore, institutionalists consider cooperation as an essential matter in a world of economic interdependence while at the same time they argue that shared interests create a demand for international institutions and rules (Keohane 1984, 7). Furthermore, neoliberals based on Young's definition of institutions, continue to be one step ahead and define sophisticated institutionalists as the ones who

> view institutions not simply as formal organizations with headquarters buildings and specialized staffs, but more broadly as recognized patterns of practice around which expectations converge (Keohane 1984, 7).

Liberal institutionalists consider recognized patterns of practice leading to convergence in expectations of nation states being crucial because of their effect on state behavior. They also argue that interdependence creates interests in cooperation. In this context, Keohane considered that, states though internally diverse, are limited by their environments. Therefore, students of world politics have sought to explain regularities in state behaviour by understanding the structures and processes of international systems. As is known, this view is recognized by the neorealist theory of Kenneth Waltz, in which the structure of international system is conceptualized as anarchic. Waltz had recast the principles of classical realism to delineate more clearly the effects of the structure of the international system on the behaviour of nation states (Lamy 2011, 117). Nevertheless, neoliberalism put forward that although neorealist theory provided a valuable beginning for analysis, it overlooked the fact that "world politics at any given time is to some extent institutionalized" (Keohane 1989, vii). Simply, for neoliberalism understanding state behaviour required not only the relative physical power capabilities of states but also the comprehension of world political institutions, regardless of whether they were formally recognized and explicitly codified (Keohane 1989, vii). This argument is in line with the increasing role of institutions as an actor in international world order.

Due to the security seeking nature of states forces, nation-states tend to be prudent concerning international cooperation and international organizations. For neorealists, a state would cooperate if the security of a state is not put into risk. However, it is not easy to guarantee the security of a state. Therefore, security seeking or security maximizing states would be concerned about the relative gains expectations of other states in terms of military and/or economic cooperation. In a nutshell, in relation to relative gains, neorealism states that if states are considering cooperation, they must also consider how the profits or gains will be distributed among them. On one hand, neorealists can focus on maximizing their own profits and care little about what the other side would gain or lose, that means they act in terms of absolute gains. On the other hand, they can think in terms of relative

gains which means that each side not only considers its own individual gain, but also considers how well it does when compared to the other side.

2.2.3. Neo-Neo Debate and Globalization

As is widely expressed, realism with its progeny neorealism constituted the dominant school of thought during the Cold War. War and peace have been the long lasting characteristics of interstate relations in that era, while neoliberal institutionalism has developed as one of the most striking theories facing neorealism with its special focus on political economy matters. With the end of Cold-War, first and foremost the bi-polar structure that characterized the world politics has come to an end. The Cold War era that has lasted for almost half a century was replaced by a multi-polar structure in this new world. At this juncture, globalization emerged as a result of new technological developments accompanied with the advances in infrastructure in the aftermath of the Cold War. No doubt that the neo-neo debate which has dominated the mainstream scholarship in the international relations since mid-1980s, has been influenced from this dramatic change. On one hand, some consider the end of the bi-polar international system as a major turning point in international history in which inter-state violence would gradually become a feature of the past, while greater cooperation would become the dominant value of various kinds of collectivities (including states). On the other hand, for others, neorealism remained the best approach to think about different issues (Baylis et.al. 2011, 254). None of the theories including the neorealism and neoliberalism have the adequate answers to explain the world politics in a global era because each sees globalization through different lenses (Baylis et.al. 2011, 7). Nevertheless, the end of the Cold War, necessitated the renewal and intensification of the ongoing debates in the international relations theories in the light of globalization.

Globalization can simply be defined (Baylis et al. 2011, 8) as a process of increasing interconnectedness between societies in such a way that events in one part of the world increasingly have effects on societies and peoples located far away. In a globalized world political, economic, cultural and social events become interconnected to each other more and more each day. Societies are affected deeply and extensively by the events of other societies in an exponential ratio (Baylis et al. 2011, 8).

In such a global world, nation states and institutions have become more interdependent. This is because globalization brought states and communities closer to each other. In such an environment of increasing agenda accompanied by new technologies and enhancements in the infrastructure, the world has become a global village which generates further interdependence of every kind of economic and cultural activities among states. Therefore, it would be right to

argue that international institutions could help states for furthering and improving cooperation among themselves in the case of globalization.

The end of Cold War increased the importance of the presence of international institutions[12] parallel to the process of globalization. It was not surprising to see several new regional organizations established by states to initiate and continue their dialogue on several topics of common concern. In a supportive fashion, Keohane (1998, 82) argued that "analyz[ing] world politics in the 1990s is to discuss international institutions: the rules that govern elements of world politics and the organizations that help implement those rules".

However, most realists do not think that globalization changes the rules of the game in international politics at all. Although states might require more resources and expertise to maintain their sovereignty, the state has still the monopoly over the coercive use of power. Neorealists like Waltz recognized that the globalization presents challenges for nation-states but denies that states are being pushed aside by new global actors. Neorealists are in the opinion that state remain the main actor but expanded its power to effectively manage the process of globalization. Neorealists are also concerned with the economic globalization. Inequality in the international system might become the greatest security threat in the future because poverty could trigger change and this change can be violent. Economic globalization further highlights existing differences in societies, creates instability in strategic regions and as a result challenges world order (Lamy 2011, 125-126). Unlike the fears of neorealists, states did not lose their authority or control against the forces of globalization. Yet globalization has influenced domestic politics and existing power structures. But transnational social movements and global advocacy networks have successfully shifted many political issues away from the state (Lamy 2011, 125-126).

Globalization discussions fall under two categories in neoliberalism. The first category revolves around the idea of a free-market commercial neoliberalism that dominates policy circles throughout the world. The second category focuses on the academic neoliberal institutionalism that promotes regimes and institutions as the most effective means of managing the globalization process. Free market liberals advocate that governments should not fight globalization or try to slow it down. They consider globalization as a positive force. From this point of view, institutions should promote rules and norms that keep the market open because eventually all states would benefit from the economic growth promoted

[12] Even though indirectly, Keohane establishes a link between international institutions and their role in the end of the Cold War. Thus, according to neoliberal institutionalist point of view, institutions have helped states to overcome collective action problems by providing information and reducing the costs of transactions during the Cold War (in Keohane 1993, 284). In simple terms, neoliberals did not believe in the necessity of the bi-polar world for the existence of strong international regimes contrary to neorealists.

by globalization. Academic neoliberals support institutions and regimes to the extent that they manage the economic processes of globalization as a means to prevent uneven distribution of resources that might widen the gap between rich and poor states (Lamy 2011, 125-126). The critics of economic globalization claim that governments will have to extend their jurisdictions and intervene more extensively in the market to extend these concerns while opening the market (Lamy 2011, 127).

2.3. International Institutions and Governance in the Global World Economy

The term governance has been used increasingly to describe policy making at the national, regional and global levels extensively since the beginning of 1980s. The blueprint of the term governance was provided by neo-liberal ideologies in 1980s. Definitions and uses of governance vary depending on the issues and levels of analysis to which the concept is applied. Yet the term covers a wide range of issues from social coordination to policy making in the absence of an overarching political authority (Krahmann 2003, 323). Meanwhile, with the fall of Berlin Wall, the world has moved away from the sharply divided international economy of the Cold War to an increasingly integrated global and capitalist economy. Regardless to mention, the basic reason behind this change is the end of Cold War in 1989 and the subsequent disintegration of the former Soviet Union. Interdependence theories of the 1970s, the rapid industrialization experienced in the 1980s, and the emerging markets arisen in East Asia, Latin America and other places in the 1990s all together shifted global economic power and created an increasingly competitive international economy. In such an atmosphere, globalization became the buzzword (Keohane 2002, 14) in the 1990s. Increases in international trade, financial flows, and the activities of multinational firms integrated the economies of nation states into global economic system more and more through the globalization process. Those developments also led to the changes at the national and international level towards the end of the decade (Gilpin 2000, 7). Globalization refers to real changes of fundamental importance. These changes have significant implications for many realms including politics, economics among others. (Keohane and Nye 2000, 193). Indeed, globalization has been affecting governance processes, and it would certainly be affected by them in the future.

Globalization has not led to the creation of new theories of international relations but transported the existing theories to new issue areas in light of the changes at the global political economy level (Drezner 2001, 55). To this end, firstly neoliberal institutionalism specifically argues that the interdependence of 1970s has taken over by globalization to describe the increases in economic openness and integration in time. Keohane defines interdependence as a state of the world, whereas globalization as a trend of increasing transnational flows

and increasingly thick networks of interdependence. Both interdependence and globalization are multidimensional concepts including economic issues. Additionally, globalization implies an answer to the question of convergence and divergence of national policies (Keohane 2002, 15). From the mid-1990s, this time new institutionalism became prevalent in the literature of the international relations parallel to the developments regarding globalization.

New institutionalists such as Meyer, DiMaggio, Powell and Douglas North argued that international institutions rather than states should respond to the demand by states for cooperative ways to fulfill their own purposes. They have considered the study of institutions as a lens for viewing work in a number of disciplines including economics, sociology, and political science (Bache et.al 2011, 22). New institutionalism recognized that institutions operate in an environment consisting of other institutions, called the institutional environment. Every institution is influenced by the broader environment in other words by institutional peer pressure. In this environment, the main goal of an organization is to survive. In order to achieve that, institutions first have to be economically successful, then they need to establish their legitimacy within the world of institutions. Further, international institutions can assist states to achieve collective gains by reducing uncertainty and the costs of making and enforcing agreements. This school of thought, however was not without its critics (Bache et.al 2011, 22; Keohane 2002, 30).

Opponents of new institutionalism criticized that international institutions are not very much of significance because states are the ones which exert the only real power. In terms of international economic organizations, opponents claim that major contributors are the ones which play the dominant role in the final decisions. Hence, the effect of these international institutions should be attributed to the efforts of those big powers behind the lines. Keohane (2002, 31) thinks that this argument was overstated because even great powers, like the US, find it useful to compromise on substance to obtain the institutional endorsement for which the decision making procedures and general rules of international institutions matter. Besides, the policies that emerge from these institutions are different than that of the individual nation states would have adopted in a unilateral fashion (Keohane 2002, 31). In a more specific manner, on one hand, economic globalization, trade globalization, financial flaws, and the activities of multinational firms all influence international economy and make it more interdependent. While on the other hand, the end of Cold War significantly weakened the political ties that have held the international economy together. Thus, the rules governing trade, money, and other international economic matters become inadequate for a highly integrated and fragile global economy. So in this two sided atmosphere, improved governance and management have become imperative (Keohane 2002, 32) in the analysis of international relations.

This is because during Cold War era, states were acting within the framework of a general order in all walks of international relations. States were in a way compelled to act within the framework of a generally accepted rules based on either non-written norms among states or within the fixed parameters of the then present institutions that they were members of. In other words, conduct of general affairs were either too simple (if everybody have agreed upon a course of action) or almost impossible (if at least some significant states have not agreed upon the main parameters of a course of action). On one hand, states could create a decision through an international organization or have to freeze that file until the main parameters would change or there would be a game-changer. However, culmination of the Cold War brought an end to this order. Since a sort of disorder and chaos started in different areas states started to seek a regional or international order – if not a set rules or regulations to protect their interests. This disorder was also accompanied by an increased agenda of states and institutions which could directly affect the communities such as environment, health, food security, water, trade and many other new global issues including competition. These new topics were not easy to tackle with existing instruments, and therefore required efforts for not only national or regional governance but also global governance as well.

2.4. Conceptualizing Governance in International Relations: Governance at the National, Regional and Global Levels

The early interactions between the term governance and international relations theories dates back to 1980s. But particularly, during the 1990s international relations theorists started to realize that something deeper and more fundamental than a mere interconnectedness was happening among the states and between the states and the individuals. The state is challenged, its sovereignty is undermined and constrained, its structures become unable to provide the necessary public goods following the incredible technological change in the face of economic globalization (Mingst 1999, 89). Moreover, the world is no longer organized into a set of discrete sovereign states exercising a large degree of control over their domestic economies. Globalizing patterns in trade, finance and economy add new complexity to international relations. They transcend, blur, and even redefine territorial boundaries (Mittlemann 1997, 229), which attempted to be explained by new institutionalism. But new institutionalism was not adequate in explaining all these changes associated with globalization. This matter clearly demonstrates the changing nature of the current global system as a whole.

Likewise the Commission on Global Governance in 1995[13] explained the change experienced in the global world by stating that

> What is new today is that the interdependence of nations is wider and deeper. What also new is the role of people and the shift of focus from states to people. An aspect of this change is the growth of international civil society. These changes call for reforms in the modes of international cooperation (Commission Global Governance 1995, 1).

As can be seen from the above reflections, the binding term for this transformative period becomes globalization following the end of Cold War. One can argue that it is the intensification of globalization which has initiated a global system. In this global system, the interaction between actors has also intensified parallel to the increase in the actual number of potential actors. Hence, in line with the developments of globalization, world is now operating in an environment where deep structural, institutional and political impediments exist. There are multiple actors having concerned with multiple issues. There exits multiple and overlapping centers of power in the global system, as a result of which governance becomes the core concept that explains this new formation in understanding world politics better.

Globalization which has significant political, social, cultural and economic dimensions that have affected the developments around the world, continuously encourages peoples and societies to seek ways to forge a new mentality and approach that might transform the world around. In this respect, globalization has increased the need for new understandings, mainly from governance, to cope with the problems that it creates. The type and nature of the interconnectedness which is inherent in globalization increased the relevance of the notion of governance. From this point of view, the link between globalization and governance entails mutual interaction of different actors.

Perhaps one of the best explanations concerning the linkage between globalization and governance was provided by Drezner. As precisely argued by

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[13] Commission on Global Governance (1995), *Our Global Neighborhood: The Report of the Commission on Global Governance*. International Commission of 28 individuals established in 1992 following the end of Cold War with an aim to suggest new ways in which the international community might cooperate to further an agenda of global security. The Commission hoped that evaluation of the strengths and weaknesses of global governance would provide a framework for more effective policies and inspire nations to adopt a more global perspective. The commission believed that the easing of East-West tension created a better environment for global cooperation. The Commission on Global Governance's greatest contribution to international affairs was its report titled *Our Global Neighborhood*. The report was first published in 1995, it presented the commission's conclusions and recommendations for discussion at the General Assembly of the United Nations' 50th-anniversary session. The Report has served as a blueprint for global governance and has become a key reference for discussions and debates on multilateral cooperation.

Drezner (2001, 52), "globalization leads to a convergence of traditionally national policies governing environmental regulation, consumer health and safety, the regulation of the labor, and the ability to tax capital". This study claims that competition law can be easily added to this list. Drezner (2001, 52) defines convergence as the tendency of the policies to grow more alike in the form of increasing similarity in structures, processes, and performances. In addition, the extent of policy convergence is determined by the ability of the states to cooperate and the ability to agree on the norms of governance (Drezner 2001, 52). At this point, the following section first considers governance as a general phenomenon, then attempts to describe it as the policymaking at the national, regional and global levels.

2.4.1. Defining Governance

When the governance literature is reviewed, it would be realized that there are many definitions and uses of governance which vary according to the use and level of analysis. In 1980s, industrialized nations such as the UK, the US and New Zealand realized that the existing governmental policymaking structures were unsatisfactory and needed to be replaced. Thus, industrialized nations recognize the need for the increasing usage of the concept of governance to describe policymaking at the national, regional and global levels. Meanwhile, the blueprint of the term governance was provided by neo-liberal ideologies supported by those industrialized nations in those years. These neo-liberal ideologies also advocated for the introduction of competition and market principles into public administrative systems (Rosenau 1992, 4). The flexibility of the concept brings its advantages and disadvantages at the same time. In a similar fashion, this study recognizes governance at the national, regional and global levels.

Governance has become a popular term especially with the rise of globalization in many policy fields all around the world. In the context of combatting global inequalities like climate change, global security, trade as well as economic issues, particularly global governance became the response to the need of global action. Governance and eventually global governance represents the ability to manage the problems at various levels through a culture of cooperation with non-violent norms and principles in a new and unprecedented way (Postolache 2012, 5). Likewise, the Commission on Global Governance (1995, 2) in its famous 1995 Report defined governance as

> the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and cooperative action may be taken. It includes formal…as well as informal arrangements that people and institutions have agreed to or perceive to be in their interest.

Governance, in general, is a phenomenon more encompassing than government. It covers governmental institutions. But it also entails informal, nongovernmental mechanisms in which those persons and organizations involved move ahead, satisfy their needs and fulfill their requests. In other words, governance is a system that depends on inter-subjective meanings and formal agreements. Therefore, governance works only if accepted by its actors (Rosenau 1992, 4). Accordingly, Rosenau (1992, 4) defines governance as such;

> Both [governance and government] refer to purposive behaviour, to goal oriented activities, to systems of rule; but government suggests activities that are backed by formal authority, by police powers to insure the implementation of duly constituted policies, whereas governance refers to activities backed by shared goals that may or may not derive from legal and formally prescribed responsibilities and that do not necessarily rely on police powers to overcome defiance and attain compliance. Governance, in other words, is a more encompassing phenomenon than government.

The recent uses of governance commonly refer to the fragmentation of the political authority among governmental and non-governmental actors at the national, regional and global levels. Unlike traditional uses of government, governance indicates a new mode of government where state and non-state institutions, public and private actors participate and cooperate at different levels of policy making (Gatta 2005, 488).

In terms of general definition, governance can be understood as the structures and processes that enable governmental and non-governmental actors to steer their interdependent needs and interests through policy making and implementation in the absence of a central authoritative unit (Rosenau 1992, 4) hence, governance brings about a multilevel analysis into the system. Indeed, there is a wide variety of international policy problems that require governance including competition law and policy. The need is sometimes global in scope as in the case of climate issues, then in other cases governance problem is both national, regional and global as in the case of competition law and policy. The following section focuses mainly on national, regional and global governance issues due to their relevance and linkage with the subject matter in question.

2.4.2. National Governance

At the national level, this study adopts that the term governance entails national and subnational levels. From this perspective, governance is divided into the following four categories (Krahmann 2003, 325). The first category associates governance with the concepts of political system or state structure. This categorization includes the analysis of presidential, parliamentary, democratic,

non-democratic, federal and centralized systems. The second category refers to the level of subnational bodies like local councils, municipalities, cities. The third category consists of particular policy sectors such as education, health, competition, transport. Last but not least, the last category entails the corporate governance (Krahmann 2003, 325-326).

Briefly, national governance entails the increasing role of private sector and nongovernmental actors in the public policy making. Indeed, from a historical point of view the increasing role of private actors in the national public policy can be traced back to governmental reforms. The reasons for these reforms initially seem to have arisen from the developments experienced in the international system. The 1970s world recession, the pressure of globalization, and the rise of the EU can be classified as the main characteristics of the international environment that had affected national governance structure in international politics. In the developing world, similar developments have been experienced by the activities of IMF and World Bank in the early 1990s (Krahmann 2003, 325).

Yet, some others argue that the increasing role of private actors and nongovernmental actors can be explained by the fact that pressure on the governments concerning the gradual decrease of their direct role in public services was already embedded in the welfare state system. Especially the extension of the functions of the state bureaucracies in time led to an organizational overload. Despite the fact that globalization is strongly affecting domestic governance, it does not mean that nation-state becomes obsolete. On the contrary, the existence of national political traditions and cultures means that the state will remain the basic institution of governance. As argued by Keohane, the compromise of embedded liberalism in return for openness was successful in the second half of the twentieth century. This compromise was the basis for Bretton Woods institutions that governed specific policy areas in world politics. This compromise combined economic globalization with some domestic autonomy for democratic politics (Keohane 2002, 214).

So, national level governance is distinguished from government in literature with an aim to explain the involvement of private actors like nongovernmental agencies, firms, associations, or interest groups etc. as the newly emerging policy making arrangements during the provision of public services as well as in social and economic regulation (Krahmann 2003, 325).

2.4.3. Regional Governance

The growth of regional organizations in world politics is a consequence of newer imperatives that follow the end of Cold War and the rise of globalization (Rosamond 2005, 463). Another reason behind the widespread increase in the regional governance relies on the fact that global organizations are not sufficient

to deal with the governance deficit at the nation state level (Kirkham and Cardwell 2006, 405). International organizations such as UN and WTO can become too slow and unwieldy that they would not be adequate and sensitive enough to satisfy the local needs.

But the use of the term governance at regional level analysis has often been associated with the complex, multilevel decision making and implementation process of the EU (Krahmann 2003, 327). From the EU point of view, the term governance is a very versatile one. It is used in connection with several contemporary social sciences, especially economics and international relations. It originates from the need of economics (with respect to corporate governance) and international relations (with respect to national governance) for an all-embracing concept capable of conveying diverse meanings not covered by the traditional term government.

Regional cooperation between nation states have been pursued throughout the world since the end of World War II. However, there has not been any standard in this tendency. The result is rather a vast number of regional entities with different structures having different sizes, aims, legal foundations, depths of integration etc. Behind this trend of regional governance, there are two important reasons (Kirkham and Cardwell 2006, 405). Firstly, regional entities are capable of performing functions that the nation states are unable to perform alone. Despite the fact that the nation state has been dominant in law making and public power, it is almost inevitable to argue that there is considerable potential in turning to the alternative solutions of governance given the global and transnational structure of the economic relations that transcends national boundaries. Indeed, the development of international organizations as well as international law demonstrates a long held recognition of the need for different forms of governance other than the one at the national level. Secondly, global organizations such as the UN and the WTO have all been criticized as to being ineffective and inefficient with respect to local needs. (Kirkham and Cardwell 2006, 405).

There are a number of reasons why regional institutions could be a solution to the inadequacies of more traditional forms of governance. In addition to political appeals, domestic self-interest presents one of the basic rationale behind the formation of regional institutions. Indeed, such formation is particularly determinant in security concerns. Thus, when faced with external threats, nation states have started to come together to establish collective security groups. NATO is one such example. Other than security issues, the pursuit of cultural, political and "economic" objectives can also help to explain the development of various regional institutions. Post-war Europe is a very good example of strong cooperation and integration leading to formation of the EU (Kirkham and Cardwell 2006, 406).

EU is a good example because no other regional body has been able to reach the EU progress in terms of political or economic cooperation so far. Moreover, no other grouping has ever reached the first level in terms of the basic requirements of integration consisting of historical reconciliation and developing the necessary political will. The degree of economic cooperation between member states of a regional body is often considered as a way of increasing competitive environment that would create a level playing field for all businesses. This would eventually pave the way to the creation of a common market as in the case of EU integration model. It can be argued that for regional governance the EU is the most advanced example in existence so far. In constitutional terms, the EU is an extraordinary legal entity. EU has a supranational character and constitutional order. But before discussing regional governance from the EU perspective further, a short glance to the EU studies through important theoretical debates under international theories is reflected below.

Neofunctionalism being the first grand theory to explain European integration was developed in the second half of the 1950s mainly by Ernst Haas in his book *The Uniting of Europe*. Indeed, as continuously put forward by Haas as a distinct approach rather than a theory, neofunctionalism not only tries to explain the dynamics of the European integration but also tries to predict the future of the integration process by mainly focusing on spill-over. Neofunctionalism places major emphasis on the role of the non-state actors especially on the secretariat of the regional organization involved. Member states remain important actors in the said process. Although they set the terms of the initial agreement, they do not determine the direction and extent of the subsequent change (Schmitter 2002, 2-3). Neofunctionalism considers integration as

> the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities to a new larger center, whose institutions possess or demand jurisdiction over the preexisting nation states (Haas 1961, 366-367).

Integration forms cooperation over particular issues and consequently spills over to expansion of integration. According to the spillover effect, policies made pursuant to an initial task and grant of power can be made real only if the task itself is expanded, as reflected in the compromises among the states interested in the task. Expansion of integration leads to a supranational authority which

> implies the existence of a continuing organization with a broad frame of reference, public debate...and the statement of conclusions in a formal resolution arrived at by some kind of a majority vote (Haas 1961, 366-368).

In brief, integration is a continuous and an inevitable process with significant consequences. Spill over is an important process that could be divided into functional (sectoral) spillover and the political spillover. Functional spillover involves the expansion of integrative activities from one sector to another whereas the latter implies increasing politicization of sectoral activity as for example when the coordination of monetary policies was replaced by a more centralized system of governance (Moga 2009, 797).

1970s and 1980s were seen as a stagnation in neofunctionalism parallel to the developments regarding the then EU's progress. At this juncture, through its intergovernmentalist critic of neofunctionalist theory, Stanley Hoffmann emphasized the importance of the national governments and their role in shaping the EU's structure while highlighting the dichotomy between low (such as economic and welfare policies) and high politics (such as foreign policy and security). When developments in the EU are examined historically, one can say that the role and the influence of intergovernmentalism increased particularly at important times such as before the signing of the basic treaties such as Single Market Act, Maastricht Treaty, Treaty on the Functioning of Europe. Whereas neofunctionalism continue to preserve its relevance when dealing with more day to day policy making issues (Moga 2009, 803).

Recently, however it has been argued that the debate between neofunctionalism and intergovernmentalism14 is lacking the necessary tool to question the development of the EU (Rosamond 2005, 463). In order to demonstrate that the neofunctionalist approach is not obsolete it was advocated that the EU institutions have an impact that goes beyond the interstate bargaining by shaping the interests of the member states, by defining the paths of political influence and even by becoming players. To this end, it can be argued that

> Once states created an international organization with independent powers, they have brought to life a creature that is, because it possesses autonomy, not entirely under their control (Moga 2009, 803).

For instance, the EU Commission has autonomous powers to enforce the EU rules which can prevent the governments from providing subsidies to industrial enterprises unless some criteria are met. Although much can be said in favour of intergovernmentalism, neofunctionalism has always been a reflexive theory despite the fact that even during its golden age of 1960s and 1970s, this theory has undergone important modifications. With the lessening of competition in between these two approaches, other theories have emerged to explain the development of the EU. Theories related to governance came into existence in

[14] Both neofunctionalism and intergovernmentalism are general, frame type theories of international relations.

such an environment. However, further comparison or possible ranking as to which explains the EU better based on the discussion between neofunctionalism and intergovernmentalism is beyond the scope of this study. Especially the regional governance has become a fashionable term to describe the EU. In fact EU is depicted as a sui generis phenomenon that came into existence in the aftermaths of the World War II (Rosamond 2005, 463) in terms of governance studies in general, and in terms of regional governance studies in particular. Being a regional entity in full power, the EU is an important actor in world politics. The EU governance system contributed greatly to the system of global governance through its 27 member states and over 500 million inhabitants. The strength of the EU governance system arises from its special position.

The system of governance within the EU is characterized by the following criteria (Krahmann 2003, 329), First, policy making and implementation involves a wide range of public and private actors at the national and international levels, such as regional authorities, employers, labor associations, and multinational corporations. Second, policy making is differentiated functionally according to various policy sectors such as external relations, internal market, agriculture and competition. Third, EU is increasingly relying on quasi autonomous agencies such as Court of Justice of the EU, European Central Bank for the implementation of the relevant policies. Fourth, the relations among diverse actors of the EU are nonhierarchical because the relations are based on mutual dependence. Fifth, neoliberal principles got strengthened among the Member States and the EU institutions. And finally, the market principles are increasingly regarded as the most suitable means of coordination. In this context, the EU's contribution into the studies of regional governance is irreplaceable. To date, the EU is the most advanced project of regional integration and thus regional governance. The EU's role as a regional governance model has been recognized by a growing number of countries around the world with its well established institutions, rules and objectives, thus it can be used as a good practice example in global governance studies as a source of inspiration (Postolache 2012, 16). Last but not least, at the regional level, the study of the EU competition policy has been regarded as one of the best examples of European integration and supranational governance due to its central and crucial role in the European integration project all this time (Aydın and Thomas 2012, 531-532).

2.4.4. Global Governance

The use of the term governance at the global level became popular especially in the beginning of 1990s. Even though the term global governance is suggested a world system or world regime, it is used increasingly for the regulated character of transnational and international relations (Krahmann 2003, 329). Meanwhile, the post-Cold War era started with expectations relying on multilateralism,

international institutions and international law. Keohane (1990, 731) defined multilateralism as "the practice of coordinating national policies in groups of three or more states" in 1990 while Kahler (1992, 681) stated that multilateralism defined by the US after 1945 as the "international governance of the many… particularly opposition to bilateral and discriminatory arrangements that were believed to enhance the leverage of the powerful over the weak and to increase international conflict" in 1992. Further to that, Kahler (1992, 681) stated that post-World War II multilateralism expressed an impulse to universality which implied relatively low levels of participation in these arrangements. Although a ticket of admission was always required, when acceding to the General Agreement on Tariffs and Trade (GATT) or joining the International Monetary Fund (IMF) or the World Bank, the price of that ticket was not set so high that less powerful or less wealthy states could also participate (Kahler 1992, 681).

Indeed the institutions and multilateralism has proved to be inadequate to address and understand the issues and challenges of the post-Cold War period. Additionally globalization has come to the forefront. Furthermore, especially the technological developments and innovations led to a borderless world, while it changes the way companies define their purposes, scope of their geographic extension that exceeds national borders. Both the demand for and supply of goods and services became cross border issues. Markets transcend nation states, capital started to flow without any restrictions while multinational companies spread across the world. Hence, the term global governance might be regarded as the way in which both the public and private actors try to accommodate conflicting interests through collective decision making processes beyond state borders. Global governance covers the activities of the government while it also includes other channels of communication, particularly those of non-state actors in global and regional market places (rating agencies, multinational firms, and nongovernmental advisors) and of civil society. All those interaction produces transnational mechanisms of governance and networks across functional policy domains (Higgott 2005, 577) (such as antitrust policy). Global governance is the combination of those arrangements that actors try to put in place to advance, retard or regulate market globalization. This is the core of the relationship between the market and the governance. It reflects the tension that is being experienced through economic liberalization. It is a political debate about the distribution of wealth rather than how to best produce that wealth (Higgott 2005, 577).

Global governance does not mean global government. There is no single world order or a top-down, hierarchical structure of authority within it. Global governance implies an absence of central authority as well as the need for collaboration or cooperation among governments and others who seek to encourage common goals and practices in addressing global issues. Global governance is

the cumulative gathering of governance related activities, rules, and mechanisms, be it formal or informal, public and private, existing in the world that we live in today. Governance deals with those problems that cannot be managed by acting of sovereign states alone. All necessitates a kind of cooperation among the governments and non-state actors, some problems necessitate the establishment of new international mechanisms for monitoring or the negotiation of the new international rules. In this sense, there is a wide variety of international policy problems as such that is in need of governance.

The pieces of global governance are the cooperative problem solving layers that have been put into place by the states and other actors to deal with different matters. These layers of governance can be summarized as follows in Karns and Mingst (2010, 5): (i) international structures and mechanisms (formal and informal), (ii) international rules and laws, (iii) international norms or soft law, (iv) international regimes, (v) ad hoc groups, arrangements and global conferences, (vi) private and hybrid public-private governance. The first layer of governance namely the international structures mechanisms are divided further into two as the intergovernmental organizations (IGOs) and nongovernmental organizations (NGOs). The IGOs can be classified as global[15], regional[16], and other[17] in terms of geographical scope; and as general[18] or specialized[19]in terms of purpose.

IGOs are the organizations that include at least three states among their membership. They have activities in several states, and are created through a formal intergovernmental agreement such as a treaty, charter and a statute. IGOs are recognized subjects of international law with separate standing from their member states. According to Abbott and Snidal (1998, 3-4), states want to become member states to the IGOs because IGOs allow for the centralization of collective activities through a concrete and stable organizational structure and a supportive administrative apparatus. Additionally, these increase the efficiency of collective activities and enhance the organization's ability to affect the understandings, environments and interests of states.

As put forward by Rosenau (1992, 10), some might also wonder whether and to what extent global governance is different from international regimes in the study of international relations. Likewise governance, regimes are arrangements composed of sets of implicit or explicit principles, norms, rules and decision making procedures around which actors' expectations converge for sustaining

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[15] Global IGO examples are UN, WHO, WTO.

[16] Regional IGO examples are ASEAN, EU.

[17] Subregional IGO examples are ECOWAS, COMESA, GCC.

[18] General IGO example is UN.

[19] Specialized IGO examples are ILO, WHO, WTO.

and regulating activities across national boundaries. International regimes are also forms of governance without government encompassing governmental and non- governmental actors. Those actors, however, agree that cooperation based on their shared interests justifies acceptance of the principles, norms, rules and procedures that differentiate while giving coherence to their regimes. The main difference between international regimes and governance is that principles, norms, rules and procedures of any regime are defined as convergence in a given area of international relations, i.e. in a given issue area, while governance in a global order is not limited to a single sphere of endeavor. In this atmosphere, international institutions constitute an umbrella frame for international regimes and orders while governance comes into play when two or more regimes overlap, conflict etc. Furthermore, authoritative principles, norms, rules and procedures are the core of the international institutions (Rosenau 1992, 9).

Against this background, it is also important to conceptualize global governance in international relations theories. Scholars challenging mainstream international relations theories of sovereign nation states embedded in an anarchical international system often mention global governance as a conceptual reference point for their occupation with world politics. The analysis of those scholars usually includes a different set of incidents such as global social movements, the activities of international organizations, public-private networks, transnational rule making, civil society and forms of private authority. Although those authors have referred to a theory of global governance, only a few of them have really tried to think through the implications of the term governance in the international relations discipline (Dingerwert and Pattberg 2006, 189).

In world politics, the work of Rosenau among others carried the line of thinking about the term global governance closest to a theory. Accordingly,

> global governance refers to more than the formal institutions and organizations through which the management of international affairs is or is not sustained. The United Nations system and national governments are surely central to the conduct of global governance, but they are only part of the picture…in an ever more interdependent world where what happens in one corner or at one level may have consequences for what occurs at every other corner or level, it seems a mistake to adhere to a narrow definition in which only formal institutions at the national and international levels are considered relevant (Rosenau 1995, 13).

As underlined by Rosenau (1995, 17), there is no single organizing principle on which global governance rests and governance does not just suddenly happen. Rosenau highlights that people have to be responsible to collective decisions, tendencies toward organization have to develop, cooperation habits

have to evolve, and evolution has to persist. The increase in the number of organizations and the interdependence level among them may trigger needs for new forms of governance but the transformation of such needs into established and institutionalized mechanisms do not come automatically and instead evolved through time.

According to Krahmann, the characteristics of global arrangements vary widely. Most of these arrangements concentrated around sets of states that share specific geographic, economic and cultural similarities. Nevertheless, even within these sets, governance is fragmented among governmental and non-governmental actors at the national and international level. Nation states through national competition agencies in our case still play a central role in global governance. But international organizations, NGOs, and multinational organizations increasingly participate in the formulation, implementation, and monitoring of international policies, rules and regulations. In the absence of a central government or authority in the international system and changing balances in power, the relationships between governmental and non-governmental actors at the national and international levels are becoming complex and horizontal. The rise of global governance like national and regional governance seems to have been enhanced partially by the globalization and partially by the national governments themselves which adopt neoliberal ideas that have supported the use of private actors (Krahmann 2003, 330).

2.5. Concluding Remarks

This study recognizes that even though every theory leaves something out and no theory can claim to offer a picture of the world that is complete, it is truism to argue that all international relations theories offer insights into the behavior of states (Lamy 2011, 128). In this context, doubtlessly, international theories have been opening up new horizons for the main research question of this study. This is because internationalization of competition law and policy can not and shall not be dissociated from the practical advancements experienced in the international political and economic system. And the theories of international relations is one of the best tools to analyse the international system. Since this study aims to introduce an insight from international relations discipline, all the theories and approaches discussed in this Chapter are indispensable and congruent during the internationalization odyssey of competition law and policy. In fact, this study claims that all the theoretical approaches mentioned herein aims to understand the mechanism and the historical evolvement behind the internationalization of competition process.

The internationalization project of competition law and policy has a long history. But especially the tremendous increases in the international mergers, international trade and the activities of the multinational undertakings keep this matter always at the core. Globalization, international trade and the activities

of multinationals transformed the international economy into a much more interdependent environment facing increased anticompetitive behavior affecting cross-border. Thus, the need for some kind of a solution started to reveal itself in the absence of international rules governing competition. This study argues that both the neo-neo debate and the governance phenomenon would give new insights to analyse better the developments in the international competition fora over the years. Particularly, in the world we live in today, internationalization of competition law can not be separated from the changes in the global economic governance. That is the reason why following the discussion on the neo-neo debate, the Chapter continued with the governance concept. The efforts to develop an international competition regime are indeed at the center of the global governance given the existence of an increasingly competitive international economy composed of national competition laws as the sole instrument to tackle cross-border anticompetitive practices and international mergers.

CHAPTER 3

THE NEED FOR A GLOBAL COMPETITION FRAMEWORK: AN OVERVIEW OF HISTORICAL BACKGROUND AND MULTILATERAL EFFORTS

Competition law has grown at an exceptional rate in recent years but especially after the end of the Cold War in response to the great changes in political thinking and economic behaviour that have taken place all around the world. There are now more than 120 competition law systems in the world compared to only two dozen in the late 1980s. Among them, the EU competition law and US antitrust law have been the most influential systems so far. In line with the increase in the number of competition laws, the number of national competition agencies has proliferated across the world. However, this rapid proliferation does not exist without challenges in the absence of a global competition regime. The idea of a global regime to protect the process of competition dates back to 1920s and not to the contemporaray era as a surprise to many. The growing influence of international cartels has repelled political and business leaders as well as scholars to start recognizing the need for a normative framework for international competition. In the quest for the internationalization of competition law and policy as part of the main aim of this study, realizing the early efforts to develop a global competition regime are very important to understand the evolvement of the process.

In this context, Chapter 3 provides an overview of the history of international antitrust after making a brief introduction of the concept of competition law and policy while delineating the concept of convergence. Chapter also explores the past stalled attempts to achieve an international law of competition with a special focus on the stalemate occurred at the WTO. In this respect, it also reviews the historical development of international institutions which differ in terms of membership, design[20], impact and activity when dealing with antitrust. In this context, the review includes the indispensable role of the OECD and the UNCTAD as international organizations while dealing with antitrust. Chapter also reviews the inalienable rise of the ICN which is a virtual network solely dedicated to competition law enforcement with a desire to enhance cooperation, and to share best practices and working towards procedural and substantive convergence by discussing common issues of competition laws. By enhancing convergence and cooperation, the ICN believes in the promotion of a more efficient and effective antitrust enforcement worldwide to the benefit of consumers and businesses. This

[20] Whether through the use of hard law or soft law instruments.

study argues that the nonbinding instruments of the OECD and the UNCTAD in the competition field towards enhanced cooperation and the creation of the ICN are complementary in the quest for the internationalization process of competition law and policy.

3.1. The Concepts of Competition Law and Competition Policy in a Globalised Economy

Competition law and competition policy are in fact two different terms as underlined in the introduction part of this study. In general, competition law seeks to control the exercise of private economic power by preventing monopoly, punishing cartels and encouraging competition (Gelhorn et. al. 2004, 74). Competition policy, however, has a much wider meaning than competition law. The application of competition policy is closely related to the existence of effective competition laws and relevant legislation, not only for developed countries, but also for developing countries. Effective enforcement of competition laws guided by competition principles are recognized as essential elements for economic development, growth and the rising levels of economic welfare (OECD 2003, 8; p. 3; UNCTAD 2003, 3; UNCTAD 1996). According to a UNCTAD study, competition policy without an effective competition law is like an automobile without an engine. (OECD 2003, 8; p. 3; UNCTAD 2003, 3; UNCTAD 1996).

Today, competition laws are being adopted in all continents and in all types of economies; be it large, small, developing, developed, industrial, agricultural, landlocked, island, liberal or post-communist in parallel with the increase in the geographic scope of the competition law. Particularly, multinational firms are subject to divergent competition regimes across different jurisdictions in which they function. Nevertheless, global markets can bring opportunities for many firms to buy, sell, and work while reducing costs of production and directing the resources to most efficient uses. They also contribute to the political stability. As can be seen, the promises seem numerous and attractive, although they are very vague in nature. This is because global markets do not necessarily distribute benefits equally among countries at different levels of development.[21] But in time the trend toward global economic integration against a multiple number of national antitrust regimes with dissimilar process, purpose and substance has started to create tension (Gellhorn et.al. 2004, 54-55).

[21] For instance, in developing countries, on one hand competition law was accepted as a way to make market players more accountable and markets more efficient with the expectation of integration of the national economy into the world markets. On the other hand, developing countries feared that as a cosmopolitan program, in other words as a global program, competition law could override national interests and the national economy to be taken over by multinational corporations which would further worsen the unequal distribution of national wealth in favor of the industrialized world. For more information on the relation between global markets, wealth and competition see especially Fox (2007, 211-236); and Chapter 1 Law, Competition and Global Markets in Gerber (2010).

Despite all these challenges, global markets have become a center of attention everywhere. In such a global world, competition is the basic mechanism of a market economy. It is basically assumed that the competition will lead to lower prices, higher quality, better service and improved efficiency while encouraging innovation and creation of new technologies. In this regard, competition law is a tool to organize economic activity in an efficient way and work for the creation of the greatest economic welfare for the society and the consumers within the market economies. The main aim of competition law and policy is to preserve and promote competition as a means of ensuring the efficient allocation of resources in an economy. This is expected to result in lower prices and adequate supplies for consumers, as well as a faster growth and a more equitable distribution of income. After lowering barriers for easing the entry of new firms into an industry, competition policy helps to form an enabling environment for entrepreneurial development (Pradeep 2002, 79). In brief, competition law and policy aims to promote economic efficiency and consumer welfare by encouraging entrepreneurial activity, market entry by new firms, and more enterprise efficiency and competitiveness. In economic terms, competition maximizes consumer welfare by increasing static efficiency and by promoting innovation (Gellhorn et.al. 2004, 57). So competition promotes mainly two types of efficiencies; these can be categorized as static efficiency[22] and dynamic efficiency[23] (Sanli 2000, 8; Arefin and Allen 2004, 3). Static efficiency is composed of two parts which are allocative efficiency (making what consumers want as shown by their willingness to pay) and productive efficiency (producing goods or services at the lowest cost thus using the fewest resources) (Gellhorn et.al. 2004, 57). Dynamic efficiency means optimal introduction of new products, more efficient production processes, and superior organizational structures over time. Moreover, competition maintains that the cost savings are transferred to consumers who could benefit from greater product quantity, quality and variety (Khemani 2002, 8).

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[22] Enterprises have to make profits to continue their survival and to increase their market shares. In a free market based economy, the only way to make profit is to decrease production costs. In other words, enterprises have to find their inputs at a lower price and use their resources in an efficient way so as to ensure productive efficiency. If not, they might loose their markets because of the coercion coming from their rivals. Besides, in order to attain the utmost productivity, enterprises need to combine production factors to ensure allocative resource efficiency. As empirical evidence from UNCTAD, WTO, World Bank suggests, barriers to competition lead to welfare losses within an economy, regardless of governmental or private constraints

[23] The use of technological progress, being a dynamic one, is also a relevant gain, which helps the enterprises to lower their costs. The innovation of products and production processes is the main element for companies to have a strong position within the competition process, since every company seeks modernization. In addition to that, undertakings are forced to adapt themselves to the new technologies due to the never-ending change in the markets.

3.2. Differences Between Competition Law Regimes Around the World

In addition to the efficiency and consumer welfare goals, competition laws might have other purposes which differ from one country to another such as; promoting competitiveness of national firms, ensuring freedom of economic action, controlling concentration of economic power, or promoting market opportunities for small firms, safeguarding the public interest (like employment, maximization of national exports or production), or market integration. There are significant differences among national/regional competition laws concerning the non-efficiency related criteria while determining their priority areas (Dhanjee 2004, 2-3). A survey of the objectives of competition legislation has put forward that the nature and scope of competition law and policy tends to differ over time and across several countries (Khemani 2002, 8). These differences may reflect a society's wishes, culture, history, institutions and other factors, which are neither easily quantifiable nor reduced to a single economic objective.

Even though national antitrust regimes do differ from each other because of the various motives behind their creation, there still exists a consensus that certain behaviors of undertakings prevent competition and the functioning of free markets. For instance, the motive was to restrain perceived influence of monopolies in US (1890), promoting economic integration to promote free trade in the EU (1957), encouraging economic efficiency in Canada (1985), the facilitation of the transition from state economic control in post-communist states of Eastern Europe (in the 1990s), core competition issues as well as participation in the restructuring of monopoly areas and a focus on the role of state bodies and officials in the economy in Russia (1990s), and the creation and development of markets for goods and services in a free and proper competition environment in Turkey (1994).

Nonetheless, as argued by Fox (2009a, 152), the definition and the goals of antitrust law change in time while they are sensitive to the context of each particular country, as well as its state of development, and economic conditions. Fox (2009a, 152) puts forward that in the US for some ninety years, beginning in the Industrial Revolution, antitrust was conceptualized as a law against power in the marketplace. In the 1960s, this concept was broadened to become synonymous with marketplace pluralism and empowerment for those that come across with injustice. In the 1980s, the US antitrust was reconceived in view of lowered trade barriers and a quest for global competitiveness. So, it became and is now a tool for efficiency to be used to prevent consumer loss through creation or abuse of market power. In a similar fashion, competition policy has been one of the foundation stones of the EU and thereof lies at the very heart of efforts to establish a single market within the EU. Since the mid-1990s, however, European competition law, has been emphasizing consumers and efficiency,

while conceiving competition law as a valuable tool to help carry out the agenda of Europe for innovation, integration and competitiveness at the same time.

Proliferation of competition laws is a slow but remarkable development in Asia. Important economies such as China have recently introduced domestic competition legislation into their legal system[24] while there are more advanced agencies like Japanese Fair Trade Commission (JFTC) and Korean Fair Trade Commission (KFTC) in the region. Historically industrial policy and fairness to businesses were priorities in Asian competition policies. As rightly pointed out by Fox, eventually markets and competition became accepted as a norm in Asia as well as most of the rest of the world. In many Asian and other countries that have adopted competition laws, equity and industrial policy objectives that can be reflected as fairness to small and indigenous businesses, and the creation of national champions, were built into the law and remain as goals (Fox 2009a, 153).

Russia is another country which has been using competition law as a tool to combat with anticompetitive practices following the end of Cold War in 1990s through its agency called Federal Antimonopoly Service (FAS). An important regional initiative including Russia came in with the formation of Euroasian Economic Commission on February 1, 2012. This Commission is composed of Russia, Belarus and Kazakhstan. The Commission holds the status of supranational, permanent body which takes its decisions independently binding for its three Member States. Among others, the Euroasian Economic Commission is responsible from competition policy. The Agreement on Common Principles and Rules of Competition, dated December 9, 2010 came into effect on January 1, 2012.[25] This Agreement defines the powers of the Commission in the sphere of competition policy. The main objective of the Agreement is the single competition policy and harmonization of competition legislation for these three countries. The common competition rules also cover practices that negatively affect competition in cross-border markets on the territories of two or more parties. As can be seen from this recent regional initiative, competition laws and policies are high on the agenda of the Parties aiming at creation of a single economic space for the region.

Regardless of the differences in the definition and goals of antitrust laws, the increase in the number of countries adopting competition laws goes parallel to the increasing number of anticompetitive practices such as price-fixing, market

[24] The Antimonopoly Law (AML) which is the first comprehensive competition law of China came into effect on August 1, 2008.

[25] Letter from the Euroasion Economic Commission to the Turkish Competition Authority dated July 2012.

sharing, exclusive dealing, tying, predatory pricing, abuse of dominant position. In a similar manner, mergers and acquisitions transcending national borders have also been proliferated. Yet, the criteria used to arrive at a decision on a competition issue continue to be a national one rather than international. In other words, the existence of national competition laws remains to be the only binding instrument to prevent anticompetitive practices or eliminate the negative results of international mergers and acquisitions. So, this situation directs the national competition agencies or bodies in charge of competition law and policy to act together in a cooperative way in the absence of an international instrument to cope with the international anticompetitive practices and mergers.

It is, thus, the global structure of the markets and the strategic origin of the nations which necessitate an international framework for the competition law. Given the resistance of competition law to become an international law, cooperation is required to carry out tasks to address conduct that transcends national borders, while common rules, standards, and modes of analysis are all desirable to have a linked world system that would soften the clashes in between different regimes. Moreover, networking among national agencies start to fill a real need by enhancing convergence of competition laws for the benefit of consumers and businesses (Fox 2009a, 151). To put it more clearly being the prominent actors in the field, the US and the EU have been main proponents behind the convergence of antitrust law and policy to cope with the internationalization of competition within and through the international organizations such as the OECD and UNCTAD but recently first and foremost by the ICN.

All these initiatives are indicators that the competition law needs at least some sort of a global framework. This is because, as rightly argued by Fox (2009a, 154) markets are global and the nations are strategic. Conduct launched in one nation might harm people in others. Without a framework that spills over national boundaries, firms in one nation may harm consumers and competitors of another (Fox 2009a, 154). One part of the problem can be handled by use of extraterritorial application or bilateral and regional agreements, but as argued in Chapters 4 and 5 of this study respectively, this is not an adequate solution. Furthermore, for businesses working with a lot of jurisdictions congruently, all with different rules, can be costly. Moreover, global coherence can not be achieved solely at the national level. To appreciate the full costs or benefits of a multinational merger as well as enforcing the optimal fines or appropriate penalties for world cartels or monopolistic conduct (Fox 2009a, 154), global framework is a need which is lacking. Against this background, the following section defines convergence to understand better the main argument of this study which questions whether the convergence of competition legislation is enough to deal with international

competition matters when the markets are broader than national boundaries in the absence of a global regime.

3.3. Definition of Convergence

In fact, there is no way to confront Ariel Ezrahi (2012, 1) who states "competition law and international have never [been] so closely associated" just like in the introduction part of his book titled *Research Handbook on International Competition Law*. Despite its domestic nature in application, it is truism to argue that national competition laws around the world reflect an almost global consensus on the benefits of free and competitive markets. This consensus has provided valuable momentum to a gradual process of harmonization in competition law and policy around the world. This worldwide spread in harmonization or resemblance associates this work with the term convergence which is very fundamental in terms of this study. Therefore, the meaning of term convergence is delineated herein.

As discussed in the introduction section, the transborder mergers increase, international cartels become widespread and abuses of dominance cases on various major markets become more visible in line with the pressures of globalization, and the increases in international trade and multinational corporations. In fact, these international practices have been effective for a long time and they are likely to be effective in the global economy in the future. All these developments lead to increases in the number of competition regimes around the world. Cheng (2012, 436) has argued that there have been concerns about the potential inconsistent enforcement given the growth in the number of competition regimes. Yet, as put forward by Dabbah (2010, 3) despite the differences in terms of domestic or regional circumstances, many of the jurisdictions do have a lot of similarities in terms of enforcement. Therefore, this study claims that the internationalization of competition law and policy is not a new phenomenon but the awareness about this phenomenon has started relatively recently parallel to the globalization and other international factors. In this regard, this study argues that convergence of competition legislation is a tool to facilitate greater understanding of the issues in the analysis of the internationalization of competition law and policy. This strategy is supported by the leading actors of the domain as well.

According to the Webster on-line dictionary, convergence simply means the occurrence of two or more things coming together, or the act of coming closer. Meanwhile, according to the Cambridge dictionary if ideas and opinions converge, they gradually become similar. While Collins dictionary defines the convergence of different ideas, groups, or societies as the process by which they stop being different and become more similar, Macmillan dictionary foresees that it is a situation in which people or things gradually become the

same or very similar. The common aspect in all of these English dictionary explanations is that no matter what the subject or the state regarding the process of convergence is, eventually they all do become similar. In a similar fashion, this study assumes that convergence of competition law and policy can occur mainly with respect to substantive norms and procedural arrangements (Cheng 2012, 438; Gerber 2010, 289) when discussing the internationalization process. In this regard, the convergence of competition law and policy has affected distinct areas of enforcement, such as the coordination of cartel enforcement in between national competition agencies, the alignment of merger procedures as well as merger appraisal in different jurisdictions, the analysis of unilateral and collusive action.

Procedural convergence refers to the harmonization of procedural rules that apply in competition cases. So far, the review of mergers and acquisitions is the most advanced area of competition law where significant procedural convergence has been achieved (Cheng 2012, 439). For instance, jurisdictions do compare the timeline and level of analysis in merger reviews with an attempt to align them with those of the most prominent actors[26] in the field. Substantive convergence refers to the harmonization of substantive competition law principles such as price fixing, market sharing, restriction of supply, collusive bidding in tenders, exclusive dealing, excessive pricing, predatory pricing, tying, and substantive merger analysis. Indeed, this is the main focus of attention in most of the convergence studies (Cheng 2012, 439). The standardization of the main prohibitive provisions can be beneficial to firms mainly in terms of clarity. Firms can easily adopt themselves to the practices and burdens arising from the rules and standards of different jurisdictions. Such clarity lessens the administrative and substantive burdens that firms have to carry in trying to learn new systems of competition law.

In fact, under normal circumstances it should be difficult to argue that competition law throughout the different regions of the world such as America, Europe, Middle East, Gulf Countries, Asia, Australia be understood and treated in the same way. However, this is exactly what is happening right now. It is now common practice to converge, that is to have similar rules, practices and theories in the competition law matters based notably on the US and the EU practices (Cheng 2012, 439). Hence, this convergence trend has ended up having several competition legislation patterns that look similar to each other. On one hand, convergence can bring along advantages by helping competition law to turn into an international phenomenon. On the other hand, it carries its disadvantages because it is indeed

[26] For instance, Turkey has two level review periods (preliminary examination and final examination) just like the EU model (phase I and phase II). In a similar fashion, China aligned the timeline of its review process with that of the EU.

necessary to take into consideration domestic needs and interests while adopting a law and designing a regime to enforce this law (Cheng 2012, 439).

Nonetheless, similar legislation would not necessarily produce the same results in every jurisdiction. Regardless of its advantages or disadvantages[27], similar competition laws can still create different results at the national level of enforcement. In this context, when cross-border anticompetitive practices or anti-competitive practices affecting more than one jurisdiction are under scrunity, the possibility of having conflicting decisions led to fears in the eyes of consumers and businesses around the world. In addition, inconsistent application of competition laws within the same market would lead to disputes. One such example is the *GE-Honeywell* merger[28] and the *Boeing/McDonnell Douglas*[29] merger where the US and the EU competition agencies had diffferent approaches. Thus, all these concerns directed the nations towards the quest for convergence to forestall future disputes. Moreover, especially given the fact that origins of antitrust or competition laws are created in Western countries, there is the risk that anticipated global uniformity in the form of convergence might lead to some other ends. For one thing, this is because in the global world we live in, the future of internationalization of competition law and policy will also depend on the decisions of those countries next to that of the US and the EU. Secondly, the necessity for global governance in the competition domain becomes very salient in the light of globalization.

Convergence carries advantages both for the nations and multinational corporations functioning simultenously in many countries around the world. From a national competition authority perspective, convergence in competition law and policy helps to achieve global cooperation and coherence especially in the light of the increasing international business, international trade, and globalization. Such an effort is especially important in a developing country where the resources are usually inadequate or in a country where the use of competition law and policy is not very well developed. In such situations together with the absence of global coherence and cooperation, neither the countries nor the consumers will be able to reach the expected benefits from the implementation of competition law and policy. This argument is also supported by Fox (2009a, 154) too.

[27] It is beyond the scope of this study to question to what extent *pret-a-porter* competition laws are suitable for the interests of especially developing countries in need of adopting such laws. Yet this matter is a very important peculiarity in the internationalization of competition. It remains to be explained why some countries take a model competition law of a developed country without carefully assessing whether such a model law is acceptable and suitable for its needs. For more information, please see Fox (2007, 211-236) and Dabbah (2010).

[28] *General Electric/Honeywell*, Case COMP/M 2220 (2001).

[29] *Boeing/McDonnell Douglas*, Commission Decision of 30 July 1997 declaring a concentration compatible with the common market and the functioning of the EEA Agreement, (Case No IV/M.877) (97/816/EC).

Likewise, from a business perspective, dealing with various laws can be burdensome. It might be both costly and time consuming. The issue gets even more complicated when one national agency's approach differs from another. Such burdens can result from inconsistent substantive outcomes of investigations of different country agencies; inconsistent procedures for pre-merger or other forms of review; or simply arising from the increasing number of competition laws that an international corporation has to deal with. These burdens might range from unimportant increase in transaction costs to blocking mergers for reasons other than competition concerns (Cheng 2012, 439; Fox 2009a, 154). That is the reason why, it is important to eliminate conflicts arising from duplicative or conflicting enforcement of different nations. In this sense, convergence gives businesses a transparent horizon in dealing with practices affecting multiple jurisdictions.

The concept of convergence has been the focus of attention in competition law studies particularly since the early 1990s. As underlined above, it is often used in general terms to refer to the similarities among competition law systems and often carries very little meaning beyond that. In simplest terms, convergence refers to a movement from a state of difference to a state of similarity. However, in order to be of value, the relative prominence and importance of the similarity of the characteristics that is subject to convergence shall be taken into account in the analysis (Gerber 2010, 281-282). For instance, the filing period of mergers is less significant than the substantive standards applied in evaluating the merger. Additionally, as suggested by Gerber (2010, 282) it is advisable to use the term convergence by specifying the areas involved. Unless the specific areas are clearly delineated, general references to this term can be misleading. For example, the statutory provisions concerning the treatment of cartels might harmonize whereas there will be no convergence in other areas of competition law such as abusive conduct and merger (Gerber 2010, 283). That is the reason why in the context of the internationalization of competition law, as rightly put forward by Gerber (2010, 283), one needs to see and understand "what is converging?" in terms of substantive norms or procedural arrangements. Systems are considered to converge when one enacts a statutory provision similar to another one (Gerber 2010, 283). In this context, this study suggests that in the absence of a global competition regime if the concept of the convergence is to have any meaning, it is necessary to specify which aspects of the system are involved at the outset. However, since this study questions whether the convergence of competition laws is used as a strategy by the nation states, the question regarding what aspects of the various competition systems are converging will not be elaborated herein. Thereof, this study argues that convergence as a general strategy eases the global cooperation and coherence among the national competition agencies.

In a similar fashion, as argued by Gerber (2010, 344) competition law and policy can form the foundations for exchanging knowledge, interests and

values across national borders. Thus, similar legislation could be considered as a constructive tool rather than acting as a constraint before the cooperation efforts. By this way, competition law and policy becomes part of the targeting process for the achievement of shared objectives across various jurisdictions (Gerber 2010, 344). It might provide means by which competition community members, particularly the national competition agencies, can participate into the process easily. Moreover, convergence is good when it is choice of the enlightened nations. This way conscious jurisdictions can produce more business certainty. It also provides for transparent, predictable and fair practices while saving transaction costs. All these increase the trade of a nation too (Fox 2011, 267). This constructive role is exposed itself in the convergence push or more leniently convergence strategy that has dominated the competition community during the last decade and more.

In this context, the study recognizes that the convergence of competition legislation as a strategy has been supported and further developed by the US and the EU agencies through time parallel to the internationalization of the field. The US and the EU are the main actors that advocated for the convergence of competition legislation across various nations in the absence of global norms in the competition field. Since those two transatlantic neighbors are the most advanced and experienced jurisdictions in this domain, they have been quite influential. Although there are multiple reasons behind the convergence motive of the US and the EU, one can argue that the main reason is to work out the complexities and differences inherent in jurisdictional applications of competition law and policy especially in today's global economy. In fact this variation is important both from a national and an undertaking perspective. To understand the current trend of convergence as a strategy in the competition field, the below section explores the past efforts and experiences regarding the venue search for the global competition law initiative.

3.4. The Venue Search for International Competition Matters: Past Efforts

The antitrust story dates back to late 19th century. This story has started on national grounds but the implications of international competition did not come along until World War II. Indeed, while serving as the US DOJ Assistant Attorney General of the Antitrust Division at the end of 1930s, Thurman Arnold[30], began the first campaign against international cartels by linking them to their totalitarian

[30] After the passage of the Sherman Act, the US faced catastrophic events like the Panic of 1907 and World War I. Especially the World War I brought the country's commitments to trust-busting to a halt that continued through the 1920s. It was only in 1937, during the second Roosevelt Administration that the antitrust enforcement came back to the forefront. Thurman Arnold served as the Assistant Attorney General for antitrust from 1938 to 1943. In Thurman's own words, "the Roosevelt Administration is responsible from the first sustained program of antitrust enforcement on a nationwide scale". Thurman Arnold's legacy of vigorous antitrust is still considered as the New Deal's economic agenda and a part of that era's legacy for modern economic policy; for detailed information please see Varney (2009).

sponsors. In this era of war, the US expanded its law with an aim to reach off-shore actors. In the famous *Alcoa*[31] case of 1945, the Court of Appeals held that US law reaches an off-shore cartel when the actors intend to affect and do affect the US market (Fox et.al upcoming, 2).

Within this context, this part of the Chapter examines the past efforts and experiences regarding the venue search for the global competition law initiative starting from the days of the League of Nations for the main aim of this study. After the attempts that have taken place at the League of Nations, this section also examines various formal international institutions working on competition. By all means, the work carried out at the International Trade Organization (ITO), General Agreements on Tariffs and Trade (GATT) and World Trade Organization (WTO) needs to be assessed to understand the internationalization of competition and the venue search for the international competition matters. In this odyssey international organizations carrying out competition work, namely the OECD and the UNCTAD, are also explored, while the developments that led to the creation of the ICN are traced in a historical context. Without doubt, the strengths, weaknesses and the effectiveness of these institutions have influenced the development of competition law and policy around the world. In its short history, particularly the ICN made significant progress regarding convergence in considerable number of procedural and substantive issues. Nevertheless, the best and optimal level of convergence and the appropriate levels of using it are still open questions taking place in the agenda of all the international institutions dealing with competition law. During this historical journey, the views of the most prominent competition actors is also being called upon.

3.4.1. The League of Nations: First Formal Discussions on International Competition Matters

The first formal discussions on international controls to regulate restrictive business practices came after World War I under the League of Nations framework. During the time in between the two World Wars, the League of Nations published numerous reports and organized many conferences to understand the phenomenon of a free, world market economy. The phenomenon of free, world market economy had functioned initially until it became a casualty of World War II. International cartels in sectors such as petroleum, aluminum and copper, chemical products and industrial agreements favoring anticompetitive behaviour were one of the problems recognized, reported and considered during the discussions at the League of Nations Economic Committee (Furnish 1970, 318) as the reasons that lead to World War I.

Again under the auspices of the League of Nations, the preparations for the World Economic Conference were started. Many reports and interventions were

[31] *United States v. Alcoa*, 148 F.2d 416, 2d Cir. 1945.

prepared and published by the League of Nations as working documents for the Conference. The commonality of these documents was their favorable approach towards cartels and industrial agreements restraining trade based on the recognition that those practices are vulnerable to abuse and improper excesses. Against this background, the question of establishing a system of international controls on the cartels was considered by the Industrial Committee of the World Economic Conference[32] in Geneva in 1927. The Industrial Committee scrutinized a proposal for a multilateral convention for the unification of national competition laws. According to this proposal[33], all international industrial agreements restraining trade that were not reported to the League of Nations would be considered illegal on the basis of illegality presumption while joint national institutions attached to a single international institution would carry out enforcement practices. The proposal also entailed national and international procedures and sanctions against restrictive business practices. Nevertheless, this proposal failed due to two reasons. Firstly, because of the fact that national approaches to anticompetitive practices were varied widely to admit the establishment of common norms, and secondly due to the fact that divergent national attitudes objected to an international regime based on the principles of national sovereignty and constitutional law (Lianos 2007, 4). Additionally, rationalization was considered as a greater concentration and specialization of industrial resources for optimum efficiency by the delegates of the Conference[34], while restrictive agreements were noted as a desirable and proper means of rationalization (Furnish 1970, 319).

[32] The Assembly of the League of Nations invited the Council to constitute a Preparatory Committee to prepare the work for an International Economic Conference on September 24, 1925 on the motion of the French Delegation. The World Economic Conference was held in Geneva between May 4-27, 1927. Although the delegates from 50 nations were grouped mainly by their respective Governments, they were not official representatives. The delegates of the US which was one one of the principal non-member state together with the then USSR were most valuable because of their clear and tactful views. There were three main Committees of the Conference which are Commerce, Industry and Agriculture. For more information on the results of the World Economic Conference held in Geneva in 1927, please see Runciman (1927, 465-472).

[33] This proposal originated from the work of William Oualid. Oualid presented his ideas in the report titled "The Social Effects of International Industrial Agreements, the Protection of Workers and Consumers" (1926), which was published by the League of Nations as a preparotory document for the World Economic Conference. Oualid submitted his report to the Preparatory Committee for the International Economic Conference.

[34] The general approach towards cartels and restrictive agreements was best reflected in the "Final Report of the World Economic Conference" (1927) as follows: "secure a more methodological organization of production and a reduction in costs by means of a better utilization of existing equipment, the development on more suitable lines of a new plant, and a more rational grouping of undertakings, and, on the other hand, act as a check on uneconomic competition and reduce the evils resulting from fluctuations in industrial activity. By this means they may assure to the workers greater stability of employment at the same time, by reducing production and distribution costs and consequently selling prices, bring advantages to the consumer…Nevertheless, the Conference considers…that such agreements, if they encourage monopolistic tendencies and the application of unsound business methods, may check technical progress in production and involve dangers to the legitimate interests of important sections of society and of particular countries".

In the aftermath of the Conference, however, the severe conditions of the Great Depression shifted governmental attitudes even more radically in favor of cartel agreements. Meanwhile, the League of Nations considered the cartels as the best true hopes for global economic recovery in 1932. On top of that European states such as Germany and the UK encouraged cartels between competing enterprises (Furnish 1970, 319; Upgren 1948, 440). The characteristics of this period can be understood clearly from the statement of the United Kingdom's Parliamentary Secretary of the Department of Overseas Trade, while providing official support to negotiations on an anti-competitive agreement between the British and German industrial associations in Dusseldorf in 1939. Parliamentary Secretary of the time asserted that

> the day of the individual trader is over, that world markets should be divided and regulated by private agreement and that an agreement like that contemplated with Germany should be negotiated with other European countries (in Furnish 1970, 321).

On the other side of the Atlantic, however, the US decided not to follow the European approach regarding government controls and business activities by way of supporting anticompetitive practices to overcome the consequences of the Great Depression. Under the leadership of Thurman Arnold[35] and later Wendell Berge[36], the Antitrust Division of the DOJ carried out a very active, ardent campaign of prosecutions and antitrust publicity beginning from the 1930s (Furnish 1970, 321). The ensuing investigations of the US went into international as well as domestic restraints of trade, and World War II provided a unique opportunity for extensive discovery of business documents and other sources of information on the operation of international cartels. Especially the US Congressional hearings publicized the details of international anticompetitive agreements which had been committed not only for economic purposes but also for the political and military objectives of Germany and Japan and to a lesser extent Italy (Furnish 1970, 322) during the World War II period. In light of these, the post-World War II period started to consider what needs to be done in order to curb the undesirable, unwanted results of the anticompetitive practices instead of seeing them as beneficent type agreements. In brief, the US has already given careful consideration as regards to its post-war foreign policy. The US has

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[35] For a detailed study of the Thurman Arnold period of the Antitrust Division of the DOJ and the enforcement practices in the late New Deal period, see Waller (2005).

[36] Head of the Department of Justice's Anti-Trust Division (1943-1947). As cited in an editorial of *The Washington Post*: "The death of Wendell Berge takes from Washington one of its most public-spirited lawyers and a man who made a notable record in antitrust enforcement". Berge consistently argued that monopoly would ruin free enterprise and that competition must be preserved. Berge is the author of the books *Cartels: Challenge to a Free World* and *Economic Freedom for the West* (1944).

decided for some time that its objective was a liberalized system of international commerce free from the state and private restraints as much as possible (Furnish 1970, 322).

Despite this rather enthusiastic approach of the US, there has been opposing views in the US. In this regard, in his famous contribution dated 1946, prepared for the Committee for Economic Development[37] an independent US think tank dealing with the problems of international economic relations, economist Edward Mason[38] focused on the private business agreements and cartels in international trade and intergovernmental commodity agreements (Albrecht 1949, 127). Mason gave support to the creation of cartels, and even argued that almost all of the activities of German cartels could be explained in terms of profit motive rather than the sinister hand of Hitler since "the application, from outside, of antitrust measures will make any appreciable difference in the social, economic and political structure of post-war Germany" (Johnson 1947, 366). By this assessment Mason rules out the significance of private monopolies in Germany and in a way saw in advance the emergence of public monopolies by putting forward that the state-trading monopoly or the state-owned industry would probably replace the private monopolies necessary for the creation of cartels in Europe, Asia and South America (Upgren 1948, 440). In fact Mason's tolerance of cartels seems contradictory to US view of liberalized system of an international trade and thus far away from finding a solution to Post-War world order.

3.4.2. Post World War II Efforts and the Failure of the Havana Charter

Almost twenty years after the attempt at the League of Nations to include competition law into the international trading system, nations proposed the first multilateral antitrust agreement as part of the Havana Charter for an International Trade Organization39 in the years that followed the era of World War II, and in light of the lessons drawn from war. The post-war revival of the global competition law initiatives must be understood as part of a broader framework of the global economy of this period. In this context, international economic relations under international law have been primarily governed by treaties. In most of the cases international organizations dealing with economic issues are established by treaties. Thus, it would not be wrong to argue that the IMF, the International

[37] Committee of Economic Development (CED) was founded in 1942 in US as an independent business think tank. CED's first mission was to help the US economy transition from war to peace-time prosperity. At the end of World War II, CED played a key role in gathering support among the American business community for the Marshall Plan. CED's work also influenced the Bretton Woods Agreement.

[38] Edward S. Mason is generally credited for founding the field of industrial organization.

[39] UNITED NATIONS CONFERENCE ON TRADE AND EMPLOYMENT (1948), held at Cuba, Havana from November 21, 1947-March 24, 1948, Final Act and Related Documents; http://www.wto.org/english/docs_e/legal_e/havana_e.pdf, (Havana Charter).

Bank For Reconstruction and Development40 (IBRD), the World Bank and the WTO are the main international economic institutions in today's global economy. The World Bank and the IMF were created after the Bretton Woods Conference of 1944 as part of a system of rules, institutions, and procedures to regulate the international monetary system while the WTO became the principal institution for trade as a successor to General Agreement on Tariffs and Trade (GATT) in time.

In the aftermath of the World War II, reconstructing trade was considered as the key to the economic development which was necessary in many parts of the world including particularly Europe. To achieve this, there was a plan to create an international organization that would stabilize and improve commercial relations. The then planned multilateral trade organization was to be known as the International Trade Organization (ITO) and agreement creating the ITO was referred to as the Havana Charter (Gerber 2010, 43). Against this backlog, this study claims that in order to understand the global competition initiatives during the post World War II period, it is also necessary to know about the initiatives in the trading regime related to competition matters.

During the preparatory phase to the Havana Charter, a special high level Committee from the US had worked on a proposal to draft the general American objective of a liberalized system of international commerce into a comprehensive scheme starting from 1943, and Great Britain as well as Canada supported this. Eventually, the said Committee published a study called "Proposals for Expansion of World Trade and Employment" in 1945. The said Proposals had two components. The first component was a set of substantive principles, in the form of Chapters applicable to states which represented a set of conduct relating to trade and focused on four main areas.[41] Among those four main areas, one of the Chapters was particularly devoted to the restrictive business practices (cartels). The second part of the Proposals provided for the establishment of the international organization that would enforce these rules with an aim to coordinate and implement multilateral policies (Gerber 2010, 43; Furnish 1970, 323).

Thus, the United Nations Conference on Trade and Employment that was held in Havana, Cuba in 1947 adopted the Havana Charter for the International Trade Organization that was meant to establish an international trade organization

[40] Founded in 1944 to help Europe recover from World War II, the IBRD is one of five institutions that make up the World Bank Group. IBRD aims to reduce poverty in middle-income countries and creditworthy poorer countries by promoting sustainable development through loans, guarantees, risk management products, and analytical and advisory services. IBRD is structured like a cooperative that is owned and operated for the benefit of its 188 member countries.

[41] These four main areas are government interference with trade (tariffs and quotas), restrictive business practices (cartels), commodity agreements among governments, and national treatment of foreign investment.

ITO.[42] Havana Charter was negotiated in 1947 and 1948 as the blueprint for the first world trade agreement. Initially, in November 1947, delegations from 56 countries met in Havana, Cuba, to consider the ITO draft as a whole. After long and difficult negotiations, some 53 countries signed the Final Act authenticating the text of the Havana Charter in March 1948. However, for various reasons, this Charter never came into force, especially its ratification process in some national legislatures proved its entry into force impossible. In fact all countries waited to see whether the US would ratify the Havana Charter before doing so themselves. In a suprising fashion, the most serious opposition to the ratification of Havana Charter came from the US Congress, even though the US government had been one of the driving forces behind it. Due to the lack of commitments from governments but first and foremost from the US concerning the ratification, in the end the ITO was stillborn (WTO 1998, 1). In other words, ITO was never created.

Although the recognition of a need for an international organization for trade to complement the International Monetary Fund and the World Bank dates back to Bretton Woods Conference in 1944, the wave of confidence in international organizations which had supported the evolvement of the Bretton Woods agenda has not been realized for by the time US Cogress took up the Havana Charter in 1949. As the crack between the US and the Soviet Union was deepening between the two opposing superpowers and their affiliated economic systems and political ideologies, the potential benefits of the ITO were not very promising. On one hand, the ITO was considered as a capitalist conspiracy by the Soviet Union. On the other hand, there seemed little justification for the US to accept constraints on its political power and economic opportunities that an international organization might impose especially when US political climate regarding international commitments was changing in the shade of increasing communism all around the world (Gerber 2010, 47-48). Thus, the Havana Charter was simply driven from the consideration of the US Congress by the then President Truman. In 1950, the US government announced that it would not seek Congressional ratification of the Havana Charter, and therefore the ITO had become effectively dead. So the ratification of the Havana Charter was not approved by the US Congress rather than being rejected right away (Gerber 2010, 48).

According to the relevant provisions of the Havana Charter, the member states of the proposed ITO would have been obliged to adopt appropriate legislation on competition law and to cooperate with the ITO in order to prevent public and private undertakings from engaging in practices that would restrain competition. Furthermore, with provisions of restrictive business practices affecting international trade which restrain competition including price-fixing, market division, and restraints fostering monopolistic control such as

[42] The GATT 1947 Agreement was brought into the Uruguay Round agreements by GATT 1994.

discrimination against particular undertakings or limiting production or fixing production quotas.

Chapter 5 of the Havana Charter contained an antitrust code but this was never incorporated into the WTO's forerunner, the GATT.43 The failed attempt to create the ITO as a specialized agency of the United Nations (UN) in 1948 could have been in a way curb the predecessor of the international competition rules. Proposed ITO was planned to extend beyond the world trade disciplines, to include rules on restrictive business practices among other things (Gilpin 2000, 63).

Following the defeat of the ITO by the US Senate, a mechanism was needed to implement and protect the tariff concessions negotiated in 1947. Thus, it was decided to take the Commercial Policy Chapter of the Havana Charter and convert it, with certain additions, into the GATT.[44] The GATT was signed on October 30, 1947 just one month before the Conference regarding the Havana Charter began on November 21, 1947. Thus, meanwhile the GATT was conceived as an interim measure that would put into effect the commercial-policy provisions of the proposed ITO. In order to bring the GATT into force quickly, a Protocol of Provisional Application was developed. As a result, the GATT was born in 1947 but without having any provisions on restrictive business practices. Hence, the GATT became the world's principal trade organization, being the only international instrument governing the conduct of world trade. The GATT was successful in fostering trade liberalization and providing a framework for trade discussions, but its authority and its scope of application were severely limited (Gilpin 2000, 63). Indeed the birth of GATT was the beginning of a long and continuing journey among the nations with an aim to have lower barriers to world trade, yet leaving the international anticompetitive practices without a specific address by preventing the creation of international norms for the competition law and policy field. Eventually, the GATT 1947 Agreement was brought into the Uruguay Round agreements by GATT 1994.

3.4.3. International Competition Law Initiative and its Failure at the WTO

After its creation in 1947, the agreement of GATT gave birth to an unofficial *de facto* international organization, also known informally as GATT. Over the years GATT evolved through several rounds of negotiations. The last and largest GATT round, was the Uruguay Round which lasted from 1986 to 1994 and led to the WTO's creation. Eventually, the WTO began life on January 1, 1995 with a half century old trading system. Whereas GATT had mainly dealt with trade in goods, the WTO and its agreements now cover trade in services, and in traded inventions, creations and designs (intellectual property). WTO is a combination of GATT elements and ideas from the ITO.

[43] http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey3_e.htm

[44] For information regarding pre-WTO process, please see: https://www.wto.org/english/docs_e/legal_e/prewto_legal_e.htm

The trading regime in the post World War II period was born as a result of the conflict between the negotiators of the US and the UK governments during the Bretton Woods Conference. The aim of the American negotiators was to achieve free trade and opening up of foreign markets as part of American industrial supremacy. The British negotiators were also in favor of free trade but they were concerned of any possibility of dollar shortage or loss of domestic economic autonomy in pursuit of full employment as well as other relevant issues. Despite the eventual British-American compromise to establish the ITO, many of the trade issues still left unsolved. So as an interim measure, the GATT was created particularly by the US and its main trading partners in 1948 (Gilpin 2000, 62). Indeed, GATT was not formed at the Bretton Woods Conference, but the participants of the Bretton Woods Conference contemplated the necessity of an organization on international trade, namely the ITO. However, following the defeat of the ITO by the US Senate in 1950 for the reasons elaborated above[45], GATT became the world's sole trade organization.

Both the GATT and its successor WTO have dealt primarily with external barriers to trade. Different national economic policies, corporate structures, and private business practices were not considered very important in the early post World War II era when the integration levels among the national economies were so low. However, in line with increased interdependence and the integration of trade with foreign direct investment, differences in national economies have become considerably significant in determining trade patterns and international competitiveness (Gilpin 2000, 107) of multinational firms. In this atmosphere, the GATT has been the only multilateral instrument governing international trade from 1948 until the establishment of the WTO in 1995. Yet, it had no rules on competition despite the growing level of interdependence among its Member Stated due to changing circumstances in world economy.

Unlike GATT, the WTO was established as a full-fledged international organization with much broader responsibilities. The work in the WTO on competition policy issues originated as specific responses to specific trade policy issues like antidumping and market access rather than a general perspective. However, the Working Group on the Interaction between Trade and Competition Policy (WGTCP) in 1996 formed with a view to change this perspective within the WTO. The WGTCP was formed at the Singapore Ministerial Conference[46] in 1996 with the participation of all WTO Members, entailing the EU proposal[47]

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[45] In section 3.4.2.

[46] WTO (1996), Singapore Ministerial Declaration of 13 December 1996, WT/MIN(96)/DEC/20, 36 ILM 218.

[47] Investment and competition: what role for the WTO? http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey3_e.htm

for an international competition law initiative.[48] The WGTCP was established to study various aspects of this issue. Decisions reached at the 1996 Singapore Ministerial Conference changed the perspective of work that was carried out in the WTO about the competition policy. In the past, competition policy issues took the form of specific responses to specific trade policy issues, rather than being the broad picture itself. Accordingly, paragraph 20 of this Declaration foresees establishment of 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 may merit further consideration in the WTO framework. So the WGTCP was formed which aimed at

> 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 may merit further consideration in the WTO framework, with the participation of all WTO Members.

Thus, the formation of the WGTCP and competition law efforts in the WTO can be easily associated with the EU initiative. It would be truism to argue that the EU was the first actor in competition world to study the need for global vision in competition policy and to make recommendations to achieve it in modern times. Fox claims that this is not surprising as the EU worked on the integration process among its member states for more than half a century (Fox 2009a, 152) To this end, previously a Committee of Wise Men, established by the then Commissioner Van Miert in 1994, prepared a Commission Report[49] which encouraged the strengthening of bilateral cooperation on competition law, and further discussed the drafting of an international competition code with a single authority responsible from its implementation. However, the report did not consider this as a realistic short or medium term option and underlined the fact that a considerable effort to make existing national laws more convergent is a prerequisite to any moves in this direction (Commission of the European Communities 1995, 12).

The report finally proposed that a plurilateral framework should be developed (including most of the elements already incorporated in the bilateral cooperation agreements including a binding positive comity instrument) (Commission Report 1995, 21). The report actually has foreseen that convergence and cooperation strategies alone were unlikely to produce the desired results at least in the foreseeable future (Gerber 2010, 103). Based on the findings of the report, the EU, at the Commission's proposal, suggested addressing the international

[48] Investment and competition: what role for the WTO? http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey3_e.htm

[49] Commission of the European Communities (1995), Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules: Report of the Group of Experts, COM (95)359 Final, July 12, 1995.

competition problems within the WTO (Schaub 1998, 1). It is in this regard that the EU Commission proposed the WTO to set up a working group that would be responsible for initial work on the development of an international framework of competition rules (European Commission 1996, 95).

The proposal of the EU Commission to the WTO for an international framework on competition law has foreseen the following features to be present in a prospective WTO agreement on competition law; these are (i) to oblige member states to enact or maintain domestic competition legislation that include at least basic rules like prohibition of cartels and monopolization (abuse of dominant position); (ii) to require the enforcement of this competition law based on principles of nondiscrimination and transparency; (iii) to provide for cooperation between competition agencies and; (iv) to aim for the gradual convergence of national practices (Tarullo 2000, 485). According to this proposal, the project for an international competition regime would begin slowly and from overall that was designed for transactions or conduct with cross-border effects. It would start with building blocks of cooperation among national antitrust agencies, principles of transparency, non-discrimination and due process, and a program for capacity building and technical assistance to developing countries (Schaub 1998, 1). It would also multilaterialize existing bilateral cooperation agreements.[50] The system would advance to the adoption of common substantive principles against abuse of dominance positions and cartels, eventually entailing the substantive law common to antitrust systems, and would put into place a process for dispute resolution within the WTO framework (Fox 2009a, 155).

Despite the formation of the WGTCP, the US did not support the EU initiative of a international competition regime and in return proposed another idea. The then officials of the US (Klein 1998, 20) after accepting the big impact of globalization on the international competition issues have argued that nations have different standards, and cooperation in enforcement of national or regional competition laws was the crucial component of international competition policy. But, the US enforcers (Klein 1997, 3) were of the opinion that a universal commitment to the adoption of and enforcement of competition laws go beyond the core concerns of the WTO multilateral trade regime. Consequently, the US put forward a recommendation against cartels at the OECD platform. Despite being an organization of developed countries, the OECD had at that time and still today has no dispute resolution powers. The 1998 OECD Council Recommendation Concerning Effective Action against Hard Core Cartels[51] was adopted in such an atmosphere. The idea for this recommendation was proposed by the US who was not pleased with the idea of using the WTO as an antitrust forum. This was

[50] For details on bilateral cooperation agreements, please see Chapter 5 of this study.

[51] This recommendation is being discussed in section 3.5.1.2. of this study.

simply because the US was not pleased with the WTO's possibility to act as a world antitrust forum (Fox 2009b, 9).

In the wake of the US criticism of its WTO initiative, the EU revised its proposal. The revised proposal became the provisional agenda of the Doha Ministerial Conference. As a result, at the WTO Ministerial Conference in Doha in 2001, Ministers

> recognized 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 (WTO Doha Ministerial 2001, paragraph 23).

Ministers further agreed that negotiations would take place after the Fifth Session of the Cancun Ministerial Conference in 2003 on the basis of a decision to be taken on modalities of negotiations by explicit consensus. In this regard, Ministers instructed the WGTCP to focus, until the 2003 Cancun Ministerial Conference, on the clarification of core principles, including transparency, non-discrimination and procedural fairness; provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building.[52] While the Cancun Ministerial Conference was approaching in 2003, reactions of different jurisdictions to an antitrust competence under the WTO roof differed extensively. In 2003 summer, as reported by Jenny (2004, 26), discussions regarding the EU proposal on competition intensified and, more or less the WTO members were divided into four main groups in their choice.

On one hand, a number of countries including Australia, Canada, Chinese Taipei, Costa Rica, Japan, Korea, Morocco, Switzerland and all of the Eastern European countries supported the EU proposal favoring a WTO framework for antitrust as the anticipated next step. On the other hand, a number of other countries including, Hong Kong China, Malaysia, India, Indonesia and the U.S. among others, contested the EU proposal either on the basis of not having any competition law and did not want to be forced to have one or not willing to have a dispute settlement mechanism that would be applicable to competition issues (Jenny 2004, 27). Hong Kong specifically mentioned that it would support only a regime against state restraints of trade, whereas India along with some other developing countries stood against a world antitrust initiative for the fear that resulting rules would favor the West and further colonize and marginalize developing countries. As explained by Fox the US officials also objected this proposal. Fox (2009b, 27) states that

[52] For more information, please see http://www.wto.org/english/tratop_e/comp_e/history_e.htm#doha.

> the US expressed strong skepticism toward such a world initiative with the fear that developing and other countries' protectionist goals would be enshrined, that consensus principles would be reduced to the lowest common denominator, that disputes would be resolved by uninformed bureaucrats, and that independent agencies would lose their prerogative of prosecutorial discretion.

The US after rejecting this idea concerning a WTO framed antitrust rules, proposed support for bilateral cooperation between national competition agencies and proposed to continue studying this matter further (Tarullo 2000, 478). The US rejection of the proposal in an outright manner is explained by Fox (1987, 12) as follows:

> [I]t is not surprising that many Americans prefer things the way they are. Americans are not steeped in the post-war Western European tradition of community building. They have the tools of unilateralism, they fear the compromises of bargaining, and they abjure the "relinquishment" of sovereignty.

A group of other developing countries including the African group and most of the Caribbean countries opposed the proposal fearing that they could not afford a competition law either because they are too small or they are underdeveloped, and they are in need of an industrial policy rather than a competition policy. Developing countries were also in the opinion that the main effect of such a global initiative in the competition domain would be to assist US, European and Japanese firms to gain access to their markets and raw materials. Their suspicion was stemmed from their past experiences. The US in the past used its antitrust rules aggressively to this end (Gerber 2010, 107).

Another reason was the growing disappointment of developing countries with the TRIPS agreement. The leaders of many developing countries believed that ostensibly neutral provisions of the said agreement had been applied in ways that gave undue and unanticipated advantages to the developed countries at the expense of the developing countries. This disappointment was affecting deeply the period when competition law was being evaluated for inclusion in the WTO. There was confusion and distrust among the developing countries regarding the obligations that they have to shoulder if competition law were included in the WTO. Moreover, most of the developing countries in question have little experience with the competition legislation. This aspect or reality drifted them more into an uncertain and cautious situation regarding the costs, burdens or advantages that the competition law might bring. Furthermore, there was little doubt that US model of antitrust would dominate their territory and for most of the developing countries, this model was of a suspect because the US conception

of antitrust law seemed more likely to impede agreements among producers in developing countries than to deter unilateral anticompetitive conduct by dominant Western and Japanese firms (Gerber 2010, 107).

Actually this was seen as a representation of just the opposite of what developing countries were expecting. Developing countries were in need of new opportunities for their domestic firms to compete as well as protection from anti-competitive conduct that would impede their developmental goals. Last but not least, most of the South American countries including Argentina, Brazil, and Chile reserved their position against the EU proposal stating that they could accept this offer only if balance of negotiations was sufficient which means they would determine their position on this issue based on the compromises they could receive in other policy areas such as in the area of agriculture. Jenny argued that none of the opponents opposed the main aim of the EU proposal but rather they objected the specific EU proposal (Jenny 2004, 27). In other words, opponents in fact would like to contribute to the fight against transnational anticompetitive cartels restricting trade. But they were opposing this proposal fearing that its costs would outweigh its benefits. They were concerned that their possible commitment to having a non-discriminatory competition law would hinder them from pursing development goals necessary for their economies. Opponents were particularly skeptical about the possibility of voluntary cooperation in case their economies are at stake as a result of cross border practices (Jenny 2004, 27).

The EU stated that the dispute settlement mechanism would play a very limited rule as it would apply only *de jure*. It also added that countries can apply specific sectoral or behavioral exemptions as long as they were transparent and not discriminatory. Nevertheless, the EU was not successful in convincing countries that there is nothing to hesitate since the dispute settlement mechanism would play a rather limited role given the fact that the EU proposal included a binding commitment subject to review through the dispute settlement mechanism. As a corollary to those discussions, countries such as Hong Kong/China, Malaysia and the US suggested to go along with a soft agreement that would not necessitate any commitment on the part of the WTO members after recognizing the merits of the competition issue. Therefore, the chair of the Working Group offered an intermediate solution which foresaw the creation of a WTO Competition Committee where members would explore issues relating to the interface between trade and competition, conduct peer reviews, work on cooperative mechanisms and oversee a technical assistance program. This intermediate solution attracted the attention of many countries in an affirmative way (Jenny 2004, 27-28).

The EU Commission became quite concerned before the 2003 Cancun Ministerial Conference regarding the possibility of acceptance of soft agreement proposal among the WTO members. The EU Commission was successful in its

attempts to prevent any such option from the Draft Ministerial Declaration (Jenny 2004, 29). But there was no consensus on modalities for future negotiations in this area in 2003 at the Ministerial Conference in Cancun, although Ministers recommitted themselves to working to implement Doha Declarations and Decisions fully and faithfully.[53] In other words, Cancun Ministerial Conference failed[54] for competition policy.

The WGTCP met many times over the course of seven years between 1996 and 2004 until its termination. This WGTCP became a vehicle for discussions and submissions from both developed and developing nations on the benefits and drawbacks of a international competition law initiative, as well as submissions on the various discrete subjects of antitrust. Negotiations on a multilateral framework on competition policy under the framework of the WTO have come to an end when the WTO General Council adopted the July 2004 package on August 1, 2004. July 2004 package put forward that the issue of competition policy would no longer form part of the Work Programme as previously set out in the Doha Ministerial Declaration55 in 2001, and therefore no work towards negotiations on any of these issues would be carried out within the WTO during the Doha Round.56 Until 2004, however, many countries including developing ones have actively participated in discussions on competition policy related matters at the WTO. The WGTCP is currently inactive.

3.4.4. The Developments that Lead to the Creation of the ICN

Parallel to those developments that were taking place at the WTO in late 1990s, US Departmant of Justice (DOJ) Attorney General Janet Reno and Assistant Attorney General for Antitrust Joel I. Klein formed the International Competition Policy Advisory Committee (ICPAC or the Advisory Committee) in November 1997 to address the competition issues that are emerging on the horizon of the global economy in the US. The Advisory Committee was asked specifically to give particular attention to the multi-jurisdictional merger review, the interface of trade and competition issues, and future directions in enforcement cooperation between U.S. antitrust authorities and their counterparts around the world, particularly in their anti-cartel prosecution efforts.

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[53] For more information see http://www.wto.org/english/tratop_e/comp_e/history_e.htm#doha

[54] The top decision-making body of the WTO is the Ministerial Conference, which usually meets every two years. It brings together all members of the WTO. The Ministerial Conference can take decisions on all matters under any of the multilateral trade agreements The failure of a conference during a round means that Ministers do not agree that there has been progress of the previous two years of the round and it usually indicates that the round will take longer than planned.

[55] WTO (2001), Doha Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001, paragraphs 20-22, 23-25 and 26 respectively.

[56] For more information see http://www.wto.org/english/tratop_e/comp_e/history_e.htm#doha.

ICPAC Report was completed after more than two years of extensive work on February 28, 2000. According to the ICPAC report, the reasons for the above mentioned topics are as follows. Initially, the large number of mergers being reviewed by a number of competition authorities, then the significant increase in the number of international cartel cases being prosecuted by the Antitrust Division of the DOJ, and the international controversy over barriers to market access stemming from allegedly anticompetitive private barriers to trade have come to make these international matters significant to U.S. antitrust policy. In preparation of this report, the Advisory Committee undertook significant outreach efforts by holding two sets of public hearings in the fall of 1998 and the spring of 1999. These hearings have given the opportunity to hear from various expert participants, including senior competition officials from around the world, lawyers, investment bankers, economists and academics as well as from a number of business and trade associations (ICPAC Report 2000, 33-39).

The ICPAC report did not consider the WTO as the natural home for international discourse regarding competition policy matters. Instead the report proposed another approach to create a home for addressing the entire global competition agenda that was called the Global Competition Initiative (GCI) (ICPAC Report 2000, 282). According to this proposal the US and other nations should continue to use -albeit not limited- existing international organizations and venues such as the WTO, the OECD, and the UNCTAD that have ongoing programs on competition policy. The Advisory Committee, however, continued to recommend that the US should explore the scope for collaborations among interested governments and international organizations to create a *new* venue where government officials, as well as private firms, nongovernmental organizations (NGOs), and others can consult on matters of competition law and policy. The report named this venue as the Global Competition Initiative (GCI) (ICPAC Report 2000, 282).

The ICPAC Report (2000, 282) envisaged that the proposed GCI should be inclusive in its membership. Moreover, the GCI would be different than already existing international organizations such as the OECD, the UNCTAD and the WTO where the antitrust matters are dealt with exclusively or extensively. This is because on one hand, the OECD was an organization of developed countries while UNCTAD supported the developing world and was not adequate for the needs of the developed ones. On the other hand, the WTO was an organization for trade officials.

That is the reason why, this new venue shall be open to developed and developing nations, and at least provide the possibility of allowing room for the private sector, NGOs and other interested parties to play a role with annual or

semi-annual meetings. The report suggested that those meetings could be devoted to opportunities for antitrust officials to exchange views and experiences mainly on cartel enforcement, merger review, enforcement cooperation, analytical tools, technical assistance. It could provide a forum where governments that support such a GCI could meet to take up an agenda that covers the full range of competition policy matters of consequence to the global economy without creating a new bureaucracy (ICPAC Report 2000, 282).

Following the launch of ICPAC Report, Joel Klein the then Assistant Attorney General in charge of DOJ's Antitrust Division delivered a speech on September 14, 2000 in Brussels. In his speech he indicated a softening towards what had been viewed as US opposition to internationalization of antitrust enforcement (First 2003, 33). Klein referred to the increase in trans-border mergers which had led to greater cooperation between US and the EC. Klein further endorsed the recommendation on the establishment of the GCI as suggested by the ICPAC report of which he was a part. He also proposed that the movement towards this initiative should be cautious and explanatory though it is something inevitable in the end (First 2003, 33). Klein also underlined that though the issues of trade and competition overlap, there are major areas where each has its own sphere. He added that the WTO by recognizing this matter dealt with many non-competition issues despite its wide-ranging trade agenda. Klein among other things stressed that for global cooperation and coordination to work, "[EU and the US agencies] need to develop a common language even if pure convergence cannot be achieved" (Klein 2000, 5).

At that time, the creation of a new venue for international antitrust discussions had raised three problems. Initially, the structure of such a venue was unclear, secondly its mission was not known, and thirdly its difference from other international venues in structure or mission needs clarification (First 2003, 34). In fact, the ICPAC report entailed some hints as the answers to these questions. First of all, the GCI would be inclusive in nature, that is it would be open to both developing and developed world country agencies unlike OECD and UNCTAD that are targeting developed and developing country agencies respectively. Besides it would be a virtual organization with minimal dedicated staff supported by participating institutions and governments (ICPAC Report 2000, 282).

During the preparation of this report, the logic behind the Committee's idea for a rather loose institution was the belief that countries may be prepared to cooperate in meaningful ways but are not necessarily prepared to be legally bound under international law. The proposed GCI is built on the premise that nations can usefully explore areas of cooperation in the field of competition

policy and facilitate further convergence and harmonization. There may be areas where nations are prepared to develop binding agreements, and other areas where the development of nonbinding principles or consultations are more promising. Again according to the ICPAC report, the mission of the GCI would be to foster dialogue among officials along with broader communities to produce more convergence of law and analysis, common understandings and common culture. The activities under this new umbrella should be seen as an effort to help prepare the groundwork at the multilateral level for more effective national enforcement and greater international cooperation. Last but not least, the inclusive nature of the initiative would differ itself from other international organizations such as the WTO, the OECD and the UNCTAD (ICPAC Report 2000, 282).

The report says that although the WTO has an important role to play, it has its limitations. The WTO is broadly inclusive in its membership, but it is centrally focused on governmental restraints with trade effects. The report further argues that not all competition policy problems are trade problems. Harmonization of procedural or substantive features of merger notification and, review and protocols to protect confidential information exchanged in the course of enforcement measures are broadly international, but they are not trade issues. Besides, the traditional mandate of the WTO may be inappropriate for competition issues because under the traditional mandate of the WTO negotiation of rules are subject to dispute settlement. Thus, the report suggested that it would be better to discuss competition issues broadly and in a consultative manner (ICPAC Report 2000, 282).

The report argues that only a limited range of competition matters are likely to give efficient results in any organization that requires a binding commitment from nations. Moreover, the report claims that given the failure of the Seattle trade summit to reach agreement on an agenda for a new round of multilateral negotiations, it is also unclear how or whether competition policy will be considered by the WTO. Again according to the report, the OECD has limitations. It further states that it serves to the limited number of member states[57]. Furthermore, its long standing Competition Committee[58] has worked particularly well as a forum for promoting soft convergence of competition policies among its members and for providing technical assistance to certain OECD observers and nonmembers (ICPAC Report 2000, 283). The report continues as follows;

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[57] OECD had 29 member states during the writing of the ICPAC report.

[58] OECD's Competition Committee first met on 5 December 1961. Then it was called the Committee of Experts on Restrictive Business Practices. It assumed that name in 2001. For more info see: Background note by the OECD Secretariat on the occasion of the "100th Meeting of Competition Committee - Successes And Failures in a Changing Environment", February 1, 2008, DAF/COMP(2008)2.

> It has not, however, achieved much success in rulemaking or dispute settlement. Moreover, numerous jurisdictions that have competition laws or policies in place or that are considering the introduction of such policy measures are not members of the OECD. And the specialized needs[59] of new competition regimes may not yet be fully integrated into the deliberations and analysis of the OECD (ICPAC Report 2000, 283).

Nonetheless, according to First, the EU initially did not give a warm welcome to the GCI proposed by the ICPAC. One month before Klein's Brussels speech, the then Commissioner, in charge of Competition Policy for the EU, Mario Monti said that he was a little disappointed that ICPAC did not propose the creation of a competition law framework at the WTO in Washington, DC at the Japan Foundation Conference (First 2003, 35; Monti 2000a, 11). He continued by saying he saw no inherent harm in the creation of the GCI but he did not think this would provide a genuine substitute for the multilateral initiative. He also stressed the fact that what the EU had in mind was not the establishment of an international competition authority, with its own powers of investigation and enforcement. Nor it wished to create a framework which could interfere directly with enforcement actions in individual jurisdictions. (Monti 2000a, 11).

Just after a month, however, Monti spoke again on the same topic this time in Brussels. Surprisingly, however Monti was rather more lenient towards this proposal. He gave his speech one day after Klein where he warmly welcome[d] the announcement by underlining that

> the [EC] believed multilateral efforts are necessary to ensure convergence and co-ordination between the vast number of …enforcement systems around the world…. An opening to multilateralism in competition matters beyond the OECD by such an authoritative opinion is a very important development that [the EC] appreciate[s] as a constructive step. It goes in the same direction as the EU's view to complement …bilateral relations, which will remain fundamental, with a multilateral framework (Monti 2000b, 9-10).

Monti reiterated his that is the EC's views in New York on October 20, 2000 during the Annual Conference of the Fordham Corporate Law Institute (Monti 2000c).

Indeed, the above declarations show that the EU and the US were coming closer to each other, with another saying converging in their understanding towards the formation of a structure similar to that of a GCI. This rapprochement was further formalized with a meeting organized by the International Bar

[59] New agencies, for instance might be in need of technical assistance in different subject areas of competition law and policy as well as trained and well educated staff.

Association (IBA) co-hosted by the American Bar Association (ABA) and Fordham University in Ditchley Park, London in February 2001. This private gathering resulted in further support for the creation of a competition network initiative among the competition authority officials as well as other experts of the field (First 2003, 36; Lugard 2011, 34).

The Ditchley Park meeting endorsed the concept of a Global Competition Forum[60] based on the view that the time has come for a multilateral institutional initiative. The meeting hosted more than 40 of the world's well-known competition officials and professionals representing 23 countries and 20 agencies and discussed the possibility of such a forum. The following three set of issues were discussed; merger control in the 21st century, competition policy and competition advocacy in developing countries, and the structural as well as process issues that face a new global initiative. The resulting consensus of the Ditchley Park meeting has prepared the ground for the formal launch of this global forum initiative as early as but before the end of 2001. It was agreed to put into place a kind of Steering Committee[61] to oversee the proposed Forum's formal birth and ongoing management. The Ditchley Park meeting was one more step toward the formalization of this project (Rowley and Wakil 2001, 1). This was in fact a house warming ceremony for all those affected by the internationalization of competition.

3.4.5. The Rise of the ICN and its Role in the Convergence Efforts

Despite the enthusiasm generated at the Ditchley Park meeting, concerns arose during the spring and summer of 2001 as to whether the progress reached in London would be at risk given the unusual long leadership change at the US DOJ (Rowley 2002, 2; Lugard 2011, 35) regarding the appointment of assistant attorney general. In 2001, it was not yet clear how the Republican Administration would consider the proposed initiative (Rowley and Wakil 2001, 1). Nevertheless, both the Assistant Attorney General Klein's successor at the US DOJ and the Chairman of the Federal Trade Commission (FTC) Robert Pitofsky's successor Timothy Muris, made it clear that the new US Administration intended to make good on the promise of the GCI envisioned by the ICPAC and the Ditchley Park meeting (Rowley 2002, 2). Thus, days later the appointment of these new officials, the ICPAC report and the Ditchley Park meeting conclusions led to the creation of the ICN which was the incarnation of the GCI. Newly appointed Chairman of the FTC Timothy Moris brought aboard William E. Kovacic as General Counsel and international expert Randolph W. Tritell, and gave them the task of implementing the support for the ICN (Lugard 2011, 35).

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[60] The name Global Competition Forum was preferred by the European regulators instead of the name GCI.

[61] This Steering Committee later became the main management body of the ICN.

The launching of the ICN on October 25, 2001 by the top antitrust officials from 14 jurisdictions - Australia, Canada, European Union, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, United Kingdom, United States, and Zambia - is by no means a very important date for the international antitrust community. To see the importance of this establishment, one needs to understand its main aim and functioning. As openly announced on its website, the ICN aims for a dynamic dialogue that serves to build consensus and convergence towards sound competition policy principles across the global antitrust community. The ICN is the only international body devoted exclusively to competition law enforcement and its members represent national and multinational competition authorities. ICN is unique in the world of antitrust as it is founded as soft-law platform with a virtual formation. Yet it has a special power in the competition world albeit its non-binding best practices and recommendations. It is important to take a look at the historical developments that lead to today's most powerful non-binding instrument before moving on to discuss whether and to what extent such convergence that ICN works on is enough to cope with international antitrust practices.

In fact, as rightly argued by Fox, the ICN is a network that arose "somewhat serendipitously to fill a void in the absence of an international law of antitrust" (Fox 2009a, 152). The ICN is a focused network for antitrust agencies from developed and developing countries. The basic aim of this network is to address practical antitrust enforcement and policy issues of common concern. The ICN is unique as it is the only international body devoted exclusively to competition law enforcement.[62] Its members represent national and multinational competition agencies. It is a very flexible organization without any formal structure. It is the member agencies who produce work products through their involvement in flexible project-driven and result-oriented working groups. Working group members communicate and coordinate its activities together via internet, telephone, fax and video conference most of the time. ICN focuses on antitrust matters rather than more contentious issues like the competition and trade nexus. In fact, the creation of the ICN was a parallel initiative against the developments that took place at the WTO. Nevertheless, following the WTO Cancun Ministerial Meeting of 2003, which dropped the antitrust policy from the trade agenda of the WTO by leading to a termination of the WGTCP, the ICN has been left as the only true international network for international antitrust matters.

The ICN endeavors to facilitate procedural and substantive convergence in antitrust enforcement through its results-oriented agenda and informal, project-driven organization. By enhancing convergence and cooperation, the ICN aims to promote more efficient and effective antitrust enforcement worldwide. It is

[62] Competition matters is only one aspect of interest among others in other international bodies such as the UNCTAD, and the OECD.

argued that the consistency in enforcement policy and elimination of unnecessary or duplicative procedural burdens stands to benefit consumers and businesses around the world. The ICN is built to allow for a dynamic dialogue that serves to build consensus and convergence towards sound competition policy principles across the global antitrust community. Nevertheless, it is also important to examine to what extent ICN has been successful in its efforts and what lies ahead.

From a theoretical perspective, convergence of national legislation in any policy field is the result of the conscious policy coordination of nation states. This is because globalization has changed political economy through the generation of a new set of global issues that were previously purely national. This is not new global politics, but new areas of bargaining. Moreover, the ability of states to cooperate and their ability to agree on norms of governance determines the extent of policy convergence (Drezner 2001, 55). This also holds for international competition law and policy practices, and the structure and the operational framework of the ICN is a support in this regard.

3.5. The Role of Other International Organizations in Fostering International Cooperation and Convergence

The previous sections of this Chapter talk about the past attempts to create a global competition regime from the perspectives of the WTO and the ICN starting from the days of the League of Nations. In fact when carefully analyzed, one can see that especially those efforts by the WTO focused on the hard law institutions. In simple words, hard law is a formalized global governance model that relies on formal rules to bind the participating countries. Although there were attempts to create a binding set of hard law competition institutions upon the founding of the modern international trade system in the past, none of them have been successful so far due to the reactions of various countries. In this journey, the below section focuses on the role of other institutions in fostering international cooperation and convergence until today. It first starts with the OECD and then continue with UNCTAD to analyze the internationalization of competition law and policies.

3.5.1. The Role of OECD in Fostering International Cooperation and Convergence

The OECD[63] was established in 1961 when 18 European countries plus the US and Canada joined forces to create an organization dedicated to global development with an aim to advance cooperation among the developed countries of the world.

The predecessor of the OECD is the Organization for European Economic Cooperation (OEEC). OEEC emerged from the US financed Marshall Plan as a

[63] To learn more about the history of the OEEC and the OECD please see: http://www.oecd.org/about/history/

permanent organization for economic co-operation and came into being on April 16, 1948. As a precondition for receiving American assistance, governments were required to lower barriers to intra-European cooperation and to coordinate their economic plans though OEEC. They were also encouraged to carry out domestic economic reforms including adoption of America's more productive manufacturing and management techniques. The US tolerated European discrimination against American agricultural and manufactured exports. The US also assisted and helped the Japanese economy to rebuild and integrate itself to the Western system. In other words, during the early years of the Cold War, the postwar international economic order and the international security order became intimately parallel (Gilpin 2009, 59). Encouraged by its success and the prospect of carrying its work forward on a global stage, Canada and the US joined OEEC members in signing the new OECD Convention on 14 December 1960. Thus, the OECD was officially born on September 30, 1961, when the Convention entered into force.

Today, OECD has 34 member countries spanning around different parts of the world, from North and South America to Europe and the Asia-Pacific region. Member Countries include many of the world's most advanced countries but also emerging countries like Mexico, Chile and Turkey. OECD is also working closely with emerging giants like China, India, Russia and Brazil and developing economies in Africa, Asia, Latin America and the Caribbean with an aim to be and to build a stronger, cleaner, fairer world. The OECD Committee of Experts on Restrictive Business Practices was established in December 1961 and it replaced the Group of Expert set up in 1953 under the former European Productivity Agency. The said Committee has devoted most of its time to pursue ways and means of promoting international cooperation in a more concrete form on anti-competitive practices affecting more than one country. Later on, this Committee was transferred into Competition Committee. Meanwhile, the late 1960s and early 1970s witnessed the growth of multinational firms. Farsighted firms started investing abroad targeting cheaper labors which was seen as a challenge by way of exploiting the local workers and local businesses (Fox et.al. upcoming, 4).

It is important to explore the role of the OECD as an advocate of international cooperation matters during the analysis carried out in this study. OECD Competition Committee, its working parties[64] and the Global Forum on Competition all together promote regular exchanges of views and analysis on competition policy issues. Over the last 45 years, the OECD adopted a series of Council Recommendations which have been elaborated and progressively refined by the Competition Committee. All these Recommendations are dealing directly

[64] Working Party no. 2 on Competition and Regulation; Working Party no.3 on Co-operation and Enforcement

or indirectly with international co-operation issues of competition authorities on enforcement cases. It would be correct to argue that the work carried out by the Competition Committee and the relevant Recommendations have been influential and decisive in advocating co-operation to deal with international antitrust matters.

Indeed, all of the key recommendations issued by the OECD Council in the area of antitrust enforcement directly or indirectly address international co-operation (OECD 2013, 101). Among them, however, only the 1995 Revised Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade deals exclusively and directly with international co-operation. The other recommendations only indirectly handle international cooperation issues. Of these recommendations, this section focuses on the 1998 Recommendation on Hard Core Cartels and the 2005 Recommendation on Merger Review due to their relevance to international cooperation efforts in the competition field. In addition to these recommendations, the OECD Competition Committee issued a series of Best Practices dealing with international cooperation. One such example is 2005 Best Practices for the formal exchange of information between competition authorities in hard core cartel investigations. In this regard, this section focuses on these said instruments tackling directly or indirectly with international cooperation issues on antitrust matters.

Thus, this section of the Chapter examines in total four of the OECD instruments which are dealing with international co-operation. It first describes the 1995 Revised Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade, and then discusses the international cooperation facets of the 1998 Recommendation on Hard Core Cartels and the 2005 Recommendation on Merger Review as well as the 2005 Best Practices for the Formal Exchange of Information between Competition Agencies in Hard-core Cartel Investigations. According to a recent OECD Secretariat Report (2013, 102) on the ICN/OECD Survey on International Enforcement Cooperation unlike other competition related recommendations,[65] the Competition Committee has never reported to the OECD Council concerning the application of the 1995 Recommendation on International Co-operation including its predecessors, and it has never revised the experiences of the Member countries with the 2005 Best Practices. Thus, the effect of the relevant OECD documents on international cooperation in the competition law and policy field left untouched until 2013.[66] The same Secretariat Report argues that the results of the joint

[65] See for example the implementation reports of the 1998 Recommendation on Hard Core Cartels, the 2001 Recommendation on Structural Separation, the 2005 Recommendation on Merger Review and the 2009 Recommendation on Competition Assessment.

[66] ICN/OECD Survey on International Enforcement Cooperation was conducted as part of a Project on international cooperation by the OECD Competition Committee following the decision of the

ICN/OECD Survey confirms the OECD's important role in shaping the current framework for international cooperation over the years. It also claims that the role of the OECD recommendations on international cooperation has been significantly more effective than that of the 2005 Best Practices (OECD 2013, 102).

3.5.1.1. Experiences with the 1995 Recommendation on International Cooperation

The current version of the OECD Recommendation on international co-operation was adopted in 1995 titled Revised Recommendation of the Council Concerning Cooperation Between Member Countries on Anticompetitive Practices Affecting International Trade (1995 Council Recommendation), as a successor to four previous Recommendations in the same domain. The history of the 1995 Council Recommendation on international co-operation dates back to 1967. The beginning of 1960s witnessed a renewed interest in international antitrust practices that has shown itself by the increased concern towards the extraterritorial application of US antitrust legislation, especially in the shipping industry as well as the 1965 Report of the Group of Experts prepared by the Committee on Restrictive Business Practices appointed by the GATT Contracting Parties (Zanettin 2002, 54). It is in such an atmosphere, the Council Recommendation Concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade was adopted by the Council of the OECD as the first recommendation on international cooperation in 1967 (1967 Council Recommendation).

According to an OECD Report (1977, 460), 1967 Council Recommendation by recognizing the fact that the power of competition agencies is limited, suggested the introduction of a voluntary notification procedure for investigations or proceedings undertaken by an OECD Member country under its legislation on restrictive business practices, when important interests of another country are involved as well as for coordination of action and exchanges of information between Member Countries on restrictive business practices on international trade. In other words, 1967 Council Recommendation encouraged Member States to (a) notify other countries of an investigation involving their important interests; (b) coordinate their respective actions when more than one jurisdiction is looking at the same case; and (c) supply each other with any information on anti-competitive practices.

The 1967 Council Recommendation recommended that the OECD Member countries should notify other countries concerning an investigation involving the important interests of another Member country. However, the proceeding country should take into account the views expressed by the other Party, while retaining

Competition Committee to focus its strategic work on international cooperation in competition enforcement as one of the strategic themes in 2012.

full freedom to take the ultimate decision. This is clearly the introduction of principle known as traditional comity (Zanettin 2002, 54). Additionally, this Recommendation acknowledged that competition agencies should operate within the limit of existing national laws and that the Council Recommendation should not be read as affecting national sovereignty and extraterritorial application of national competition laws.

In 1973, a new Recommendation was adopted by the OECD Council. 1973 Recommendation of the Council Concerning a Consultation and Conciliation procedure on Restrictive Business Practices Affecting International Trade (1973 Recommendation) being in line with the earlier version recognized the need for closer cooperation between the OECD Member countries. A little bit more innovative (Zanettin 2002, 54) than the previous one, 1973 Recommendation advised that the OECD Member Countries should request consultation[67] with other Members against the anti-competitive practices that harmfully affect the interests of the requiring state, which is the definition of positive comity. Another innovative characteristic of the 1973 Recommendation was the introduction of a kind of dispute resolution in case such a consultation process cannot provide a satisfactory solution; that is accordingly, a question can be submitted to the Committee for conciliation purposes[68].

Yet a newer version of the Recommendation was adopted in 1979, under the title Council Recommendation Concerning Cooperation between Member Countries on Restrictive Business Practices Affecting International Trade (1979 Recommendation) abolishing the previous two Recommendations. 1979 Recommendation combined the 1967 and 1973 versions and entailed two sections. The first section included notification, exchange of information, coordination of actions when an OECD Member Country decided to take enforcement actions likely to affect the interests of other Member Country(ies). The second section of the 1979 Recommendation involved consultation and conciliation procedures when a Member Country considered that anticompetitive actions by undertakings located in another one were likely to affect its important interests.

Yet 1979 Recommendation was replaced in 1986 with a newer version namely the Council Recommendation Concerning Cooperation between Member Countries on Restrictive Business Practices Affecting International Trade. The main difference from the previous versions was the addition of the guiding principles. The purpose of these guiding principles was "to clarify the relevant procedures and thereby to strengthen co-operation and to minimize conflicts in the enforcement of competition laws" (OECD 1986, Appendix Article 1). Thus,

[67] See Section I. paragraph 1 of the 1973 Recommendation, C(73)99(Final).

[68] See Section I. paragraph 5 of the 1973 Recommendation, C(73)99(Final).

the guiding principles at least tried to foresee clear and transparent rules and procedures for notification requests, information requests, and confidentiality procedures of Member Countries.

As already in use, the latest amendment was adopted in 1995 as mentioned at the beginning of this section. 1995 Council Recommendation on international co-operation composed of the following five main parts: (i) a section on notification of an investigation or proceeding which may affect important interests of another member country (part I.A.1); the notification procedure should enable the proceeding member country, while retaining full freedom of the ultimate decision, to take account of the views of the other member country and to design remedial actions that the other member country may find it feasible to take under its own laws (OECD 2013, 146); (ii) a section on coordination of actions calling on member countries to co-ordinate their action, insofar as appropriate and practicable, where two or more member countries proceed against an anticompetitive practice in international trade (part I.A.2); (iii) a section on assistance and exchange of information between investigating agencies[69] (part I.A.3). Member countries should assist each other and co-operate in developing or applying mutually satisfactory and beneficial enforcement measures and to do so, they should supply each other with such relevant information on anticompetitive practices as their legitimate interests permit them to disclose. The exchange of information under the Recommendation is subject to the laws of participating member countries governing the confidentiality of information (OECD 2013, 146); (iv) a section on consultation procedure. The recommendation distinguishes between consultation in case a member country wishes another country to engage in an enforcement action to protect important interests in the requesting jurisdiction (a positive comity request) (Article I.B.4); and consultation in case a member country wishes to request another member country to assist in its own enforcement action (a request for investigatory assistance) (part I.B.5). Both requests for assistance are governed by the same standard: the requested country is to give full and sympathetic consideration to the request (OECD 2013, 149); (v) a section on conciliatory procedure, in case the consultation procedure has no satisfactory conclusion (part I.B.8). In that case, the member countries concerned can consider having recourse to the good offices of the Competition Committee with a view to conciliation. (OECD 2013, 149).

[69] Assistance might include any of the following steps, consistent with the national laws of the countries involved: a) Assisting in obtaining information on a voluntary basis from within the assisting Member's country; b) Providing factual and analytical material from its files, subject to national laws governing confidentiality of information; c) Employing on behalf of the requesting Member country its authority to compel the production of information in the form of testimony or documents, where the national law of the requested Member country provides for such authority; d) Providing information in the public domain relating to the relevant conduct or practice.

A set of Guiding Principles is included in the appendix of the said Recommendation for the implementation of these cooperation mechanisms laid down in the text. The purpose of these principles is to clarify the procedures of the Recommendation and thereby to strengthen cooperation and to minimize conflicts in the enforcement of competition laws. Nevertheless, the main discrepancy of the text from its predecessors is its main emphasis on the particular case of mergers. In fact, such an approach was parallel to the realities of the 1990s during which there has been a proliferation of international mergers all around the world. This matter was also highlighted in the Preamble of the 1995 Council Recommendation.

3.5.1.2. Experiences with the 1998 Recommendation Concerning Effective Action on Hard Core Cartels

Through the 1998 Recommendation Concerning Effective Action on Hard Core Cartels (1998 Recommendation on Hard Core Cartels), the OECD for the first time ever defined and condemned a particular kind of anticompetitive conduct. This is because hard core cartels are among the most unfavourable violations of competition law. They simply injure consumers in many countries by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others. Thereof, effective action against hard core cartels is particularly important from an international perspective. They distort world trade as a result of which market power, waste, and inefficiency are created in those countries whose markets would otherwise be competitive. Hard core cartels particularly depend on cooperation among the participating domestic and multinational firms since they generally operate in secret, and relevant evidence may be located in many different countries.[70] In this vein, it was expected that the 1998 Recommendation on Hard Core Cartels would contribute to the efficient operation of international markets by promoting cooperation among OECD member countries as well as non-member countries.

The Recommendation starts with the advice that OECD member countries should ensure that their competition laws effectively halt and deter hard core cartels by providing for effective sanctions and adequate enforcement procedures and institutions to detect and remedy hard core cartels (part I.A.1). Then the second part of the Recommendation underlines the common interest of the member countries in curbing hard core cartels and puts forward principles regarding when and how to cooperate in a hard core cartel investigation. To this end, the Recommendation invites member countries to improve cooperation through positive comity principles[71] under which a country could request the other country

[70] http://www.oecd.org/competition/cartels/recommendationconcerningeffectiveactionagainsthardcorecartels.htm

[71] See Chapter 4 for more information on the comity principle.

to take necessary action in order to remedy allegedly anticompetitive conduct that is substantially and adversely affecting the interests of the referring country.

Additionally, the 1998 Recommendation on Hard Core Cartels recognizes the mutual interest of the member countries in preventing hard core cartels warrants cooperation that might include sharing documents and information in their possession with the competition authorities of other nations (part I.B.2). It also realizes the importance and benefit of assisting each other's competition authority during the investigatory process by gathering documents and information on behalf of another agency on a voluntary basis and when necessary through use of compulsory process. Last but not least, the Recommendation encourages the member countries are to review all obstacles to their effective co-operation in the enforcement of laws against hard core cartels and to consider actions, including national legislation and/or bilateral or multilateral agreements or other instruments, by which they could eliminate or reduce those obstacles in a manner consistent with their important interests (Article I.B.3) (OECD 2013, 142).

3.5.1.3. Experiences with the 2005 Recommendation of the Council on the Merger Review

Effective merger review is another important component of a competition regime as it would help to prevent consumer harm from anticompetitive transactions that would likely reduce competition among rival firms and/or foreclose competitors. Within this context, the OECD Competition Committee has long focused on a broad range of issues related to the review of mergers under national competition regimes.[72] In order to consolidate its vast experiences and to take into account the important work carried out by other international organizations (especially the ICN) working in the area, the OECD Council adopted the 2005 Recommendation of the Council on the Merger Review[73] (2005 Merger Review Recommendation) on 23 March 2005.

The 2005 Merger Review Recommendation aimed to contribute to greater convergence of merger review procedures, including cooperation among competition authorities, towards internationally recognized best practices. It should thus help to make merger review procedures more effective, while at the same time helping competition authorities and merging parties to avoid unnecessary costs in multinational transactions (OECD 2013, 143).

Part B of the Recommendation particularly deals with the coordination and cooperation on cross-border merger cases. It recommends that when applying their merger laws, countries should aim at the resolution of domestic competitive

[72] http://www.oecd.org/competition/cartels/recommendationconcerningeffectiveactionagainsthardcorecartels.htm

[73] OECD (2005), Recommendation of the Council on the Merger Review, C(2005)34.

concerns arising from the particular merger under review and should endeavour to avoid inconsistencies with remedies sought in other reviewing jurisdictions (part I.B.2). Member countries are also encouraged to consider actions, including national legislation as well as bilateral and multilateral agreements or other instruments, by which they can eliminate or reduce impediments to co-operation and co-ordination (part I.B.3).

3.5.1.4. Experiences with the 2005 Best Practices on the Exchange of Information in Cartel Cases

The 2005 Best Practices on the Exchange of Information in Cartel Cases (2005 Best Practices) identify safeguards that shall be considered by the member countries in their applications when their respective competition authorities are authorized to exchange confidential information in cartel investigations. As underlined in its text, the 2005 Best Practices are based on the 1995 Recommendation on International Cooperation and the 1998 Recommendation on Hard Core Cartels, and draw from the OECD Competition Committee's previous work on the fight against hard core cartels, and in particular the subject of information exchanges in hard core cartel investigations. Consistent with these Recommendations and in light of the Competition Committee's work on the topic of information exchanges in cartel investigations, the Competition Committee advises the member countries to support information exchanges and in accordance with their laws, to seek to simplify and to expedite the process for exchanging information in order to avoid imposing unnecessary burdens on competition authorities and to allow an effective and timely information exchange.[74]

3.5.2. The Role of UNCTAD in Fostering International Cooperation and Convergence

The establishment of UNCTAD also dates back to 1960s like the OECD. Early 1960s witnessed growing concerns about the place of developing countries in the international trade. This initiative has led many of these countries to call for the convening of a full-fledged conference specifically devoted to tackling the problems of the developing countries and identifying appropriate international actions. Thus, the first ever UNCTAD Conference was held in Geneva in 1964. Given the magnitude of the problems at stake and the need to address them, the UNCTAD was institutionalized to meet every four years, with intergovernmental bodies meeting between sessions and a permanent secretariat providing the necessary substantive and logistical support.

Today UNCTAD through its Competition and Consumer Policies Branch provides competition authorities from developing countries and economies in transition with a development-focused intergovernmental forum for addressing practical competition law and policy issues. Development perspective is quite

[74] Paragraph 4 in the 2005 Best Practices on the Exchange of Information in Cartel Cases.

determining in UNCTAD agenda because it promotes the development-friendly integration of developing countries into the world economy since its establishment in 1964. From the competition linkage perspective, the UNCTAD's role became more significant given the failure of the WTO to achieve consensus concerning the need to launch negotiations on an international framework for antitrust in the context of the WTO. This is because the initiative to adopt international rules for antitrust has been a long standing issue in the history of international competition. In different terms, the global governance of competition law and policy is an important matter for international trade and development.

It would not be wrong to argue that the role of UNCTAD has been underestimated by those thinkers and scholars whose focus was on the role of other international fora such as the OECD, WTO, and the ICN in the discussions on the internationalization of competition. The main explanation provided for this lack of interest is that the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (UN Set) adopted by the United Nations General Assembly in 1980 does not have a binding effect. Despite this non-binding characteristics of the UN Set, the validity of the UN Set has been reaffirmed over and over again during the subsequent UN Conferences to Review All Aspects of the Set which is held every five years (Lianos 2007, 2) since 1980.

The UN Set is the result of the efforts of the developing countries to question the foundations of the international trade and develop a new international economic order in 1960s and 1970s. The provisions of the UN Set were designed with an aim of economic development of the less developed countries and an objective that consequently affecting the substantive provisions of the said Set. The actions undertaken concerning competition law under the auspices of UNCTAD were the continuation of the post-World War II efforts for an international antitrust framework. But this time the motivation for such an international initiative was coming from the developing countries side.

Those developing countries who had recently gained economic interdependence were trying to impose a New International Economic Order (NIEO) on developed countries to redistribute the world's wealth that would work in their favor in 1970s (Lianos 2007, 7). It is rather difficult to know exactly when the term NIEO was first used but the official recognition of the term by the UN can be accurately dated (Mahiou 2011, 1). As explained by Mahiou, beyond this official recognition, the roots of the term can be traced back to the UN strategies for development launched in the early 1960s, the debates on international trade and development law. The new international economic order testifies first and foremost to the determination of the new States that emerged from decolonization to participate effectively in international life and, at least to fix essentially the global economic system put in place in the aftermath of the World War II. The

general belief was that such a system (represented by the IMF, the World Bank, and the GATT), based on liberal principles and completely dominated by a few Western powers led mainly by the US, no longer met contemporary needs. In an attempt to change it, developing countries set up the Group of 77 to coordinate their positions and demands vis-à-vis the developed countries.[75] Thus the NIEO was introduced as two Resolutions adopted by the General Assembly of the UN; first through the Declaration on the Establishment of a New International Economic Order[76] (the Declaration) and then through the Programme of Action on the Establishment of a New International Economic Order[77] (the Programme). The Declaration stated that the NIEO shall be funded, among others, on the following principle

> Regulation and supervision of the activities of transnational corporations by taking measures in the interest of the national economies of the countries where such transnational corporations operate on the basis of the full sovereignty of those countries.

Jointly with the Declaration, the UN General Assembly also unanimously adopted the Programme as a supportive instrument which would work as an action plan. Programme reflects the commitment of the developing countries to go beyond a mere declaration and further to set forth ways and means for the implementation of the principles found in the Declaration. The objective of the Programme was to strengthen the role of the UN in the field of international economic cooperation. Concerning the regulation and control over the activities of transnational corporations, Section V of the Declaration stated that "all efforts should be made to formulate, adopt, and implement an international code of conduct for transnational corporation". As can be seen, NIEO Declaration put forward that the developing countries must be in a position to regulate and control the activities of multinational corporations operating within their territory as one of its main principles, thus designated a path for competition rules. In the 1970s and 1980s, the developing countries continued to push for NIEO and an accompanying set of documents to be adopted by the UN General Assembly.

These were the years when the application of any nation's antitrust rules to foreign cartels led to diplomatic protests, blocking legislation, and claims that such jurisdictional assertions violate international law. States like Switzerland and South Africa has sanctioned or threatened to sanction its citizens who helped in the enforcement of a foreign competition law. Additionally, the basic tenets of

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[75] The further debate concerning the roots and analysis of the NIEO is beyond the scope of this study. Nevertheless, NIEO is a valuable concept due to its introduction of economic factors and the level of development into legal analysis and the appraisal of relations among States.

[76] Resolution 3201 (S-VI) adopted on May 1, 1974 by the UN General Assembly.

[77] Resolution 3202 (S-VI) adopted on May 1, 1974 by the UN General Assembly.

free markets and competition law is questioned especially by those nations opted for a Marxist tradition or at least prefer state protectionism. Meanwhile, however, a UN Group of Eminent Persons has been urged for an international antitrust code in order to define when the extraterritorial application of a national competition law is or is not justified. In such an ambivalent atmosphere that the UN General Assembly decided in the winter of 1978 to convene a UN Conference to complete work on agreed principles and rules concerning the control of restrictive business practices. Thus, under the auspices of UNCTAD, the UN Conference on Restrictive Business Practices held its first session in Geneva from November 19 to December 7, 1979 with a mandate to negotiate a code of conduct on restrictive business practices. The Conference was the culmination of five years of work of three *ad hoc* committees of experts.

Of these three *ad hoc* committees, the first one *w*as convened in 1974 prepared a report on restrictive business practices with a tentative code of conduct for enterprises which then was rejected by the Trade and Development Board of the UN Conference on Trade and Development as not adequately thorough and not representing important interests of governments. In line with this, UNCTAD authorized second and third *ad hoc* group or governmental experts, the last one working under the mandate agreed at the Fourth UNCTAD Conference which was held in Nairobi in 1976 (Davidow 1979, 587). This mandate, leading to the signature of the UN Set, covered the identification of restrictive business practices likely to injure international trade, especially the trade and development of developing countries; formulation of principles and rules to deal with such practices; development of systems for information exchange and collection; and the formulation of a model law of competition for developing countries. Under this mandate, these three *ad hoc* expert groups got together about six times over a two year period, until the mandate had been progressed. During these meetings an agreed list of restrictive practices likely to be injurious to trade and development was determined, and the first model law was drafted.

UN Conference on Restrictive Business Practices produced two -rather surprising- results. First the possibility of an early agreement (scheduled for April 1980) and secondly the emergence of the Soviet Union as an important factor in the negotiations. Having aware of all the different group positions, a substantial set of principles and rules was completed at the expert level in April 1979 based on the mandate arising from the UNCTAD IV Conference held in Nairobi. In the Group of Experts Meeting, the developing countries originally proposed a broad code that would require developed countries to prevent their transnational corporations from carrying out a wide range of business practices that allegedly restraint the trade and development of developing countries. Subsequently, however, these norms became only of political value far away from being concise. Although the effects of the NIEO cannot be uniformly assessed, still it has spurred the

developing countries to win some partly workable mechanisms such as the non-binding UN Set adopted in 1980.

More than three decades following its adoption, the UN Set is to date still the only multilateral instrument on competition policy. It provides a set of equitable rules for the control of anti-competitive practices, recognizes the development dimension of competition law and policy, provides a framework for international cooperation and exchange of best practices, including the provision of technical assistance and capacity building for interested member countries in this field. Understanding the importance of the UN Set is also closely related to the internationalization of competition laws and policies which among others considers the international expansion of competition law as the primary tool to regulate increasingly global markets. This is because as argued by many (Lianos 2007, 3) even if it is not binding, the UN Set can contribute to the emergence of a customary international rule against anticompetitive practices that would eventually lay the foundations of some form of global competition regime or at least the convergence of different competition regimes as this study argues.

The UN Set is very detailed and comprehensive text than any other document in the competition law and policy field. The objectives are to ensure that restrictive business practices do not interfere with trade liberalization, particularly those affecting the trade and development of developing countries; to encourage efficiency in international trade and development, particularly that of developing countries such as through the creation and protection of competition to protect and promote social welfare in general and, in particular, the interests of consumers in both developed and developing countries; to eliminate disadvantages to trade and development that may result from the restrictive business practices of the transnational corporations, or other enterprises, to provide a Set of Multilaterally Agreed Equitable Principles and Rules for the control of restrictive business practices for adoption at the international level and thereby to facilitate the adoption and strengthening of laws and policies in this area at the national and regional levels.

All the objectives of the UN Set are still valid today under the influence of the rapidly expanding globalization affecting many policy areas including competition. This is because while important actions are taking place nearly in all of the markets, governments should continue their efforts in minimizing any negative impact on competition arising from either their own interventions or the behaviour of the private undertakings. Additionally governments shall also take into account the risk of creating adverse consequences of their domestic firms in other states, given the global dimensions of many markets. However, most competition authorities are still unable to come to grips with the challenges

arising from the global economic crisis affecting their national interests, either in domestic markets or in world markets.

Currently, through its Competition and Consumer Policies Branch operating under the Division on International Trade and Commodities, UNCTAD acts as a depository of international competition legislations, the Model Law on Competition and the United Nations Set of Principles on Competition. Furthermore, UNCTAD is engaged in technical cooperation with countries seeking capacity-building and technical assistance in formulating and/or effectively enforcing their competition law. As part of its technical cooperation activities, UNCTAD has successfully developed a Voluntary Peer Review mechanism. Moreover, every year, since year 1998, UNCTAD hosts the Intergovernmental Group of Experts on Competition Law and Policy for consultations on competition issues of common concern to member States and informal exchange of experiences and best practices, including Voluntary Peer Reviews of Competition Law and Policy.

The Model Law on Competition[78] of UNCTAD serves as a template especially for developing countries while drafting their competition laws. Among others, the Model Law on Competition is an instrument to prompt developing countries to adopt competition laws due to UNCTAD's mandate and role in the international competition world. The substance of the Model Law is being reviewed regularly and thus takes into consideration different opinions of the UN Member States during the annual IGE meetings. This characteristics of the Model Law makes it very special because all Member States have an opportunity to work on a common document which would surely act as a convergence instrument especially among the developing countries.

Additionally, UNCTAD has been progressively working on the regional networks such as Latin America, Africa, Mediterranean countries, the Balkan states, Asian countries, Gulf States. These initiatives come into existence sometimes as part of a project on reforming the regional competition framework such as the West African Economic and Monetary Union (WAEMU) Commission and UNCTAD's Competition and Consumer Policies Branch jointly held national consultation seminars or as part of a technical assistance program to establish and/or strengthen capacities in various institutions related to competition, and facilitate the exchange of experiences among the beneficiary countries as in the case of COMPAL programme targeting five[79] Latin American countries.

[78] TD/RBP/CONF.7/8. This is a living document reviewed regularly. This document is being updated according the comment of the UNCTAD member states. The design of the Model Law 2010, the most recent one, has been made more reader-friendly in which recent developments in legislation, case law and commentaries are contained in comparative tables indicating the types of laws or solutions adopted by countries for different aspects of the competition issues.

[79] Nicaragua, Costa Rica, El Salvador, Peru and Bolivia.

UNCTAD's support for all these regional gatherings in line with the Model Law on Competition would surely help harmonize and converge the legislation of those countries that followed their approach.

3.6. Concluding Remarks

This Chapter is devoted to the brief history of international antitrust. In terms of this study, the overview explored the stalled attempts to achieve an international law of competition or an international competition regime. The Chapter also provided the definition of convergence in terms of this study. Further the Chapter focused on the role of international organizations dealing with antitrust.

In fact, international organizations have started to delve into the process of internationalization of competition from the early days of the League of Nations after the end of World War I. Then during the post-World War II period, the first multilateral antitrust agreement was proposed as part of the Havana Charter, but this attempt was not successful and ended up with the still born ITO based on the objections of many countries including the US government. The Chapter also discussed the formation of the GATT providing the necessary system for the world trade. The GATT was formed, however, without having any provisions regulating restrictive business practices. The Chapter also reviewed the attempts at the WTO during the venue search for international competition matters. Additionally, the Chapter examined the efforts of other international organizations in the field, the OECD and the UNCTAD respectively. Last but not least, it looked into the creation and fast rise of the ICN, while focusing on its soft power in shaping the international competition field by advocating procedural and substantive convergence in the absence of a global competition regime.

The basic aim of the ICN is to address practical antitrust enforcement and policy issues of common concern. Member agencies produce work products through their involvement in flexible project-oriented and results-based working groups that enhances the dialogue and understanding among countries that adopted different approaches. It is a very flexible organization without any formal structure. This virtual network puts away the formalities among the officials of all member agencies around the world. It increases communication and awareness with respect to various countries' enforcement, legislation, organization, etc. But the most contribution of the ICN is the introduction of the concept of convergence among its member agencies.

All these past efforts at the multilateral level are indicators of the inadequacy of national competition systems in dealing with national and cross-border anti-competitive practices and the need for a international competition regime. Since all business related issues are of global nature, this necessity makes itself more visible. Within this context, the Chapter aimed to show different international

cooperation efforts through the use of various instruments by the international organisations with respect to the internationalization of competition. For instance, today at the ICN best practices are seen in various forms such as handbooks[80] and recommendations[81] among others regarding competition law practices. These best practices are in a way the ultimate objective towards which member agencies to the ICN are expected to converge or supported to converge. The speciality of the ICN best practices is that these documents are getting prepared at the Working Parties composed of voluntary ICN members and they are finalized after a long discussion and examination period. In other words, those convergence points reached under the best practices are determined by the ICN member agencies and sometimes appointed non-governmental advisors working on the subject in question.

Indeed, all these developments at the multilateral level can be expounded in line with the theoretical analysis provided in the previous Chapter. Both neorealism and neoliberalism agree that international system is anarchic but they study different worlds. In this sense, neoliberalism seems to be a better theory to explain the attempts of the international competition community in the aftermath of the World War II and during the Cold War eras. Neoliberalism claims that neorealism minimize the importance of globalization, international interdependence and the regimes created to manage these interactions. Globalization, international interdependence and attempts to create an international competition regime have been influential on the internationalization process particularly following the end of Cold War era. From this view point, particularly the historical development of internationalization of competition law and policy was part of the international response to this complex situation. It was not an independent process that could be accepted or rejected on its own. Further, states may abandon multilateral activity that encourage cooperation if they see others gaining more from that arrangement as was the case in the failure of the Havana Charter and the proposed international competition rules associated with it.

Nevertheless, the efforts of the OECD, the UNCTAD and the WTO at the multilateral fora can be explained by the rise of neoliberal instutionalism. However, particularly the abandonment of the WTO's competition law working group and the relevant studies for responding to the global increase of transnational anti-competitive restraints indicates the need for another explanation from the international relations discipline. This is because the institutions and understandings of multilateralism as they existed at the end of

[80] Such as investigative techniques handbook, anti-cartel manual etc.

[81] Such as recommended practices for merger analysis, recommended practices for merger notification and review procedures, recommended practices on the assessment of dominance/ substantial market power, recommended practices on the application of unilateral conduct rules to the state-created monopolies etc.

Cold War have proven to be insufficient to address and understand the issues and the challenges of the Cold War. Therefore, especially in 1990s, scholars of international relations theories realized that something massive and deeper than a simple interconnectedness was happening among the states, and between the states and the individuals. State structure as well as sovereignty was challenged in line with the tremendous spread of globalization. This has triggered a search for new issues. Thus, the guidance comes from the studies on governance.

After the historical introduction concerning the role of multilateral efforts and the meaning of convergence for this study, the following Chapter starts exploring the unilateral action of nation states to cope with the internationalization process of competition law and policy. Unilateral action has been an important instrument that nation states have used widely to cope with this internationalization problem in the absence of an international competition regime.

CHAPTER 4

THE GLOBAL REACH OF NATIONAL COMPETITION LAWS AS A RESPONSE TO INTERNATIONALIZATION: UNILATERAL APPLICATION

In the world that we live in, the need to comply with the reality of the global markets has led the nations to look beyond their borders while the same motive has directed them to search for modalities and instruments in tackling international anticompetitive practices. In order to handle international anticompetitive restrictions, historically the very first reaction of the national competition authorities has been to unilaterally assert jurisdiction (extraterritorality) over those transactions that partially or entirely take place outside their jurisdictions (Zanettin 2002, 7). Although the extraterritorial application of a national competition law is a very complicated and controversial issue, it has been used to remedy foreign practices that affect domestic markets and consumers.

Following the discussions on the historical developments regarding the venue search for the international competition issues and the increasing role of international organizations on international cooperation, this Chapter examines the unilateral application of states to cope with the internationalization of competition law and policy. The Chapter recognizes that historically states took a unilateral stance against the global restraints of competition in the absence of an international competition regime. Meanwhile, it also realizes the limits of national laws in cross-border transactions in responding to matters related to the internationalization of competition. In this quest especially the practices of the US and the EU, the prominent players of the world trade are taken into account. This is basically due to the vast experiences of these two jurisdictions in the enforcement of competition laws compared to many other jurisdictions.

As this study highlights in its entirety, there is no doubt that the anticompetitive restraints with cross-border effects are rapidly increasing while competition laws continue to be national. But again as underlined throughout this study, there has not been an extensive international instrument to tackle this matter yet. Hence, as an initial response, some countries have tried to fill this gap through the unilateral application of their national competition laws. In other words, national competition authorities attempted to address cross border restraints through the extraterritorial application of their domestic competition laws. But so far, unilateral approach of individual states were considered as limited and controversial. In this respect, this Chapter intends to show the challenges and opportunities that unilateral approach has brought forward until today.

Against this background, herein, this chapter studies the global reach of national competition laws in a unilateral fashion. It starts with the international allocation of jurisdiction, that is the scope of application. The scope of application is very important in understanding the extraterritorial application of the national competition laws. Therefore, the Chapter also examines the evolvement of the effects doctrine that constitutes the jurisdictional basis for the extraterritorial application of competition laws including the US and the EU. Meanwhile, it discusses comity considerations based on the experiences of these two prominent actors of world trade and economy. The discussion on the comity considerations is particularly significant since the sovereignty constitutes a very delicate matter in the application of extraterritoriality. Despite the pros and cons, the use of the effects doctrine embedded in a national competition regime is very significant in the quest for the internationalization of competition. Such an understanding would shed a light on the main question of this study regarding whether substantive and procedural convergence as a strategy can be used as an adequate substitute in the absence of a global competition regime and accordingly what the future of the international competition framework would look like.

4.1. The International Allocation of Jurisdiction

The allocation of jurisdiction or the scope of application of a national law is essentially a question of public international law[82] and based on the principle of territoriality. The effects doctrine was developed mainly by the US courts which can be considered as an extension of territoriality (Zannetin 2002, 8). Nevertheless, the limits upon a state's jurisdictional competence and the ability to apply its relevant competition legislation to overseas undertakings (extraterritoriality) have still been a controversial issue in the international studies. Among others, the application of a national law to the conducts occurring on the territory of another state can be regarded as an infringement of the latter's sovereignty. Indeed, sovereignty and consequent jurisdictional issues constitute another area of concern that raised objections in dealing with cross border activities.

4.1.1. The General Theoretical Problem

The assertion of jurisdiction is one of the main issues affecting national agencies in international antitrust practices because nations facing international competition problems feel bound to expand the scope of their competition laws to the cross-border practices in order to protect consumer welfare and/or other objectives foreseen in their laws for their local markets. In general, extraterritorial jurisdiction is the legal ability of a state to exercise authority beyond its borders. States assert extraterritorial jurisdiction to protect their own national interests. This principle has been reconciled with the international law on the basis of the

[82] Since the scope of this study is beyond a detailed explanation and/or analysis of public international law, the concept of jurisdictional competence is only dealt with briefly.

effects doctrine (Neven and Roller 2000, 850). Thus, the effects doctrine can be considered as an extension of the territoriality principle into the international law. The territoriality principle and the effects doctrine constitute the most important jurisdictional bases for the extraterritorial application of competition laws.

There are at least two elements to a state's jurisdictional competence. First, a state has jurisdiction to make laws (legislative, prescriptive or subject matter jurisdiction). Second, a state has jurisdiction to enforce its laws (enforcement jurisdiction). It is not necessary to have the limits of these two jurisdictional principles be the same; that is to say they do not have to be parallel to each other. Most of the controversies arise after the enforcement jurisdiction and it is generally against enforcement jurisdiction that the states apply blocking statutes. But an assertion of subject matter jurisdiction by one state over the citizens in another may not cause a conflict as long as the former state does not try to enforce its laws in the territory of that state (Whish 1993, 472). As far as subject matter jurisdiction is concerned, public law generally agrees that a state has power to make laws affecting conduct within its territory (territoriality principle) and to regulate the behavior of its citizens, entailing companies incorporated under its law, abroad (nationality principle). The territoriality principle has been extended as a result of which a state is given jurisdiction not only where the acts are originated in its territory (subjective territoriality) but also where they are completed within its territory although originated abroad (objective territoriality) (Whish 1993, 371).

The classical example is of a gun being fired across a border. When a gun is fired in State X across the border and has a harmful effect in state Y, both states can claim jurisdiction in the same matter: State X would have jurisdiction on the basis of subjective territoriality, while state Y would have jurisdiction on the basis of objective territoriality (Whish 1993, 371) which is the effects doctrine. According to the effects doctrine, the conduct which produces effects within a state's territory may be subject to the jurisdiction of that state, irrespective of the perpetrator's domicile or seat as well as where the conduct is carried out. As illustrated in the above example, the effects doctrine seems relatively indisputable when the effect is direct and obvious. But the situation is much more problematic where the effects are indirect and economic as in the case of the enforcement of competition rules (Neven and Roller 2000, 850). Therefore, under the effects doctrine the legitimacy to apply the objective territoriality to the effects of an agreement made in another state can be questioned. Having said that it is also utmost importance to underline the fact that there is an analogy between the shot fired across the border to the neighboring state and a conspiracy of firms in one state charging predatory or excessive prices in another (Whish 1993, 371).

Based on the above explanations, the effects doctrine in antitrust law and in this study simply means that the national competition laws are applicable to

all undertakings even located outside that state's territory, when the behaviors or transactions of those undertakings produce an effect within the national boundaries of the enforcing country. According to the effects doctrine, the nationality of undertakings is irrelevant for the purposes of the antitrust enforcement. By this way the effects doctrine can cover all undertakings irrespective of their nationality. In fact the problems arising from the absence of an international framework have long been tried to be sorted out through the use of extraterritorial jurisdiction principle and the effects doctrine associated with it. Unsurprisingly, the US and the EU approaches form the basis of this discussion. This is because in practice while the extraterritorial powers of some jurisdictions, like the US and the EU, are enough and powerful to prevent anticompetitive practices, other states might come across with difficulties arising from lack of jurisdiction, lack of necessary administrative capabilities and ability to gather enough evidence from undertakings located abroad.

4.1.2. The Development of the Effects Doctrine

Historically, the internationalization of antitrust has expanded rapidly especially after the 1950s. When the past experiences are examined, it can be observed that the extraterritorial application of national competition laws is generally the first response of the competition agencies to address international anticompetitive practices throughout the historical development of the matter in question. This is because in the absence of an effective international regime, the national competition agencies are left to tackle cross border anticompetitive practices by themselves. And from a retrospective perspective the best tool they have got in hand, at the first place, has been the national law itself. So nations start using their national competition rules against international and foreign arrangements affecting their domestic territories in a unilateral fashion (Whish 2009, 471).

The US is the first and foremost jurisdiction which can be credited for initiating the use of extraterritoriality as part of its antitrust policy in the 1940s and progressing it over the years. Indeed when the US started to apply its antitrust laws extraterritorially in a unilateral fashion, at the same time a very different solution to remedy international anticompetitive practices were attempted to get effectuated in the international fora by the 1948 Havana Chapter. As discussed in Chapter 3, Havana Chapter has never been ratified as a result of which this ambitious multilateral solution of the late 1940s never came into existence (Zanettin 2002, 2-5). In response to the unilateral use of US antitrust laws with respect to international arrangements and behaviour, blocking statutes were enacted as an initial reaction from the other states such as France and UK in 1970s. Another important development of the era was the formation of the European Economic Community (EEC) in 1957 with the signing of the Rome Treaty having

substantive competition law provisions. Competition law provisions found in the Rome Treaty set one of the most important policy areas of the European integration process which aims at the unification[83] of the European markets.

When the Treaty of Rome was signed, there had been so little experience in Europe in general, and in the then EEC Member States in particular, concerning the use and application of competition laws. Only Germany had a competition law system but it was not even operational during the drafting of the Treaty of Rome (Gerber 1994, 98). The goal of a unified market as part of the market integration goal was the most central impetus for this new formation in the war torn Europe. At that time, attempts to move towards a political union were rejected and the plans for a European Defense Community was not accepted. Hence, Common Market was regarded as serving a variety of economic goals in light of the political goal of replacing conflict with cooperation (Gerber 1994, 101-102).

Economic integration has also been considered as the only means of dealing with the combined economic and political power of the US. In this context, as cited in Gerber (1994, 102) "integration represented a means of regaining independence, power, status vis-à-vis the country [US] that had assumed world leadership in the wake of two world wars". So the idea of constructing competition law in 1960s in the EU was for the sake of creating a Common Market. European competition law eliminated the obstacles to the flow of goods, services and capital across European markets. In time, competition law had become a central component of the EU legal system.[84] All the applicant states to the EU, before becoming full Member States align their domestic competition law with the core provisions of EU law.[85] Hence, competition law enforcement was also evolving at the nation-level.

In 1970s, many nations in Europe started to introduce provisions concerning extraterritorial reach of their domestic laws into their legislations, the aim of which

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[83] It is this unification aspect which has shaped institutional structures and competences within the EU system. It further generated conceptual framework for the development and application of its substantive norms.

[84] See Chapter 6 "Competition Law in Europe" in Gerber (2010) for details on the development of national competition laws in Europe.

[85] When "Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty" (OJ L 1, 4.1.2003, p. 1–25) entered into force on 1 May 2004, it made it compulsory for national competition authorities (NCAs) to apply Article 101 of the TFEU Treaty where they apply national competition law to agreements or concerted practices which may affect trade between EU Member States, and to apply Article 102 of the TFEU Treaty where they apply national competition law to any abuse prohibited by Article 82. Furthermore, Regulation 1/2003 foresees mechanisms of close co-operation between all competition authorities in the European Union. As a framework for these mechanisms, the network of European competition authorities (ECN) has been established. (For more information, please see http://ec.europa.eu/competition/ecn/faq.html)

was to deal with international conflicts. This was the very first reaction of the nations against the unilateral enforcement of antitrust rules of the US. It is truism to argue that the US has been the most active player among other nations in its ability to apply its national rules against actors abroad. Without delay, however, the nations such as France and the UK introduced the blocking statutes[86] to cope with the overseas enforcement of the US. Meanwhile, the EU became another actor who realized effects doctrine through the EU Commission and the Court of Justice of the EU decisions with an aim to protect its citizens from off-shore acts.

Blocking statutes existed largely as a response to the attempts of the US to enforce its antitrust laws abroad. Nations enacted a variety of blocking statutes that often prohibit discovery with respect to certain domestic industries, or block the enforcement of foreign judgments within their country (Price 1995, 315). The country which enacted the blocking statutes prohibit its citizens from cooperating with foreign authorities, such as by providing evidence or consenting to judgments (Tritell and Parisi 2011, 3). Nations justify the use of blocking statutes based on the sovereignty concerns, most of them are used as legal instruments that shield domestic industries from competitive outside forces (Price 1995, 315). The only exception was Germany which signed an antitrust cooperation agreement with the U.S. in 1976 (Tritell and Parisi 2011, 3).

The territorial perspective of competition law enforcement may be considered as the core peculiarity which shapes and limits international cooperation and harmonization of competition laws. This feature is determinate in the enforcement and during the application of competition laws. This is because the international enforcement landscape is composed of different clusters of domestic enforcement that differ in size, economic power and political interests. This without doubt has a great impact on each jurisdiction's attitude to cooperation, and thus affects convergence efforts of these nations to a wide extent.

As argued by Ezrahi (2012, 6), long arm national jurisdiction plays a role in reducing possible transfer of wealth and brings enforcement of competition laws closer to their core values. Likewise, extraterritoriality carries its own risks mainly as over enforcement and under enforcement. Over enforcement happens, for instance, when a national jurisdiction blocks a remote transaction that has an adverse effect within the home jurisdiction while the same transaction might have benefits on the consumers in the overall. The risk of over enforcement might arise when for instance a number of jurisdictions fine an undertaking for the same anticompetitive conduct and these fines all together result in an aggregated overcharge. At this point, it is important to remember that under enforcement can be remedied by the vigorous enforcement action of another jurisdiction while this is not the case for over enforcement. In such cases, welfare loss cannot be

[86] See section 4.1.1. for details.

compensated through extraterritoriality but only through international cooperation and dialogue (Ezrahi 2012, 6). In this context, advocacy for convergence could be a tool to curtail negative effects of under enforcement.

Today, both the EU and the US embraced the effects doctrine into their respective legislations. They both have used it in a way to assert jurisdiction when their markets are affected by a particular practice (Neven and Roller 2000, 849). Extraterritorial application of national competition laws has been largely accepted to sue all anticompetitive conducts that affect a nation's territory even if they are located abroad. Nonetheless this might be considered as a violation of sovereignties. That is the reason why countries would be hesitant to allow another state to enforce its antitrust law on their own territories. Besides, conflicting interests of the countries might lead to diplomatic and economic disputes over the extraterritorial application of antitrust laws as well. Sovereignty and consequent jurisdictional issues have always been an area of conflict. In this vein, jurisdictions need to overcome any objections related to the extraterritorial enforcement's violation of traditional comity principles. In general, comity principle holds that one nation should defer to the law and rules of another where the other party has a greater interest (Fox 2011, 268).

Consequently, this study claims that the use of effects doctrine is easier to ink than to put into action even for the most advanced actors like the US and the EU. For many other countries, the effects doctrine and its use most of the time lie on theoretical grounds rather than being precisely effectuated. The following section elaborates on both the US and the EU approach towards the use of effects doctrine and comity considerations as the good practices in the field.

4.2. The US Antitrust Laws and Their Global Reach

The overriding policy of the federal antitrust laws is to protect competition in the US markets. In an increasingly internationalized and intertwined global economy, both domestic and foreign activities potentially threaten competition in the US markets. The US realized the importance and the necessity of extending the scope of application of its antitrust rules beyond a narrowly interpreted principle of territoriality at a very early stage of enforcement in order to cover anticompetitive practices that take place across border but have a restrictive effect within its domestic markets. The Sherman Act[87], the landmark federal statute, for instance applies to conduct that restrains trade or commerce "among the several States, or with foreign nations". The US Congress, however, did not speak out the extent to which the federal antitrust laws were to reach anticompetitive activities occurring outside the US. Moreover, neither the statutory language nor the legislative history of the antitrust laws provided any guidance as to the

[87] 15 U.S.C.A. § 1 et seq.

meaning of "commerce…with foreign nations". This ambiguity has left the task of determining the extraterritorial scope of the antitrust laws to federal courts.

Within this context, the effects doctrine was developed in time by the US Courts as an extension of territoriality principle. Antitrust laws generally define anticompetitive practices by referring to their effects since the effect is a constituent part of the law. By granting jurisdiction to the national competition agencies where the effects are felt, the effects doctrine can be considered to be in conformity with the territoriality principle. The EU was also among the first and prominent actors that realized the significance of effects doctrine as a fundamental instrument to address international restrictive practices (Zanettin 2002, 8). The innovation of US antitrust laws and policy has been followed extensively by most of the competition agencies worldwide. In other words, the US antitrust enforcement in all respects has been benchmarked by many jurisdictions worldwide.

4.2.1. Statutory Development

The competition policy in the US was started to being shaped by the state-level[88] antitrust in the 1860s and 1870s and it was culminated in the enactment of the Sherman Act[89] in 1890 and later in 1914 in the enactment of Clayton Act[90] and the Federal Trade Commission Act at the federal level. The Sherman Act focused on two of the three principal areas of modern competition law enforcement: agreements among undertakings and the unilateral conduct cases (or monopolization as it is termed in the Sherman Act). The omission of mergers among undertakings, which is the third principal area of modern competition law and policy, from the Sherman Act has been blamed by some scholars for contributing to the great US merger wave of the late 1890s. So later on Clayton Act was enacted with its specific provisions addressing mergers in 1914.[91] Until 1914, the Antitrust Division of the Department of Justice (DOJ) which is headed by an Assistant Attorney General[92] was the sole responsible agency from antitrust in the US. Meanwhile, a combination of Congressional dissatisfaction with the performance of the DOJ in enforcing the Sherman Act and the fear in the modern business context regarding the increasing complexity of antitrust enforcement required a specialized, expert antitrust agency which led to the creation of the Federal Trade Commission (FTC). Since then FTC's

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[88] For information on the state level antitrust enforcement in the US, please see "Chapter XII Enforcement and Adjudication A.2. Antitrust Enforcement by State Governments" in GELLHORN, et.al. (2004).

[89] Although the Sherman Act of the US is the second competition law in North America following Canada, it is the oldest law that has been enforced. 15 U.S.C.A. § 1 et seq.

[90] 15 U.S.C.A. § 12 et seq.

[91] Like the Sherman Act, much of the substance of the Clayton Act has been developed and animated by the U.S. courts, particularly by the Supreme Court.

[92] Assistant Attorney General is nominated by the President and confirmed by the State.

Bureau of Competition shares responsibility for federal-level antitrust enforcement with the Antitrust Division of DOJ.

The American system of antitrust enforcement has a special character of concurrent enforcement. In addition, antitrust is the only area in which two substantial federal agencies, the FTC and the DOJ being the main antitrust enforcement bodies share enforcement responsibility for an economic regulatory scheme. Additionally, States' Attorneys General[93] have authority to enforce the federal antitrust laws. Further, States' Attorneys General are heavily involved in enforcing antitrust laws of their particular states, most of which are similar to the federal ones (Hovenkamp 2005, 592).[94]

US antitrust laws are enforced by both the FTC's Bureau of Competition and the Antitrust Division of the DOJ. The agencies consult each other before opening any investigation. The Antitrust Division of the DOJ handles all criminal antitrust enforcement. The Bureau of Competition of the FTC's investigates potential law violations and seeks legal remedies in federal court or before the FTC's administrative law judges. The FTC[95] is an administrative body that uses an administrative system, under which the five-member Commission can issue decisions and impose remedies, all subject to appeal in the federal courts. Complaints issued by the Commission are adjudicated in a trial-type proceeding conducted within the agency, overseen by an Administrative Law Judge (ALJ). The ALJ's initial decisions may be appealed to the Commission, which conducts a de novo review to render its final decision. At the conclusion of such administrative adjudications, respondents may appeal adverse FTC decisions to an appropriate federal appellate court. In addition, the FTC may bring civil lawsuits in a federal district court against companies to enjoin and seek remedies for anticompetitive behavior. A party aggrieved by an FTC administrative decision may seek review in one of the 12 regional U.S. Courts of Appeals. The FTC's Bureau of Competition also serves as a resource for policy makers on competition issues, and works closely with foreign competition agencies to promote sound and consistent outcomes in the international arena.[96]

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93 The State Attorney General is both the chief legal counsel and the chief law enforcement officer in each of the 50 states of the US. In his role as the State's chief legal counsel, the Attorney General not only advises the Executive branch of State government, but also defends actions and proceedings on behalf of the State. In some States, the Attorney General serves as the head of a State Department of Justice, with responsibilities similar to those of the United States Department of Justice. Most Attorney Generals are elected statewide; some, however, are appointed by their State's governor, legislature, or State Supreme Court.

94 Since these state-level statutes are beyond the scope of this study, they will not be discussed herein any further.

95 FTC is also responsible for consumer protection.

96 For more information please see http://www.ftc.gov

The Antitrust Division of the DOJ exercises its enforcement authority through civil and criminal actions. All the lawsuits of the Antitrust Division are brought in the federal courts. The Antitrust Division prosecutes certain violations of the antitrust laws by filing criminal suits that can lead to large fines and jail sentences. In other cases, the Antitrust Division institutes a civil action seeking a court order forbidding future violations of the law and requiring steps to remedy the anticompetitive effects of past violations.[97] In cases filed in federal court by the FTC, DOJ, a state government, or private parties under the federal antitrust laws, initial decisions are issued by the federal district courts, which are the trial courts of the federal court system. The losing party has the right to appeal a final district court decision to the US Court of Appeals in the circuit in which the district court sits. In turn, the party that loses in the Court of Appeals may ask the Supreme Court to review a Court of Appeals decision, but in the substantial majority of cases the Supreme Court declines to conduct such a review. When the Supreme Court reviews a Court of Appeals decision, it may affirm or reverse it. The US Supreme Court has had the leading role in shaping how these laws are applied in time. This is because, unlike the intermediate appellate courts of the federal system, the Supreme Court has discretion to choose the cases it will hear. This choice of freedom have a profound effect on the development of antitrust laws (Pate 2004).

The US Congress chose not to enact detailed prescriptions for antitrust enforcement, and rely instead on the courts to apply the broad statutory principles to anticompetitive conduct. After 1950, Supreme Court decisions especially shaped the antitrust doctrine. As the then Assistant Attorney General William Baxter has observed during his tenure, this common law approach may lack the certainty provided by a more detailed statute, but it permits the law to adapt to new learning without the trauma of refashioning more general rules that afflict statutory law. As cited by Hewitt Pate, the Assistant Attorney General of the DOJ between 2003 and 2005, Supreme Court has described the antitrust laws as having "a generality and adaptability comparable to that found to be desirable in constitutional provisions" (Pate 2004).

The Sherman Act is the basic statute and it simply prohibits (i) contracts, combinations, and conspiracies in restraint of trade and (ii) monopolization, combinations, and conspiracies to monopolize, and attempts to monopolize. As underlined in Areeda et.al. (2004, 3), although being a statutory subject, it is truism to argue that the prohibition of trade restraints and monopolization in the Sherman Act is very vague and general. Therefore, it's the statutory interpretation shaped by judicial lawmaking which is important in the development of common antitrust law in the US especially when the statue is as general as the Sherman Act. The antitrust laws are deeply penetrated into US business. The statutes

[97] For more information please see http://www.justice.gov/atr/index.html

apply to interstate commerce, and interstate commerce covers a wide range of commerce. The judicial interpretation of what constitutes a restraint of trade is a very sophisticated one. In brief, the broad definition of conduct subject to antitrust scrutiny, together with the broad reach of the federal commerce power, has greatly expanded the coverage of the antitrust laws in the US (Areeda 2004 et.al., 3-4).

4.2.2. Effects Doctrine in the US

This section presents some of the landmark US antitrust cases that are related to the extraterritoriality of antitrust law in the US. The Sherman Act prohibits restraints and monopolization or attempted monopolization of "trade or commerce among the several States, or with foreign nations". It first starts with the *American Banana Co. v. United Fruit Co*[98] case, which brings a limited approach to jurisdiction by focusing on the place of the acts where the complaints take place, and continued with *Alcoa*[99], the landmark decision which introduces the effects doctrine in the US antitrust law. Last but not least, it analyzes *Timberlane*[100] and *Mannington Mills*[101] cases that are constraining the effects test around the factors of balancing and reasonableness.

4.2.2.1. The Scope of Application of the US Antitrust Law

The extraterritoriality principle is one of the most important instruments of the American antitrust system in discussions about the global reach of the US antitrust laws. The US antitrust law is in fact the classical example for the application of extraterritoriality principle. The Federal Courts have the power to use the federal antitrust laws to reach activities that occur outside the borders of the US. Nevertheless, this power could raise difficulties particularly with regard to the law of a foreign sovereign. In this regard, the main antitrust legislation of the US, the Sherman Act, the Clayton Act and the Federal Trade Commission Act have some kind of jurisdiction in the international arena. The Sherman Act prohibits anticompetitive restraints in, or monopolization of, any part of "…trade or commerce among the several States, or with foreign nations" in sections 1[102] and 2[103] respectively.

On one hand, it can be argued that the Sherman Act gives no clear directions concerning jurisdiction over an American undertaking's actions abroad or a

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[98] *American Banana Co. v. United Fruit Co.,* 213 US 347 (1909).

[99] *United States v. Alcoa,* 148 F.2d 416 (2d Cir. 1945).

[100] *Timberlane Lumber Co. v Bank of America* 549 F.2d. 597 (9th Cir.1976), cert. denied, 472 US 1032 (1985).

[101] *Mannington Mills v. Congoleum Corp* 595 F.2d 1287 (3rd Circuit 1979).

[102] Section 1: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal".

[103] Section 2: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony"

foreign undertaking's activity within its own country. On the other hand, it can be argued that by adding special emphasis "to trade…with foreign nations", the Sherman Act, the first US Federal act, aimed at curbing foreign cartels and monopolization that restrains or monopolizes trade within the United States (Kim 2003, 386). So as supported by many, by making reference to the foreign nations, it makes it clear that the US Congress originally intended to reach and regulate restrictive practices that take place abroad even though it did not provide any further explanation. That way the said provisions extended to comprise extraterritoriality principle. But the question how far this jurisdiction reaches is still an open one. This is because until now neither the courts, nor the legislature have fully delineated the scope of the US antitrust jurisdiction in respect of disputes involving foreign commerce (Kim 2003, 387). Today, the US application in this area still remains a work in progress.

4.2.2.2. Early Years

US Federal Courts were reluctant to apply federal antitrust too aggressively to acts committed in a foreign country during the first half of the 19th century (Hovenkamp 2005, 767). Therefore, the US Federal Courts have had to struggle with the scope of US antitrust enforcement regarding foreign parties and foreign territories. *American Banana Co v. United Fruits.*[104] *(American Banana)* which dates back to 1909 is the first case involving a foreign element. The American Banana Company sued the United Fruit Company to be in conspiracy with the Costa Rican militia and other officials to monopolize production and exportation of bananas from Central America to the US. In this case Justice Holmes delivered the opinion of the Supreme Court. Justice Holmes stated that;

> No doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such countries may treat some relations between their citizens as governed by their own law.[105]

Finally, Justice Holmes, and that is to say the Supreme Court concluded that

> But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done…In the first place the acts causing the damage *[that is the monopolization of the production and exportation of the bananas in Costa Rica, the restraint of the trade and the fixed price maintenance by the United Fruit Company]* were done, so far as it appears, outside the jurisdiction of the United States and within that of other states.[106]

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[104] *American Banana Co. v. United Fruits,* 213 U.S. 347 (1909), (Supreme Court Decision).

[105] 213 U.S. 347, at 355-356 (1909).

[106] 213 U.S. 347, at 356 (1909).

As can be seen from the above, Justice Holmes explained that there were geographical limits to the US antitrust authority, and the lawfulness of an act must be determined wholly by the law of the country where the act is done. Thus, the Supreme Court took a skeptical stance towards jurisdiction since these events took place outside the US (Kim 2003, 387). For Justice Holmes, this was an aspect of sovereignty. Any other view would be contrary to the comity of nations (Kim 2003, 387). *American Banana* case shows that at the beginning the Supreme Court was cautious to apply the Sherman Act extraterritorially (Zanettin 2002, 9) and thus interpreted the US antitrust law rather narrowly as territorial. As asserted by Fox, Justice Holmes implied that the Sherman Act stops at the US shores (Fox 1987, 568). This can be read from the following lines;

> any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power. 'All legislation is prima facie territorial'.[107]

Another interesting assertion came from the eminent scholar Hovenkamp who claims that foreign legality test of the *American Banana* decision in a way served to prevent Sherman Act from governing the world (Hovenkamp 2005, 767). But soon Courts started to show dissatisfaction with the strict territoriality principle and began to relax the holding of *American Banana*. Hence, subsequent decisions eroded the strict territorial test of the *American Banana*. The gradual erosion was first seen in *United States v. Pacific & Arctic RY. Navigation Co.*[108] decision dated 1913. The case was about a conspiracy to discriminate on rates on shipping between the US and Canada. This gradual erosion continued to be felt in the *United States v. Sisal Sales Corp.*[109] *(Sisal Sales)* decision dated 1927 which was about a conspiracy to impede competition in the importation of sisal goods from Mexico (Popofosky and Scholer 2005, 2). US firms allegedly conspired with Mexican firms and officials to monopolize sales of sisal into the US and elsewhere. Although many acts took place in Mexico, the Supreme Court held that the Sherman Act applied. The legal ground for the reasoning was that part of the sisal conspiracy took place in the US and that it was funded by the US banks. Additionally, the Supreme Court stressed the fact that the defendants "brought about forbidden results within the US"[110]. *Sisal Sales* in fact indicated the coming of a new era which would entail effect or intended effect as the central factor in the jurisdictional inquiries (Fox 1987, 569).

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107 213 U.S. 347, at 355-357 (1909).

108 *United States v. Pacific & Arctic RY. Navigation Co.,* 228 US. 87 (1913).

109 *United States v. Sisal Sales Corp* 247 U.S. 268 (1927).

110 247 U.S. 268, at 276 (1927).

4.2.2.3. Alcoa Decision and the Effects Doctrine

The gradual erosion against *American Banana*'s limited jurisdictional approach was completed later in *United States v. Aluminum Co. of America*[111] *(Alcoa)* in 1945. *Alcoa* by overruling the *American Banana* decision clarified the policy of the US in applying antitrust laws to conduct occurring abroad. Judge Hand's 1945 *Alcoa* opinion adopted the effects test which asserts that agreements made abroad can violate the Sherman Act, "intended to affect imports and exports (and) . . . is shown actually to have had some effect on them".[112] With this case the Supreme Court clearly held that US law reaches an off-shore cartel when the actors intend to affect and do affect the US market. In other words, it embraced the famous effects doctrine into the US antitrust law by focusing on the conduct's consequences. This decision is the landmark decision of the extraterritorial application of the antitrust laws.

Alcoa was mainly about the monopolization of the US aluminum market by the Aluminum Co. of America (Alcoa). The purpose of this international cartel was to limit the production and sales of aluminum in the world markets. This international cartel was composed of producers from Canada, England, Germany and Switzerland as well. The DOJ also prosecuted the activities of Alcoa's Canadian subsidiary which was alleged in violation of the section 1 of the Sherman Act for its international quota fixing cartel agreement concluded in Switzerland and involving European aluminum producers to stay out of the US market. The complaint alleged that the offshore cartel was monopolizing both interstate and foreign commerce in aluminum. All the undertakings involved in the conspiracy were incorporated in foreign countries. But the quotas[113] included the sales of these firms were in the US. In this landmark decision, Judge Learned Hand of the Court of Appeals for the Second Circuit interpreted antitrust laws as covering illegal contracts of a foreign corporation which were made abroad with other foreign corporations and which related to business carried on to acts to be performed abroad. In *Alcoa* case, neither an American company was involved nor did any act take place in the US. But jurisdiction was claimed on the basis of an effect on US foreign and domestic commerce (Raymond 1967, 558). To this end Judge Learned Hand stated that:

> (T)he only question open is whether Congress intended to impose the liability and whether our own Constitution permitted it to do so: as a court of the United States we cannot look beyond our own law. Nevertheless, it is quite true that we are not to read general words, such as those in this Act, without regard to the limitations cus-

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[111] *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d. Cir. 1945).

[112] 148 F.2d 416, at 444 (1945).

[113] Quota cartels limit output of their members.

> tomarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the "Conflict of Laws." We should not impute to Congress and intent to punish all whom its courts can catch, for conduct which has no consequences within the United States…
>
> (I)t is settled law…that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends.[114]

Thus, for the first time the effects test was recognized in the US case law by finding violation against even those agreements made abroad as long as they were intended to affect imports and did affect them. Further to that, Judge Hand assumed that Congress did not intend the statute to reprehend either unintended effects or agreements intended to affect imports or exports without an ultimate effect)Fox 1987, 569).

Judge Hand, indeed realized that every restraint on trade has numerous effects that can spill into a wide variety of markets. However, the Sherman Act should not empower every person capable of suing in federal court and asserting injury caused by an antitrust violation (Hovenkamp 2005, 767). By adopting the assertion of jurisdiction over acts outside the US "if they were intended to affect imports and did affect them", it was decided that the US courts have proper subject matter jurisdiction over antitrust activity that are committed abroad as long as the trade within the US markets and upon its foreign trade is affected.

Indeed, the above reading of the jurisdictional reach of the antitrust laws is quite wide (Areeda et.al. 2004, 99). To this end, Judge Hand acknowledged that if there is trade between the US and a third country, almost any limitation of the supply of goods in another country might have repercussions in the US based on the following lines in the decision;

> It may be argued that this Act extends further. Two situations are possible. There may be agreements made beyond our borders not intended to affect imports, which do affect them, or which affect exports. Almost any limitation of the supply of goods in Europe, for example, or in South America, may have repercussions in the United States if there is trade between the two. Yet when one considers the international complications likely to arise from an effort in this country to treat such agreements as unlawful, it is safe to assume that Congress certainly did not intend the Act to cover them. Such agreements may on the other hand intend to include imports into the United States, and yet it may appear that they had no effect upon them.[115]

[114] 148 F.2d, at 443-444 (1945).

[115] 148 F.2d, at 444 (2d. Cir. 1945).

This case helped to establish the effects doctrine in the US law which asserts that the US courts have jurisdiction over acts abroad, if those acts have an effect within the territorial jurisdiction of the US. In other words, effects test will not apply to conduct that might have unintended repercussions in the US and will not apply to agreements intended to affect the US trade but without having such effect. Simply, it only required actual intent and effect (Zanettin 2002, 9). This landmark decision is much more explanatory when compared to *American Banana,* not only because it was concerned with the place of the effect, but also because the effects doctrine extends the scope of subject matter jurisdiction (Zanettin 2002, 10-11).

The time periods those cases correspond is also significant to understand the evolution of the extraterritoriality principle in the US. According to Zanettin, both in the economic and political spheres, the US had given up its traditional isolationism to embrace the role of a world leader in 1945. *Alcoa* was realized at a time when the US was trying to liberalize international trade. This is clearly seen in the US's initial support for the 1947 Havana Charter that included provisions on restrictive business practices or in the ambitious international antitrust enforcement policy of the then Assistant Attorney General of the DOJ, Thurmon Arnold (Zanettin 2002, 10).

In the aftermaths of the *Alcoa* decision, the US began a period of aggressive extraterritorial enforcement (Guzman 1988, 1507). Nevertheless, without any delay, the world reacted to this Court created effects doctrine. Especially the 1970s and 1980s witnessed this dismay. This dismay led to laws, policies and practices to frustrate US enforcement notably through blocking statutes. Among other countries, such as Australia, Canada and France, the UK asserted that effects alone are not sufficient to give jurisdiction (Whish 1999, 371). Extraterritorial application of US antitrust laws has always been controversial and resulted in international conflict with its trading partners. The basic complaints are the use of effects doctrine and the treble damage remedies available in private US antitrust cases. According to the third countries, the reason for the former is the erosion of the territoriality principle that derives from a nation's sovereignty over national territory, whereas the latter is seen as a too harsh remedy to be imposed on third parties (Seung 1993, 296).

4.2.3. Aftermath of the Alcoa Decision: Refinements

Against the above mentioned reactions towards the extraterritorial jurisdiction practices of the US from different countries, the US had tried to resolve the international conflict and, therefore made some refinements into its famous effects doctrine. The international pressure against the US policy regarding extraterritorial application of its antitrust laws presents itself in the form of blocking statutes gave rise to the principle of reasonableness and balancing into the antitrust law in the 1970s. Hence, the below section elaborates on the

developments regarding extraterritorial use of the US antitrust laws around the comity considerations, congressional efforts, and other relevant developments.

4.2.3.1. Comity Considerations

Following the approval of the effects doctrine introduced by *Alcoa*, the US made some refinements to its policy against the criticisms that it received from the other countries. Comity considerations, among others, constitute an important part of these refinements. The US has received most of the objections from the other governments in the area of sovereignty and consequent jurisdictional issues, while exercising its extraterritorial jurisdiction. Therefore, when engaging in extraterritorial jurisdiction, the US antitrust authorities felt the necessity to overcome sovereignty concerns that arise; for instance while they seek for information and testimony from non-US citizens abroad. In brief, the US antitrust authorities need to overcome potential objections related to the principles of comity (ICPAC Report 2000, annex 1-C-ii).

Comity is the legal principle whereby a country should take the important interests of other countries into account while conducting its law enforcement activities, in return for their doing the same. Comity is the exercise of jurisdiction with an accompanying understanding of the impact that the exercise of jurisdiction may have on the law enforcement activities of other countries (OECD 2012, 4). Thus, in determining whether to assert jurisdiction to investigate or to bring an action, or to seek particular remedies in a given case, each of the US antitrust agencies- DOJ and FTC- takes into account whether significant interests of any foreign sovereign would be affected in the Antitrust Enforcement Guidelines for International Operations issued by the US DOJ and the FTC, dated April 1995[116]

Following the *Alcoa* decision, the effects doctrine was subject to gradual jurisprudential evolution due to comity considerations. In this regard, the first tuning that was made on the doctrine was the introduction of the qualified effects test. In *United States v. Timken Roller Bearing Co.*[117] decision, the jurisdiction was based on the ground that the foreign conduct had a "direct and influencing effect on [US] trade". Likewise, in *United States v. Swiss Watchmakers*[118], the US Court asserted jurisdiction over a cartel of Swiss watchmakers regulating the manufacturing and exports of the watches based on the fact that it had "a substantial and material effect upon [US] foreign and domestic trade" (Zanettin 2002, 11). This approach of the US Courts was fully endorsed by the Supreme Court. Further, the Supreme Court

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[116] In performing a comity analysis, the US antitrust agencies take into account all relevant factors. For a more detailed discussion of these factors, please refer to the "Antitrust Enforcement Guidelines for International Operations" see "Section 3.2 Comity".

[117] *United States v. Timken Roller Bearing Co., 83 F. Supp. 284, 309 (ND Ohio 1949).*

[118] *United States v. Swiss Watchmakers,* Trade Case, 1962.

in other decisions, like *Continental Ore Co. v. Union Carbide & Carbon Corp.*[119], has consistently granted jurisdiction where a significant effect on US domestic or import commerce is found (Hovenkamp 2005, 767).

Starting in 1976 with the *Timberlane Lumber Co. v. Bank of America*[120] (*Timberlane*) and followed by the 1979 *Mannington Mills v. Congoleum Corp*[121] (*Mannigton*) decisions, some US courts began to follow a new trend where they tried to apply the effects doctrine in a more moderate way. Accordingly, the courts dealing with antitrust cases may find sufficient effects for jurisdictional purposes, and yet they refuse to apply the US law. This was the approach of the Court of Appeals for the Ninth Circuit in *Timberlane*, where the plaintiff complained about a US bank's activities in Honduras. Timberlane, a US company, had hoped to mill lumber in Honduras and ship it to the US. It was disappointed when it lost its timberlands. Timberlane sued the Bank of America, Honduran firms and Honduran officials alleging a conspiracy not only restraining trade in lumber land in Honduras, but also driving Timberlane out of lumber milling business in Honduras. Initially, the district court dismissed the case by finding no direct and substantial effect on US commerce (Fox 1987, 571).

However, the Court of Appeals appealed the decision. Despite this, the Court of Appeals just like District Court, affirmed and held that it was proper to dismiss the case for lack of subject matter jurisdiction based on the jurisdictional rule of reason analysis. In *Timberlane* decision, the Ninth Circuit Court of Appeals, similar to *Alcoa* decision, decided that subject matter jurisdiction is established if only some actual or intended effect is presented. Additionally, however, it put forward that it is necessary to have additional effects to establish the violation. Even then the Court of Appeals insisted that it may refrain from asserting extraterritorial authority unless the effects on the US commerce are sufficiently strong (Areeda et.al. 2004, 99). In the *Timberlane* decision, Judge Choy of the Court of Appeals made a tripartite analysis to determine whether the court should exercise jurisdiction or not with respect conducts abroad. Initially, there must be some actual or intended effect on American foreign commerce. Then, the effect should be sufficiently large to prevent a cognizable injury to the plaintiff. Last but not least, the interests of the United States must be sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority. Such reasoning has been referred in many decisions including *Mannington Mill* (Fox 1987, 571; Zanettin 2002, 12).

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119 *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690, 705, 82 S. Ct.1404, 1414 (1962).

120 *Timberlane Lumber Co. v Bank of America* 549 F.2d. 597 (9th Cir.1976), cert. denied, 472 US 1032 (1985).

121 *Mannington Mills v. Congoleum Corp 595 F.2d 1287* (3rd Circuit 1979).

The evolution of the effects doctrine into jurisdictional rule of reason was appeared especially after the US courts and antitrust agencies understood that the extraterritorial application of the US antitrust law was likely and in fact did cause conflicts with foreign jurisdictions. Relying on the international comity principle, some courts held the view that they must undertake an analysis of foreign interests and conflicts, and balance them with the US domestic interests before they decide whether assertion of jurisdiction over foreign conducts is proper. This balancing test or the so called jurisdictional rule of reason was first introduced in *Timberlane* (Zanettin 2002, 13).

Indeed, *Timberlane* was the first antitrust decision which incorporated the reasonableness and balancing tests into the jurisdictional inquiry (Fox 1987, 571). The Courts in *Timberlane* and *Mannington* decisions consecutively modified the effects test by taking comity considerations into account. So, it was required not only that there should be a direct and substantial effect within the US but also that the respective interests of the US in asserting jurisdiction and of any other states which might be offended by such assertion should be weighed against one another (Whish 1999, 372). In other words, the US antitrust laws should be applied to foreign conduct only when the US, on balance, is the most interested nation state. The result was called the jurisdictional rule of reason (Seung 1993, 304).

Following the jurisdictional rule of reason approach of *Timberlane*, the Court of Appeals for the Third Circuit in *Mannington* formulated its own jurisdictional rule of reason by adopting a two-step analysis. Mannington Mills had alleged that its dominant competitor, Congoleum secured patents in 26 foreign patent offices deceitfully, and thus blocked Mannington Mills from these markets. Likewise Timberlane, initially the district court dismissed the case for lack of jurisdiction, while the appellate court reversed the case and adopted the two-step analysis. Accordingly, the Court of Appeals first asked whether jurisdiction exists; and second, if so, whether it should be exercised (Fox 1987, 573).

Both of these tests, though differ from each other slightly; require the courts to consider whether the interests of the US in exercising jurisdiction is adequately strong with regards to other nations to justify an assertion of extraterritorial territory. The difference between the *Timberlane* and the *Mannington* is the approach towards the determination of jurisdiction. *Timberlane* adopted the effects and the international comity together in determining whether to exercise jurisdiction, whereas *Mannington* found the existence of jurisdiction first and then evaluated international comity factors to determine whether the Court should exercise jurisdiction (Seung 1993, 304). Both offer interest analyses, although *Timberlane's* list of factors to be weighed does not include harm to foreign relations while the Mannington Mill does (Fox 1987, 573). Nevertheless,

overall they have the same purpose. In practice while some courts[122] have adopted the jurisdictional rule of reason test, some others[123] have explicitly rejected it and continued to use the effects test of the *Alcoa*. Unfortunately, due to the inherent flaws, jurisdictional rule of reason test has never been contributed significantly to resolve international conflict that the US has come across with during the applications of the effects doctrine. Besides, after these decisions, the courts have placed greater emphasis on the interests of the US while giving less consideration to the legitimate interests of the foreign nation (Seung 1993, 304).

By the time the Supreme Court decided *Hartford Fire Insurance Co. v. California*[124], it was well established in the US that the Sherman Act applies to "foreign conduct that was meant to produce and did in fact produce some substantial effect in the US". The substantial effects test, which is meant to catch those foreign practices which have more than a *de minimis* effect on US trade, has constantly been used by US courts which was fully endorsed by the Supreme Court (Zanettin 2002, 11) through *Hartford Fire*, when it stated that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some effect in the United States."

Indeed in *Hartford Fire* decision, the Supreme Court did not encounter any difficulty in concluding the facts of the case meeting the traditional effects test. Several insurance companies of the US and UK were alleged to have breached the Sherman Act by making agreements to change certain terms of insurance policies and not offering certain types of insurance coverage. But the UK companies argued that the US courts did not have jurisdiction over conduct that occurred in another jurisdiction and the conduct was lawful thereof even if the conduct produced effects in the US. Against this, the Supreme Court did not decide whether a court may decline to exercise Sherman Act jurisdiction over foreign conduct. The Supreme Court rather found that the principles of international comity were not raised unless there was a true conflict between the US and a foreign law (Areeda et.al. 2004, 100). Besides, such a conflict exists only if the person subject to the

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122 For instance *Industrial Inv. Dev. Corp v. Mitsui & Co.,* 671 F.2d 876 (US Court of Appeals, Fifth Circuit 1982).

123 For instance see *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d (1984) case. Laker Airways a British corporation in liquidation filed an antitrust action in the US District Court of the District of Columbia against several defendants including American, British and other foreign airlines. Laker alleged conspiracies to destroy its businesses of providing low fare transatlantic air services. The Court examined the two basis of jurisdiction: territoriality and nationality. The District Court found that both the US and the UK had legitimate grounds to assert jurisdiction to prescribe law relating to the conduct in question. The effects doctrine provided the basis of US jurisdiction as the economic effects of the alleged conspiracies impaired significant American interests; LEIGH, M. (1984), "*Judicial Decisions Laker Airways v. Sabena, Belgian World Airlines, US Court of Appeals, DC Circuit, March 6 1984",* American Journal of International Law, pp. 666-668.

124 *Hartford Fire Insurance Co. v. California*, 113 S. Ct. 2891 (1993)

regulation by two states cannot comply with the laws of the both, and is obliged by foreign law to behave unlawfully under domestic legislation.

4.2.3.2. Congressional Efforts

The US governmental authorities could not stay indifferent to other states' reactions; therefore they intervened in order to limit the judicial discretion of the courts. In this regard, congressional efforts of the US are worthwhile to mention among the refinement efforts in the US. In 1982 the Foreign Trade Antitrust Improvements Act[125] (FTAIA) was enacted at the Congress with an aim to reduce international conflicts and criticisms against the extensive use of effects doctrine by the US.

Congress attempted to clarify jurisdictional wise matters through the enactment of FTAIA of 1982. This Act, accompanied by exceptions, amended the general jurisdiction provisions of the Sherman Act and the FTC Act.[126] In brief, the FTAIA declares that the Sherman Act shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless (i) such conduct has a direct, substantial and reasonably foreseeable effect on domestic or import commerce or on export trade or export commerce of a person engaged in such commerce in the US; and (ii) such effect gives rise to a claim under the Sherman Act.

After the enactment of the FTAIA, the Antitrust Enforcement Guidelines for International Operations[127] dated 1995 was issued on April 1995 by the DOJ and the FTC fully. The Guidelines endorsed the substantial effects test of the *Hartford Fire* in cases involving import commerce, as well as the direct, substantial and reasonably foreseeable test of the FTAIA. The wording of the Guidelines seem to imply that the direct, substantial and reasonably foreseeable test impose a higher

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[125] Foreign Trade Antitrust Improvements Act, 1982, 15 U.S.C.A. § 6a

[126] The FTAIA states:

This Act shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of this Act, other than this section.

If this Act applies to such conduct only because of the operation of paragraph (1)(B), then this Act shall apply to such conduct only for injury to export business in the United States.

[127] Issued by the DOJ and the FTC on April 1995, that can be found at:

http://www.justice.gov/atr/public/guidelines/internat.htm

These Guidelines of the DOJ and the FTC have revised and updated the DOJ's 1988 Antitrust Enforcement Guidelines for International Operations, which are withdrawn.

threshold than the *Hartford Fire* test. Additionally, both of the antitrust agencies would apply the same principles regarding their foreign commerce jurisdiction to Clayton Act Section 7 cases as they would apply in Sherman Act cases[128] as the Clayton Act defines commerce as covering "trade or commerce…with foreign nations".[129]

The US antitrust agencies were also affected from this case-law and particularly from the *Hartford Fire* decision. They have opted for jurisdictional rule of reason approach developed by the *Timberlane* and *Mannington* cases which is not perfect as a test either. On one hand, the US antitrust agencies acknowledge and pay special attention to whether there is a true, genuine conflict with foreign laws and policies. On the other hand, they clarify their point of view regarding comity considerations with the following lines in the Guidelines: "in determining whether to assert jurisdiction to investigate or bring an action, or to seek particular remedies in a given case, each Agency takes into account whether significant interests of any foreign sovereign would be affected." This way, they are prepared to refrain from asserting jurisdiction even in the absence of conflict (Zannettin 2002, 13).

4.2.3.3. Other Developments under the FTAIA

The US efforts to resolve the international conflict are not limited with the above mentioned Congressional attempts. Further, this conflict was tried to be overcome through case law interpreting the FTAIA. Moreover, the bilateral and mutual assistant agreements are tools to tackle this matter. Since the bilateral and mutual assistant agreements are the subjects of the next Chapter of this study, they are not discussed herein.

Indeed, the FTAIA aimed to establish a uniform test which stipulates that the jurisdiction can only be asserted over conduct involving commerce with foreign nations that has a direct, substantial and reasonably foreseeable effect on US related commerce. This Act exempts export related transactions as long as they do not have an adverse effect on US economy. Apart from the reasonably foreseeable effects requirement, this test is similar to the effects test introduced by the *Alcoa*. Despite the Congressional efforts to develop a uniform test to solve the jurisdictional dilemma, the said statute became an increasingly troublesome issue for the US courts (Sicalides and Williams 2004, 1). The disagreement among

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[128] See 3.14 Jurisdiction Under Section 7 of the Clayton Act of the Antitrust Enforcement Guidelines for International Operations.

[129] Clayton Act § 1, 15 U.S.C. § 12 provides definitions and short titles of the Act. Accordingly, "commerce," means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States.

certain US appellate courts focused on the meaning and the proper application of the FTAIA exception where the anticompetitive conduct affects US commerce. The FTAIA limits the subject matter jurisdiction of antitrust laws firstly by providing that the Sherman Act will not apply to trade of commerce with foreign nations unless the conduct has a direct, substantial and reasonably foreseeable effect on domestic or export commerce of the US. Second, it considered whether such effect gives rise to a claim under the Sherman Act. Nevertheless, the FTAIA asserts jurisdiction over all matters pertinent to import trade or commerce (Sicalides and Williams 2004, 1).

It is widely accepted that the reading of the said statute is difficult and the main difficulty arises from the interpretation of the give rise to a claim clause found in the relevant provision of the FTAIA. According to Gellhorn et.al. (2004, 560-562), there are three versions on the reading of the words "such effect gives rise to a claim" when foreign plaintiffs would be permitted to assert claims in US Courts. Some courts read those words for non-import foreign commerce to require that a particular plaintiff's injury arose from the anticompetitive effects on US commerce as in the *Den Norske Stats Oljeselskap As v. Heer Mac Vof*[130] decision. Hence, the Court of Appeals found that even though a plaintiff claimed that an antitrust conspiracy caused prices to rise in the US, the courts in the US lacked jurisdiction under the FTAIA because the plaintiff's injury did not arise from the domestic anticompetitive effect. The Court of Appeals focused on the notion that US antitrust laws are inapplicable to wholly foreign transactions. Others read them as requiring only that a domestic effect violate the substantive provisions of the Sherman Act as put forward by the *Kruman v. Christie's International PLC*[131] decision.

Later on, in *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*[132] *(Empagran)*, the Court of Appeals for the D.C. Circuit considered the same issue previously decided by the Second and Fifth Circuits respectively in *Den Norske* and *Kruman* decisions, whether section 2 of the FTAIA requires a plaintiff to show that the anticompetitive effect on US commerce alleged caused the injury to the foreign plaintiff as the court held in *Den Norske*, or whether the plaintiff need only demonstrate that the defendant's conduct gives rise to any claim under the Sherman Act, as the court held in *Kruman*. The Court of Appeals for the D.C. Circuit in its *Empagran* decision criticized the approach taken by the Fifth Circuit in *Den Norske* as overly rigid and criticized the the approach of the Court of Appeals for the Second Circuit as reaching too far in its view of subject matter jurisdiction. Thus, the D.C. Circuit established yet another approach to reading

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130 241 F.3d 420 *(5th Cir. 2001).*

131 *284 F. 3d 384 (Sd Cir. 2002).*

132 *F. Hoffman-LaRoche, Ltd. v. Empagran*, 315 F.3d 338 (Court of Appeals for the D.C. Cir. 2003)

the FTAIA and further complicated the already existing circuit split.[133] Reference to *Empagran* shall be made once again as a further development to solve the problem of jurisdictional matters related to the enforcement of antitrust laws in the US. *Empagran* was about a global price-fixing cartel in vitamins. The issue in Empagran was whether a foreign plaintiff can sue for damages in a US court even if the harm it suffered took place outside the US. The court also had to consider the application of FTAIA of 1982.

Court of Appeals for the D.C. Circuit in *Empagran* decision required that "the conduct's harmful effect on US commerce must give rise to a claim by someone, even if not the foreign plaintiff who is before the court". However, the Supreme Court reversed this approach by stating that when an international conspiracy causes US harm and also independent foreign harm, a foreign private plaintiff may not recover for that foreign harm (Gellhorn et.al. 2004, 562). In other words, the Supreme Court stated that the exception found in the FTAIA does not apply where the plaintiff's claim rests solely on the independent foreign harm. Justice Breyer delivered the opinion of the Supreme Court as follows (Sicalides and Williams 2004, 2);

> [t]he price-fixing conduct significantly and adversely affects both customers outside the United States and customers within the United States, but the adverse foreign effect is independent of any adverse domestic effect.[134]

Empagran decision which dates back to 2004, is the Supreme Court's only occasion to interpret the affect of the statute on antitrust claims on non-import foreign commerce. That case is about a multinational conspiracy among producers of vitamins. The existence and the illegality of the cartel and the domestic plaintiffs' right to recover were unquestionable. But the plaintiffs were foreign purchasers that made their purchases from the foreign members of the cartel. Therefore, the issue concerns

> (1) significant foreign anticompetitive conduct with (2) an adverse domestic effect and (3) an independent foreign effect giving rise to the claim. In more concrete terms, this case involves vitamin sellers around the world that agreed to fix prices, leading to higher vitamin prices in the United States and independently leading to higher vitamin prices in other countries such as Ecuador.[135]

Thus, the transactions were solely foreign and not part of either import or export commerce (Hovenkamp 2005, 768). The opinion delivered by Justice

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133 Sicalides, and Williams (2004), *op.cit.,* p.2.

134 (03-724) 542 U.S. 155 (2004), (Supreme Court of the United States).

135 (03-724) 542 U.S. 155 (2004), (Supreme Court of the United States).

Breyer at the Supreme Court echoed the protest in *Hartford Fire* decision regarding the importance of the use of ambiguous statutes, in such a way to avoid conflict with the sovereign states whose antitrust laws are different from the US law in both substance and remedy (Hovenkamp 2005, 768). In brief, *Empagram* is a case in which the transaction between a foreign seller and a foreign purchaser outside the US, were regarded as insubstantial for the application of US antitrust laws.

In *Empagran* the Supreme Court recognized that the basic principles of comity

> Provide Congress greater leeway when it seeks to control through legislation the actions of *American* companies…and some of the anticompetitive price-fixing conduct alleged here took place in *America.* But the higher foreign prices of which the foreign plaintiffs here complain are not the consequence of any domestic anticompetitive conduct *that Congress sought to forbid*, for Congress did not seek to forbid any such conduct insofar as it is here relevant, *i.e.*, insofar as it is intertwined with foreign conduct that causes independent foreign harm. Rather Congress sought to *release* domestic (and foreign) anticompetitive conduct from Sherman Act constraints when that conduct causes foreign harm. Congress, of course, did make an exception where that conduct also causes domestic harm. See House Report 13 (concerns about American firms' participation in international cartels addressed through "domestic injury" exception). But any independent domestic harm the foreign conduct causes here has, by definition, little or nothing to do with the matter…
>
> Where foreign anticompetitive conduct plays a significant role and where foreign injury is independent of domestic effects, Congress might have hoped that America's antitrust laws, so fundamental a component of our own economic system, would commend themselves to other nations as well. But, if America's antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat.[136]

As can be seen, the Supreme Court asserted that, due to comity considerations, it could decline jurisdiction even though the jurisdictional requirements are met. The Supreme Court held that the Sherman Act does not reach claims arising out of foreign injury that is independent of domestic effects of the anticompetitive conduct. Simply the Supreme Court concluded that the plaintiffs had suffered harm in Ukraine, Panama, Australia, and Ecuador and not in the US. Therefore,

[136] (03-724) 542 U.S. 155 (2004), (Supreme Court of the United States).

they cannot sue in the US. Likewise, the Court of Appeals for the District of Columbia concluded that foreign plaintiffs had suffered harm outside of the US, thus could not recover damages in the US.

The Supreme Court's decision in *Empagran* resolved the circuit split in favor of the Court of Appeal for the Fifth Circuit's interpretation of the FTAIA which requires that a plaintiff suffer domestic harm for a US federal court to exercise jurisdiction over the claim. However, the Supreme Court, did not answer the question of application of the FTAIA to cases where the foreign injury is not independent of the anticompetitive conduct's domestic effects (Sicalides and Williams 2004, 2). Whish (2009, 475)[137] also notes that

> this is an important feature of the Supreme Court judgement in *Empagran* which left open the question of whether the foreign plaintiffs could sue in the US if the foreign injury that they had suffered was inseparable from the domestic harm caused by cartel to the customers in the US.

Yet, in practical terms, FTAIA which was enacted with an aim to reduce the international conflicts did not solve this problem due to the said Act's failure to cover any criterion regarding the balance of the vested interests (Dere 2011, 10). Indeed, when the FTAAI was enacted in 1982, international cartels were were either dormant or left undetected. Additionally, as underlined by Davis (2005, 58), legislative history betrays little indication of congressional attention to how the FTAIA might impact international cartels.

Despite the evolution of the effects test over the years either through case law or other relevant legislations such as FTAIA, the US application of the effects test still remains a work in progress. On one hand, the antitrust agencies worldwide increasingly are working together to reduce the potential for conflict with an increasing emphasis on cooperation. While on the other hand, convergence towards similar antitrust policies and enforcement approaches are being promoted bilaterally and through international organizations, notably the OECD and the ICN (Krauss 2009).

4.3. The EU Competition Law and its Global Reach

The EU started to assert jurisdiction abroad only in 1960s. The extraterritorial reach of EU competition rules started with a limited approach requiring the existence of a subsidiary within the EU[138] and then it has been extended towards

[137] The matter whether domestic and foreign injuries were insaperable or individisible so that a foreign plaintiff can sue in the US is beyond the scope of this study, thus will not be elobarated further.

[138] *ICI v. Commission* (Dyestuffs) [1972] ECR 619, [1972] CMLR 557.

a full-fledged effects doctrine in time. In a chronological order, the development of the effects doctrine in the EU is dealt below.

4.3.1. Origins of the EU Competition Law

From the very beginning, competition law has been a tool to maintain the market integration goal within the EU. The then Articles 85 and 86 of the European Economic Community (EEC) Treaty (later articles 81 and 82 of the European Community (EC) Treaty and eventually articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) as of today) have been inserted into the Treaty of Rome to achieve this end by combatting against the anti-competitive practices of firms that would restrain the creation of the Common Market. In 1957, the Rome Treaty, the official name of which is the Treaty establishing the, EEC was adopted by six nations namely France, Germany, Italy and the Benelux countries. Thus, these six nations became the original six Member States of the EEC.

Political and economic nationalism divided the war-torn Western Europe in the aftermaths of the World War II. When the EEC was established, borders among the nations were mainly economic and these economic frontiers were creating barriers to trade. The political economy of the nations diversified. Some nations had statist regimes with a vast number of state-owned enterprises and most of them were under the influence of the government regulation. Foreign investment was not welcome in those nations while high trade barriers in the form of quotas and tariffs prevented the free flow of goods across nations. The undertakings were striving against inefficiencies and stagnation as a result of which, European businesses were lagging on the eve of global trade and competition (Fox 2009b, 1). The idea behind the creation of the EEC Treaty and the Communities was to create a peaceful Europe by breaking down the economic barriers between the hostile post-war nations on the grounds that people who trade together grow in a way to respect one another and work harmoniously to achieve common goals.

The basic provisions of the EEC Treaty required the Member States to remove state barriers to trade in the internal European market. This requirement comprised of both tariff and non-tariff barriers that prevented the free movement of goods, services, capital and people with an aim to create a common market. The EEC Treaty or the Treaty of Rome are colloquially known as the Common Market adopted a limited number of common policy areas to protect and sustain this aim of which competition policy is one policy area. More than a half a century after the adoption of the EEC Treaty, today the European Community had grown into 27 nations while the European Union was created by the signature of the Treaty on European Union (TEU) (better known as the Maastricht Treaty) on

November 1, 1993. Upon the entry into force of the Maastricht Treaty in 1993, the EEC was renamed as the European Community (EC) to reflect that it covered a wider range of policy. The EC existed in this form until it was abolished by the Treaty of Lisbon in 2009. Lisbon Treaty brought an end to the European Community, abolished the former EU architecture and makes a new allocation of competencies between the EU and the Member States. Following the entry into force of the Treaty of Lisbon in 2009, the EU's two core treaties were amended: both the TEU and the Treaty establishing the European Community (TEC). The latter is renamed as the Treaty on the Functioning of the European Union (TFEU).

Indeed, the competition law provisions of the EU have been in force since the adoption of the Treaty of Rome in 1957. The Treaty of Rome is gradually evolved into the Treaty on the Functioning of the European Union (TFEU). Today, the European Commission is composed of 27 Commissioners, each appointed by a Member State. One of these Commissioners is in charge of competition policy including the policy on state-aids[139]. Competition Directorate is responsible for competition matters and it is headed by a Director General. The European Commission investigates, enforces and adjudicates competition law related matters within its jurisdiction following the initiation of the cases by the Competition Directorate. Appellate body concerning competition law related matters today is the European General Court (GC) and the Court of Justice of the EU (Court of Justice). The Court of First Instance (CFI), which was established in 1989, renamed as European GC in 2009 to relieve a growing burden on the Court of Justice. The Court of Justice was previously known as the European Court of Justice (ECJ). Appeal lies to the Court of Justice[140] on matters of law.[141]

4.3.2. Objectives of the EU Competition Law

The EU Commission is empowered by the TFEU for the enforcement of the competition provisions namely through Articles 101 and 102 and the Merger Regulation. Moreover, since May 1, 2004, national competition authorities of the EU Member States are also entitled to fully enforce Articles 101 and 102

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139 State aid rules are specifically exempted from the analysis carried out in this study since this is a unique characteristics of the EU competition law and since this study only deals with the internationalization of competition rules applicable to firms.

140 The Court of Justice of the EU interprets EU law to make sure it is applied in the same way in all EU countries. It also settles legal disputes between EU governments and EU institutions. Individuals, companies or organizations can also bring cases before the Court if they feel their rights have been infringed by an EU institution. For more information regarding the composition and work of the Court of Justice, please refer to Court of Justice's website: http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm

141 For the sake of simplicity and to prevent inconsistencies, this study uses the current terminology for the EU institutions and legislations in this study.

of the TFEU while national courts may also apply these provisions in order to protect the individual rights conferred on citizens by the TFEU. In other words, the competition law regime was set up within the EU on a two-tier system in which the European Commission and the national competition authorities have parallel competence to apply Articles 101 and 102 of the TFEU in a particular case.[142]

Article 101 (the then Article 85 of the EEC Treaty and then Article 81 of the EC respectively) of the TFEU prohibits all agreements, concerted practices and decisions of associations of undertakings that may affect trade between member states and that have as their object or effect prevention, restriction or distortion of competition within the internal market of the EU. Article 101 covers not only horizontal agreements (between actual or potential competitors operating at the same level of the supply chain) but also vertical agreements (between firms operating at different levels, i.e. agreement between a manufacturer and its distributor). There is only a limited exception to this general prohibition. The most flamboyant example of illegal conduct infringing Article 101 is the creation of cartel agreements between competitors (such as price-fixing and/or market sharing). Article 102 of the TFEU (the then Article 86 of the EEC Treaty and then Article 82 of the EC Treaty respectively) prohibits abuse of dominant position and contains an exhaustive list of abusive practices. Last but not least, merger control is introduced into the scope of the EU acquis on competition policy for the first time in 1989 through Merger Regulation[143] which was substantially revised in 2004[144] with an aim to improve the system.

As regards to extraterritorial reach of EU competition rules, Articles 101 and 102 are silent as to whether they are applicable to those foreign and international anticompetitive practices and conduct or not. However, the enforcement practices throughout the years lead to the conclusion that articles 101 and 102 apply no matter where an undertaking has its headquarters or where the agreement has been concluded. Meanwhile, the 1989 Merger Regulation was based on the one-stop shop principle, which has given the EU Commission sole control over all major cross-border mergers. The 2004 Merger Regulation further facilitates the use of one-stop shop principle by adopting the principle of subsidiarity that

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142 Please see Council Regulation (EC) No 1/2003 of December 16, 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, (2003) O.J. L1/1 (Regulation 1/2003).

143 Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, [1989] OJ L 395/1.

144 Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings [2004] OJ L 24/1.

ensures the same merger need not be notified to several competition authorities in the EU and the merger is examined by the judicial authority best placed to do so.

The EU competition law regime has evolved over time and become one of the most mature regimes in the world in a consistent manner. Likewise, the extraterritorial application of competition rules is also developed during this time. Consequently, today the EU competition law regime is applying the effects doctrine in its practices. Since the EU is an important international player that has actively worked on the use of extraterritoriality, this section of this study considers the competition law regime of the EU and its evolvement towards global reach in this respect. Although the core provisions of the TFEU, namely the Articles 101 and 102 do not explicitly mention whether those provisions might apply extraterritorially, historically, however there are three phases that shaped the progress regarding the applicability of these provisions to foreign activity that takes place and/or does have an effect in the single market of the EU. These phases can be divided into three as economic entity doctrine/test, the implementation test and the effects test.

4.3.3. The EU and the Early Days of the Effects Doctrine under the EU law

Contrary to Section 1 and 2 of the Sherman Act which explicitly refer to foreign commerce, neither Article 101 nor Article 102 of the TFEU involves any reference to jurisdiction defining the sphere of application of the said provisions. Nevertheless, this has never generated a limitation before the application of the effects doctrine by the EU.

4.3.3.1. Early Cases

The grounds for the extraterritorial application of EU competition rules to the practices of those firms located abroad dates back to 1964, to the case of *Grosfillex*[145]. The European Commission considered the effects doctrine for the first time in this decision. In this case, two companies Grosfillex of France and Fillistorf of Switzerland concluded a sales agreement in which Fillistorf agreed not to sell any products similar to those that it received from Grosfillex, and Grosfillex was obliged to sell its products only to Fillistorf in Switzerland. Parties applied for a negative clearance for their agreement. The European Commission noted that the agreement was concluded between one company within the EU and the other one outside the EU and the activities were taking place outside the EU. Thus, the European Commission decided that this agreement was not intended to prevent, restrict, or distort competition within the EU.

[145] Decision of the Commission of the European Communities, *Grosfillex-Fillistrof*, OJ of 9.4.1964

As rightly stated by Dabbah (2010, 453) for *Grosfillex* case, the Commission felt that the whole spirit, letter and operation of EU competition rules were actually compatible with effects doctrine while deciding on the case. The territorial scope of EU competition law is determined neither by domicile of the firm nor by where the agreement is concluded or carried out, and the sole and decisive criterion is whether an agreement affects competition within the Common Market or designed to have this effect. In this regard, *Grosfillex* decision made clear that the European Commission fully embraced the effects doctrine (Dabbah 2010, 453). The EU's position was later confirmed in its Eleventh Report on Competition Policy[146]. The aforementioned report by referring to 1964 *Grosfillex* decision openly stated that;

> The [European] Commission was one of the first antitrust authorities to have applied internal effect theory to foreign companies, both to their advantage and to their detriment. Putting the theory into practice can, it is true, have repercussions outside the Community: but that is not a reason for regarding it as inadmissible exercise of extra-territorial jurisdiction.

Early attitude of the Court of Justice regarding extraterritorial application can be attributed to the Béguelin[147] case. One of the parties in this case was a firm located in France Béguelin, whereas the other one was a Japanese company Oshawa which appointed an exclusive distributor for Belgium and France. These two firms signed an exclusive dealing agreement for pocket gas cigarette lighters. The application of the EU competition rules to the Japanese company was not discussed in this case. Nevertheless, the Court of Justice, even though implicitly, have recognized the application of its competition rules extraterritorially by stating that:

> the fact that one of the undertakings which are parties to the agreement is situated in a third country does not prevent application of that provision [*the then Article 85; currently Article 101 (1) of the TFEU*] since the agreement is operative on the territory of the common market[148]

Later in its famous *Dyestuffs (ICI)* decision[149] in 1969, the question regarding the acceptability of the extraterritorial application of EU competition law raised that explicitly for the first time. The European Commission justified its ability to fine foreign firms that were part of a price-fixing cartel on the grounds that the conduct of these firms resulted some effects within the EU (Zanettin 2002, 17).

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146 Eleventh Report on Competition Policy - 1981, Commission of the European Communities, p. 36

147 Béguelin Import Co. v S.A.G.L. Export, Case 22-71, 61971CJ0022, Judgement of the Court 25 November 1971.

148 Paragraph 11 of the Judgement of the Court 25 November 1971; Béguelin Import Co. v S.A.G.L. Export, Case 22-71, 61971CJ0022.

149 Decision of the Commission of the European Communities, *Dyestuffs (ICI)*, OJ 1969 L 195/11

The European Commission fined ICI of England which was not a member state to the EU at that time. To this end, the said decision put forward that:

> This decision is applicable to all undertakings which took part in concerted practices, whether they are established within or outside the Common Market…The competition rules of the Treaty are, consequently, applicable to all restrictions of competition which produce within the Common Market effects set out in Article 85 (1) *[currently Article 101 (1) of the TFEU]*[150]

Dyestuffs case was appealed before the Court of Justice which gave the EU's highest appellate body the chance to express its opinion on this topic for the first time. Contrary to expectations, the Court of Justice avoided the extraterritoriality question and refused the proposal of the Advocate General Mayers (Dabbah 2010, 453). Advocate General Mayers took, albeit a slight difference, a similar stance to the European Commission decision and urged the Court of Justice to base its jurisdiction on direct, foreseeable and substantial effect, which had the advantage of respecting the limits set by international law on the extraterritorial application of domestic law (Zanettin 2002, 18). However, the Court of Justice avoided the extraterritoriality question in the case and simply did not accept the Advocate General Mayers's suggestion to adopt the effects doctrine. The Court of Justice instead held that the jurisdiction should be asserted on the basis of the territoriality by relying on the existence of a single economic group or the economic entity doctrine which means that the parent (non-EU) firms enjoyed control over the strategic business behavior of its subsidiary firm based in the EU. The participation of the latter is considered as an illegal conduct that can be attributed to the former. The Court of Justice decided that Article 101 (the then Article 85) of the TFEU can be applied on the aforementioned basis and the question of extraterritoriality was not relevant in the facts of this case (Dabbah 2010, 453).

4.3.3.2. Wood Pulp as a Landmark Case: Implementation Doctrine

Despite the EU's enthusiasm towards a US style effects doctrine, the Court of Justice was not sharing the same excitement. This lack of enthusiasm of the Court of Justice demonstrated itself in the *Wood Pulp*[151] case as well. Indeed the European Commission followed its earlier approach by stating that the EU competition law applies extraterritorially even when the conduct outside the EU produces adverse economic effects within it.

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[150] Paragraph 28 of the Decision of the Commission of the European Communities, *Dyestuff (ICI)*, OJ 1969 L 195/11.

[151] *Woodpulp*, Commission Decision of 19 December 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/ 29.725) (85/202/EEC), OJ of the European Communities No L 85/1, 26.3.85.

The European Commission had found out that forty-one non-EU producers together with two non-EU trade associations of woodpulp had engaged in concerted practices infringing Article 101 (1). The registered offices of all of these producers and trade associations were based outside the EU borders. But all of them had either subsidiaries or some other forms of establishment within the EU. The European Commission had imposed substantial fines on the parties to the infringement in the form of fixing prices of woodpulp. Hence the Commission stated that:

> Article 85 of the EEC Treaty applies to restrictive practices which may affect trade between Member States even if the undertakings or associations which are parties to the restrictive practices are established or have their headquarters outside the Community, and even if the restrictive practices in question affects markets outside the EEC. [152]

Moreover, the European Commisssion clarified what effect is as follows:

> …all the addresses of this Decision were during the period of the infringement exporting directly to or doing businesses within the Community. Some of them had branches, subsidiaries, agencies or other establishments within the Community. The concentration on prices, the exchange of sensitive information, relative to prices, and the clauses prohibiting export or resale all concerned shipments made directly to the buyers in the EEC…shipments affected by these agreements amounted to…60% of EEC consumption….The effect of the agreements and practices on prices announced and/or charged to customers and on resale of pulp within the EEC was therefore not only substantial but also intended. [153]

The Court of Justice again declined to deal with the issue in question directly which reached itself via an appeal action. Thus, the Court of Justice instead stated that article 101 (1) TFEU would apply where a price fixing agreement is implemented within the EU. This statement led to a new approach within the EU competition law regime as a result of which the behaviour or conduct of a non-EU based firm would be caught not because it produces effects within the EU but simply because this firm has the effect of implementing the infringement within the EU by its own subsidiaries or agents (implementation doctrine). Based on this, likewise Dabbah (2010, 454) and others (Whish 2009, *op.cit,* p. 480; Dere 2012, p. 15), it can overtly be argued that the ECJ has rejected the US style effects doctrine. And contrary to the explicit US approach concerning the extraterritorial reach, the Court of Justice in a way hid itself behind the implementatiton doctrine.

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[152] *Woodpulp*, paragraph 79.

[153] *Woodpulp*, paragraph 79.

The Court of Justice divided the anticompetitive conduct into two elements. First, the formation of the agreement, decision and/or concerted practice, and then its implementation. The Court of Justice by its decision insisted that the decisive factor is the place where the anticompetitive conduct is implemented because if the Court of Justice had attached the application of the EU competition rules to the place of the anticompetitive conduct was formed, the undertakings would have easily escaped from its application.

Following the *Wood Pulp*, the European Commission continued extensively following the implementation approach that the Court of Justice has adopted. *PVC*[154] (Polyvinyl Chloride) and *LdPE*[155] (Low Density Polyethylene) cartel cases are two examples in this regard[156]. In the former case, namely the PVC, the European Commission conducted an investigation into an alleged price-fixing cartel in which the Norwegian manufacturer of PVC participated. The undertaking in question was a non-EU based firm. The ruling was made based on the infringement of Article 101 (1) TFEU. In other words, the European Commission made its judgment based on the implementation doctrine. Likewise, in the *LdPE* case, the European Commission used implementation doctrine to bring an action against the several manufacturers of thermoplastic low-density polyethylene for fixing prices and taking part in other forms of collusion. However, the European Commission singled out Rapsol, a Spanish firm of LdPE manufacturer, based on the argument that Rapsol did not implement its agreement within the EU but rather in Spain.[157] Indeed, the effects doctrine has been recognized and accepted by the European Commission in all these decisions mentioned so far, while the Court of Justice has preferred to rely on the economic entity and implementation doctrines which are politically less controversial instead of explicitly deciding effects doctrine is being applied within the EU.

4.3.3.3. Merger Cases and the Effects Doctrine

In addition to the above mentioned Article 101 cases, the extraterritoriality concept has also shown itself in the merger transactions of the EU. Article 1 of the revised Merger Regulation 139/2004[158] provides an explanation as to what constitutes a Community dimension. According to the Merger Regulation any concentration with an EU dimension will, subject to very limited exceptions, fall

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[154] *PVC*, Decision 89/190, Commission Decision of 21 December 1988 regarding the Polyvinyl Chloride Cartel, 32 OJ European Commission (No. L 74) 1 (1989).

[155] *LdPE*, Decision 89/191, Commission Decision of 21 December 1988 on the Low Density Polyethylene Cartel, 32 OJ European Commission (No. L 74) 1 (1989).

[156] PVC and LdPE are key intermediate products used by the plastics processing industry.

[157] This is a case handled before Spain joined the EU in 1986.

[158] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation); Official Journal L 24, 29.01.2004, pp. 1-22.

within the Commission's exclusive jurisdiction. Consequently, a concentration will be deemed to have an EU dimension where at least two of the undertakings concerned meet the turnover thresholds set out in Articles 1(2)-(3) EU Merger Regulation.

This concept as argued by Dabbah rightly gives the European Commission a very wide jurisdiction to cover even purely foreign mergers whose parties are foreign and non-EU based (Dabbah 2010, 457). Thus, a merger transaction can easily fall within the scope of Community dimension due the extremely broad nature of the Merger Regulation. Accordingly, even a merger operation that does not produce an effect within the EU or a transaction having a very minimal effect is in the jurisdiction of the EU. Following examples can be given in this regard. First, the joint venture between *Nestle Pillsbury and Haagen Dazs*[159] being an ice-cream and frozen desert businesses in the US. Second, the merger between *Boeing and McDonnell Douglas*[160], merger between the two US aircraft manufacturers. In the *Nestle/Pillsburry/Haagen-Dazs*, the European Commission has concluded that the notified operation fell within the scope of the Merger Regulation, and decided that the said operation did not raise serious doubts as to its compatibility with the Common Market and with the EEA. Furthermore, the European Commission has foreseen that

> it is not necessary to delineate the relevant product and geographic markets because, in all alternative market definitions considered, effective competition will not be significantly impeded in the EEA or any substantial part of the area.There are no affected markets in the EEA.[161]

Similarly in the *Boeing/McDonnell Douglas*[162] acquisition, where both Boeing and McDonnell Douglas are United States corporations with publicly traded shares, the EU Commission based on the effects doctrine scrutinized the transaction. Boeing and McDonnell Douglas merged to form a single firm as a result of which Boeing's acquisition of McDonnell would leave only American Boeing and European Airbus as two competing companies in the market. The European Commission feared a strengthening of Boeing's dominant position in the global market for large commercial jet aircrafts (Karpel 1998, 1031), and finally intervened in a merger between two firms through the extraterritoriality principle. In spite of the huge US concern regarding European Commission's use of Merger Regulation to examine a merger between two US corporations based

[159] Case No IV/M.1689-Nestle/Pillsburry/Haagen-Dazs US.

[160] *Boeing/McDonnell Douglas*, Commission Decision of 30 July 1997 declaring a concentration compatible with the common market and the functioning of the EEA Agreement, (Case No IV/M.877) (97/816/EC).

[161] Case No IV/M.1689-Nestle/Pillsburry/Haagen-Dazs US.

[162] OJ 1997 L 336/16, Commission decision of 30 July 1997.

on the extraterritoriality principle, the EU side responded that its investigation was conducted strictly on the basis of the EU law and mergers in violation of EU law were subject to penalty (Dabbah 2010, 457).

Meanwhile, it would seem that the General Court has endorsed the effects doctrine. In line with this, in *Gencor v. Commission*[163] the extraterritoriality question in merger transactions was eventually dealt with in a clearer manner. The transaction that was subject to notification was the merger of the platinum group metals (PGM) interests of the two companies Gencor and Lonrho located in South Africa. Both Gencor and Lonrho have substantial operations in the European Union. Gencor and Lonrho notified the series of agreements relating to the concentration to the European Commission, as required by EU law. On April 24, 1996, the European Commission declared that the concentration was incompatible with the Common Market on the ground that it would have led to a collective dominant position on the part of the entity arising from the concentration. *Gencor* brought an action before the General Court for the annulment of the European Commission decision.

Gencor asserted especially that Merger Regulation was concerned only with mergers carried out within the EU, and the European Commission could not apply its merger rules to a transaction which related to economic activities carried on in a non-member country and had been approved by the appropriate authorities of that country (South Africa). Gencor further argued that the Merger Regulation was inapplicable to the concentration in question, given that the main field of activity of the undertakings carrying out the transaction (here the mining and refining of PGMs) was in South Africa. The General Court examined first of all whether the Merger Regulation would be applied in this case and then whether its application to a concentration of this kind was contrary to public international law. The General Court pointed out that the Merger Regulation applies to all concentrations with a Community dimension. Under the relevant regulation, a concentration has a Community dimension if a number of conditions relating to the volume of turnover, in particular in the Community, are met. The regulation does not require, on the other hand, that "in order for a concentration to be regarded as having a Community dimension, the undertakings in question must be established in the Community or that the production activities covered by the concentration must be carried out on Community territory. The Community legislation ascribes importance to the criterion of sale within the common market rather than to that of production.

Although the registered offices and the mining operations of the notified parties were outside the EU, the General Court held that the application of the

[163] *Gencor/Lonrho,* Commission Case No IV/M.619, OJ 1997 L 11, p. 30; Court of First Instance Case T-102/96.

Merger Regulation to a merger between companies located outside the EU territory is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community (Geradin et.al. 2011, 28). With this, the General Court upheld the European Commission's decision that the plan to merge these two companied into a single company was indeed incompatible with EU competition rules and, by definition, with the Common Market. Nevertheless, the South African competition authorities did not oppose the concentration transaction in the light of South African competition law.

The ECJ also referred to the Merger Regulation's objective of ensuring that competition is not distorted in the common market. Concentrations which, while relating to mining and/or production activities outside the Community, create or strengthen a dominant position, thereby significantly impeding effective competition in the common market, thus fall within the scope of the regulation. The ECJ then found that it was compatible with public international law to apply the Merger Regulation, in view of the foreseeable, immediate and substantial effect of the concentration in the Community. The Court of Justice concluded that the Commission's decision was not inconsistent with either the Community mergers regulation or rules of public international law. The Court therefore dismissed the action brought by Gencor and confirmed the Commission's decision.

4.4. Concluding Remarks

As examples from the US and the EU have shown the extraterritorial use of competition rules can be a useful tool in tackling with international competitition practices including mergers with a cross-border effect. Nevertheless, the unilateral application of the effects doctrine was not sufficiently adequate and effective in the governance of global competition. There have been many shortcomings and problems associated with the unilateral application of national competition laws. Based on the discussions above, to claim jurisdictions over the actions of businesses taking place abroad and/or over businessmen from other nations is a difficult task which could face many oppositions from the foreign country whose sovereignty intervenes with that of the jurisdiction that applies extraterritoriality.

From a neorealist perspective, any form of internationalization that would lead to the creation of a global competition regime would essentially be ineffective if imposes rules and standards upon sovereign states in a way that do not conform to the interests and priorities of those nations. This view is also shared by Dabbah (2003, 267) and it can be explained on the basis of two neorealist assumptions. On one hand, it is unlikely for nations to cooperate towards the creation of an international system of antitrust, if this means that nations would have to limit their sovereignty in favour of the autonomous institutions in the system. On the other end of the spectrum, there is another possibility. Assuming that countries would

cooperate to limit the effect of the rules and principles of a global competition regime; domestic courts and competition authorities could opt not to implement that international system's norms and rules due to reasons relating to sovereignty.

When the US approach is examined, at the beginning the Courts were cautious to apply the Sherman Act extraterritorially (in *American Banana*) and thus interpreted the US antitrust law rather narrowly as being only territorial by implying that the Sherman Act stops at the US shores. The effects doctrine was invented by the US courts in the famous *Alcoa* case in 1945. This case in practice kicked off the widespread application of extraterritoriality in national competition laws. The US antitrust law and policy is the classic example providing jurisdiction over international commerce (Seung 1993, 295) based on the effects doctrine. In the *Alcoa* decision, it was held that the US courts have subject matter jurisdiction if the anticompetitive conduct affected and, was intended to affect US commerce. Later, however, other US courts attempted to adopt a more moderate approach, importing factors such as reasonableness and balancing of interests, but this softening of approach did little to mitigate the attitude of the states that have influenced (Layton and Parry 2004, 311). According to the effects doctrine, anticompetitive business practices affecting domestic markets, irrespective of their origin of location or practices, are subject to national competition laws. Hence, the US has applied its antitrust laws to many anticompetitive agreements and conducts abroad based on this doctrine. Initially the focus was on cartels but then mergers came under scrutiny as well. Especially, the case against the vitamins cartel, *Empagran* case, in mid 2000s has prevented the application of US antitrust laws in an unlimited worldwide way.

On the other side of the Atlantic, the EU has started to assert jurisdiction over anticompetitive practices in 1960s with a somewhat limited approach, then in 1970s it has extended its approach as a result of which the EU started to look for the existence of a subsidiary within the EU through *Dyestuffs* in 1969. 1988 Woodpulp judgement of the ECJ employs the implementation test. Gradually the extraterritorial reach of EU competition rules reached a full-fledged usage in time. The EU for the first time in the *Gencor/Lonrho* merger case openly referred to the effects doctrine by stating that the conduct in question has an effect on the common market, independent of the location of the firm or firms involved.

In a world of broad extraterritorial reach of foreign antitrust laws, overlapping decisions of different national agencies can easily contradict. Moreover, even merger cases which necessitate the analysis of global geographic markets, there is the risk to reach different ends. From this point of view, *Boeing/McDonnell Douglas* is a special case because of the fact that the EU and the US reached different results during their analysis of the same global market. Those differences point to the fact that there remain important diversities in the enforcement philosophies

of different jurisdictions such diversities or conflicts can be resolved through more or less formal coordination and cooperation. However, this coordination and cooperation has its limits if first of all substantive rules may not allow for that kind of flexibility and secondly, enforcement bodies, whether a national competition agency or a court, may not have sufficient procedural possibilities (Drexl 2003, 54; Klein 1997, 1). Thus, bilateral cooperation efforts of nation states and their respective competition agencies is the subject of the next Chapter.

Bilateral efforts were considered as a way of smoothing the conflicts generated by the application of national competition laws to those practices that were tolerated or even encouraged in other jurisdictions by foreign agencies. Extraterritoriality improved by bilateral cooperation is the foremost and effective answer to the development of international antitrust practices. But surely it is not the only response.

CHAPTER 5

COOPERATION AS A RESPONSE TO INTERNATIONALIZATION OF COMPETITION: BILATERAL AND REGIONAL OPTION

Changes in the international economy call for more cooperation in the competition law and policy field. In fact the need for more cooperation is being underlined among the actors of the international community for a long time in the absence of a global competition regime. Even though the unilateral application of national competition laws (extraterritoriality) has been the first response of many states to tackle international competition problems, it is only one of the approaches in handling this dilemma. This is mainly because the unilateral application has its limits due to confined use of coercive power of a national competition agency across domestic borders. Therefore, cooperation among antitrust agencies has become a supplement against the extraterritorial application of competition laws. Cooperation among competition agencies can be categorized under the following three broad categories as bilateral enforcement cooperation agreements, bilateral trade agreements, and regional trade agreements. All these agreements are important cooperation instruments in international competition fora that have been used to foster cooperation among nations in the absence of an international competition regime.

Increased bilateral or regional cooperation among competition agencies is necessary for competition enforcement to be effective and efficient in curbing international anticompetitive practices because investigating international anticompetitive infringements poses many difficulties at the nation state level. From this perspective, cooperation among agencies is considered as an evolutionary process, like the concept of convergence (UNCTAD 2013, 3). Cooperation in between and among agencies helps reducing problems that arise from the use of national competition laws against those practices and conduct held abroad.[164]

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[164] More and more international trade disputes involve private business practices restricting market access of foreign rival firms. Such disputes include among others high profile conflicts between Japan and US as in the *Kodak-Fuji* case, or between Mexico and US as in the *Telmex* case over access to telecommunications services. In both of these cases, the US tried to use trade law instead of antitrust law to solve the dispute. Trade policy aims to open foreign markets to new competition but there are limits to the extent to which trade agreements can discipline anticompetitive practices within world markets. This study, mainly concerned with international agreements in relation to competition rather than focusing on the said competition-trade related aspect of the matter. To assess the relation between trade, investment and competition policies in detail, see especially Janow et.al. (1998), 253-298; Hoekman (1997), 383-406; and Dabbah (2010).

Cooperation facilitates effective and efficient enforcement of competition laws while providing maintenance of competition in the global markets. That is not only an expression of economic theory but also a fact of life (Parisi 2010, 1).

There is an ongoing transition that has reshaped and still reshaping the multinational dialogue even in the absence of an international regime. This new dialogue is laying the ground work for the international competition initiatives in our contemporary era. With the support of the bilateral and regional efforts, greater transparency and harmony is actually dominating the international competition landscape. More and more competition agencies are coordinating their activities while sharing a similar language in carrying out their domestic activities. This convergence and coordination activities do affect distinct areas of competition law enforcement mainly from cartel enforcement alignment to merger regimes and to unilateral conduct issues. Nevertheless, such convergence does not come without any constraints. Therefore, this Chapter also revolves around the drivers and obstacles to cooperation instruments in and among various jurisdictions. Given the growth of international business and the proliferation of competition regimes around the world, cooperation arises as a need not only for the competition agencies but also for the undertakings and their legal counsellors. Companies and their counsellors should understand how antitrust agencies cooperate with one another and accordingly how they handle cross border transactions effectively (Parisi 2010, 2). Thereby, the purpose of this Chapter is to describe how various competition agencies cooperate with one another to tackle international practices and whether cooperation efforts have been adequate in this manner.

As mentioned above, competition agencies can rely on different legal bases or instruments for international cooperation that can be categorized under three broad categories; (i) bilateral enforcement cooperation agreements, (ii) bilateral trade agreements, and (iii) regional trade agreements. Firstly, bilateral enforcement cooperation agreements, and the confidentiality waivers (Parisi 2010, 18)[165] closely associated with those agreements, are valuable instruments available for most of the competition agencies (OECD 2013, 12). Bilateral enforcement cooperation agreements roughly can be divided into two types. One one hand, there are those binding international agreements signed in between the governments of the states which are categorized further into two as first generation

[165] Parisi explains confidentiality waivers as follows: "when more than one antitrust authority reviews a matter, the businesses involved can facilitate effective resolution of the matter by granting waivers of confidentiality concerning particular documents or information. Such a waiver does not constitute publishing the information provided on the front page of the *Financial Times*; the waiver simply allows the reviewing authorities to discuss information that the businesses have submitted to at least one of the reviewing agencies." For examples of what kind of information the US and the EU agencies can or can not share in the presence of confidentiality waivers and the pros and cons of waivers, please see Parisi (2010).

and second generation agreements. First and second generation agreements do not necessarily involve dispute settlement mechanisms (OECD 2013, 52). On the other hand, there are those soft bilateral enforcement cooperation agreements like Memorandum of Understandings (MOUs), which are signed in between the competition authorities directly. Secondly, bilateral trade agreements that include a chapter on competition also considered as cooperation instruments by the states. Particularly the efforts of the EU is one such example in this regard. Thirdly, regional trade agreements that discuss competition is another instrument of cooperation for states particularly in the operation of regional blocs because competition law and policy is an important tool for the achievement of operationally effective and competitive regional markets.

Thus, the following section starts with the distinction between the first generation (soft, non treaty international agreements) and second generation (mutual legal assistance treaties) agreements under the bilateral enforcement cooperation framework, and then provides the EU and US bilateral enforcement cooperation agreements as an example in this regard. This is because first and foremost the cooperation in the field of competition policy in between these two jurisdictions is the most well-known and advanced one among its peers. Besides, similar to other policy fields the transatlantic relationship on competition law and policy still is the most important bilateral relationship around the world today. As is known, even the possibility of any disagreement in between the US and the EU on economic grounds can negatively impact a wide range of matters in the international arena. The distinction in between soft and hard cooperation is also being analyzed within the margins of this study by its reference to MOUs. Soft law cooperation efforts through the use of MOUs as a new instrument is dealt with in the light of the specific case of Turkey. Last but not least, the Chapter also recognizes the bilateral and regional cooperation efforts in the form of trade agreements. Meanwhile, it seeks to explore the complexity arisen from the drivers and the obstacles to cooperation and convergence.

5.1. Bilateral Enforcement Cooperation Agreements

Bilateral cooperation among the competition authorities is not a new phenomenon. Bilateral cooperation particularly facilitates the effective and efficient enforcement of competition laws when cross border issues are in question. Bilateral cooperation in the field of competition traditionally revolves around the existence of bilateral enforcement cooperation agreements. These agreements can be in the form of a hard law or a soft law[166] instrument. However, regardless of its structure, bilateral enforcement cooperation shall be understood in a way

[166] In defining soft law, the emphasis is put on the issue of the legal effect of the instruments used. Since it is not within the scope of this study to further delineate this issue, please see Senden (2004) for more information regarding the concept soft law.

to capture all the situations in which the competition agencies can cooperate or coordinate their activities with an aim to enhance enforcement in between. Therefore, bilateral enforcement cooperation can be achieved in different forms with or without a formal mechanism.

Bilateral enforcement cooperation agreements do not harmonize the competition laws of the signatory parties. These agreements provide for mutual enforcement cooperation mechanisms for states. So far cooperation has been used as an alternative for the harmonization, and thereby the convergence of national competition regimes. Since no agreement on international competition matters could have been achieved in the last century, enforcement cooperation has been developed in between states in order to tackle the consequences of cross border anticompetitive practices (Papadopoulos 2010, 52).

There are several types of bilateral enforcement cooperation agreements. The intensity of cooperation differs from one type to another. Some are binding agreements between the governments. Despite their binding nature however, they may not necessarily include dispute settlement provisions. These are generally called as first generation (soft) bilateral enforcement cooperation agreements and second generation (mutual assistance treaties) bilateral cooperation agreements (OECD 2013, 52). Yet there is another category, which is non-binding in nature. They are called MOUs. MOUs are even softer arrangements than the first generation agreements that are solely based on the mutual consent of the parties. MOUs are signed between the competition agencies on a voluntary basis. They generally formalize existing working relationships around an annual action plan, and/or ease activities like technical assistance and capacity building.

5.1.1. First Generation (Soft) Cooperation Agreements

The very first example of bilateral enforcement cooperation efforts in the competition field can be traced back to late 1950s. In a case relating to a US investigation of a patent pool among Canadian radio and television makers designed to exclude US manufactured goods from the Canadian market, the governments of the US and Canada entered into negotiations to coordinate their enforcement activities and to prevent any possible future conflict. The outcome of the case and the subsequent negotiations were referred to as the Fulton-Rodgers Understanding of 1959, which was named after the Canadian Minister of Justice and the US Attorney General at the time. The said understanding constructed a channel of communication on antitrust matters through notification and consultation (Papadopoulos 2010, 52-53).

When the year 1967 arrived, enforcement cooperation between competition agencies has already become a focus of interest at the international level. This interest displayed itself in the adoption of 1967 OECD Recommendation

concerning Cooperation between Member Countries on Restrictive Business Practices Affecting International Trade in the same year. 1967 Council Recommendation has been modified several times, the recent one being in 1995.[167] 1995 Council Recommendation encouraged the OECD Member States to cooperate in antitrust enforcement issues.

According to the OECD, main benefits expected from bilateral cooperation are improved effectiveness of the enforcement mechanism of the parties regarding cooperation, improved efficiency in competition investigations, reduced need for sharing confidential and other information, avoidance of jurisdictional conflict, protection for the legitimate interests of the cooperating parties, and relief for firms from having to deal with more than one competition authority and from having to be faced with the risk of inconsistent decisions by two authorities (Dabbah 2010, 289). Dabbah argues that the list of benefits is not exhaustive and convergence is another important benefit that reveals from bilateral cooperation. In Dabbah's own words (2010, 289),

> Convergence deserves particular emphasis because it is a long term benefit that goes beyond individual cases or isolated instances of cooperation toward developing a policy perspective on the whole exercise of understanding and applying competition law. Convergence supports the role of bilateral cooperation as one of the strategies to internationalize competition law and policy.

Although the provisions of the 1967 OECD Recommendation were general, still the content of the bilateral agreements of 1970s or the so called first generation agreements have been influenced widely from its provisions. With this document, the OECD became the first international organization that encouraged its Member States to enact cooperation agreements in competition enforcement matters. Within this context, enforcement cooperation agreements between competition policy jurisdictions began to spread for the first time in mid 1970s through the first generation agreements, which are competition specific by nature (Zanettin 2002, 57). When the first generation agreements have started to evolve as a reaction towards the inadequacy of the extraterritorial application of antitrust laws mainly in the US, the world competition community was witnessing the creation of blocking statutes against the use of extraterritoriality.[168] England, France, Canada and Australia are among the first countries that have passed blocking legislation in response to unilateral application of US antitrust laws to

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167 For the details of the OECD Recommendations, see Chapter 3, section 3.5.1. of this study.

168 For other information on the blocking statutes and its relation to the use of effects doctrine, see Chapter 4 section 4.1.1. of this study.

those anticompetitive conduct outside of US borders. These four countries have enacted those laws in order to protect their domestic markets and industries from actions of the US antitrust bodies and private litigants[169] in the *Uranium Antitrust Litigation*. The *Uranium Antitrust Litigation* was started in 1970s when the US DOJ investigated the uranium production industry.[170]

Thus, based on the suggestions in the 1967 OECD Recommendation, first generation agreements that are competition specific were started to be signed in between the US and other countries in such an atmosphere. The US has entered into its first bilateral cooperation agreement with Germany[171] in 1976. According to Terchte (2011, 10), although the practical use of this very first cooperation agreement between the US and Germany remained marginal, it still reflects a fundamental insight due to its foresight regarding the necessity of global competition politics against the background of an accelerating globalization of anti-competitive practices. The said agreement provides vague and general principles of collaboration.

Afterwards, the US has signed bilateral agreements with Australia[172] in 1982, with Canada[173] in 1984, 1995 and 2004, with the EU in 1991, with Brazil, Japan and Israel each of them separately in 1999, with Mexico in 2000, and with Chile in 2011. The EU has also concluded similar enforcement cooperation agreements with other countries on a bilateral basis. In this respect, the EU has engaged actively in cooperation with competition authorities from many countries outside the EU. Cooperation with some of those is based on bilateral enforcement agreements dedicated entirely to competition, that are competition specific agreements. Within this context, the EU has signed bilateral agreements with Canada in 1999, with Japan in 2003, and with Korea in 2009. Indeed, it is not surprising to see that the vast majority of the bilateral enforcement cooperation agreements have had the US or the EU as one of the signatory parties. This is due

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169 US allows recovery of treble damages in private legal actions seeking to apply antitrust laws to persons acting outside of its borders. Further explanation about the matter is beyond the reach of this study.

170 United States v. Gulf Oil Corp., Crim. No. 78-123 (E.D. Pa., filed May 9, 1978).

171 Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976.

172 Agreement between the Government of the United States of America and the Government of Australia Relating to Cooperation on Antitrust Matters, June 29, 1982.

173 Agreement between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws, August 3, 1995 *replaced* Memorandum of Understanding Between the Government of Canada and the Government of the United States of America as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Rules March 9, 1984.

to the robust enforcement of the US and the EU antitrust law and policy and the significant role these two jurisdictions play in the world economy and trade.

The first generation agreements with Germany, Australia, and Canada, in other words the traditional cooperation efforts in the competition law and policy field, started initially on the basis of defensive and/or vague collaboration grounds rather than active and efficient cooperation needs of the signatory countries (Papadopoulos 2010, 63). First generation agreements are negotiated basically in between the competition agencies of the contracting states. Since those agreements do not harmonize the competition laws of the contracting parties, historically they did not arise from any convergence concerns either. They do not override domestic law. Yet all these agreements provide for one kind of enforcement cooperation mechanisms at the end.

First generation agreements are soft law agreements and thereby include limitations on the ability of the competition agencies to share confidential information. They all provide for a basic procedure of cooperation including notification of cases of mutual interest, exchange of information, cooperation and coordination of enforcement activities and negative comity (Papadopoulos 2010, 54-55). As underlined by Dabbah, bilateral agreements do not necessarily aim at one specific goal (Dabbah 2011, 289). These agreements do include multiple objectives with multiple benefits, which are all being advocated by various international organizations including the OECD[174].

Many first generation bilateral agreements[175] include notification provisions foreseeing that each party would provide the other party information on planned actions that might affect the important interests of the other side. All of the said agreements also contain provisions for consultations to resolve unilateral or mutual concerns albeit their differences. Nevertheless, none of those agreements foresees any provision concerning the exchange of confidential information without the provider's consent. In other words, information exchange provisions do not override domestic laws. Besides, all these agreements allow the requested party to take its own national interests into account while determining whether and to what extent such cooperation can be provided.

In addition, first generation bilateral agreements are generally executive agreements. This means they are formal, binding international agreements that contain commitments on the exercise of discretionary authority as in the non-application of blocking statutes in Article 5 of the Australia-US Agreement (Parisi

[174] OECD is one of these organizations which has been advocating extensively from late 1960s on.

[175] Those first generation agreements signed iIn between the US and Germany, Australia, Canada, the EU, Israel, Japan, Brazil, and Mexico.

2010, 5).[176] From the US side, as a standard entry into such bilateral agreements by the US DOJ or FTC (antitrust agencies) on behalf of the US government necessitates the authorization by the State Department under the terms of Case-Zablocki Act of 1972.[177] Since those bilateral agreements are not treaties they do not require the consent of two thirds of the US Senate but just authorization (Parisi 2010, 5).

Since a foremost characteristic of the first generation bilateral agreements is that they are considered as soft law instruments as an alternative to hard law while formalizing international relations in the form of international agreements, this approach can be explained by neoliberal institutionalism dominating the world political economy from 1970s on. Hard law legislation is precise, legally binding obligations that delegate authority for interpreting and implementing the law. Soft law, however, refers to those provisions which are not legally enforceable. There are many scholars who argue that the increasing use of soft law can destabilize the whole international normative system into an inadequate instrument that is not able to serve its purpose. The lack of legally binding obligations along with the confidentiality clause and the exchange of non-confidential information alone in reality give absolute discretion to the signatory parties to ignore those agreements in case they think their important interests would be impeded (Papadopoulos 2010, 59).

Then one can question the rationality behind the choice of soft law agreements over hard law agreements. Whilst the chance of signing a multilateral agreement in respect of internationalization of competition law is quite low, countries have been looking for alternative solutions to deal with it. Doubtless to say, soft forms of cooperation are much more flexible than traditional, binding bilateral enforcement agreements. As quoted in Papadopoulos (2010, 59), Reismann states that

> thanks to soft law we still have people channeling efforts toward law and toward trying to achieve objectives through legal mechanism, rather than going ahead and doing it in other fashions.

In majority of first generation agreements, the US is one of the signatory parties. This is firstly because bilateralism in the competition law enforcement is attributed to the US policy on international antitrust law in the aftermath of

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[176] Agreement between the Government of the *United States of America* and the Government of *Australia* Relating to Cooperation on Antitrust Matters, (June 29, 1982); Australia passed its latest blocking statutue in 1984 despite the existence of the cooperation agreement in between these two countries. However, the 1982 Cooperation Agreement requires Australia forbearance in the use of its blocking legislation. Accordingly, the mere seeking by legal process of information or documents located in one country shall not be regarded as affecting adversely the national interests of the other country (article 5.2).

[177] 1 USC § 112b.

the World War II. The US[178] historically resisted participation in international institutional arrangements supporting a global competition regime to the extent that such institutional efforts would jeopardize its political autonomy (Papadopoulos 2010, 60). Secondly, it is because the US has started to use bilateral agreements as a complementary to the unilateral application of its antitrust rules as a response to criticism in the international fora.

5.1.2. Bilateral Agreements with Positive Comity Arrangements

First generation agreements were followed by those cooperation agreements involving comity considerations. International comity principles are being applied by many jurisdictions in many substantive areas of law such as tax, anti-bribery, environmental regulation. Likewise jurisdictions employ international comity in competition law with an aim to ensure that complex cross border enforcement problems are resolved in a manner that balances the policy and enforcement concerns of the states involved (OECD 2013, 4). International cooperation in the competition field uses two types of comity principles. These are the negative comity and the positive comity. Negative comity or traditional comity refers to a country's consideration of how to prevent its laws and law enforcement actions from harming another country's important interests. Positive comity means a request by one country that another country undertake enforcement activities in order to remedy allegedly anticompetitive conduct that is substantially and adversely affecting the interests of the referring country (OECD 2013, 5).

The cooperation agreements that were started to be signed in 1990s, are symbolizing a deeper cooperation commitment in the competition law enforcement at the international level because they do involve positive comity agreements. Positive comity can be characterized as the most revolutionary form of cooperation that some of the first generation agreements provided for (Papadopoulos 2010, 73). In fact, the positive comity is not a new concept; it has its roots in the 1967 OECD Recommendation on Cooperation between Member Countries on Restrictive Business Practices. 1991 EU/US Agreement[179] was the first competition specific bilateral cooperation agreement involving positive comity principle that was further enhanced with the 1998 Positive Comity Agreement[180]. Another example in this regard is the US/Canada Agreement; the 1984 US/Canada agreement[181] was a Memorandum of Understanding, thus it was

[178] As discussed extensively in Chapter 3 of this study.

[179] Agreement between the Government of the *United States of America* and the *Commission of the European Communities* regarding the application of their competition laws - Exchange of interpretative letters with the Government of the United States of America, (September 1991).

[180] Agreement between the Government of the *United States of America* and the *European Communities* on the Application of Positive Comity Principles in the Enforcement of their Competition Laws (June 1998).

[181] Agreement Between the Government of the United States of America and the Government of

a first generation agreement, while the replacing 1995 US/Canada Agreement involved a positive comity[182] principle as well as enforcement cooperation[183] and coordination[184] provisions. Positive comity practices were further improved and enhanced in between these neighboring jurisdictions further with the 2004 Enhanced Positive Comity Agreement[185]. Nonetheless, none of those agreements override domestic laws prohibiting the share of confidential business information without the consent of the other agency. Additionally the cooperation agreements by the US and Israel, Japan, Brazil, and Mexico all entail positive comity provisions.

5.1.3. Cooperation Agreements between the US and the EU

In the area of competition law and policy, there is a tendency to focus on transatlantic disputes in individual competition cases like 1997 *Boeing-McDonnell Douglas* and 2001 *GE-Honeywell* mergers. Despite the conflict and tension experienced during the decision making process of these two prominent merger cases, there has been a very active and fruitful cooperation through which both sides of the Atlantic try to come up with a meaningful solution. Indeed, transatlantic relations present a useful composite of the political, economic and legal dynamics that promote the formalization of bilateral governance and new forms of multilateral governance. These dynamics are all so important because they are all coming into existence in a policy area mainly regulating domestic issues, while extensively turning into cross-border issues (Damro 2006, 2).

Given the historical background of transatlantic relations and the evolvement of competition law on both sides of the Atlantic, one specifically needs to consider why the EU and the US felt a need to create a formal framework for cooperation, prior to today's operative convergence efforts, in competition law and policy in addition to the above mentioned first generation bilateral agreements in this field. Indeed, the early attempts concerning cooperation in between two jurisdictions have been seen as way of ensuring a common line of action against international cartels and improved coordination regarding mergers across the border.

Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws (August 1995) *replaced* Memorandum of Understanding Between the Government of *Canada* and the Government of the *United States of America* as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Rules (March 9, 1984).

[182] Article V of the 1995 US/Canada Agreement; accordingly each party can invite the other party to take, on the basis of the latter's legislation, appropriate measures regarding anti-competitive behaviour implemented on its territory and which affects the important interests of the requesting party.

[183] Article III of the 1995 US/Canada Agreement.

[184] Article IV of the 1995 US/Canada Agreement.

[185] Agreement between the Government of the United States of America and the Government of Canada on the Application of Comity Principles to the Enforcement of Competition Laws, October 5, 2004.

The most well-known and famous example of bilateralism in the competition law and policy field is the one in between the EU and the US. The EU/US bilateral cooperation is a very important example because these two jurisdictions are the most advanced and most influential jurisdictions in the field of competition law and policy enforcement in the world. The EU and the US agencies have entered into crucial bilateral agreements with third countries in addition to mutual cooperation agreements in between themselves. Among other benefits, being the world's most prominent jurisdictions, the EU-US cooperation agreements gradually turned into advocates of convergence in time.

The EU and the US antitrust agencies cooperate primarily on the basis of 1991 EU/US Cooperation Agreement and the 1998 Positive Comity Agreement. Cooperation foreseen under these agreements is intensified when the parties to a case have granted a waiver allowing the exchange of otherwise protected information. Indeed, 1991 EU/US Cooperation Agreement is the first bilateral enforcement cooperation agreement incorporating positive comity concept. Accordingly, the US Government can ask the EU to take enforcement action against an anticompetitive conduct in Europe but with effects in US and/or vice versa. Following that in 1998, both the EU and the US entered into a new agreement different than the 1991 EU/US Cooperation Agreement that clarifies and elaborates when and how positive comity can be invoked.

The EU/US cooperation in the competition law and policy field has developed over time and accelerated especially after the signing of the 1991 EU/US Competition Cooperation Agreement. 1991 EU/US cooperation model did not come along as part of a wider and deeper economic and/or political integration process such as what has been experienced within the EU among the member states over more than the past 50 years but as a result of a real economic need. The characteristics of this relation can be used a role model for many countries while providing general rules and frame regarding the actual or potential use of similar bilateral agreements. Understanding transatlantic relationship is also useful in understanding the likelihood of cooperation and sustainability in this policy area. Moreover, as underlined by Damro (2006, 1),

> Due to the centrality of this bilateral relationship in the international system, EU/US agreement and cooperation is frequently crucial for facilitating the development and design of new forms of *international governance* across multiple policy areas.

1991 EU/US Cooperation Agreement regarding the application of their competition laws was signed on September 23, 1991. This agreement pioneered an era in which the dominant trend has been close cooperation and increasing policy convergence between the competition authorities of the EU and the US

(Tritell and Parisi 2011, 1). This 1991 EU/US Cooperation Agreement aims to promote cooperation between both sides. It provides for notification of cases being handled by the competition authorities of one Party, to the extent that these cases concern the important interests of the other Party (Article II), and exchange of information on general matters relating to the implementation of the competition rules (Article III); cooperation and coordination of the actions of both Parties' competition authorities (Article IV); a positive comity procedure by virtue of which either Party can invite the other Party to take, on the basis of the latter's legislation, appropriate measures regarding anti-competitive behaviour implemented on its territory and which affects the important interests of the requesting Party (Article V); and a traditional comity (negative comity) procedure by virtue of which each Party undertakes to take into account the important interests of the other Party when it takes measures to enforce its competition rules (Article VI);

1991 EU/US Cooperation Agreement further provides for regular bilateral meetings to share information on current enforcement activities and priorities; on economic sectors of common interest, to discuss policy changes, and to discuss other matters of mutual interest relating to the application of competition laws. On the basis of this Agreement, the EU and the US antitrust enforcement agencies, the FTC and the DOJ, until today (Parisi and Tritell 2011, 2) implemented the notification, information sharing, and coordination provisions of the 1991 Cooperation Agreement to achieve an effective method in investigating and resolving enforcement matters of mutual cooperation concern; and made references to the experience gained during the concurrent enforcement in order to achieve substantive convergence of enforcement policies and practice particularly in merger control and cartel enforcement.

However, despite the existence of many conflicts, several matters have been handled on informal basis in between two sides of the Atlantic. Eventually, the EU has resolved one matter in a formal way which was referred by the US DOJ under the positive comity provision. It was a case with respect to allegations of anti-competitive behaviour by European airlines preventing US based airline computer reservation systems from competing effectively in certain European countries. Therefore, the EU has decided to close the investigation of Air France for alleged discrimination against SABRE which is an American computerized reservation system (CRS), after the French airline agreed to a code of good behaviour offering SABRE equivalent terms to those offered to its partly owned CRS Amadeus, as well as to other CRSs[186]. The successfully conducted

[186] Sabre and Amadeus are computerised reservation systems which facilitate the sale of air tickets and related services. Sabre was controlled by US carrier American Airlines, and Amadeus is owned by Air France, Germany's Lufthansa, Spain's Iberia and Continental Airlines of the United States.

investigation was the first to have been initiated by a request from the US DOJ made in accordance with the 1991 EU/US bilateral cooperation agreement (Parisi 2010, 6). The then European Competition Commissioner Mario Monti (European Commission 2000, 2) said the following as a comment on the case:

> I am pleased that this investigation, the first to result from a positive comity request, has produced a satisfactory outcome. It demonstrates that close cooperation between the EU and US enhances the effectiveness of competition law enforcement on both sides of the Atlantic.

1991 EU/US Cooperation Agreement has had a number of positive outcomes. Convergence in between two regimes is indeed one of the most important among these results (Dabbah 2011, 290) despite the continued procedural and substantive differences. Nevertheless, it's this bilateral cooperation which renders convergence be possible to an impressive degree. Bilateral cooperation enabled these two parties to better understand each other's competition law and policy as well as their approaches to different individual enforcement implementations that would eventually eliminate unnecessary divergences in their legislation.

Despite the existence of article V of the 1991 EU/US Cooperation Agreement which foresees positive comity principles, 1998 EU/US Positive Comity Agreement was designed to further strengthen the positive comity provisions of the bilateral cooperation in between these two jurisdictions. Indeed, 1998 Agreement was signed based on the recognition that 1991 EU/US Cooperation Agreement has contributed to coordination, cooperation, and avoidance of conflicts in competition law enforcement and thus further enhancing the effectiveness of 1991 EU/US Cooperation Agreement is needed.

Under the positive comity rules, one party may request the other party to remedy anti-competitive behavior which originates in its jurisdiction but affects the requesting party as well. This agreement clarifies both the mechanics of the positive comity cooperation instrument, and the circumstances in which it can be availed of. Positive comity provisions are not frequently used as companies (i.e. complainants) prefer to address directly the competition authority they consider to be best suited to deal with the situation.

In order to understand the administrative arrangements regarding the application of 1991 EU/US Cooperation Agreement, Administrative Arrangement on Attendance (AAA) was signed. The AAA is not a new agreement. It just sets forth administrative arrangements between the competition authorities of both sides concerning reciprocal attendance at certain stages of the procedures in individual cases, involving the application of their respective competition rules. These arrangements were concluded in the framework of the agreements between the EU and the US concerning the enforcement of their competition

rules, and in particular the provisions regarding co-ordination of enforcement activities. With the help of AAA the competition officials from both sides have attended many proceedings in a number of important merger cases. For instance, in *Air Liquide/BOC*, officials of the FTC attended the oral hearing within the European Commission. In spite of all these agreements that provide the grounds for cooperation between the competition agencies of US and the EU, there is still room for improvement for international enforcement matters.

5.1.4. EU Efforts in First Generation Bilateral Cooperation Agreements

The EU has not been as active as the US in respect of bilateral coopeation agreements until recently. This is for one thing mainly because of EU's support for a multilateral solution under the frame of the WTO throughout the 1990s until the collapse of the WTO talks on competition law. Besides the EU Commission believed that the use of bilateral agreements are limited and the cooperation - if wanted- can be carried out no matter what. Moreover, the EU has been signing bilateral trade agreements including provisions on competition in the context of its enlargement and neighbourhood policy which obliges the signing parties to adopt competition legislation similar to that of the EU. But today, according to the most recent Commission Staff Working Paper dated 2011[187], EU Commission gives utmost importance to closer cooperation among competition authorities not only in Europe, but also across the globe. This is because EU thinks that it is essential to ensure consistency in the outcome of enforcement activities of different authorities, to enhance the effectiveness of the investigations, and to secure a level playing field for EU businesses in world markets.

As encouraged by the European Parliament as well, the EU Commission has engaged into a policy dialogue with the authorities of other states to promote convergence on both substantive and procedural competition rules. The EU Commission has also continued to cooperate closely with many competition agencies in concrete enforcement activities. So far the EU has concluded agreements with the US, Canada, Japan and Korea on cooperation between their respective competition agencies. These agreements include provisions on the notification of enforcement activities to the other side, coordination of investigations (for example coordinating the timing of dawn raids), positive and negative comity, and the establishment of a dialogue on policy issues. These agreements also specify that the competition agencies cannot exchange confidential information which is protected under their respective laws. The inability to exchange confidential information severely limits the scope of cooperation between the European Commission and foreign competition agencies. This limitation can undermine the effectiveness of the Commission's

[187] EU Working Paper (2011), Commission Staff Working Paper Accompanying The Report From The Commission On Competition Policy 2011.

competition enforcement activities, especially in investigations of competition cases that have an international dimension, such as international cartels. This is why the Commission is trying to move beyond these first generation agreements and negotiate cooperation agreements which would also include provisions allowing the parties' competition agencies to exchange, under certain conditions, information which is protected under their respective rules on confidentiality. It is currently negotiating two second generation agreements, one with Switzerland and one with Canada. If these negotiations were concluded successfully, these agreements would enhance further the efficiency and effectiveness of enforcement cooperation activities.

From the EU side, a large number of agreements comprising competition provisions have been concluded between the EU and third countries. These agreements can be arranged as follows: (i) Agreement on the European Economic Area; (ii) Bilateral agreements with Candidate Countries and Western Balkan Countries; (iii) Dedicated competition cooperation agreements with competition authorities (first and second generation agreements as well as so-called Memorandum of Understandings); (iv) Competition chapters or protocols in bilateral general agreements (such as Free Trade Agreements, Association Agreements, Economic Partnership Agreements); (v) and, finally, multilateral texts (WTO Agreements, OECD Recommendations and Best Practices and UNCTAD Sets of Principles and Rules).

These texts have increased rapidly over the last decades. Some are used more often compared to others, while some exist in the form of international treaties and still there are some which are administrative arrangements fully within the competence of the European Commission. Globalized markets need a competition culture fostered internationally, and the Commission is promoting convergence on substantive and procedural rules. Cooperation agreements have been concluded with the competition authorities of the US, Canada, Japan and Korea. Farther reaching agreements are currently being discussed with the Swiss and Canadian authorities, to enhance the efficiency and effectiveness of case cooperation.

To mark the 20th anniversary of its first cooperation agreement with the US, the Commission, the US Federal Trade Commission and the US Department of Justice adopted revised Best Practices on cooperation in merger investigations to further optimize their bilateral cooperation in merger investigations in 2011. A set of best practices on cooperation in reviewing mergers was infact agreed as early as 2002. These best practices were updated and revised in 2011. They are not legally binding but simply intend to set forth an advisory framework for interagency cooperation. They put in place a structured basis for cooperation in reviews of individual merger cases.

The best practices recognize that cooperation is most effective when the investigation timetables of the reviewing agencies run more or less in parallel. Merging companies will therefore be offered the possibility of meeting at an early stage with the agencies to discuss timing issues. Companies are also encouraged to permit the agencies to exchange information which they have submitted during the course of an investigation and, where appropriate, to allow joint EU/US interviews of the companies concerned. The practices designate key points in the respective EU and US merger investigations when it may be appropriate for direct contacts to occur between senior officials on both sides.

5.1.5. Second Generation Cooperation Agreements

The first generation agreements initially have been followed by agreements including positive comity. Then the second generation agreements evolved with the assistance of mutual legal assistance treaties in the antitrust field. The basic characteristic of the first generation agreements was that they were aiming at resolving conflicts that had already occurred in between contracting parties while positive comity agreements and second generation agreements were more proactive in nature.

Mutual Legal Assistance Treaties (MLATs) are bilateral treaties that provide mutual obligation for the signatory parties to access foreign based evidence and to assist one another in such matters. In other words, MLATs are treaties that provide for co-operation in criminal matters which create hard law obligations on signatories. MLATs oblige the parties to assist each other by obtaining evidence located on the requested jurisdiction's territory for the purposes of the law enforcement investigations of the requesting jurisdiction. MLATs in the field of competition are again a byproduct of US practice. MLATs are approved by the Congress in the US, therefore they carry the federal law status. MLATs are not necessarily antitrust specific. Besides there are many jurisdictions that do not have a MLAT signed in between them or even if they do have a MLAT in force, the provisions of such agreements might have an explicit exclusion for competition legislation enforcement. Although details vary, a typical MLAT can provide for taking testimony and statements in the requested jurisdiction; serving process; providing documents or records located in the requested jurisdiction; executing requests for searches and seizure; and in some cases, giving any other form of assistance not prohibited by the law of the requested jurisdiction or consistent with the objects of the treaty.

The US, at the request of the DOJ, adopted the International Antitrust Enforcement Assistance Act[188] (IAEAA) in 1994 to overcome constraints on the exchange of confidential information in civil matters. IAEAA is designed to permit the US antitrust agencies DOJ and the FTC to negotiate bilateral antitrust

[188] 15 U.S.C.6201-6212.

mutual assistance agreements applicable both to criminal and civil matters. This legislation authorizes the DOJ and the FTC to share otherwise confidential antitrust evidence in their possession with other jurisdictions or use their respective investigative powers. The very first IAEAA agreement was signed and entered into force in between US and Australia on April 26, 1999. This agreement foresees the exchange of evidence on a reciprocal basis for antitrust enforcement. It also envisages to assist each other in obtaining evidence located in each other. The said agreement assures that the confidentiality of information to be protected. But it has not been enforced in any cases so far. The reason for not having other IAEAA agreements from the US side can be explained with the lack of necessary legislation to permit governments to negotiate IAEAA type agreements. Australia, however, had the necessary legislation therefore became the possible number one choice of the US at the time of the signing (Klein 1997, 8).

5.1.6. Trend of the Millennium Years: Back to Soft Law through MOUs?

Nearly after four decades of introduction of first generation (soft) bilateral agreements, soft law in internationalization of competition law is today reflecting itself in the form of Memorandum of Understandings (MOU). MOU is a softer instrument of cooperation between the countries and thus the competition agencies when compared to first and second generation agreements. MOUs are becoming increasingly popular all around the world in the last decade. Turkish Competition Authority, Russian Federal Antimonopoly Service, Japanese Fair Trade Commission, Korean Fair Trade Commission, Austrian Competition Authority are only examples of a few agencies that are heavily signing MOUs with other competition authorities around the world. Interestingly, the US who is the traditional leader in signing bilateral enforcement cooperation agreements has signed MOUs with the agencies of Russia (2009), India (2011) and China (2011) in recent years.

Turkey is an example in this vein. The MOU journey of the Turkish Competition Authority started in 2005 while hosting the 5th UN Conference on Competition Policy in Antalya. It was the first time ever a UN Conference on Compeitition Policy was held out of Geneva. The party to this very first MOU that Turkey signed in the area of competition law and policy, was the Korea Fair Trade Commission (KFTC). This journey continued in 2005 with the Romanian Competition Council, in 2007 with the Bulgarian Commission on Protection of Competition, in 2008 with the Portuguese Competition Authority, with the Council of Competition of Bosnia and Herzegovina and the Authority for Fair Competition and Consumer Protection of Mongolia during the 9th Annual Conference of the ICN in Istanbul in 2010, in 2011 with the Federal Antimonopoly Service of Russia, the Croatian Competition Authority, and the Austrian Competition Authority, last but not least in 2012 with the newly established Competition Board of Turkish Republic of Northern Cyprus,

the Egyptian Competition Authority and finally with the Agency of the Republic of Kazakhstan for the Protection of Competition in May 2013.

When looked into the general characteristics of the MOUs signed by Turkey, it is observed that they are voluntary in nature and signed on the basis of mutual consent, willingness and determination of the parties. In addition cooperation in the field of competition law and policy is the basic goal. They also facilitate the exchange of non-confidential information between the parties. They are all soft cooperation instruments, they are formal yet practical and flexible in nature, and finally they do not foresee any common enforcement mechanisms. These characteristics could also been observed in other countries MOUs'.

The MOU experiences of the Turkish jurisdiction show that the existence of even a soft form agreement simplifies the communication in between the parties, and increases the knowledge about each parties' enforcement and organizational structures. Contracting parties can reach out at each other easily and rapidly (one knows whom to call or send an e-mail). This easiness and rapidity bring flexibility to the formal nature of the MOUs. They let parties to follow what is going on in each other's jurisdiction, so that the results can be used to develop better practice. They can be even be used as a technical assistance mechanism as in the case of MOU signed by Turkish Competition Authority with the Mongolian agency and the Competition Board of Turkish Republic of Northern Cyprus. The Turkish Competition Authority is periodically exchanging information with respect to latest developments in its legislation, cases and statistical data with the said agencies. This is considered an experience sharing exercise by the contracting parties. In the absence of global competition rules, networking can be a way to, say the least, and exchange non-confidential information among the competition agencies around the world. In this context, networking can be carried out either through multilateral or bilateral instruments.

5.2. Trade Agreements

Apart from these bilateral cooperation agreements, competition provisions are also found in trade agreements. Trade and competition have an important link. Trade generally provokes competition in markets and thus benefits the member states of the trade agreement with better resource allocation, higher efficiencies and improved productivity. At the same time it is the potential of increased competition that provokes protectionist motives and further prevents the political will to enter into trade agreements. Competition is considered as the best friend of a trade policy maker. Their objectives are very much linked to each other (Brusick et.al. ed. 2005, xviii).

The importance of trade policy to world trade development includes consideration of the negative effects of private restrictive practices during the opening of the competitive markets. Generally, private restrictive practices are

not directly eliminated directly by the reductions in governmental trade barriers. Additonally, those practices which have the effect of blocking or restricting access to markets by foreign traders may either substitute private trade barriers for governmental ones or prevent the elimination of governmental barriers. In such a situation, an effective competition law that would eliminate private trade barriers is of great significance to the world trading system (Jones 2006, 2).

As discussed throughout this study, with globalization competition becomes more international due to reduced trade barriers and technological progress. Thus, the interrelation between trade and competition policies increases. With globalization, the interface between trade and antitrust policies has become clearer. The main difference between trade and antitrust policy is that antitrust policy is primarily concerned with the conduct of undertakings and determined nationally, while trade policy focuses on the behavior of countries to secure access to domestic market by foreign firms and determined internationally (Hudec 1999, 79).[189]

Restrictive practices to the flows of international trade and investment have been eliminated by agreements between countries to a great extent. But trade policy does not seem to be sufficient alone to increase trade flows among countries without removing the anti-competitive practices of private undertakings. It is argued that as trade barriers are eliminated, the restrictive conducts of private firms replace them (Amato 2001, 453) In addition, as trade barriers are eliminated, cross border competition increases. As a result of these developments, the effect of anticompetitive practices might spread across different countries. In this respect, competition policy and its enforcement play a major role in advancing international trade which is obstructed by anticompetitive business practices, monopolies or state aids (Yanık 2005, 1). However, domestic competition laws are not always sufficient enough to deal with international activities of the undertakings. That is the reason why the harmonization of the competition laws of as well as cooperation among trade partners or neighboring countries is very important. Therefore, trade agreements can be used as a level playing field concerning the enforcement role of competition laws in the international arena and harmonization of competition laws among trading partners.

Today there are more and more bilateral and regional trade agreements consisting chapters on competition related provisions. Most of the time, competition provisions are rather side articles found in these rather general trade agreements. Typically, the main objective of a free trade agreement is to improve the relations in between two jurisdictions. In recent years, especially the EU has insisted on inclusion of competition chapters that require its partner states to enact

[189] Further details on the linkage between trade and competition is beyond the scope of this study. For more information, please see Chapters 4 and 5 in Papadopoulos (2010), and Chapter 5 in Brusick et.al. eds. (2005).

specific provisions in their competition laws. Those provisions help to enhance cooperation and convergence in the competition laws of signatory states.

5.2.1. Bilateral Trade Agreements

In the last two decades, bilateral trade agreements have been at the core of the EU's external trade policy. The EU is the most well known and successful example that has used bilateral trade agreements as a tool to export its trade policy including competititon policy. This strategy of the EU can also clearly be seen in the EU trade agreements with competition provisions. In this vein, the EU has three broad categories of trade agreements. First, there are the agreements with candidate countries within the context of their accession process to the EU. Secondly, there are the agreements signed with a large number of countries which surround the EU geographically. These are basically the Southern Mediterranean and former Soviet Union states. With this, the EU aimed at strengthening its overall cooperation with its neighbouring countries, most of which are included in the European Neighbourhood Policy. Finally, the EU has extended its bilateral trade agreements network to selected trade partners around the world (Papadopoulous 2010, 97).

Competition provisions are included in bilateral trade agreements of the EU in the context of a much wider and diverse legal framework containing rules relating to political dialogue, trade liberalization, human rights, democratic principles and the approximation of the legislation of the contracting parties. In other words, commercial, political and cultural issues are all addressed by those agreements. The starting point and the common denominator for further cooperation based on the bilateral trade agreements are rules relating to trade.

The main role for competition law is to reduce and even eliminate anticompetitive practices that might have an effect on trade between the signatory parties liberalization (Papadopoulos 2010, 103). This function of the EU competition law is particularly tested in the context of the EU integration project.

In a similar vein, the EU has required its prospective new member states to apply best endeavors to ensure their competition laws to be compatible with the EU's competition rules too. For instance, trade is the overriding principle both in the EU/Turkey Customs Union Agreement[190] and the bilateral FTAs[191] signed

[190] Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union

[191] Turkey has bilateral free trade agreements with many countries including EFTA states, Israel, Romania, Bulgaria, Macedonia, Croatia, Bosnia Herzegovina, Tunisia, Palestinian Administration, Tunisia, Georgia, Israel, Serbia, Chile, Jordan, Syria, Egypt, Montenegro, South Korea, Mouritius and Morocco, all include competition related provisions. The provisions set out in the CU agreement between Turkey and the EU is more detailed than those found in FTAs.

in between Turkey and other countries. All these agreements contain provisions aiming to remove obstacles to trade as well as providing protection to traders. Furthermore, it is very important to analyze to what extent those provisions are effective in attaining its objectives.[192] To this end, Customs Union Agreement imposed an obligation on Turkey, as a prospective Member State to the EU, to ensure that its legislation in the field of competition rules to be compatible with those rules of the EU and its effective application. In other words, Turkey undertook to adopt a competition law system including the establishment of competition authority, the content and application standards of which are defined in the Customs Union.

The same strategy of the EU continues in its relations with its neigbouring countries. According to the 2004 Strategy Paper on European Neighborhood Policy (European Commission 2004, supra note 24). EU Commission is of the opinion that the countries in question by sharing EU's fundamental values and objective would be drawn into an increasingly close relationship, going beyond cooperation to involve a significant measure of economic and political integration. Moreover, EU Commission argues that convergence towards comparable approaches and definitions, legislative approximation on antitrust regulations would eventually be needed for partners to advance towards convergence within the Internal Market (Papadopoulos 2010, 104).

Currently, there is an ongoing bilateral trade agreement negotiation between the EU and the US which is called the Transatlantic Trade and Investment Partnership (TTIP). The first round of talks were held in Washington, D.C. between 8-12 July 2013. The negotiations are covering twenty various subject areas including discussions on competition. The EU side suggested to include provisions related to antitrust and mergers that would open the door to agencies in both jurisdictions to exchange confidential information on mergers and other investigations without getting prior consent from the undertakings under investigation. If agreed, competition authorities on both sides of the Atlantic would further deepen their cooperation (Crofts and Nylen 2013, 1) and thus convergence in antitrust matters. Since the trade negotiations are expected to last at least two years, the results would surely set up a benchmark in the field of competition enforcement for the trading partners around the world.

5.2.2. Regional Trade Agreements

Regional deals are always on the forefront of the economic actors. In discussions on cooperation as a response to internationalization of competition,

[192] The analysis given with respect to Mediterrenean Partners and the EU found in "Geradin D. 2004, Competition Law and Regional Economic Integration- An Analysis of Southern Mediterranean Countries, World Bank Series, p. 37" is adapted.

regional trade agreements do have an important role. According to the WTO estimates regional agreements account for half of the total value of the global trade. In an increasing fashion, regional agreements contain competition law related provisions more and more even though the role of competition provisions often have limited and even secondary role in regional agreements. Nevertheless, even this secondary role has been an effective instrument concerning the introduction and enforcement of competition laws in countries of various regions around the world. Furthermore, regional agreements containing competition provisions would assist in harmonizing competition laws among the trading partners. The category of regional agreements include both regional trade agreements (RTAs) and regional integration projects.

Competition policy and its enforcement not only play a major role in advancing international trade which is obstructed by anticompetitive business practices, monopolies or state aids but also help to enhance convergence in competition policies of countries at the international arena via harmonization of the competition laws. Parallel to the proliferation of national and international initiatives aiming to promote competition law and policy in the aftermath of the post-Cold War period, RTAs have been accelerating in number among and between developed and developing countries. According to an UNCTAD study of 2005 (Brusick et.al. ed. 2005, vii), there are around 300 bilateral and regional agreements, of which more than 100 contain commitments on competition policies with implications at both regional and national level. About 80 percent of the over 100 have been negotiated in the last decade and are part of a trend for deeper RTAs which often include articles for liberalizing trade in services, investment, labour and other trade-related provisions. Interestingly, developing countries negotiate about as many RTAs among themselves (South-South RTAs) as with developed countries (North-South RTAs).

Competition provisions in RTAs have many objectives. First of all, nearly all RTAs with competition provisions state that such provisions are needed so that the benefits of trade and investment liberalization are not compromised by cross-border anti-competitive practices (Brusick et.al. ed. 2005, viii). The full benefits of free trade can be enjoyed, only if private restrictive practices such as market sharing or price-fixing agreements do not substitute the place state-constructed trade barriers after their elimination. Secondly, the reason for including competition issues in RTAs was to create region-wide competition policies and institutions that seek greater levels of integration by establishing common markets or economic and political unions. RTAs characterized by a higher level of trade integration are more likely to contain competition provisions (Brusick et.al. ed. 2005, viii). If parties to an RTA are seeking an integrated common market (as in the case of EU), then anti-competitive practices must not replace government restrictive schemes within the integrated market for the initiative to be successful.

RTAs aim at reducing obstacles to trade within a specific geographical region. To underline once again, the role of competition provisions is to prevent the creation of private barriers to trade that could undermine the efforts to reduce public trade barriers. In fact such agreements are becoming becoming widespread in many regions all around the world (Brusick et.al. 2005). Some examples of such agreements include the ANDEAN Community, the Caribbean Community Secretariat (CARICOM), the Common Market for Eastern and Southern Africa (COMESA), the EU, the Common Market of the South (MERCOSUR), the North American Free Trade Agreement (NAFTA), the Southern African Customs Union (SACU), and the West African Economic and Monetray Union (WAEMU). Of which however, the EU initiative is still the most comprehensive and successful regional integration initiative of all times. European Free Trade Association (EFTA) is another significant regional integration originated in Europe and associated to the EU through the Agreement on European Economic Area (EEA). Despite the existence of a close cooperation in between them, the EFTA is far beyond the success of the EU (Papadopolous 2010, 281).

Gal (2010, 240) states that proliferation of such agreements is a very significant trend in the world trade and it can be termed as a new wave of regionalism. This new wave of regionalism is characterized by an increased dynamism as well as deeper levels of integration that go beyond information sharing and positive comity principles for competition fora. The inclusion of competition provisions in RTAs intends to prevent the practices to frustrate competition that could diminish the benefits from liberalization and/or integration (Gal 2010, 241). Among others, the EU has been considered the most successful and far reaching example among the regional agreements. The success of the EU depends especially on the harmonization and convergence of competition laws among its Member States (Brusick et.al 2005; Gal 2010, 240).

Another significant regional trade agreement having competition provisions is the NAFTA which was signed in between the US, Mexico and Canada. NAFTA entered into force as of January 1, 1994. The goal of NAFTA was to eliminate barriers to trade and investment among the contracting parties, and the competition provisions played a marginal role in its implementation. None of the contracting parties of the NAFTA had the intention to create a political and social union. A political union would be in conflict with the traditional belief in the US that this kind of a union would undermine the political economy of the country. Meanwhile, the Canadian and Mexican governments were concerned with the possibility of imbalances that could occur against the bargaining power of the US. So the NAFTA agreement was signed as a FTA rather than a customs union. In addition to that, NAFTA did not provide for a supranational body to enforce its provisions. Last but not least, even though the provisions of NAFTA were

very precise and obligatory, the parties did not opt for a strong regional judicial institution (Papadopoulos 201, 285). Hence, there was no NAFTA competition agency, court of justice, parliament or an executive body.

The NAFTA has five articles on competition which is assembled in Chapter 15 of this agreement. The special chapter on competition is titled Competition Policy, Monopolies and State Enterprises. Article 1501 (1)[193] of the NAFTA does not dictate substantive competition rules to the contracting states, but only obligates the parties to have such rules. While doing that, NAFTA does not specify what rules those should be. But it does require the NAFTA contracting states to have competition rules and that the those rules are enforced. Article 1501 (2)[194] continues by underlining the importance of cooperation and coordination among the competition authorities in competition enforcement in the free trade area but without specifying any uniform competition rules.

When NAFTA came into effect, all parties namely the US, Canada and Mexico had their own antitrust laws in force. Despite the developed nature of antitrust legislation in US and Canada, the situation in Mexico was not very promising. On one hand, there was a general reference to the nonexistence of monopolies in the 1917 dated Mexican Constitution, while on the other hand there existed the 1934 dated Monopolies Law. Despite these legal instruments, the competition law and policy was difficult to apply and its enforcement was very political. This is because the state was a very active market player that the law had very little if any effect. However, in preparation for the entry into force of the NAFTA and in line with the economic reforms intended to make free competition as Mexico's primary engine of economic growth, a new Federal Economic Competition Law was adopted in December 1992 that became effective in June 1993 (Jones 2006, 8). NAFTA does not have any general antitrust laws which is uniform throughout the NAFTA area. The signatory parties to the NAFTA are free to use their own competition law standards based on their own policy choices. The only exception is the Article 1502 (3)(d)[195] where state created monopolies shall not use its monopoly position

[193] NAFTA, Article 1501: Competition Law 1. Each Party shall adopt or maintain measures to proscribe anticompetitive business conduct and take appropriate action with respect thereto, recognizing that such measures will enhance the fulfillment of the objectives of this Agreement. To this end the Parties shall consult from time to time about the effectiveness of measures undertaken by each Party.

[194] NAFTA, Article 1501: Competition Law 2. Each Party recognizes the importance of cooperation and coordination among their authorities to further effective competition law enforcement in the free trade area. The Parties shall cooperate on issues of competition law enforcement policy, including mutual legal assistance, notification, consultation and exchange of information relating to the enforcement of competition laws and policies in the free trade area.

[195] Article 1502: Monopolies and State Enterprises
3. Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any privately owned monopoly that it designates and any government monopoly that it maintains or designates:

to engage in anticompetitive practices in a nonmonopolised market in its territory that adversely affecting the investments of the other party (Jones 2006, 10).

In Latin America, an interesting example on regional integration to assess is the MERCOSUR[196] experience. The parties to MERCOSUR had agreed to harmonize their competition policies as a necessary step towards the integration process. This ambitious target has led Argentina, Brazil, Paraguay and Uruguay to sign the Fortaleza Protocol in 1996. Fortaleza Protocol established an ambitious set of guidelines toward a common competition policy in the region, thus the signatory countries committed themselves to a common institutional framework to address competition issues. The protocol implies that all member countries must have an autonomous competition agency; that the national law will cover the whole economy; that the competition authority will be strong enough to challenge other public policies whenever necessary, and that the member countries will share a common view about the interplay between competition policy and other governmental actions.

As in a number of other MERCOSUR provisions, the Protocol relies on cooperation among members regarding the application of their respective laws in those cases with extraterritorial effects. There was an expectation that the framework would evolve, and that a Committee (Committee for the Defense of Competition), which would comprise of national agencies that would take charge of intra-regional investigations, would be created. However, this institutionalized body is still to be established. Following the Mercosur philosophy, however, the said protocol has not created supranational organisms, and therefore the effectiveness of the regional disciplines continues relying on the enforcement power and capabilities of the national agencies (Tavares Araujo 2001; Gerber 2010, 110; Rosenberg and Araujo 2005, 206). Likewise, there have been several attempts at regional integration in Africa in the 2000s. Especially the efforts of West African Economic Monetary Union (WAEMU) founded in 2006 have potential for further development that remains to be seen.

Another important regional initiative very recently including Russia came in with the formation of Euroasian Economic Commission on February 1, 2012. This

(d) does not use its monopoly position to engage, either directly or indirectly, including through its dealings with its parent, its subsidiary or other enterprise with common ownership, in anticompetitive practices in a non-monopolized market in its territory that adversely affect an investment of an investor of another Party, including through the discriminatory provision of the monopoly good or service, cross subsidization or predatory conduct.

[196] The Fortaleza Protocol for the Protection of Competition in MERCOSUR was adopted by Decision 17/96 on 17 December 1996 by the countries members to the Common Market of the Southern Cone (MERCOSUR), created by the Agreement of Asunción on March 16, 1991. The member countries of MERCOSUR are Argentina, Brazil, Paraguay and Uruguay. The Protocol contains the main provisions related to competition policy in MERCOSUR.

Commission is composed of Russia, Belarus and Kazakhstan. The Commission holds the status of supranational, permanent body which takes its decisions independently binding for its three Member States. Among others, the Euroasian Economic Commission is responsible from competition policy. The Agreement on Common Principles and Rules of Competition, dated December 9, 2010 came into effect on January 1, 2012. This Agreement defines the powers of Commission in the sphere of competition policy. The main objective of the Agreement is the single competition policy and harmonization of competition legislation for these three countries. The common competition rules also cover practices that negatively affect competition in cross-border markets on the territories of two or more Parties. As can be seen from this recent regional initiative, competition laws and policies are high on the agenda of the Parties aiming at creation of a single economic space for the region. All those regional projects brought in the harmonization of the laws which is a very necessary and important step including the positive social impacts for the economy and society as a whole. But that is not enough to solve the cross-border anti-competitive conduct dilemma.

According to an UNCTAD study (Cernat 2005, 34), the trend among countries that are willing to ink regional trade agreements with competition provisions are far less eager to implement them. To this end, it states that

> This weak implementation record can be partly explained by the fact that RTAs with CRPs is a relatively new phenomenon. The history of regional integration has shown that 'deep integration' rules, such as competition provisions, need time to fully materialize... However, expeditious progress can only be expected if strengthening of implementation capacity in developing and transition RTA members is accompanied by reinforced commitment from developed countries to effectively address the main competition-policy concerns of their trading partners.

As a corollary to the finding in the UNCTAD study, it is also important to mention that the mere existence of competition provisions in RTAs is not sufficient if not supported by proper and enforceable set of implementation rules to enforce them in real cases for instance while addressing cross border cartels and mergers. In that sense, the use of competition provisions found in RTAs shall be used together with clear and specific implementation rules.

At this juncture and based on the above examples from various regions, it would not be wrong to argue that except for the EU regional integration projects that have achieved full implementation of competition provisions regarding transnational anti-competitive conduct have been few and limited in effect. However, bilateral or regional cooperation efforts have been considered as modest and limited forms of coordination given the stalled attempt of a global

competition law at the WTO level. Some argue that these efforts are alternatives to global coordination and cooperation while some others see them as quick practical measures to deal with urgent cross-border enforcement issues.

5.3. Concluding Remarks

This Chapter suggested that the insufficiency stemming from the use of extraterritoriality to tackle cross border anticompetitive practices necessitates support from other instruments, this support could be provided by proper and enforceable set of cooperation agreements. Thus, the extraterritorial application of competition laws improved and backed by bilateral and/or regional cooperation among national competition agencies have arisen as the most visible and effective answer to the development of international antitrust practices in the absence of a global competition regime. In this regard, three broad categories of cooperation agreements have been examined. They are bilateral enforcement cooperation agreements, bilateral trade agreements, and regional trade agreements.

Even if the direct object of the enforcement cooperation agreements does not necessarily involve harmonization of the competition laws of the signatory states, they provided for mutual information exchange mechanisms while facilitating the relations in between the contracting parties. This is because much before the introduction of convergence as a tool to deal with cross-border anticompetitive conduct, bilateral agreements started to be used as cooperation instruments to solve the dilemma of the internationalization of competition. This approach can be regarded as an alternative or a substitute way in a retrospective manner. Yet, the existence of bilateral and regional cooperation is not the sought answer either but only allowed for interim measures.

CHAPTER 6

CONCLUSION: CONSENT TO CONVERGENCE AS A STRATEGY

"International antitrust today is less world antitrust and more antitrust without borders".
Eleanor M. FOX (2011, 265)

This study analyzed the internationalization of competition law and policy. The roadmap of the internationalization of competition law and policy has not been away from the challenges, conflicts and realities around the world. This is because competition laws remain national while competition issues have become essentially transnational and furthermore international with the changes in the global economy. During the quest, the study approached the issue of internationalization at a three level analysis, namely unilateral, bilateral and multilateral enforcement of competition law and policy. Despite being a highly topical issue, there have not been enough studies in the literature explaining how the internationalization process of competition law and policy can be explained through the international relations theories. Internationalization of competition law and policy in fact stems from the necessity to fill the gap in between the patchwork of domestic competition regimes and international business activities in the absence of a global competition regime. In this context, this study tried to contribute to the literature by providing a spectrum of the attempts of nation states from a unilateral, bilateral and multilateral perspective while relating all these efforts to the developments in world politics in general, and global economy in particular.

For this purpose, this study first examined the internationalization of competition law and policy from a theoretical perspective. At the beginning, it delved into the international relations discipline. This study identified that international relations theories are eye opening instruments in understanding the role of international institutions and the behavior of nation states throughout the evolvement of the internationalization of competition law and policy in time. One of the main conclusions of this study is that it is through the assistance of international relations theories that one can clearly realize the organization of the international institutions as well as the behavior of nation states. This is because understanding the relation between the nation-states and the international institutions is as important as understanding how to promote and support cooperation in the competition law and policy field at the international level in the absence of a global competition regime. This study argued that such

an explanation can be provided first by the debate between neorealism and neoliberalism which has dominated the mainstream academic scholarship in international relations when all the developments of the domain are examined from a historical perspective. Then, it referred to the approach of governance, but particularly to global governance to explain the absence of an international competition regime.

At the outset, this study explored the aspects, which are considered vital for neorealism and neoliberal institutionalism each apart. While doing so, it intended to demonstrate the rising role of international institutions which have been wholly or partially working on competition law and policy. These institutions are primarily the OECD, the UNCTAD and the ICN. The concept of governance and its various levels with a special focus on global governance were touched upon to identify today's competition community environment as well. In this framework, this study focused on the following elements from a theoretical perspective: the increasing role of institutions, relative gains concerns and cooperation efforts within the neo-neo debate, and the concept of governance.

The global competition project of post-World War II era was totally different than that of the project proposal of the idealist era of the League of Nations. In 1945 the hopes for an international competition regime seems more likely than the ones in 1920. First of all, the idea of a competition law has been disseminated among the economic policy makers and thinkers. Secondly, the perceptions of international economic and political relations have changed dramatically which had placed global issues in the foreground of policy thinking by the end of World War II. The Great Depression and the two world wars had shown that states become more interdependent to each other after the dissemination of economic problems across the globe. The need for international cooperation became evident. It was clear that problems associated with the consequences of war can only be sorted out at the international level. Hence, this study recognized that the revival of the global competition law and policy project in the post-war period shall be handled with the assistance of neoliberal theories which focus on issues of cooperation, relative gains and international political economy.

As elaborated in the study, from a neorealist perspective, any form of internationalization that would lead to the creation of a global competition regime would essentially be ineffective if imposes rules and standards upon sovereign states in a way that do not conform to the interests and priorities of those nations. This can be explained on the basis of two neorealist assumptions. On one hand, it is unlikely for nations to cooperate towards the creation of an international system of antitrust, if this means that nations would have to limit their sovereignty in favour of the autonomous institutions in the system. On the other end, domestic courts and competition authorities could opt not to implement that international

system's norms and rules due to reasons relating to sovereignty, assuming that countries would cooperate to limit the effect of the rules and principles of a global competition regime. In addition to this sovereignty based neorealist explanation concerning the possible ineffectiveness of a global competition regime, the stalled attempt of the Havana Charter attempting to create the ITO following the end of World War II can be interpreted by the neoliberal claim which puts forward that cooperation does not work when states fail to follow the rules that would not secure their national interests. Another determining factor was the relative gains concern. When the Havana Charter was driven from the consideration of the US Congress in 1950, it was mainly because of the relative gains concern of the US in the wake of the rise of the Cold War. The US was simply worried to give up its political power and economic oppurtunities to an international organization in the shade of increasing communism. However, the efforts of the OECD, the UNCTAD and the WTO in the competition law fora can be explained by the rise of neoliberal instutionalism.

Alongside the above explanations arising from the neo-neo debate, particularly the abandonment of the WTO's competition law working group and the relevant studies for responding to the global increase of transnational anticompetitive restraints indicates the need for another approach from the international relations discipline which is the phenomenon of governance. Governance as suggested by this study, is a very important notion to understand the internationalization of competition law and policy. The process of globalization, especially economic globalization has changed the scope and structure of global governance. There is no doubt that the economic and political developments at the global level will increasingly continue affecting various domestic policies, including competition. For the sake of this study, the concept of governance in international relations theories was analyzed at the national, regional and global levels parallel to the three level internationalization process.

As discussed in this study, especially following the end of Cold War, economic globalization has started contributing to the formation of networks among national competition agencies. One particular example is the ICN which has a multilateral structure. Even though competition issues have been on the agenda of international organizations like the OECD, the UNCTAD, and the WTO much before the creation of the ICN, the ICN became a phenomenal international body exclusively devoted to competition law and policy parallel to the dramatic increase in the number of states enacting and enforcing national competition laws in the last two decades. Meanwhile, the non-governmental advisors (NGAs) and multinational corporations have become interested in competition law too. Hence, this study argued that all these factors indicated global governance as the most plausible explanation for the internationalization process in competition law and

policy in the aftermath of the Cold War. The ICN as the only international body exclusively working in the competition field is unique. The basic aim of the ICN is to establish an informal network of competition agencies to disseminate the antitrust enforcement practices, promotion of competition agency, and facilitation of international cooperation. Member agencies produce work products through their involvement in flexible project oriented and results based working groups that enhances the dialogue and understanding among countries that adopted different approaches. It is a very flexible international body without a formal structure. Such flexibility increases communication and awareness with respect to legislation, enforcement and organizational structure of competition agencies in other countries. But the most important contribution of the ICN is its ability to bring the concept of convergence to the foreground among the actors of the competition community.

Broadly speaking, this study identified that convergence of national legislation in any policy field is the result of the conscious policy coordination of nation states. This is because globalization has changed political economy through the generation of a new set of global issues that were previously purely national. This is not new global politics, but new areas of bargaining. Moreover, as discussed in the study, the ability of states to cooperate and their ability to agree on norms of governance determines the extent of policy convergence. Thus, this study concludes that this also holds for international competition law and policy practices, and the structure and the operational framework of the ICN is a support in this regard.

This study also analyzed the unilateral and bilateral/regional practices to cope with the internationalization of competition. In spite of the increasing globalization of businesses in time, unilateral and bilateral enforcement practices are conducted effectively only by a few jurisdictions. The study examined the development of extraterritorial application of national competition laws, with another saying the unilateral application, given the stalemate at the international fora concerning an international regime. After the US, other nation states mostly from the developed world in Europe, tried unilateral approach in time with the development of competition laws in their countries. When the effects doctrine grounded on unilateral application led to frictions between different jurisdictions, nations affected from the practices of the other state started enacting blocking statutes as well. But, the inherent territorial nature of domestic competition laws created difficulties in an increasingly globalized world where anticompetitive practices or transactions affect more than one jurisdiction. In this respect, domestic competition laws failed to find solutions to this dilemma. Hence, against the inadequacy of unilateral action, states turned into bilateral efforts. Despite its limitations, the world owes a lot to the effects doctrine in the absence of a global competition regime.

In this regard, this study confirmed that the territorial perspective of competition law enforcement is another feature which shapes and limits international cooperation and convergence of competition laws. The territorial perspective has significance in the global economy. While anticompetitive practices become increasingly transnational, enforcement remains domestic in nature. One of the conclusions of the study provided that the problems related to the internationalization of competition law cannot be solved with the sole existence of extraterritoriality. Thereof, as a corollary it discussed the bilateral cooperation agreements, bilateral trade agreements and other regional efforts to cope with the challenges arising from the internationalization process. But, experience has shown that both bilateral and regional cooperation agreements have had clear deficiencies to solve the challenges arising from cross-border anticompetitive conduct.

Hence, another important conclusion is that bilateral cooperation is a transitionary instrument towards a cooperative bilateralism focusing on the dispute prevention based on the mutual practices of competition agencies. So, the study offered reflections from prominent case studies on bilateral efforts as a response to this shortcoming. It focused particularly on the EU/US Bilateral Cooperation Agreement. In the debate over the development of the internationalization of competition law and policy, both the US and the EU competition regimes have been fundamental for a number of reasons. First and foremost, both of these regimes have been applied for a long time. The US law is older than hundred years whereas the regime of the EU is more than fifty years old. Secondly, both have helped to shape the competition cultures and norms of nations deeply and thoroughly. It is also believed that the bilateral efforts of the US and the EU would help to increase and promote multilateral cooperation endeavors of the competition policy area. Thereof, at the regional level, the study of the EU competition policy has been regarded as one of the best examples of European integration and supranational governance due to its central and crucial role in the European integration project all this time.

Since the end of Cold War, there has been a profound shift from state-oriented economies to market-oriented economies. In this regard, competition law and policy has made great progress in opening up the markets to competition over the past decades. The globalization of markets became a very important incident of this period, particularly cross-border economic activity has increased enormously. In this global economy, states and their economies are progressively more interlinked and interdependent to each other. Thus, many countries around the world started realizing the significant benefits that come from well-judged decisions against cartels, abuse of dominant position cases and anticompetitive mergers and acquisitions.

Meanwhile, however, the market place as a level playing field for all undertakings start shifting from national to global levels. This change affected firms rather drastically by transforming domestic business activity into an international one. The growth of international business activity brings new challenges and problems in addition to the opportunities that it holds. Rapid growth of international business has various consequences over the national economic policies including the one related to competition law and policy. Additionally, globalization has increased competition among the international and multinational firms and this transnationalization increased the number of anticompetitive behavior at the international level.

Whilst the world economy is increasingly integrated and globalized by witnessing more and more international business activity each day, competition law enforcement continues to be a domestic one which is carried out in a patchwork of national competition regimes. The growing number of cartel cases exceeding national markets, increasing number of transnational mergers and acquisitions, and exclusion of foreign firms from domestic markets are all signs of how serious the situation is for the world economy in the absence of an international or global competition regime. Within this context, this study showed that today's global competition enforcement landscape is delineated and shaped by globalization of markets and the proliferation of national competition regimes without an international competition regime.

Against this background, this study suggests that with an apparent stalemate in efforts to develop a global competition regime, convergence of competition legislation is the best strategy to fill the gap between the state level legislation and the global level businesses. Advocates of convergence hope that it would lead to greater uniformity, and eventually to better enforcement. Here, in such an atmosphere, even national competition laws can play a very different, but significant role, especially if they are converging. This study foresees that competition law and policy can form the foundations for exchanging knowledge, interests and values across national borders. Thus, similar legislation could be considered as a constructive tool rather than a constraint before the cooperation efforts. By this way, competition law and policy becomes part of the targeting process for the achievement of shared objectives across various jurisdictions. It might provide means by which competition community members, particularly the national competition agencies, can participate into the process easily. Moreover, convergence is good when it is choice of the enlightened nations. This way conscious jurisdictions can produce more business certainty. It also provides for transparent, predictable and fair practices while saving transaction costs. All these increase the trade of a nation too. This constructive role is exposed itself in the convergence push or more leniently convergence strategy that has dominated the competition community during the last decade and more.

As already mentioned, from the very beginning, the ICN has started to work actively and advocate extensively for convergence in the substantive and procedural aspects of world competition systems. However, it is also important to acknowledge the existence of other international organizations –namely the OECD and UNCTAD- or regional schemes working on the promotion of one way of convergence for different reasons even before the existence of the ICN. The work of those organizations and schemes has been affecting and would surely affect future policy choices of the competition community in the future. The basic idea behind the convergence as a strategy is that as more and more competition law systems become similar and more effective in eliminating anticompetitive behaviour around the world, the combined effect of such enforcement eventually lead to an automatic elimination of global restraints. In other words, if one or more jurisdictions could effectively combat with international cartels or eliminate the handicaps of international mergers in a similar fashion and in a timely manner, then the negativities arising from the lack of a global competition regime would gradually diminish in time.

However, the purpose of the convergence strategy should not be to redesign the instruments of competition enforcement around the world, but rather develop a common solution or to prepare a common denominator within the current framework in which competition agencies are mandated to enforce their respective competition laws within the ambit of their respective legal authorities. Convergence, as advocated within the ICN terminology and indicated in this study, is not based on an agreement, therefore it is free from the costs and burdens of coordination and negotiation that a binding agreement necessitates. Although convergence is a very vague concept, its use as a strategy to narrow the differences and bring the enforcement practices closer to each other would surely help to avoid inconsistencies in remedies and outcomes of enforcement actions. The convergence practice as a strategy when spreads all around the world to competition agencies in different jurisdictions would also help businesses reduce their costs of compliance.

Nevertheless, the general experience so far shows us that the more the convergence strategy disseminated around the world, the more complex it becomes. This complexity arises from national reflexes of domestic agencies to guard their legal territories in the face of an approaching standardization trend in global competition. It is because in practice national competition agencies do have different legal powers, experiences, traditions and culture that might act as an impediment to work closely together. Finding the right tools and ways to take these objectives forward will continue to require an open dialogue, respect and trust.

Yet the current situation also shows that the convergence of competition legislation as a strategy is the only common denominator and opportunity both

at the international community and the nation-state level. This is because one hand, in the face of globalization, the power of nation states diminished due to its insufficiency as a meaningful and powerful regulator in the domain of competition law and policy to cope with cross-border anticompetitive conduct. On the other hand, the international community still could not reach the anticipated maturity level to get together under a global competition regime given the fact that every country just looks after its own interests. However, there still exists a central issue which remains for discussion. This issue is how far convergence can move ahead in creating an effective and functioning global regime for competition law and policy. In other words, this matter would continue to be further elaborated in the international fora which would definitely lead to better understanding of the pros and cons of convergence as a strategy. Finally, the time will show whether the convergence as a strategy would remain concentrated among a few nations or disseminated among the other nations of the competition community in the absence of a global regime.

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Appendix A

CURRICULUM VITAE

PERSONAL INFORMATION

Surname, Name: KAYIHAN ÜNAL, Lerzan
Nationality: Turkish (TC)

EDUCATION

Degree	Institution	Year of Graduation
MA	KATHOLIEKE UNIVERSITEIT LEUVEN European Studies	1999
BS	METU Management	1995
High School	TED Ankara College High School, Ankara	1991

WORK EXPERIENCE

Year	Place	Enrollment
2012- Present	Turkish Competition Authority	Coordinator, President's Office
2011-2012	Turkish Competition Authority	International Relations Coordinator
2010-2011	Turkish Competition Authority	Senior Competition Expert, International Relations Department
2009	Federal Trade Commission, Northeast Regional (NERO) Office, NYC, US	International Fellow
2006-2008	Turkish Competition Authority	Competition Expert, International Relations Department
2005-2006	UNCTAD, Competition and Consumer Policies Branch, Geneva, Switzerland	Consultant
2004	ILO, IPEC, Geneva, Switzerland	Intern
2002-2003	Turkish Competition Authority	Competition Expert, International Relations Department
2001-2003	Turkish Competition Authority	Competition Expert, Technical Department No. 4
1997-2001	Turkish Competition Authority	Ass. Competition Expert, Technical Department No. 4
1995-1996	Ernst and Young Int., Istanbul	Junior Assistant, Tax Department

FOREIGN LANGUAGES

Turkish : Native
English : Excellent, YDS A level – Fall 2013 (95/100)
French : Good, Diploma of DELF 2ème degree (advanced), and KPDS B level - November 2007 (83 /100)

PUBLICATIONS

1. KAYIHAN UNAL, L. (2012), "Experiences on Regional and Bilateral Integration: Lessons From Turkey" in Zhang (ed.), *Recent International Scholarship in Economic Law*, Beijing Law Press, China (in Chinese language); a predecessor of this study was presented in English language during the UNCTAD/ IDRC/Yeditepe University Seminar on Competition Provisions on Regional Trade Agreements (July 31- August 1, 2006) in Istanbul.

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3. KAYIHAN, L. (1999), "An Analysis of Vertical Restraints and Green Paper Implications", unpublished MA Dissertation, Katholieke Universiteit Leuven, Leuven, Belgium.

4. KAYIHAN UNAL, L. (2006), "To what extent competition affects small and medium sized enterprises (SMEs) especially in developing countries and whether competition is good for the creation of an enabling business environment for SMEs with a special emphasis on Turkey", Unpublished Paper submitted to UNCTAD, February 2006.

5. KAYIHAN UNAL, L. (2006), "The relationships between Competition Authorities and Sectoral Regulators", Unpublished Paper submitted to UNCTAD, May 2006.

6. KAYIHAN UNAL, L. (2004), Translation of "Gender, Education and Child Labour in Turkey" an IPEC-ILO publication from English to Turkish.

7. KAYIHAN UNAL, L. (2004), Girl Child Labour Series (Vol 1-IV), ILO Publications, Geneva, took part in the editorial assistance team.

- Volume Nº 1 Girl child labour in agriculture, domestic work and sexual exploitation: rapid assessments on the cases of the Philippines, Ghana and Ecuador
- Volume Nº 2 A comparative analysis: girl child labour in agriculture, domestic work and sexual exploitation: the cases of Ghana, Ecuador and the Philippines
- Volume Nº 3 Global child labour data review: a gender perspective
- Volume Nº 4 A selected annotated bibliography on girl child labour: a gender perspective

ACADEMIC AWARDS

Jean Monnet Scholar, Katholieke Universiteit Leuven, MA in European Studies, 1999, Belgium.

Appendix B

TURKISH SUMMARY

REKABETİN ULUSLARARARASILAŞMASI: ULUSAL REKABET MEVZUATLARININ BİRBİRİNE UYUMU ULUSLARARASI NİTELİKTEKİ REKABET İHLALLERİ İLE MÜCADELEDE YETERLİ MİDİR?

Bu çalışma rekabet hukuku ve politikasının uluslararasılaşma sürecini çözümlemeye yönelik doğru yöntemi inceleme amacıyla yola çıkmıştır. Adı geçen uluslararasılaşma sürecinin en büyük kısıtı, teşebbüslerin ülke sınırını aşan nitelikteki rekabet karşıtı faaliyetlerine karşı, bunlarla mücadele için ülkelerin elinde bulunan araçların ulusal nitelikteki mevzuatlardan oluşmasıdır. Bu yönde tezin amacı, küresel nitelikte bir rekabet rejiminin bulunmadığı günümüz dünyasında, bir strateji olarak ayrı ayrı ülke rekabet mevzuatlarının birbirine uyumunun uluslararası nitelikteki rekabet ihlalleri ile mücadelede yeterli olup olmadığını sorgulamaktadır. Araştırma tabiatıyla ülkeler arasında artan ve gelişen işbirliği çalışmalarını da içermektedir. Rekabet hukuku ve politikasının uluslararasılaşması, ulusal rekabet rejimleri ile iş dünyasının uluslararası nitelikteki faaliyetleri arasında ortaya çıkan boşluğun doldurulmasına ilişkin ihtiyaçtan kaynaklanmaktadır. Bu çerçevede çalışma üç seviyeli bir analizi içermektedir. Bunlar, uluslararası rekabet konularının çok taraflı seviyede ele alınabileceği yetkili makama dair araştırma, rekabet mevzuatının tek taraflı olarak ülke dışı uygulaması ile ikili ve bölgesel işbirliği çabalarından oluşmaktadır. Bahsedilen bu üç seviyeli değerlendirme uluslararasılaşma sürecinin kendisini oluşturmaktadır. Dolayısıyla, çalışma küresel rekabet rejiminin ancak adı geçen uluslararasılaşma sürecinin iyi bir şekilde anlaşılmasıyla başarılabileceğini savunmaktadır. İşte bu sebepten, çalışma farklı disiplinlerin katkısının gerekli olduğunu ileri sürmektedir. Bu çerçevede, sözkonusu çalışma özellikle uluslararası ilişkiler teorilerinin uluslararasılaşma sürecini kavramsallaştırma yolunda yeni bir yol açabileceğini değerlendirmektedir.

Çalışma giriş bölümüyle birlikte toplam 6 bölümden oluşmaktadır. Giriş bölümünde tezin amacı ortaya konulduktan sonra, ikinci bölümde rekabet hukuku ve politikasının uluslararasılaşma sürecini kavramsallaştırmak amacıyla uluslararası ilişkiler teorilerinden yararlanılmıştır. Tezin giriş bölümünde de belirtildiği üzere, uluslararası ilişkiler teorileri uluslararası nitelikteki olayların neden meydana geldiğini açıklamaya çalışır. Bu çalışma bakımından uluslararası ilişkiler teorileri rekabet hukuku ve politikasının uluslararasılaşma sürecine anlamaya yönelik bir araç olarak belirlenmiştir çünkü rekabet hukuku ve politikasındaki gelişmeler uluslararası siyaset ve ekonomide meydana

gelen değişimlerden ayrı düşünülemez. Teoriler bu tezin konusu bakımından soyutlamayı kolaylaştıran, bir olayın karmaşık etkilerini ayırt etmek üzere kullanılan, teşebbüslerin rekabet karşıtı davranışları bakımından kural koymayı ve uygulama stratejilerini belirlemeyi şekillendiren, anılan stratejilerin maliyetlerini nicel hale getiren ve son olarak konuya ilişkin detayları daha etkin bir şekilde anlamaya yardımcı olacak araçları sağlar. Bu çerçevede tezin ikinci bölümü realizm ve liberalizmin temellerine atıf ile başlamış, daha sonra neo-neo tartışması olarak adlandırılan neorealizm ve neoliberalizmi incelenmiş, bu iki akımın özellikle işbirliğine, uluslararası örgütlere, küreselleşmeye ve göreli kazançlara yaklaşımını ele almıştır. Neorealizm-neoliberalizm tartışması devleti, sermaye piyasalarını ve işbirliğini detaylı olarak incelemesi nedeniyle seçilmiştir. Bu çalışma, devletlerin ve uluslararası örgütlerin rekabet hukuku ve politikasının uluslarasılaşma sürecindeki davranışlarını uluslararası ilişkiler teorilerinin yardımıyla açıklanabileceğini ileri sürmektedir. İkinci bölüm ayrıca konunun daha iyi açıklanabilmesini teminen 1990'lı yılların başında gelişmeye başlamış olan yönetişim kavramını da ulusal, bölgesel ve küresel olmak üzere üç seviyede ele almıştır.

İkinci bölüm ayrıca konunun daha iyi açıklanabilmesini teminen 1990'lı yılların başında gelişmeye başlamış olan yönetişim kavramını da ulusal, bölgesel ve küresel olmak üzere üç seviyede ele almıştır. Yönetişim kavramı tezin temel tartışma konusu ile de doğrudan alakalıdır. Şöyle ki, küreselleşme ile birlikte klasik uluslararası ilişkiler teorileri bir değişime uğramıştır. Buna göre, uluslararası ilişkiler konusunda çalışan akademisyenler 1990'lı yıllarda ülkeler arasında ve ayrıca ülkeler ile bireyler arasında sade bir karşılıklı bağlılıktan öteye daha derin ve daha temel başka değişimler olduğunu ortaya koymuşlardır. Ticaretin, finansın ve ekonominin giderek küreselleşmesi uluslararası ilişkilere de yeni bir zorluk getirmiştir. Bu çerçevede, ticaret, finans ve ekonomi sınırları aşan bir niteliğe bürünmüşlerdir. Bu durum öncelikle, yeni kurumsallcılıkla açıklanmaya çalışsılsa da, yönetişim kavramı konuya ilişkin değerlendirmenin temelini oluşturmuştur. Çalışmanın temel amacı bakımından özellikle küresel yönetişim çok önem arzetmektedir. Tezde bölgesel yönetişim için olarak ise AB örneği en iyi uygulama olarak verilmektedir.

Çalışmanın üçüncü bölümü ise ülkelerin rekabet mevzuatlarının uyumu kavramını tanımladıktan ve rekabet hukuku ile politikası arasındaki farka değindikten sonra, çalışma konusu uluslararasılaşma sürecinde tarihsel gelişimini irdelemiştir. Bu tez bakımından uyum kavramı rekabet mevzuatlarının esas ve usul yönünden uyumu olarak ikiye ayrılmaktadır. Tez usul ve esas bakımından uyumdan ne analşılması gerektiğini ifade ettikten sonra, bu çalışma bakımından bu kavramın bir strateji olarak seçilmesi üzerinde duracağının da altını çizmektedir. Bununla birlikte, tez, uyum konusu işlenirken en önemli hususun

bir rekabet mevzuatının hangi yönünün uyumundan bahsedildiğinin belirlenmesi gerektiğinin de altını çizmektedir.

Üçüncü bölümde daha sonra, uluslararası alanda yaşanılan çok taraflı girişimleri tarihsel bir bakış açısıyla anlatmaktadır. Zira, bugün gelinen noktayı anlamak için en azından 1. Dünya Savaşından bu yana konuya ilişkin uluslararası platformda neler yapıldığının anlaşılması çok büyük önem taşımaktadır. Günümüzde pek çok ülkede rekabet hukuku ve politikası benimsenmiş olup, hızlı bir gelişim göstermektedir. Bu yönde sayıları 120'yi aşan ülke bakımından ulusal rekabet mevzuatının varlığından söz etmek mümkündür. Oysa günümüz dünyasında küreselleşme ile birlikte, rekabet karşıtı sonuçlar doğuran teşebbüs faaliyetlerinin artan bir şekilde ülke sınırlarını aştığını görmekteyiz. Bu durum ise karşımızda çözülmesi gereken bir sorun olarak çıkmaktadır. Aslında, rekabet hukuku bakımından uluslararası nitelikte bir rejimin ya da en azından kuralların oluşturulmasına yönelik girişimler ilk olarak Birinci Dünya Savaşı sonrasında görülmektedir. Bununla birlikte, en önemli uluslararası nitelikteki girişim İkinci Dünya Savaşı Sonrasında ortaya çıkmıştır. İkinci Dünya Savaşı sonrasında uluslararası rekabet kurallarını da içerisinde barındıran bir Havana Sözleşmesi ile Uluslararası Ticaret Örgütü'nün kurulması teklif edilmiş ve fakat bu teklif uluslararası sistemdeki gelişmelere paralel olarak hiçbir zaman hayata geçirilememiştir.

Tezin üçüncü bölümünde ayrıca, GATT ve Dünya Ticaret Örgütü nezdinde yaşanan gelişmelere yer verilmiş, OECD, UNCTAD ve Uluslararası Rekabet Ağı'nın (ICN) uluslararasılaşma sürecindeki katkılarına ve rolüne değinilmiştir. OECD kuruluşundan bu yana yayımladığı ve periyodik aralıklarla gözden geçirdiği tavsiye kararları aracılığıyla OECD üyesi ülkeler arasındaki uluslararası işbirliği faaliyetlerini desteklemekte, yılda üç kez toplanan Rekabet Komitesi çalışmaları ile de bu çabaları yaymaya devam etmektedir. UNCTAD ise yapısı gereği az gelişmiş ve gelişmekte olan ülkelere rekabet hukuku ve politikası alanında teknik yardım taşımakta, bu ülkelerin konuya ilişkin kapasite inşasını desteklemektedir. Bu son üç uluslararası örgüt arasında özellikle ICN ülke rekabet mevzuatlarının birbirine uyumunun önemine amaçları arasında açıkça saymakta ve bu yönde yoğun çalışmalar yapmaktadır. Ülke mevzuatlarının uyumu usul ve esas olarak iki başlık altında toplanmaktadır. Uyum öncelikle ABD ve Avrupa Birliği gibi rekabet hukukunu ve politikasını derinlemesine benimsemiş ve uzun süredir uygulamakta olan aktörler tarafından desteklenmektedir.

Dördüncü bölüm ise ulusal rekabet kanunlarının ülke dışı uygulamasını incelemiştir. Piyasaların küreselleşmesi ile rekabet ihlallerinin de sınır ötesine taşınması, teşebbüs ya da teşebbüslerin rekabeti kısıtlayıcı davranışlarına ait etkilerin gerçekleştirildiği yerden çok daha farklı piyasalar üzerinde hissedilmesine yol açmaktadır. Bu durum ise, rekabet kurumlarını ulusal nitelikteki

rekabet kanunları ile çözümlenmesi mümkün olmayan ihlallerle karşı karşıya bırakmaktadır. Bu kapsamda çalışmada Amerika Birleşik Devletleri (ABD) yargı kararları ile gelişen etki doktrini ele alınmış, ayrıca anılan uygulamaya yönelik tepkiler ve müdahaleler sonucu etki doktrinin gelişimi incelenmiştir. Çalışma, Avrupa Birliği (AB) bakımından da rekabet hukuku kurallarının etki doktrini çerçevesindeki uygulamasını, AB Komisyonu ile Avrupa Birliği Adalet Divanı'nın (ABAD) konuya yaklaşımı çerçevesinde irdelemiştir.

Alcoa kararı ABD'nin etki doktrini uygulaması bakımından dönüm noktasını oluşturmaktadır. Bu karar ile Amerikan Yüksek Mahkemesi gerçek etki ve niyet unsurlarına dayanan etki doktrini benimsediğini duyurmuş ve etki doktini aracılığıyla ABD mahkemelerine uluslararası unsurlu rekabet ihlallerinde çok geniş bir yetki tanımıştır. Bu durum ise öncelikle bu durumdan etkilenen Fransa ve İngiltere gibi devletlerin tepki göstermelerine neden olarak büyük tartışmalara yol açmıştır. Zira, o tarihlerde, uluslararası kamu hukukunun ülkesellik ilkesi açısından önemli bir istisna olan etki kıstası yerleşik bir içtihat değildir. Bu tepkiler karşısında mahkemeler ve rekabetten sorumlu kurumlar kayıtsız kalamamışlardır. ABD mahkemeleri farklı kararları aracılığıyla, etki doktrini sınırlandırmak üzere, adı geçen doktrine etkinin doğrudan, önemli ve makul ölçüde öngörülebilir olması ve yargılama yetkisinin makullüğü gibi unsurlar ilave etmişlerdir. Aslında, etki doktrini mahkemelerin yorumuna göre somut olaylar bakımından farklı sonuçlara ulaşılmasını mümkün kılan bir özelliğe sahiptir. Bu yüzden de etki doktrini uluslararası alanda halen çok tartışmalı olan bir kavramdır. AB uygulamasına bakıldığında ise Kurucu Antlaşmanın ilgili maddeleri olan 101 ve 102'de etki doktrinine açık bir atıf olmadığı görülecektir. Buna ragmen, ilk yıllarda, AB Komisyonu etki doktrinini açıkça uygulamak istemiş olmakla birlikte, Avrupa Birliği Adalet Divanı konuya doğrudan atıf yapmak yerine, kendisi adına siyasi açıdan daha az riskli gördüğü ekonomik bütünlük teorisi ya da uygulama doktrini gibi farklı kavramlardan yararlanmayı tercih etmiştir. Bununla birlikte, özellikle uluslararası boyutu olan yoğunlaşma işlemlerinde hem Genel Mahkeme, hem de AB Komisyonu rekabet kurallarını ülke dışında uygulamışlardır.

Tez rekabet kurallarının tek taraflı olarak adlandırılan ülke dışı uygulamasının bir uzantısı olarak etki doktrini çerçevesindeki gelişiminin, küreselleşen dünyamızda sınır ötesi etkileri bulunan ihlallerle mücadelede yeterli olmadığını savunmaktadır. Bu çerçevede, beşinci bölümde bu defa anılan eksikliği gidermek için ülkelerin işbirliği aracı olarak kullandıkları ikili uygulama ve ikili ticaret anlaşmaları ile bölgesel ticaret anlaşmalarını incelemiştir. İkili işbirliğinde halen en ileri örnek olan 1991 tarihli ABD/AB İşbirliği Anlaşması detaylıca ele alınmış, bölgesel ticaret anlaşması olarak NAFTA hükümleri değerlendirilmiştir. Tezin bu bölümü son on yılda pek çok ülke rekabet kurumu tarafından kullanılan işbirliği protokollerini de Türkiye örneği üzerinden ele almıştır.

Tezin altıncı bölümü sonuca ayrılmıştır. Soğuk Savaşın sona ermesinden sonra piyasa ekonomilerine hızlı bir geçiş yaşanmaya başlamıştır. Rekabet hukuku ve politikası ise bu dönemde piyasaların rekabet açılmasında çok önemli bir rol oynamıştır. Bu dönem ayrıca küreselleşmenin de hızla yayıldığı bir dönemdir. Küresel ekonominin baskın olduğu böylesi bir dönemde ülkeler, kurumlar ve ülke ekonomileri birbirlerine çok daha bağımlı hale gelmişlerdir. Rekabeti kısıtlayıcı davranışların etkili olduğu pazarlar hızla ülke sınırlarını aşarken müdahale aracı olarak kullanılan rekabet rejimlerinin kapsamının, doğal olarak, ulusal sınırlar ile belirleniyor olması rekabet hukuku ve politikasının uluslararasılaşma sürecindeki en kilit noktadır. İşte bu bağlamda, bu çalışma tarihsel olarak ülkelerin bu sorunla mücadelede başvurdukları tek taraflı, ikili, bölgesel ve çok taraflı çözüm yollarını uluslararası ilişkiler teorileri perspektifinden incelemiştir. Çalışma, rekabet hukukunun öncelikle geliştiği ABD ve AB'de de bu konunun gelişiminin politik ve ekonomik gelişmelere paralel olarak ilerlediğini ortaya koymaktadır. Bu sebeple anılan değişimler uluslararası ilişkiler teorileri ışığında incelendiğinde anlam teşkil edececeğini öne sürmektedir. Bu yönde, öncelikle realizm, liberalizm ve bu iki temel akımın türevleri olan neorealizm ve neoliberalizm ele alınmış, söz konusu teorilerin uluslararası işbirliği, küreselleşme ve göreli kazançlar hususlarında yaptığı tartışmalara odaklanmıştır.

Çalışma, neorealist bakış açısından yaklaşıldığında, küresel nitelikte bir rekabet rejimini hedefleyen herhangi bir faaliyetin, düşüncenin ya da çalışmanın egemen ülkeler üzerinde egemenliği kısıtlayıcı sonuçlar doğuracak özellikler taşıyacak olursa etkin olmayacağı sonucunun altını çizmektedir. Zira neorealizme bakış açısıyla açıklanmaya çalışılacak olursa, böyle bir durum öncelikle ülkelerin egemenliklerinden bağımsız bir kurum lehine vazgeçilmesi anlamına gelecek ve ayrıca ülke mahkemeleri ya da rekabetten sorumlu kurumları da egemenliklerini devretme noktasına taşıyacaktır. 1945 sonrası dönemde Havana Şartı ile kurulması planlanan ve fakat aralarında ABD olmak üzere ülke parlamentolarından onay alamayarak yürürlüğe giremeyen Uluslararası Ticaret Organizasyonu'nu (ITO) örneğinin başarısızlığı da buna örnek teşkil etmektedir. ABD Parlamentosunun ITO hususundaki bir diğer çekincesi ise 1950 yılına gelindiğinde kendisini git gide daha çok kendini hissettiren Soğuk Savaş gölgesinde komünist ülkelerin böylesi uluslararası nitelikte bir oluşumda yer almayarak, ABD'ye kıyasla göreli kazançlar elde etme endişesi ile de açıklanabilecektir.

Çalışmada ayrıca, günümüzde ülkelerin peşi sıra koştuğu ve özellikle ICN, OECD ve UNCTAD gibi uluslararası örgütler ve yapılar aracılığıyla savunuculuğu yapılan rekabet mevzuatlarının uyumu projesinin bir strateji olarak, küresel ya da uluslararası nitelikteki rekabet kurallarının olmadığı günümüz dünyasında çok belirleyici olduğu vurgulanmaktadır. Ülkelerin ulusal mevzuatlarında takip ettikleri uyum çalışmaları bir bakıma ülkelerin bilinçli politika seçimleri

sonucu ortaya çıkmaktadır. Bu durum küreselleşmenin yayılmasıyla daha önce sadece ulusal nitelikte olan pek çok alanın küresel niteliğe bürünmesinden kaynaklanmaktadır. Bu ise uzlaşmanın sağlanması gereken yeni alanları ortaya çıkarmaktadır. Böylesi bir ortamda, ülkelerin işbirliği ve yönetişim kuralları çerçevesinde anlaşmaya varabilme kabiliyetleri söz konusu politikalar bakımından uyumun derecesini de belirleyici bir faktör konumuna geçmektedir. Çalışma, bu yaklaşımın uluslararası bir rekabet rejiminin yokluğunda, rekabet hukuku ve politikasının uluslararasılaşma süreci bakımından da geçerli olduğunu ortaya koymaktadır.

Tezde ülkelerin tarihsel ve ekonomik alanda yaşanan değişimlere paralel olarak ikili işbirliği anlaşmaları ile ikili ve bölgesel ticaret anlaşmaları yoluyla da ulusal nitelikteki rekabet hukukunun uluslararası kimliğe bürünen ihlallerle mücadele yoluna gittiğini ortaya konulduktan sonra, yine örnekler çerçevesinde anılan işbirliğinin yeterli olmadığı sonucuna varılmaktadır. Ancak bu çabaların tümden yetersiz ya da anlamsız olduğunu söylemek doğru değildir. Zira, ülkeler NAFTA örneğindeki Meksika gibi daha etkin etkin bir rekabet kanunu benimseme yoluna gedebilmektedir.

Öte yandan, küresel ve bağlayıcı nitelikteki rekabet kuralları yerine rekabet mevzuatlarının uyumunun bir strateji olarak kabul edilmesinin ulusal kanunlar ile uluslararası nitelikteki ihlaller ya da yoğunlaşmalar arasında oluşan boşluğu kapatmada ne kadar yeterli olacağını ancak zaman belirleyecektir. Bu noktada unutulmaması gereken bir diğer önemli husus ise, uyumun bir strateji olarak ülkeler arasında hızla yayılmasına rağmen, ülkelerin kültür, gelenek ve hukuki altyapılarındaki gözlenen farklılık nedeniyle konuya ilişkin karmaşanın artmasıdır. İşte bu yüzden, uyumun ele alınırken harfiyen uyulması gereken kurallar bütününden çok ortak bir payda olarak değerlendirilmesi yerinde olacaktır.

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