

Anton Godt

International Cooperation in Competition Law Matters

A Closer Look at Trade Agreements

Anton Godt
International Cooperation in Competition Law Matters

This work is licensed under a
[Creative Commons Attribution-ShareAlike 4.0 International License](https://creativecommons.org/licenses/by-sa/4.0/).



erschienen in der Reihe der Universitätsdrucke
im Universitätsverlag Göttingen 2022

Anton Godt

International Cooperation
in Competition Law Matters

A Closer Look at Trade Agreements

Universitätsverlag Göttingen
2022

Bibliographic information

The German National Library lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available in the Internet at <http://dnb.dnb.de>.

Contact

Anton Godt

Email: aegodt@gmail.com

Dissertation, Georg-August-Universität Göttingen

This work is protected by German Intellectual Property Right Law.
It is also available as an Open Access version through the publisher's homepage and the Göttingen University Catalogue (GUK) at the Göttingen State and University Library (<https://www.sub.uni-goettingen.de>).
The license terms of the online version apply.

Typesetting and layout: Sascha Bühler



© 2022 Universitätsverlag Göttingen
<https://univerlag.uni-goettingen.de>
ISBN: 978-3-86395-559-5
DOI: <https://doi.org/10.17875/gup2022-2049>

Meinen Eltern

Vorwort

Die nachfolgende Arbeit ist der Juristischen Fakultät der Georg-August-Universität Göttingen im Wintersemester 2021/2022 als Dissertation vorgelegt worden.

Meinem Doktorvater Prof. Dr. Peter-Tobias Stoll möchte ich für die äußerst hilfreiche Förderung und das stetige Interesse an diesem Projekt, und vor allem für die herausragende Betreuung sehr herzlich danken.

Ebenso möchte ich mich bei Herrn Prof. Dr. Hartmut Weyer für die zügige Erstellung des Zweitgutachtens bedanken.

Während der Erstellung dieser Arbeit ist mir von zahlreichen Menschen wertvolle Hilfe zuteil geworden. All diesen bin ich zu Dank verpflichtet.

Besonders möchte ich mich bei PD Dr. Till-Patrick Holterhus, MLE., LL.M. (Yale) für die vielen Denkanstöße und die stetige Unterstützung bedanken. Aber auch Gerry H. Kahn aus New Haven (USA), Agata Daszko, LL.M. (Leiden) und Dr. Sophie Nordhues sollen an dieser Stelle nicht unerwähnt bleiben.

Nicht zuletzt wäre das Projekt ohne die tatkräftige Unterstützung meiner Eltern, Dr. med. Rüdiger und Thekla Godt, nicht möglich gewesen.

Berlin, im Herbst 2021
Anton Godt

Zusammenfassung

Die vorliegende Arbeit versucht, einen Mikrokosmos des Dilemmas von Freihandelspolitik und Marktabstottung zu erörtern: Das internationale Wettbewerbsrecht. Der Fokus der Arbeit liegt auf der internationalen Zusammenarbeit auf diesem Gebiet, wobei verschiedene Handelsabkommen und deren Bestimmungen, die sich mit Fragen des Wettbewerbsrechts befassen, besondere Beachtung finden.

Durch eine eingehende Analyse dieses Mikrokosmos führt die Arbeit den Leser zunächst in die bestehende Notwendigkeit der internationalen Zusammenarbeit in wettbewerbsrechtlichen Angelegenheiten ein. Dies geschieht, indem zunächst ein historischer und materiell-rechtlicher Hintergrund des internationalen Wettbewerbsrechts dargestellt wird, der die Probleme des internationalen Rechts und die Fragen der internationalen wirtschaftlichen Verflechtung beschreibt. Vor diesem Hintergrund erörtert die Arbeit die Ziele und Bedürfnisse der internationalen Zusammenarbeit bei der Durchsetzung des Wettbewerbsrechts.

Im Anschluss daran skizziert die Studie den Status quo der internationalen Zusammenarbeit in wettbewerbsrechtlichen Angelegenheiten. Dazu werden in chronologischer Reihenfolge die verschiedenen Ansätze der vielen multi- und bi-lateralen internationalen Abkommen untersucht, die versucht haben, die Probleme des Wettbewerbsrechts zu lösen (WTO, GATT etc.). Anschließend liegt der Schwerpunkt dieser Arbeit auf der Analyse von bilateralen Handelsabkommen. Im Rahmen dieser Analyse soll das Potential von Handelsabkommen für die wettbewerbsrechtliche

Zusammenarbeit aufgezeigt werden. Aus diesem Grund werden nur die bilateralen Handelsabkommen analysiert, die sich in eigens vorgesehenen Wettbewerbskapiteln mit der Thematik der behördlichen Kooperation im Wettbewerbsrecht beschäftigen. Dabei werden die verschiedenen Stadien der Zusammenarbeit entlang der verschiedenen Integrationsphasen etwaiger Handelsabkommen analysiert. Die höchste Form der Integration von Handelsabkommen – Zollunionen – wird gesondert behandelt, wobei das Beispiel der EU als Beispiel dienen soll. Denn allein die Tatsache des mehr als 60-jährigen Bestehens der EU und die gemeinschaftsrechtliche Vereinheitlichung des EU Wettbewerbsrechts impliziert ein hohes Maß an Kooperation und Konvergenz in wettbewerbsrechtlichen Fragen. Insgesamt können optimistische Ausblicke für das Forum der Handelsabkommen gezeichnet werden, wobei jedoch Rückschläge des politischen Realismus Rechnung getragen wird.

Table of Contents

Vorwort	VII
Zusammenfassung	IX
§ 1 Problem and Objective	5
§ 2 Course of Analysis	7
§ 3 The Need for International Cooperation	9
A) International Law	9
I) Prescriptive Jurisdiction	10
1.) Jurisdiction in International law	10
2.) The Territorial Principle	11
a.) The Problem of Subjective and Objective Territorial Jurisdiction	12
b.) Approaches Piercing the Veil of Territoriality	13
aa.) The System of Cumulated Sub and Objective Territoriality	13
bb.) The Effects Doctrine	14
(1.) US Antitrust Law	14

(a.) United States v. Aluminum Co. of America (Alcoa)	15
(b.) Timberlane Lumber Co. v. Bank of America N.T. & S.A.	16
(c.) Hartford Fire Insurance Co., et al., vs. California	17
(d.) United States v. Nippon Paper Industries Co., Ltd, et al.	18
(2.) The Effects Doctrine as Part of Public International Law	20
(a.) Customary International Law	20
(aa.) Consuetudo – Firm State Practice	21
(bb.) Opinio Juris	22
(b.) Limits of Effects Doctrine in International Law	22
(aa.) Principles of International Law	22
(bb.) International Contract Law	24
(c.) International Law Principle	24
(3.) Intermediate Result	25
cc.) Pseudo Territorial Approaches	25
(1.) Economic Unit	25
(2.) Implementation Test	26
(3.) Lex Loci Solutionis	31
(4.) Intermediate Result	32
dd.) Measurement	32
c.) Conclusion to Territorial Piercing Doctrines	32
3.) Prescriptive Jurisdiction and Antitrust Law Concluded.	32
II) Jurisdictional Enforcement	32
1.) The Evolution of US Antitrust Enforcement Provisions	33
a.) The Structure of US Antitrust Enforcement Provisions	33
b.) US Antitrust Enforcement Guideline for International Operations of 1977 and 1988	34
c.) US Antitrust Enforcement Guideline for International Operations of 1995.	35
aa.) Prevention of Diplomatic Disputes – US International Antitrust Enforcement Assistance Act of 1994	35
bb.) Prevention of Legal Loopholes	36
cc.) Intermediate Result	36
d.) US Antitrust Enforcement Guideline for International Operations and Cooperation of 2017	36

2.) Intermediate Result	38
III) Excursus: US Judicial Antitrust Review	38
IV) Conclusion	39
B) Market Interdependencies	40
I) Historical Development	41
II) The Balance of Market Interdependencies	43
C) Intermediate result.	43
§ 4 The Status Quo of International Cooperation in Competition Matters. . .	45
A) The Meaning of International Antitrust Co-operation and Enforcement . .	45
B) Multilateral Cooperation	47
I) Historical Development of International Cooperation	48
1.) League of Nations International Economic Conference	48
2.) Bretton Woods Conference 1944 and Havana-Charter 1947 . .	49
3.) The ECOSOC Cartel Commission Proposal of 1953	51
4.) The Intention of the European Council	52
5.) The GATT	53
6.) Intermediate Result	54
II) The United Nations	54
1.) The UNCTAD	54
a.) The Development of a UN Codex Regarding Restrictive Business Practices	55
b.) Overview	55
c.) Material Provisions	56
d.) Regional Procedural Principles	56
e.) UNCTAD Assistance to International Cooperation	57
f.) Reforms and Developments of the UN Codex	58
2.) Legal Classification and Efficiency Check	60
III) The Recommendations of the OECD	61
1.) The Legal Basis of the OECD	62
2.) Recommendations	63
a.) Recommendation of the Council Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade of 1967 . .	63
b.) Recommendation of 1973	65
c.) Recommendation of 1979	66
d.) Recommendation of 1986	67
e.) Recommendation of 1995	69
f.) Recommendation Concerning Effective Actions Against Hardcore Cartels of 1998	69

g.) OECD Reports and Recommendation Regarding Merger Review	74
h.) Recommendation on Competition Assessment	77
i.) Recommendation Concerning Structural Separation in Regulated Industries	77
j.) Recommendation on Fighting Bid Rigging in Public Procurement	78
k.) Recommendation Concerning International Co-operation on Competition Investigations and Proceedings	78
l.) Best Practice Roundtables Fighting the Barriers of Innovation	81
m.) Intermediate Result.	82
3.) Global Forum on Competition	83
IV) The World Trade Organization (WTO)	83
1.) Purpose and Structure of the WTO	84
2.) Legal Character and Principles of the WTO	86
a.) Constituting Free Trade or Trade Liberalization?	86
b.) The Principles of the WTO	87
c.) Measurement	91
3.) WTO and Competition Law	91
a.) The Draft International Antitrust Code Initiative of 1993. . 91	
aa.) Five principles of the DIAC	92
(1.) National Law Approach.	92
(2.) Non-Discrimination	92
(3.) Consensus Wrongs	92
(4.) International Procedural Initiative (IPI)	92
(5.) Trans-Border-Only Maxim	93
(6.) Measurement.	93
bb.) Substantive and Procedural Antitrust Provisions . . . 94	
(1.) Substantive Antitrust Provisions	94
(2.) Procedural Antitrust Provisions	94
(3.) Measurement.	95
cc.) Implications for the WTO	95
b.) Report of the EU Group of Experts – Competition Policy in the New Trade Order of 1995	95
c.) Working Group Trade and Competition.	96
d.) Kodak-Fuji Case.	97
e.) Dogma of an International Antitrust Code.	97
aa.) European Commission Proposals Establishing an International Antitrust Code.	98

f.) Future WTO Competition Law – Problems and Possible Solutions	99
4.) Intermediate Result	100
V) The International Competition Network	100
1.) Legal Basis and Dogma	101
2.) Insight to the ICN’s work – The 16th ICN Conference in Porto in 2017.	103
a.) The Advocacy Working Group	103
b.) The Cartel Working Group	104
c.) Intermediate Measurement	106
3.) Conclusion.	106
VI) Co-Working Approach: OECD and ICN Survey on International Competition Enforcement Co-operation of 2013 .	107
VII) Results and Perspective on Multilateral Cooperation	108
C) Bilateral Competition Law Cooperation	108
I) Legal Basis of Bilateral Antitrust Cooperation	108
II) Examples of Bilateral Competition Law Agreements	110
1.) “Soft” Bilateral Competition Law Agreements	110
2.) Bilateral “Positive Comity” Competition Agreements	111
3.) “Harder” Bilateral Competition Agreements – MLATs.	116
III) Examples of Bilateral Dissents in Competition Law	119
1.) Boeing-McDonnell Douglas Case	120
2.) GE-Honeywell Case.	122
3.) EU-US Administrative Arrangement of Attendance of 1999 .	124
4.) EU-US Merger Working Group’s Best Practices on Cooperation in Merger Investigations of 2011	125
5.) Findings	127
IV) Intermediate Result	127
D) Conclusion	128
 § 5 Trade Agreements and International Cooperation in Competition	
Law	131
A) Introduction	131
I) Antidumping and Competition Law – Integration in Trade Agreements.	132
II) Anticompetitive Conduct as Non-Tariff Trade Barrier.	135
III) Intermediate Result	136
B) Trade Agreements – Status Quo Analysis	137
I) Preliminary Considerations	137
II) Provisions Concerning Substantive Competition Matters in Trade Agreements	138

1.) General Declaration for “Undertakings Not to Distort Competition”	139
2.) Monopoly and Merger Provisions.	142
a.) Provisions Regarding Monopolies	142
b.) Provisions Regarding Mergers.	144
3.) Intermediate Result	146
III) Competition Enforcement Provisions in Trade Agreements	146
1.) Co-operation Fostering Provisions	146
a.) Trade Development Agreements	147
b.) Preferential Trade Agreements	150
aa.) Direct Provisions	151
bb.) Indirect Reference	154
cc.) Measurement	157
c.) Free Trade Agreements	158
aa.) FTAs from 1945-2002	158
bb.) FTAs between 2002-2019	161
(1.) FTAs of 2003	162
(2.) FTAs of 2004	164
(3.) FTAs of 2005	167
(4.) FTAs of 2006	169
(5.) FTAs of 2007	170
(6.) FTAs of 2008	171
(7.) FTAs of 2009	172
(8.) FTAs of 2010	175
(9.) FTAs of 2011	177
(10.) FTAs of 2012	178
(11.) FTAs of 2013	181
(12.) FTAs of 2014	182
(13.) FTAs of 2015	186
(14.) FTAs of 2016	186
(15.) FTAs of 2017	188
(16.) FTAs of 2018 and 2019.	190
d.) Evaluation and Findings.	193
2.) Institution-Building Provisions.	194
e.) Provisions Creating National Competition Authorities.	194
f.) Provisions Creating “Competition Working Groups”	195
g.) Provisions Creating “Joint Authorities” Responsible for Competition Matters.	195
h.) Provisions Creating “Common Competition Authorities”	196
3.) Procedural Core Principles	197

4.) Intermediate Result	201
IV) Provisions Relating to Competition Law	201
1.) State Trading Enterprises	202
2.) State Aid.	204
V) Dispute Resolution	206
VI) Intermediate Result	206
C) Customs Union	207
I) EU Competition Law	207
1.) The Basis of EU Competition Law	208
a.) EU Antitrust Regulation Procedures	209
aa.) The Power to Regulate Antitrust Law	209
(1.) Scope of Antitrust Investigations	210
(a.) Functional Scope of Applicability	210
(b.) Temporal Scope of Applicability	211
(c.) Geographical Scope of Applicability	211
(d.) Personal Scope of Applicability	211
(2.) Limitations	212
bb.) Measurement	212
b.) EU Merger Regulation Procedures	212
aa.) Principles for EU Merger Regulation.	213
(1.) EU Competition Law's Scope of Measurement.	213
(2.) Quantitative Scope	213
(3.) Precautionary Merger Control.	214
(4.) Competences and One-Stop-Shop.	214
(5.) Time Limitation by the European Commission	214
(6.) Judicial Review	215
bb.) EU Merger Regulation Procedure	215
(1.) Allocation of Rights and Duties	215
(2.) Pre-Notification Phase.	215
(3.) Notification Phase	216
(4.) Phase I	216
(5.) Phase II	216
(6.) Measurement.	217
c.) EU Government Procurement Regulation	217
d.) EU State Aid Regulation	217
e.) International Competition Law	217
aa.) EU Competences for External Affairs	218
(1.) Institutional Competence of the EU for External Affairs	218
(a.) Common Trade/Competition Policy.	218
(b.) Implicit External Competences of the EU	219

(c.) Intermediate Result	219
(2.) Sole- and Mixed Competences of the EU for External Affairs	219
(3.) Institutional Competence of an EU Authority for External Affairs	220
(4.) Measurement	221
bb.) Direct Applicability of International Law	221
cc.) General Principles of EU Law for International Competition Agreements	222
(1.) Scope of EU Body Competencies as Competition Law Authority Regulating External Competition Law Matters	222
(2.) Enforceability of international competition law	223
(3.) Confidentiality and competition law enforcement.	223
dd.) Consequences for International Competition Law Treaties of the EU	224
f.) Facets of EU Competition Law	224
2.) EU Internal Enforcement Cooperation in Competition Law	225
a.) The European Competition Network	225
b.) EU Merger Working Group	232
3.) Intermediate Result	234
II) Other Examples	235
1.) EEA: EU-EFTA Competition Rules	235
a.) Common EEA Authorities	235
b.) Substantive Competition Rules and Convergent Interpretation	236
c.) Two Pillars Principle and “One Stop Shop”.	236
d.) Measurement	236
2.) CARICOM Competition Rules	237
3.) Other Examples	238
III) Intermediate Result	239
D) Comparison and Conclusion.	240
§ 6 Final Conclusion	241
Literature	245
Agreements	245
Data	249
(Journal) Articles	249
Judgements	253
Monographs	255

Official Notifications	258
Websites	263

§ 1 Problem and Objective

Ever since 1945, trade between states has become increasingly liberalized. Common international fora have been founded with the aim of upholding global economic interconnection. Nevertheless, the gap between the developed and the underdeveloped states remains yawning. Some states are the ‘winners’ of trade liberalization – some are the ‘losers’. Notwithstanding these discrepancies, states constantly and increasingly seek not only to further liberalize trade but also to create free trade. The resistance to these liberal economic ambitions can be witnessed in the form of widespread protests worldwide against further political and economic interdependence. Many people wish to preserve their respective economies and protect them from foreign externalities while, at the same time, wanting to only spend as little money on goods and services as possible. Moreover, on the one hand they desire to be connected throughout the world, while on the other they want their cultures to be protected from internationalization and rationalization. This choice between the global ‘opening’ and the protectionist ‘isolation’ of markets, neighborhoods, and even thoughts is the dilemma of our time.

This work seeks to discuss the microcosm of this dilemma: international competition law and, more specifically, focus on international cooperation in this field, while affording special attention to various trade agreements and their provisions dealing with matters of competition law.

Even if competition law together with its interstate cooperation may only be a microcosm of the dilemma, it can be a strong regulatory tool used to solve it. This thesis advocates for the use of this regulatory tool by states: namely for the acceptance of competition law fostering fair market conditions, as well as for international cooperation in these matters. This thesis does not entertain the view that states should seek to prevent the described dilemma of ‘open versus isolated’ through complete economic isolation nor that trade liberalization should lead to a rationalization of aspects of the different societies – it is the understanding and perception of the thesis that cultural diversity may only be upheld when core principles of society are excluded from market theory and application.

Overall, competition law cooperation has the potential to serve not only as a political tool but also as an arbitrating factor to foster solution to the dilemma. This thesis shall explain that when applied correctly – that is with mutual agreement of states, competition law, is able to bring a certain degree of balance between economic and political interdependence. Lack of mutual agreement, on the other hand, may result in hindering a free, fair and undistorted market by one or both sides.

§ 2 Course of Analysis

By delving into an in-depth analysis of this microcosm, the thesis introduces the reader to the existing need for international cooperation in competition law matters. It does so by first presenting a historical and factual background describing the problems of international law and the issues relating to international economic interdependence. Against this backdrop, the study discusses the objectives and needs of international competition enforcement cooperation.

Consequently, the study outlines the status quo of international cooperation in competition law matters. It does so by examining, in chronological order, the various approaches found in many multi- and bi-lateral agreements which have attempted to solve the problems of competition law. After this factual examination, the main ambit of this thesis is to analyze trade agreements. Within this analysis, the thesis seeks to show the potential of trade agreements with regards to competition law cooperation. For this reason, the thesis affords further analysis to the more advanced and more developed trade agreements containing competition chapters. Subsequently, it analyzes the different stages of cooperation and inherently related matters through the integration phases of trade agreements. The highest form of trade agreement integration – customs unions – is discussed separately, the example of the EU is especially telling. Without revealing too much, the sole fact regarding more than 60 years of existence of the EU may imply high levels of cooperation and convergence in competition law matters. The conclusions regarding trade

agreements of lower integrated phases will give optimistic foresights for the forum of trade agreements regulating competition law cooperation, whilst also taking account of the backlashes of political realism.

§ 3 The Need for International Cooperation

The call for international cooperation of antitrust authorities arises out of examining the topic from two different angles: first one addresses the classical premises and boundaries of international law (A)), the second one the accelerating and widespread interdependencies currently found between economic markets (B)). Therefore, the call emerges by a view through a legal (doctrinal) and a practical lens, as the need for cooperation arises where legal and technical barriers have to be overcome.

A) International Law

The regulation of competition in a broad sense is an act of state sovereignty, as competition authorities enforce jurisdiction over the interaction of individuals. The most prominent elaboration of jurisdiction is the *separation of powers* model by *Montesquieu*. It divides jurisdictional state powers into the legislative power, the executive power and the judiciary creating *checks and balances*.¹ These powers are divided respectively into three different functions. The first one deals with the binding law that state organs establish. Those take on different forms, such as legislation, executive orders, administrative regulations or court determinations. They are called

¹ Cf. for others: Jörn Ipsen, *Staatsorganisationsrecht. Staatsrecht* (28. edn, 2016) 206.

prescriptive jurisdiction. The second function deals with the capacity of a state to enforce its prescriptive jurisdiction. The third type deals with adjudicative jurisdiction, thus with the procedural regimes of a state's judiciary.

To understand the ambit of state jurisdiction² regarding international competition law, the historic context and its development has to be taken into account.³ Therefore, first, one has to understand the basis and development of prescriptive jurisdiction (I.). Subsequently, the enforcement of jurisdiction is explained (II.) with reference to different types of jurisdiction (III.).

I) Prescriptive Jurisdiction

Prescriptive jurisdiction describes the area where the state legislates enforceable – binding law. Hence, the legal boundaries of prescriptive jurisdictions are vital to understand its ambit.

1.) *Jurisdiction in International law*

The characteristics of jurisdiction in international law are to be differentiated from jurisdiction in national law, as international law is cooperative, weakly organized, political and indirect.⁴ Since states all stay in sovereign equality, as there is no such thing as a law of “the stronger”, the boundaries of sovereign freedom will be found in one state's act of self-commitment.⁵ Consequently, states retain their freedom of action, as long as there is no prohibition in international law, to which the very state subdues itself. This is the outcome of the historic Lotus-case of 1927. The Permanent Court of International Justice (PCIJ) established the Lotus rule by stating:

“Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.”⁶

² Staker in Malcolm D. Evans, *International law* (4. rmd edn, Oxford Univ. Press 2014) 309: “...‘Jurisdiction’ is the term that describes the limit of the legal competence of a State or other regulatory authority...to make, apply, and enforce rules of conduct upon persons...”; Therefore, it is “...achieved by means of legislative, executive or judicial action...” cf. Malcolm N. Shaw, *International law* (Seventh edn, Cambridge University Press 2014) 469.

³ Andreas v. Arnould, *Völkerrecht* (3rd, rmd. edn, Müller 2016)Ref. 38: “...international law is in a regular evolution and variances entered gradually over a long period of time...”; Grote in *Max Planck encyclopedia of public international law: MPEPIL* (Oxford Univ. Press 2008)(6/2006).

⁴ v. Arnould, *Völkerrecht Ref. 38*; Friedrich Berber, *Lehrbuch des Völkerrechts. Erster Band: Allgemeines Friedensrecht* (JSTOR 1959)§3.

⁵ v. Arnould, *Völkerrecht Ref. 38-40*.

⁶ S.S. “Lotus”, *France v Turkey, Judgment, (1927) PCIJ Series A no 10, ICGJ 248 (PCIJ 1927), 7th September 1927, Permanent Court of International Justice (historical) [PCIJ] 1927* para. 45; even

Even if this case would be decided differently today, this main argument still reflects the legal opinion of the global majority (*opinio juris*), also being constantly applied (subsequent practice). Therefore, the Lotus case is a precedent establishing international customary law.⁷

The rule does certainly not mean that a state may do whatever it wishes: Rather there has to be a clear connecting link approved by international law to which states may refer to.⁸ The most prominent such linking factors decisively established in international law – also known as ‘principles of jurisdiction’ – are the principles of territoriality and nationality. An advisory intention of international law regarding public jurisdiction can be affirmed by the tenets of territorial inviolability, sovereign equality, and the exclusion of intervention.⁹

2.) *The Territorial Principle*

Following the Lotus case, state territory is an object of international law, as this principle recognizes the full authority of states: classically states may only enforce their jurisdiction within the space they can practice complete authority. Thus the “territorial principle is a corollary of the sovereignty of a State over its territory. That sovereignty entails the right of the State to describe the laws that set the boundaries of the public order of the State”.¹⁰

Historically in Emperor Justinian’s time, the maxim *extra territorium ius dicenti impune non paretur* (One who gives judgement outside his territory may be disobeyed with impunity) emerged and has been part of e.g. the traditional Anglo-American criminal system.¹¹ The boundaries of territorial sovereignty in terms of state jurisdiction are to be found at the state’s land and sea borders¹² extending up to

if historic, case reaffirmed in 2013 by Supreme Court of the United Kingdom: *R. v. Gul 2013*, UKSC 64 2013) para. 57.

⁷ Cf. Fn 5.

⁸ *Corfu Channel case, Judgement of April 9th 1949, ICJ Reports 1949 1949*) 22 “...every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States...”: Therefore, states have to exercise authority within the boundaries of international law; Robert Y. Jennings and Lassa Oppenheim, *Peace. Parts 2 – 4. Oppenheim’s international law* (9. rev. edn, 1996) 564.

⁹ Werner Meng, ‘Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht’ (Zugl. Mainz, Univ., Habil.-Schr., 1993, Springer 1994) 500.

¹⁰ Evans, *International law* 316; v. Arnauld, *Völkerrecht* 342; regarding inaccuracy of the meaning of the principle of territoriality cf. Meng, ‘Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht’ 501.

¹¹ Robert Y Jennings, ‘Extraterritorial Jurisdiction and the United States Antitrust Laws’ 33 *Brit YB Int’l L* 1957 146, 148.

¹² Often defined by treaties, sometimes by the doctrine of *uti possidetis juris*: cf. e.g. *Frontier Dispute Burkina Faso v. Republic of Mali, ICJ Reports 1986* (ICJ, 1986) 554 para. 20 ff. ; Matthias Herdegen, *Völkerrecht* (15., rmd and extended edn, 2016) para. 24, ref. 1.

12 nautical miles from its coast, and the airspace above its land and sea territory.¹³ At first glance, taking into account the specific example of a state's antitrust law and its enforcement by its antitrust authorities, the territorial principle means that (antitrust) law may only be applied within one state's territory. But at second glance one will see an exception to the stated rule.

a.) The Problem of Subjective and Objective Territorial Jurisdiction

First, there is the constellation of subjective territorial jurisdiction, where a state wants to apply prescriptive jurisdiction to an occurrence originated within its territory, but carried out extraterritorially.¹⁴ For example, two companies initiate an antitrust law infringement against the law and within the territory of State A, but the actual infringement takes place in State B. Theoretically, State A may enforce its antitrust laws against the injuring party, but it will not succeed in the end, as no interests of the State are affected.¹⁵ State B as the "wronged" state theoretically cannot enforce its antitrust laws against the injuring party under the classical territorial principle. The more virulent and problematic legal constellation, which is the other way around, is the so-called constellation of objective jurisdiction¹⁶: The infringement takes place within one state and infringes its laws, but wrongdoing was initiated outside its territory. For example, two companies from State B plan an action violating the antitrust laws of State A and carry out their action in State A. State A wants to enforce its antitrust laws against the tortfeasors but theoretically cannot, because they remain outside its territory – in State B.

Examining the territorial principle, taking into account the options of subjective and objective jurisdiction, one notices a legal loophole creating an imbalance of law.

Considering these loopholes, the door for misconduct is wide open; referring to the given example, it gives companies the possibility to influence markets in their favor (e.g., through price fixing). The result of the unfair conduct is unfair markets. Furthermore, the internationalization of commerce aggravates the problem, as foreign conduct has a substantial effect on the national economy.¹⁷

These problems led states to extend their laws extraterritorially stepping back from the territorium *ius dicenti maxim* and introducing exceptions to the principle of territoriality.

¹³ Cf. *Three-Elements* state theory e.g.: v. Arnould, *Völkerrecht Ref. 70 f.* or Herdegen, *Völkerrecht para. 24, ref. 1.*

¹⁴ Cf. Jürgen Basedow, *Weltkartellrecht: Ausgangslage und Ziele, Methoden und Grenzen der internationalen Vereinheitlichung des Rechts der Wettbewerbsbeschränkungen* (Mohr Siebeck 1998) 12; Evans, *International law* 317.

¹⁵ Clearly a constellation which is hard to detect, as the main effects will take part outside one states territory. Cf. Basedow, *Weltkartellrecht: Ausgangslage und Ziele, Methoden und Grenzen der internationalen Vereinheitlichung des Rechts der Wettbewerbsbeschränkungen* 12.

¹⁶ *Ibid*; Evans, *International law* 317.

¹⁷ Meng, 'Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht' 503.

b.) Approaches Piercing the Veil of Territoriality

As extensions of jurisdiction beyond strict territoriality came along with disputes regarding international law aspects, states tried to reform applications of their jurisdiction, justifying their legal views. An overview of the different approaches may be presented as follows: the system of cumulative sub and objective territoriality (aa.)), the doctrine of pseudo-territoriality (bb.)), the effects doctrine (cc.)), and the principle of consideration (dd.)). All different methods will be displayed under the aspect of antitrust law.

aa.) The System of Cumulated Sub and Objective Territoriality

States enact laws to regulate areas within their jurisdiction. Therefore, antitrust laws are set up to protect fair conduct within ‘their’ domestic market. States which link their laws to the concept of strict territoriality, thus, manage to accumulate objective and subjective matters regarding the judicial linking point: the infringement of competition law has to take place within the state territory and has to have an impact upon the very domestic market.¹⁸ For example, the central linking point of the British Restrictive Trade Practices Act of 1976 (where companies had to register their economic conduct with the British authorities) was the term “carrying on business”.¹⁹ This linking point was understood to be interpreted as narrowly as possible, e.g. there was no obligation for parental firm to register a carrying on business within the UK, even if a subsidiary of it was transacting business within the UK. Not even the delivery of goods under the Act established a “carrying on business” within the UK. The term rather required a permanent activity within the UK, ran within the territory of the UK under its jurisdiction. To agree with Basedow, this accumulation prohibits international disputes, as an extraterritorial application of British law was not possible – but the price is comparatively high, as the scope of such a competition law is narrowly limited and results in delivery gaps in competition law.²⁰ That is the reason why the United Kingdom repealed its Restrictive Trade Practices Act of 1976 in 2000 and harmonized its competition and antitrust law with the EU law (Art. 101, 102 TFEU). Nowadays, the linking point of the accumulated sub- and objective territoriality seems to have expired, as no prominent state applies it anymore – neither in competition law nor in other areas.

¹⁸ Basedow, *Weltkartellrecht: Ausgangslage und Ziele, Methoden und Grenzen der internationalen Vereinheitlichung des Rechts der Wettbewerbsbeschränkungen* 13.

¹⁹ *Ibid*; Cf. Sect 6 (1) *UK Restrictive Trade Practices Act* (1979) c.34.

²⁰ Basedow, *Weltkartellrecht: Ausgangslage und Ziele, Methoden und Grenzen der internationalen Vereinheitlichung des Rechts der Wettbewerbsbeschränkungen* 14f.

bb.) The Effects Doctrine

The effects doctrine is the most well-known approach piercing the veil of strict territoriality. As the effects doctrine first emerged in and was developed through US antitrust law, this section will first inspect its evolution in case law, especially regarding extraterritorial jurisdiction.²¹ It will then evaluate the effects doctrine vis-à-vis public international law and its limitations.

(1.) US Antitrust Law

Antitrust law is the law regulating the restraints of the freedom of trade.²² Therefore, historically, it has existed for as long as trading has been taking place, and a sense of guilt regarding trade restraints has developed accordingly. Thus, the exact date, time, or place for the invention of antitrust law cannot be noted.²³ Notwithstanding, in the 1890 Sherman Act the United States codified its sense of guilt against trade restraints, becoming the first nation to codify antitrust law in its Sec. 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 hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, at the discretion of the court.

Moreover, the Sherman Act criminalized the special example of building monopolies as being an unlawful trade restraint in its Sec 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 misdemeanor, and, on conviction thereof; shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

²¹ Dietmar Baetge, 'Globalisierung des Wettbewerbsrechts: eine internationale Wettbewerbsordnung zwischen Kartell- und Welthandelsrecht' (Zugl. Hamburg, Univ., Habil.-Schr., 2006 2007, Mohr Siebeck 2009) 261.

²² Cf. Lawrence Anthony Sullivan, *Handbook of the law of antitrust*, vol 7 (West Publ. 1977) Ch. 1, 14; Meinrad Dreher and Michael Kulka, *Wettbewerbs- und Kartellrecht: eine systematische Darstellung des deutschen und europäischen Rechts* (9., rmd edn, Müller 2016) Ref. 555 ff.

²³ Cf. Dreher and Kulka, *Wettbewerbs- und Kartellrecht: eine systematische Darstellung des deutschen und europäischen Rechts* Ref. 560 ff. : The meaning of the term "antitrust law" varied from country to country. Whilst the German authorities approved Cartel-contracts to be valid (Reichsgericht cf. RGZ 28, 238) and regulated unfair conduct (Reichsgericht cf. Benrather Tankstelle, RGZ 134, 342), the Anglo-American legal system already knew a prohibition of "restraint of trade" and "conspiracy to monopolize".

This early antitrust law of the US is linked to the doctrine of strict territoriality.²⁴ That is why the Supreme Court denied an extraterritorial application of the Sherman Act in its first relevant judgement.²⁵ After the Second World War, the Second Circuit Court of Appeals disregarded the jurisprudence of the Supreme Court and extended the US antitrust jurisdiction with its Alcoa case extraterritorially.²⁶

(a.) United States v. Aluminum Co. of America (Alcoa)

The firm Aluminum Co. of America (Alcoa), a large firm manufacturing aluminum and its products, established high market shares in the aluminum sector by licensing the systems to manufacture aluminum from bauxite invented by Hall and Bradley.²⁷ Whilst Alcoa had high market shares in different aluminum products, such as virgin aluminum, they reached out to foreign aluminum manufacturers. Through their Canadian wholly-owned subsidiary, Alcoa managed to arrange two quota system agreements seeking to limit the amount imported into different countries including the US.²⁸ As the plaintiffs sued for a breach of antitrust law under the Sherman Act, Judge Hand held that foreign antitrust breaches may fall under US jurisdiction, as long as they have an effect upon the US economy.²⁹ The only requirement Alcoa sets for the effects test is a certain intention the (foreign) wrongdoers have to “actually...affect the foreign commerce of the United States”.³⁰ Therefore, after Alcoa the intended effects test was applied when foreign conduct was considered to break US antitrust law.³¹ This judgement was a dramatic change to the US political and legal system, as it was possible to apply domestic law extensively. Domestically, the US

²⁴ Baetge, ‘Globalisierung des Wettbewerbsrechts: eine internationale Wettbewerbsordnung zwischen Kartell- und Welthandelsrecht’ 262; Alexander Dlouhy, ‘Extraterritoriale Anwendung des Kartellrechts im europäischen und US-amerikanischen Recht’ (Julius-Maximilians-Universität Würzburg 2002) 65ff; Phillip E. Areeda and Herbert Hovenkamp, ‘Fundamentals of anti-trust law’ 2002, 275ff, (<http://leagle.wcl.american.edu/search/i?=1539-7203>); Elliott Sulcove, ‘Extraterritorial Reach of the Criminal Provisions of US Antitrust Laws: The Impact of United States v. Nippon Paper Industries, The’ 19 U Pa J Int’l Econ L 1998 1067, 1071.

²⁵ *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) Cf. Syllabus: “While a country may treat some relations between its own citizens a governed by its own law in regions subject to no sovereign, like the high seas, or to no law recognized as adequate, the general rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where it is done.”

²⁶ *US v. Aluminium Co. of America et. al.* (148 F. 2d 416) (Circuit Court of Appeals, Second Circuit, 1945).

²⁷ Ibid.

²⁸ Arrangement One in 1931 and Arrangement Two in 1936 cf. Ibid; Sulcove, ‘Extraterritorial Reach of the Criminal Provisions of US Antitrust Laws: The Impact of United States v. Nippon Paper Industries, The’ 1073.

²⁹ Nowadays also called *effects*-test cf. Baetge, ‘Globalisierung des Wettbewerbsrechts: eine internationale Wettbewerbsordnung zwischen Kartell- und Welthandelsrecht’ 262.

³⁰ *US v. Aluminium Co. of America et. al.* (148 F. 2d 416) 444.

³¹ For the term *intended effects*- test cf. Baetge, ‘Globalisierung des Wettbewerbsrechts: eine internationale Wettbewerbsordnung zwischen Kartell- und Welthandelsrecht’ 263; Areeda and Hovenkamp,

antitrust law is no longer linked to the doctrine of strict territoriality, but to the effects doctrine, as confirmed by the lower courts in 1951³² and by the Supreme Court in 1962.³³ Internationally the extraterritorial application caused far-reaching diplomatic displeasure accompanied by disputes in international law. Referring to the doctrine of pseudo-territoriality, the Great Britain Government was the loudest state to disagree with the extensive extraterritorial application of the US antitrust law. Therefore, Great Britain did not only express its displeasure via diplomatic channels e.g., by *amicus curiae* in litigation within the US and the refusal of aid requests for letters rogatory; it also enacted counter-legislation against the US antitrust law.³⁴

(b.) *Timberlane Lumber Co. v. Bank of America N.T. & S.A.*

The *Alcoa* extension of the effects doctrine and the legal and diplomatic disputes involved, showed a certain lack of development of the effects doctrine, especially a lack of comity regarding the extent to which the effects must reach to be judicially relevant, and the comity of judicial conflict in international law being caused by extraterritorial jurisdiction.³⁵ When the Ninth Circuit Court had to deal with these problems subsequently, it found that the inhibition to apply US antitrust law to foreign conduct had decreased and therefore, the potential of international conflict became too great. Thus, in the *Timberlane* case, it established a jurisdictional rule of reason narrowing the scope of the effects doctrine, creating a balance between domestic and foreign interests:³⁶

- A potential of conflict between domestic and foreign law;
- The nationality of the parties and their carrying on business/ habitual residence;
- The options of compliance measures of the involved states;
- The significance between US and foreign compliance measures in terms of efficiency;
- The extent to which foreign conduct is explicitly trying to harm US commerce;

'Fundamentals of antitrust law' 280; Sulcove, 'Extraterritorial Reach of the Criminal Provisions of US Antitrust Laws: The Impact of *United States v. Nippon Paper Industries, The*' 1074.

³² *United States vs Imperial Chem. Industr. Ltd*, 100 F. Supp. 78 (S.D.N.Y., 1951).

³³ *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690 (1962) 1962).

³⁴ Baetge, 'Globalisierung des Wettbewerbsrechts: eine internationale Wettbewerbsordnung zwischen Kartell- und Welthandelsrecht' 263; Spencer Weber Waller, 'The internationalization of antitrust enforcement' 77 Boston University Law Review 1997 343, 384, ; James R Atwood, Kingman Brewster and Spencer Weber Waller, *Antitrust and American business abroad*, vol 2 (JSTOR 1981) §§ 6.16-17.

³⁵ Cf. Sulcove, 'Extraterritorial Reach of the Criminal Provisions of US Antitrust Laws: The Impact of *United States v. Nippon Paper Industries, The*' 1074.

³⁶ *Timberlane Lumber Co., et. al. vs. Bank of America National Trust and Savings Association, et. al.*, (United States Court of Appeals Ninth Circuit, 1976) 1382ff.

- The foreseeability of this harmful conduct and its effects;
- The relative importance to the charged misconduct within the United States as compared with conduct abroad.

This Timberlane doctrine was slightly modified by the Third Circuit Court in 1979 in the *Mannington Mills* case.³⁷ The court explicitly added the considerations of “possible effect upon foreign relations if the court exercises jurisdiction and grants relief” to the Timberlane rule of reason.³⁸ Together Timberlane and *Mannington* formed a judicial rule in applying US antitrust law extraterritorially, which was codified within the Foreign Trade Antitrust Improvement Act (FTAIA) in 1982.³⁹ Notwithstanding, courts still seemed to be reluctant in applying this rule, as they seemed to struggle to balance competing foreign interests.⁴⁰

(c.) *Hartford Fire Insurance Co., et al., vs. California*

Following the cautious application of the Timberlane-Mannington rule, the US Supreme Court had to deal with a similar problem in the *Hartford Fire Insurance* case,⁴¹ where it rejected the former rule, representing a sharp U-turn in US antitrust law. The defendants were domestic insurance companies and a reinsurance company from England. The plaintiffs filed suit against them, stating that the insurance companies conspired to restrict the terms of coverage of commercial general liability (CGL) insurance.⁴² The British reinsurance company was alleged to violate the Sherman Act by forcing the US insurance companies (primary insurers) to change their standard CGL insurance policies to the standard they wanted to sell and “thereby rendering ‘pollution liability coverage...almost entirely unavailable for the vast majority of casualty insurance purchasers in the State of California’”.⁴³ Instead of trying to apply the Timberlane-Mannington rule in their defense, the British reinsurance company stated that the foreign interests overcame the US interests, and therefore

³⁷ Sulcove, ‘Extraterritorial Reach of the Criminal Provisions of US Antitrust Laws: The Impact of United States v. Nippon Paper Industries, The’ 1077; *Mannington Mills, Inc., vs. Congoleum Corporation* (United States Court of Appeals, Third Circuit, 1979).

³⁸ For further modifications cf. Sulcove, ‘Extraterritorial Reach of the Criminal Provisions of US Antitrust Laws: The Impact of United States v. Nippon Paper Industries, The’ 1077 Rf. 46 and *Mannington Mills, Inc., vs. Congoleum Corporation* 1297.

³⁹ Cf. 15 U.S.C. § 6a.

⁴⁰ For a neat overview on US case law cf. Michael G McKinnon, ‘Federal Judicial and Legislative Jurisdiction Over Entities Abroad: The Long-Arm of US Antitrust Law and Viable Solutions Beyond the Timberlane/Restatement Comity Approach’ 21 Pepp L Rev 1993 1219, 60, ref. 298.

⁴¹ *Hartford Fire Insurance Co. et. al. v. Carlifornia et. al., 509 U.S. 764 (1993)* (US Supreme Court, 1992).

⁴² *Ibid*, 771; Varun Gupta, ‘After Hartford Fire: Antitrust and Comity’ 84 Geo LJ 1995 2287, 2295.

⁴³ *Hartford Fire Insurance Co. et. al. v. Carlifornia et. al., 509 U.S. 764 (1993)*, 795; Gupta, ‘After Hartford Fire: Antitrust and Comity’ 2295.

the case should not fall under US jurisdiction and the Sherman Act.⁴⁴ But the court rejected their argument and stated that “it is well established...that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States”.⁴⁵ The US Supreme Court dismissed the Timberlane-Mannington rule, but rather asked for a true conflict between domestic and foreign law. Following the argumentation of the Supreme Court such a true conflict only exists where there is a real conflict in law. Concerning the London reinsurance company, the demands of the US Sherman Act did not have a real conflict with the antitrust law of Britain, therefore, the Sherman Act was applicable in that civil case.⁴⁶

In accordance with this approach the courts have to find a substantial effect upon the United States and need to apply the jurisdiction extraterritorially, unless the defendant would be forced to violate foreign law in order to fulfill US law.⁴⁷ Clearly, this decision of the US Supreme Court substantially limits the scope of application of the Timberlane-Mannington rule, as the threshold of finding a conflict was really high.

Thus, as the Supreme Court set up such high obstacles, it moved away from the established application of the jurisdictional rule of reason and widened the extraterritorial jurisdiction of US law tremendously.

(d.) *United States v. Nippon Paper Industries Co., Ltd, et al.*

Even if the Supreme Court explicitly extended the US antitrust jurisdiction in *Hartford Fire*, lower courts still remained reluctant to apply the established rule. Symbolically, the different court proceedings of the *Nippon Paper* case show the dissents from the rules of judicial extraterritorial application – especially regarding the extraterritorial application of the criminal law provisions of the Sherman Act.

Nippon Paper Industries et al. were accused of a price fixing conspiracy regarding thermal paper within Japan and then distributing their facsimile paper to the US at an inflated price.⁴⁸ Therefore, even if the price fixing took place outside the US territory, the conduct was alleged to be a breach of the Sherman Act and its provisions (e.g., FTAIA).

⁴⁴ *Hartford Fire Insurance Co. et. al. v. Carlifornia et. al.*, 509 U.S. 764 (1993); Sulcove, ‘Extraterritorial Reach of the Criminal Provisions of US Antitrust Laws: The Impact of United States v. Nippon Paper Industries, The’ 1078 Ref. 54:”the position of the London reinsurance defendants is not that the Sherman Act does not apply in the sense that a minimal basis for the exercise of jurisdiction doesn’t exist here...[their] position is that there are certain circumstances...in which the interests of another State are sufficient that the exercise of that jurisdiction should be restrained.”

⁴⁵ *Hartford Fire Insurance Co. et. al. v. Carlifornia et. al.*, 509 U.S. 764 (1993) 796.

⁴⁶ *Ibid*, 799.

⁴⁷ Gupta, ‘After Hartford Fire: Antitrust and Comity’ 2296; Sulcove, ‘Extraterritorial Reach of the Criminal Provisions of US Antitrust Laws: The Impact of United States v. Nippon Paper Industries, The’ 1079.

⁴⁸ *United States vs. Nippon Paper Industries Co., Ltd.; Jujo Paper Co., Inc.; and Hirinori Ichida* (United States District Court, D. Massachusetts, 1996), 57.

First, the Federal District Court in Massachusetts had to decide whether the criminal action brought against Nippon et al.,⁴⁹ alleged breach of the Sherman Act (more specifically the FTAIA, 15 U.S.C. § 6a), fell under US jurisdiction. Departing from the rulings of the US Supreme Court, the District Court held that the Hartford Fire rule only included extraterritorial jurisdiction concerning civil and not criminal matters. The Court rather applied the principle of personality as a linking point for US criminal jurisdiction.⁵⁰ Referring to this linking point, the District Court held that it had no jurisdiction over the criminal action brought against Nippon et al., as neither the provision of the FTAIA nor the Sherman Act itself clearly referred to the extraterritorial application of criminal law. Hence, the application of criminal charges outside the sovereign boundaries of the US is only possible when mentioned explicitly.

On appeal the First Circuit Court of Appeals rejected the District Court's decision and reversed it: Criminal provisions regarding the Sherman Act are to be applied in the same extraterritorial manner as the civil actions regarding the Sherman Act.⁵¹ First, the Sherman Act does not differentiate between civil and criminal matters,⁵² second the Hartford Fire rule of the Supreme Court has to be applied, since a true conflict arises only when Japanese law 'forces' the defendant to act in a way incompatible with US antitrust law.⁵³ The court held that the actions alleged by the complaint were illegal under both the US and Japanese laws. Moreover, it took § 403 Restatement (Third) of Foreign Relations Law into account and reasoned that the court had jurisdiction because of the international character of commerce.⁵⁴ Further, the court argued that it has to have jurisdiction because of the negative incentives which arise if no action would be taken against unlawful misconduct.⁵⁵

The result was that the effects doctrine was reaffirmed and has been applied under US law ever since, even though the application led to different disputes legally and diplomatically.

Japan did not only express her displeasure diplomatically, but it took part in the legal proceedings against Nippon et al. as an *amicus curiae*. In the *amicus* brief, the Japanese government made clear that an extraterritorial application of criminal jurisdiction was a breach of the principle of sovereignty and therefore, a breach of inter-

⁴⁹ Nippon was formed in 1993 by the merger between Jujo and Sanyo Kokusaku Co., Ltd., both Japanese corporations with their principal places of business in Japan (cf. *Ibid*).

⁵⁰ Cf. *Ibid*, 58f.: "*The modern doctrine of personal jurisdiction, thus, involves two distinct and independent bases for exercise of a sovereign's power: (1) physical presence of the person within the territorial boundaries of the sovereign, and (2) sufficient contacts with the sovereign to justify reaching him extraterritorially*".

⁵¹ *United States vs. Nippon Paper Industries Co., Ltd., et. al.* (United States Court of Appeals, First Circuit, 1997) 9.

⁵² *Ibid* 5.

⁵³ *Ibid* 8.

⁵⁴ *Ibid*.

⁵⁵ *Ibid*: Which is an example of law being influenced politically.

national law.⁵⁶ Clearly, a government taking part in judicial proceedings as an *amicus curiae* arguing against the legal and political findings of the US courts goes beyond diplomatic dissent. As already mentioned, the next level is a counter legislating system – as the United Kingdom established against the reach of US jurisdiction.

(2.) The Effects Doctrine as Part of Public International Law

Despite the fact that the effects doctrine was a key point in legal disputes nationally and internationally, more and more states adopted the effects doctrine. The effects doctrine is applied and valid in France, Italy, Greece, Austria, Spain, Switzerland,⁵⁷ Germany⁵⁸ and the Czech Republic. Moreover, even the Peoples Republic of China is applying the effects doctrine, which also prevails in Canada and South America.⁵⁹ The widespread application of the effects doctrine imposes a question of whether the effects doctrine is part of international law. The legal sources of international law are described in Art. 38 (1) ICJ-Statute.

First, one has to ask if the effects doctrine is part of international law in general, and then – more precisely – to what extent the effects doctrine is valid for international law standards in terms of drafting and application.

While the effects doctrine is not part of any international conventions or treaties in line with Art. 38(1)(a) ICJ-Statute, it may be found in customary international law in line with Art. 38(1)(b) ICJ-Statute (a.). However, even so, the effects doctrine still has its limits in international law (b.).

(a.) Customary International Law

Customary international law represents the part of international law not codified, but rather originating from an *opinio juris* – the legal opinion of states– and a *consuetudo*, a firm state practice.⁶⁰ Hence there are no binding measures identifying customary international law, as referred to in Art. 38 (1)(b) ICJ-Statute and the recent publication of the United Nation International Law Commission called “Identification of customary international law”.⁶¹

⁵⁶ Jennifer C Farlow, ‘Ego or Equity--Examining United States Extension of the Sherman Act’ 11 *Transnat'l Law* 1998 175, 200, ; Edieth Yvette Wu, ‘Evolutionary Trends in the United States Application of Extraterritorial Jurisdiction’ 10 *Transnat'l Law* 1997 1, 6.

⁵⁷ Art. 2 II Kartellgesetz (KG).

⁵⁸ Cf. § 130 II GWB.

⁵⁹ For an overview to comparative law cf. Peter-Tobias Stoll and Till Patrik Hoterhus in Jan Busche and Andreas Röhling, *Kölner Kommentar zum Kartellrecht Band 2* (Carl-Heymanns Verlag 2014) 1407 Ref. 97; Kurt Lipstein et. al., *International Encyclopedia of Comparative Law: Private international law. Restrictions on competition* (J. C. B. Mohr (Paul Siebeck) 1995) 134.

⁶⁰ Instead of others cf. v. Arnauld, *Völkerrecht* 107 Ref. 258.

⁶¹ UN International Law Commission, Identification of customary international law. Text of the draft conclusions provisionally adopted by the Drafting Committee (A/CN.4/L.872) (2016); It is taken for granted that the conclusions of the ILC represent the major opinions of the United

Art. (1)(b) ICJ-Statute states:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

[...]

b. international custom, as evidence of a general practice accepted as law

Therefore, one has to look for the general practice (consuetudo) before looking at the acceptance (opinion juris).⁶²

(aa.) Consuetudo – Firm State Practice

In accordance with the provisionally adopted draft conclusions of the ILC identifying customary international law, state practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions.⁶³ The different varieties are displayed in Conclusion draft 6[7] of the ILC publication.⁶⁴ Furthermore, the state practice has to be consistent and general, meaning that it must be widespread and sufficient, although a long duration for the practice is not required.⁶⁵

As pointed out, the effects doctrine was developed by the US judiciary and is a firm part of the US antitrust legal system. Thus, one may certify a firm state practice for the US. The question is whether the mentioned global (general) “adoption” of the effects doctrine by other states fulfills the ILC requirements of state practice.⁶⁶

The fact that the general idea of the effects doctrine, namely the validity and possibility of extraterritorial jurisdiction, is recognized and adopted around the world, implies that the general boundaries of the effects doctrine has become part of international customary law.⁶⁷

Nations Member States. Therefore, it is ought to represent the major legal opinion on the identification of customary law globally.

⁶² *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark and Netherlands)*, ICJ Judgement of 20.2.1969, ICJ Report 1969, 3 1969) § 77.

⁶³ Commission, Identification of customary international law. Text of the draft conclusions provisionally adopted by the Drafting Committee (A/CN.4/L.872) (2016) Draft Conclusion 5 [6]; Furthermore, the ILC draft conclusion 4[5] states that not only state practice, but also conduct of international organizations and other actors may be considered as practice – the ILC is following a mediating viewpoint to the controversial interpretation of the term practice i.a.w. Art. 38 I b.) ICJ-statute; cf. v. Arnould, *Völkerrecht* 107 Ref. 259.

⁶⁴ I.a.t. Art. 13 I UNCh the ILC, as side organ to the UN General Assembly, is one of three pillars codifying international law cf.v. Arnould, *Völkerrecht* 58 Ref 143; More detailed cf. Christian Tomuschat, ‘The International Law Commission-An Outdated Institution’ 49 German YB Int’l L 2006 77.

⁶⁵ Cf. Commission, Identification of customary international law. Text of the draft conclusions provisionally adopted by the Drafting Committee (A/CN.4/L.872) (2016) Draft Conclusion 8[9] No. 1, 2.

⁶⁶ Cf. Fn. 61.

⁶⁷ Ulrich Loewenheim et. al., *Kartellrecht: Kommentar* (3. Auflage edn, 2016) 72 Ref. 97; Rainer Bechtold, Wolfgang Bosch and Ingo Brinker, *EU-Kartellrecht Kommentar* (3rd rmd edn, 2014)

Yet the detailed elaboration and application of the effects doctrine is highly diverse. Consequently, a consistent international application of the effects doctrine, as required by the conditions for the formation of customary international law, goes beyond the scope of this work.

(bb.) *Opinio Juris*

Art. 38 (1) (b) ICJ-Statute states that the International Court of Justice (ICJ) shall apply “international custom, as evidence of a general practice accepted as law”. The condition of an *opinio juris* is displayed in the acceptance of international custom as law. This acceptance has to be expressed by every state, although the way in which it is expressed may differ. Following the Nicaragua decision of the ICJ concerning the effects doctrine, the globally widespread and profound application of the effects doctrine is evidence that a firm state practice is required for international customary law, indicating a sufficient level of and for *opinio juris*.

(b.) Limits of Effects Doctrine in International Law

Still, the (general) effects doctrine has boundaries in international law.⁶⁸ These boundaries are posed by principles of international law (aa.) as well as international contract law (bb.).

(aa.) Principles of International Law

Principles of international law are the essence of international customary law that they are of such a great consent and of such high validity for international law that their application need not be justified by the verification of a firm state practice and an *opinio juris*.⁶⁹ Two principles setting a boundary for the effects doctrine are – as demonstrated on the basis of the Lotus case – the principle of territorial sovereignty and the principle of nationality.⁷⁰ As shown beforehand, the breach of those principles has before led to several legal and diplomatic disputes, whilst breaches had to be justified. One may hold that the principles of territorial and national sovereignty do not fit international competition law nor international antitrust law. Therefore, other principles of international law, fitting international competition and antitrust law, have to be determined. A principle of international law concerning the effects

6 Ref. 18; Dreher and Kulka, *Wettbewerbs- und Kartellrecht: eine systematische Darstellung des deutschen und europäischen Rechts* 294 Ref. 767ff.

⁶⁸ Peter-Tobias Stoll and Till Patrik Holterhus in Busche and Röhling, *Kölner Kommentar zum Kartellrecht Band 2* 1409 Ref. 101ff.; Loewenheim et. al., *Kartellrecht: Kommentar* 72 Ref. 97.

⁶⁹ Peter-Tobias Stoll and Till Patrik Holterhus in Busche and Röhling, *Kölner Kommentar zum Kartellrecht Band 2* 1410 Ref. 104; cf. Graf Vitzthum in Wolfgang Graf Vitzthum and Alexander Proelß, *Völkerrecht* (De Gruyter 2016) 54 Ref. 142.

⁷⁰ Cf. § 2 A I.) 1.) Fn. 9.; also in Peter-Tobias Stoll and Till Patrik Holterhus in Busche and Röhling, *Kölner Kommentar zum Kartellrecht Band 2* 1411 Ref. 105; Loewenheim et. al., *Kartellrecht: Kommentar* 74 Ref. 102, 103: are referring to a principle of *non-interference*, which is ought to refer to the principles of territory and nationality.

doctrine is the prohibition of the abuse of power. It prohibits the application of the effects doctrine in times of imbalances between a specific cause and a state's action, so where states are not entitled to enforce jurisdiction.⁷¹ Whilst it is highly debated whether the prohibition of the abuse of powers is a tenet of international law,⁷² one might interpret it to be accepted as a general principle by “the civilized nations” under Art. 38 (1)(c) ICJ-Statute.⁷³ It can be found in the evolution of the effects doctrine in the US (e.g. in the *Timberlane-Mannington* rule, etc.), requiring the application of the effects doctrine to be reasonable and justified. Still, the interest in the prohibition of the abuse of power may be achieved by subsuming the usage of state powers under the acknowledged and existent regulations of state powers – rather to look if state action is within its boundaries rather than to look if the action is out of bounds.⁷⁴

Furthermore, the principle of non-interference could limit the usage of the effects doctrine as the “emitting state” could impose its antitrust laws on the “induced state”.⁷⁵ One opinion sees the principle of non-interference as a distinct principle.⁷⁶ The prohibition of interference applies when qualified interferences in foreign state matters occur. This is only the case a state imposes a certain degree of pressure onto another to alter its will on the application of laws. If and when a judicial conflict in international law reflects such “pressure” is highly debatable.

Another opinion denies the existence of the sole principle of non-interference, as it is simply the essence of the principle of territorial sovereignty. There are limitations to the effects doctrine in the principle of territorial sovereignty, but in a general measure; e.g. through political disputes.⁷⁷ second opinion is favorable, as the creation of a principle which simply represents the essence of another principle feels artificial. Furthermore, the argument that the principle of non-interference according to Art. 2 (7) UNCh only prohibits the UN from interfering in the affairs within the jurisdiction of the Member States but does not apply to the Member States, is

⁷¹ Peter-Tobias Stoll and Till Patrik Holterhus in Busche and Röhling, *Kölner Kommentar zum Kartellrecht Band 2* 1412 Ref. 110; Stadler in Eugen Langen, Hermann-Josef Bunte and Christian Bahr, *Kartellrecht, Deutsches Kartellrecht, Band 1* (12. Aufl. edn, 2014) 1889 Ref. 144 ff.

⁷² Approving: *Certain German Interests in Polish Upper Silesia, Series A, Nr. 7, 30* (PCIJ, 1925); *Nottebohm Second Phase, ICJ Reports 1955, 26* (ICJ, 1955); Dissenting: Alexandre Kiss, ‘The Abuse of rights’ 1 *Encyclopedia of Public International Law* 1992 4; Cf.

⁷³ Kiss, ‘The Abuse of rights’ Ref. 9; Busche and Röhling, *Kölner Kommentar zum Kartellrecht Band 2* 1412 Ref. 110; Stadler in Langen, Bunte and Bahr, *Kartellrecht, Deutsches Kartellrecht, Band 1* 1889 Ref. 145.

⁷⁴ Cf. Busche and Röhling, *Kölner Kommentar zum Kartellrecht Band 2* 1413 Ref. 110; Knut Ipsen, Volker Epping and Eberhard Menzel, *Völkerrecht: ein Studienbuch* (6.rmd edn, Beck 2014) § 39 Ref. 44.

⁷⁵ Stadler in Langen, Bunte and Bahr, *Kartellrecht, Deutsches Kartellrecht, Band 1* 1890 Ref. 146.

⁷⁶ Ibid.

⁷⁷ Peter-Tobias Stoll and Till Patrik Holterhus in Busche and Röhling, *Kölner Kommentar zum Kartellrecht Band 2* 1411 Ref. 108.

convincing. Therefore, the principle of non-interference is not a principle concerning the effects doctrine and extraterritorial jurisdiction as these remain within the control of states.

Following the “principle of non-interference”, the so-called “principle of the balance of interest” could establish limitations to the effects doctrine. The principle asks for a balance of the measures imposed by one state compared to the opposed interests of the other (induced) state.⁷⁸ When it comes to extreme imbalance between emitting state measures and induced state interests, the emitting state measures have to take a step back.⁷⁹ This principle of balance of interests can be found in the US antitrust law, displayed in the legal concept of “comity” as demonstrated above.⁸⁰ Another opinion does not agree with the acceptance of the principle as international law, as there is a lack of a firm state practice and *opinio juris* of the principle.⁸¹ To align the effects doctrine with international law requires the principles to be a firm part of international law. As the state practice is not as firm as required in global relation, the mentioned second opinion is right. Therefore, the “principle of balance of interests” is not part of international law and consequently is insufficient to set limits on the effects doctrine.

In the end, the existing principles of international law can only set up very general limitations on the effects doctrine.⁸²

(bb.) International Contract Law

Besides international customary law and international law principles, the effects doctrine may be altered or limited by international contract law. As already said and stated in the *Lotus* case, states may take action within their territory and if they wish to extend their jurisdiction, they have the opportunity to do so. Consequently, they have the contractual freedom to arrange extraterritorial jurisdiction through international law contracts. This may not allow general limitations to the effects doctrine but introduces the possibility of specific limits thereto.

(c.) International Law Principle

Clearly, the effects doctrine is part of international custom, but not of such high validity for international law that one may subsume it to be a general principle of international law in line with Art. 38 (1)(c) ICJ-Statute and the discussion above.

⁷⁸ *Phonak/Resound, VI-Kart 8/07 (V)* (OLG Düsseldorf, 2008); EC, Aluminium imports from eastern Europe, IV/26.870 (1984); Stadler in Langen, Bunte and Bahr, *Kartellrecht, Deutsches Kartellrecht, Band 1 1890 Ref. 147*.

⁷⁹ *Ibid.*

⁸⁰ Cf. Timberlane-Mannington Rule.

⁸¹ Peter-Tobias Stoll and Till Patrik Holterhus in Busche and Röhling, *Kölner Kommentar zum Kartellrecht Band 2 1413 Ref. 111*.

⁸² *Ibid.*; Michael Martinek, ‘Das uneingestandene Auswirkungsprinzip des EuGH zur extraterritorialen Anwendbarkeit der EG-Wettbewerbsregeln’ 1989 IPRax 1989 347 349.

(3.) Intermediate Result

The effects doctrine is a prominent example of a legal concept which was founded in one state, emerged globally and found such great application and acceptance that it is considered to be part of customary international law. Furthermore, it is notable that the effects doctrine is able to pierce the veil of such a traditional concept of law as the rule of strict territoriality. Therefore, the effects doctrine may be said to represent a modern approach – not only regarding the history of law concepts, but also technically.

cc.) Pseudo Territorial Approaches

As shown above, the effects doctrine has led to severe disputes in international law. Furthermore, the linkage to the classic principles of territoriality hindered states from applying their laws, e.g. their antitrust laws, to foreign misconduct. Therefore, certain states tried to modify the concept to avoid disputes, whilst ensuring the application of their laws. The most prominent example of such a modification is the so-called implementation test.

The states applying the implementation test⁸³ nominally follow the concept of subjective territoriality. For the application of their competition laws, they demand that the misconduct is carried out domestically, leastwise it has to have links to conduct being assigned to foreign entities carrying on business within its state territory.⁸⁴ This pseudo-territorial approach shall be examined by the example of EU law.

(1.) Economic Unit

In the classic territorial approach, the offending company is held liable only within the territory of the punishing state. With the application of the effects doctrine there are no relevant borders to jurisdiction. In the implementation test approach, the state is nominally sticking to the principle of territoriality but extends the interpretation to what is meant by the company itself. The economic unit as a whole is held liable, rather than the single legal entity located within the state boundaries.⁸⁵

The central legal measures of EU antitrust law are Arts. 101, 102 TFEU (previously Arts. 85, 86 ECC). Art. 101 TFEU, prohibits all “agreements between undertakings...which have... as their object or effect the prevention, restriction or distortion of competition within the internal market”. Accordingly, the term ‘undertaking’ is interpreted as every economically active entity, regardless of its legal or financial structure.⁸⁶ Therefore, the wrongdoing ‘firm’ is not the legal company it-

⁸³ Basedow, *Weltkartellrecht: Ausgangslage und Ziele, Methoden und Grenzen der internationalen Vereinheitlichung des Rechts der Wettbewerbsbeschränkungen* 15f: Basedow calls the implementation test the doctrine of pseudo-territoriality: It is used in the EU, Kanada and Japan.

⁸⁴ Ibid.

⁸⁵ Ibid 16.

⁸⁶ *Höfer v Macrotron*, C-41/90, ECLI:EU:C:1991:161 (ECJ, 1991)Ref. 21; *Dansk Rørindustri et. al. IEC, joint case C-189/02 P, C 202/02 P, C-205/02 P until C-208/02 P and C-213/02 P* (ECJ,

self, but the multi-corporate enterprise as a whole, which can be composed of many different legal personalities.⁸⁷ Therefore, the EU has jurisdiction in every single case in which a multi-corporate enterprise acting within the EU territory. Pursuant to the cartel prohibition of Arts. 101 and 102 TFEU, a breach of the prohibition exists if an undertaking within the EU violates the cartel prohibition. At first glance, the place of legal implementation lies within the borders of the EU. On further examination, however, the classic theory of subjective territoriality is modified: While linking the “jurisdiction” of the EU to the European term of an undertaking, the EU law refers to the concept of subjective territoriality, but effectively extends the jurisdiction of antitrust matters extraterritorially.⁸⁸ Compared to the classical territorial approaches and the effects doctrine, the doctrine of economic unit overlaps with both and appears to be a compromise. On the one hand, the doctrine of economic unit complies with the concept of territoriality, as the EU law lies within its territorial sovereignty.⁸⁹ On the other hand, however, the linkage of the implementation test to the European concept of economic entity implies a similarity to the extraterritorial application of the effects doctrine.

(2.) Implementation Test

Even if the doctrine of economic unit covers most cases, the scope of jurisdictional applicability ends where wrongdoing firms do not actually have undertakings within the EU. The ECJ had to deal with this situation for the first time in the *Wood Pulp* case.⁹⁰ In 1984, the European Commission imposed sanctions against a wood pulp producing cartel from the US, Canada, and Scandinavia and two associations representing wood pulp products associations (called KEA) because they fixed prices for wood pulp.⁹¹ The decision was of great interest because it was anticipated that the ECJ would approve the effects doctrine for EU law. In the end, the ECJ did not do so but established its own test, the so-called implementation test.⁹² The ECJ extended the EU jurisdiction by pointing towards the place of conduct of the named cartel activities, as the sanctioned conduct was the sole direct delivery of goods to

2005); *Areva et. al. v. EC, joint case C-247/11 P and C-253/11 P* (ECJ, 2014) Ref. 50; *Geigy v EC, C- 52/69* (ECJ, 1972) Ref. 45; Kersting in Loewenheim et. al., *Kartellrecht: Kommentar* 88 Ref. 2; Christian Bürger, ‘Unternehmensinterne Aufteilung einer Geldbuße der Kommission’ WuW 2015 348.

⁸⁷ Cf. *Areva et. al. v. EC, joint case C-247/11 P and C-253/11 P* Ref. 125.

⁸⁸ Jürgen Basedow, ‘International Antitrust: From Extraterritorial Application to Harmonization’ 60 *La L Rev* 1999 1037 1040.

⁸⁹ Also cf. Baetge, ‘Globalisierung des Wettbewerbsrechts: eine internationale Wettbewerbsordnung zwischen Kartell- und Welthandelsrecht’ 267.

⁹⁰ *Woodpulp, joint Decision 89/95* (ECJ, 1988).

⁹¹ *Ibid* cf. 5233-5239.

⁹² Martinek, ‘Das uneingestandene Auswirkungsprinzip des EuGH zur extraterritorialen Anwendbarkeit der EG-Wettbewerbsregeln’ 347.

the EU market.⁹³ The ECJ expanded the interpretation of the term conduct to an extent, which included the – normally separately interpreted⁹⁴ – effects to the EU market.⁹⁵ The conduct of the cartel at issue, such as price fixing, contracting, advertising etc., did not matter to the ECJ. The ECJ justified its decision with the argument that anticompetitive conduct regarding Art. 81, 82 and 85 ECC (now Arts. 101, 102, 105 TFEU) is composed of two behavioral characteristics: the formation of a cartel and its enforcement.⁹⁶ However, the sole place of formation of a cartel cannot be the main argument for the justification of finding jurisdiction to address anticompetitive conduct, because it would create an easy opportunity for the firms to elude EU jurisdiction by forming the cartel extraterritorially.⁹⁷ The pivotal point in the matter is the place of the anticompetitive conduct.⁹⁸

Similarities to the effects doctrine tempted some commentators to argue that the application is a de facto application of the effects doctrine.⁹⁹ Only relating to the results of the cartel activities (effects), assigning its conviction to the conduct of the cartel, de facto makes the effects doctrine applicable in the EU. Other commentators disagree with the de facto similarity of this ECJ approach and state that the implementation test has a smaller jurisdictional scope than the effects doctrine if the term ‘conduct; is interpreted as a positive or active behavior.’¹⁰⁰

That the Wood Pulp decision was the decision which allegedly created the implementation test raises the question of whether the ECJ even wanted to establish a new jurisdictional doctrine, like the implementation test, or whether it quietly wanted to establish the effects doctrine – trying to avoid diplomatic disputes.

To find out which interpretation is right, one has to directly compare the two doctrines.

⁹³ Ibid.

⁹⁴ In International law, the terms *conduct* and *achievement*, as well as *behavior* and *effects* are to be interpreted separately to find the correct *forum*. All terms are to be considered as norms of conflict. Especially in antitrust law, because of its similarity to law of torts and criminal law, the correct *lex fori* was to be found in the *locus delicti commissi* so far; Cf. Ibid 351.

⁹⁵ Cf. Ibid 351.

⁹⁶ *Woodpulp, joint Decision 89/95 Ref. 16.*

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Following the ECJ decision *ibid*; Cf. Martinek, ‘Das uneingestandene Auswirkungsprinzip des EuGH zur extraterritorialen Anwendbarkeit der EG-Wettbewerbsregeln’ 350ff.; Martin Schödermeier, ‘Die Vermiedene Auswirkung’ WuW 1989 21.

¹⁰⁰ Cf. Basedow, *Weltkartellrecht: Ausgangslage und Ziele, Methoden und Grenzen der internationalen Vereinheitlichung des Rechts der Wettbewerbsbeschränkungen* 19; e.g. Canadian jurisdiction (Restrictive Trade Practice Commission of 1965) asking for “an overt act which takes place in Canada” similar to the implementation test. Smaller scope of implementation test, because of e.g. low-price arrangements on foreign soil near to the states border, pulling consumers to their country.

A real extraterritorial application, such as the application of the effects doctrine, does not link to territorial sovereignty at all. As shown, the only requirement of foreign conduct that has to be met, is the creation of an emission effecting the internal market of the jurisdiction-seeking state. Therefore, the pivotal point of differentiation between the implementation test and the effects doctrine is the place of conduct.

To examine what is meant by ‘place of conduct’, one has to define the terms ‘place’ and ‘conduct’. As outlined already, the effects doctrine does extend the state’s jurisdiction extraterritorially. Therefore, certain requirements as to the place of misbehaving conduct are irrelevant. The conduct has to have an effect on the internal market of the jurisdiction-seeking state. Conduct or behavior of a firm can be active or passive, intentional or negligent.

In the USSC case *Hartford Fire*, the effects doctrine is considered applicable when foreign economic entities intentionally want to “produce and did in fact produce some substantial effect in the United States”. The US Supreme Court limits the effects doctrine to intentional behaviors, while negligent conduct is not discussed – although the Court is silent as to the degree of intent. Intent is defined as the knowledge of all statements of facts of (criminal) conduct.¹⁰¹ The different degrees of intention vary from direct intent (*dolus directus*)¹⁰² to eventual intent (*dolus eventualis*).¹⁰³ The embrace of direct intention is indisputably part of conduct which is to be sanctioned under the effects doctrine.¹⁰⁴ It is not clear if indifferent conduct will also be considered as intentional and thus granting extraterritorial jurisdiction under the effects doctrine. In *Hartford Fire*, the foreign cartel intentionally fixed prices to affect the US market, therefore, an intent of antitrust infringing conduct cannot be detected. The fact that the Supreme Court rather looked at the effects caused in the US market by the Hartford insurance companies, leads to the conclusion that the intentions of the infringing parties do not really matter. Rather, the effect of the active conduct on the US market is at stake.

The higher the effects to the US market – intentionally or not – the more it is likely that the US administrations apply their antitrust regimes. Therefore, one may presume that indifferent intention to the conduct will not hinder US extraterritorial jurisdiction. An extension to indifferent intention to debatable conduct cannot be detected. The fact that the matter of intention is hard to verify without witnesses supports the assumption: the US jurisdiction would be harshly limited if it was halted because of lack of evidence.

¹⁰¹ Cf. for other areas, definition from German criminal and infraction law: Claus Roxin, *Strafrecht, Allgemeiner Teil, Band I, Grundlagen, Der Aufbau der Verbrechenslehre*, vol 4 (C.H. Beck 2006) 437 Ref. 4.

¹⁰² *Dolus directus* means target-oriented behavior; cf. Ibid 438 Ref. 7.

¹⁰³ *Dolus eventualis* means indifferent (careless) intention; *ibid*.

¹⁰⁴ Cf. *Hartford Fire Insurance Co. et. al. v. Carlifornia et. al.*, 509 U.S. 764 (1993) 755; *United States vs. Nippon Paper Industries Co., Ltd., et. al. 2.*

To conclude, in US competition and antitrust law the effects doctrine extends US jurisdiction, when active misbehavior, whether intentionally or not, affects the US economy by directly intervening in the market or by its indirect effects to the market.

According to the ECJ, the place of conduct has to be within the EU market.¹⁰⁵ As the wood pulp cartel directly sold its goods to the EU market, their conduct is included by the means of territorial jurisdiction. This indicates that the ECJ expanded its interpretation of the term ‘conduct’. As long as the direct foreign misbehaving conduct affects the EU market, it is ought to be considered subject to of EU jurisdiction, because it de facto takes place within the EU. As such, the ECJ denied jurisdiction over the KEA association, which did not actively take part in the conduct relevant, namely the direct delivery to the EU market.¹⁰⁶ The association did not produce, sell or trade in the wood pulp goods,¹⁰⁷ the KEA merely suggested prices to the producing parties, which while not distinguishable from price fixing, ultimately was not an EU-market-affecting procedure.¹⁰⁸

The difference between active EU market implementation and non-EU market implementation is the key point in the differentiation between the implementation test and the effects doctrine. The ECJ applied the concept of territorial sovereignty,¹⁰⁹ expanding its jurisdiction arguably because of a de facto implementation of conduct within the EU. The antitrust authorities of the US did not intervene, neither diplomatically nor legally, regarding international law.

Therefore, it seems as if the ECJ was not intending to extend EU jurisdiction by the application of the effects doctrine, nor did the ECJ intend to establish a new jurisdictional doctrine like the so-called implementation test. Rather, the dependence on the concept of territorial sovereignty shows that the ECJ sought to avoid international conflict and therefore used the concept of territorial sovereignty superficially, whilst widening its interpretation.

The arguments of Martinek that the differentiation between conduct and effects of anticompetitive behavior went wrong, and the conduct of the KEA were effects rather than conduct itself, sounds artificial. The causal procedure, from organizing a cartel to price fixing to actual trade to the EU is comprehensive in this case. There is no interference between the participation of the KEA in the actual trading acts of the cartel members. As effects can only be the results of anticompetitive behavior, and not anticompetitive behavior itself (like the actual and intentional trade to a fixed price within the EU), the KEA cannot be accused of producing anticompetitive effects. On the other hand, the different understandings of anticompetitive behavior and its effects raises the question of the interpretation of causal events, the wide or

¹⁰⁵ See above the *locus delicti commissi*.

¹⁰⁶ *Woodpulp, joint Decision 89/95 5245 Ref. 27.*

¹⁰⁷ *Ibid Ref. 24.*

¹⁰⁸ *Ibid.*

¹⁰⁹ Loewenheim et. al., *Kartellrecht: Kommentar* 77 Ref. 113.

narrow interpretation of the condition-sine-qua-non formula and the requirement of an objective attribution: while the implementation test requires a connection of immediacy regarding the direct effect on the market, the effects doctrine does not.

The solution to the dispute about the conditions of EU (extra-) territorial jurisdiction was uncertain, because the ECJ did not really point out its dedicated opinion. Recently, the ECJ had to deal with extraterritorial application in its *InnoLux* case.¹¹⁰ A foreign corporation behaved in an anticompetitive manner, which was sanctioned by the European Commission as a breach of Arts. 101 and 102 TFEU.¹¹¹ The ECJ clarified that an indirect market effect is part of EU jurisdiction. Vertical integrated foreign corporations fixed prices for LCD components. These price-fixed components formed part of assembled end products. The assembled product was sold to third parties, which traded the end product within the EU market.¹¹² Compared to the *Wood Pulp* case, the ECJ did not require a connection of immediacy. Rather, it extended its understanding of market-affecting conduct to indirect effects.¹¹³ This shows that the commentaries of Martinek and Schödermeier pointed in the right direction: The ECJ did want to include effects, therefore de facto applied the effects doctrine without naming it.

Consequently, the interpretations of a so-called implementation test of the ECJ, which had a limited scope of extraterritorial jurisdiction, were mistaken.¹¹⁴ Recent commentators even suggest that the ECJ interpretation of the EU jurisdictional scope has a “longer arm” than the US extraterritorial application of the effects doctrine nowadays.¹¹⁵ A comparison has to be drawn to the US case of *Motorola*, which coincidentally had very similar facts to the ECJ case *InnoLux*. Mobile manufacturing entity, *Motorola*, manufactured mobile phones outside the US. It bought LCD displays from *AU Optronics*. *AU Optronics*, *Samsung et al.*, formed a cartel of LCD displays and fixed prices for these, which was all classified as foreign conduct. In the end, the mobile phones were traded within the US market. The US Court of Appeals stated that the US FTAIA does not extend US jurisdiction to the stated case, as a direct, substantial, and reasonably foreseeable effect on trade or commerce with foreign nations was not given according to 15 U.S.C. § 6a.¹¹⁶ The difference between *Motorola* and the *InnoLux* case of the ECJ, is that *Motorola* sought redemption for the anticompetitive behavior of their business partner *AU Optronics*, while the European Commission fined *InnoLux* for their cartel commitment. Therefore,

¹¹⁰ *InnoLux Corp v. EC*, C-231/14 P (ECJ 2015) Ref. 2.

¹¹¹ *Ibid.*

¹¹² Cf. Loewenheim et. al., *Kartellrecht: Kommentar IntKartR Ref. 76*.

¹¹³ *Ibid.*

¹¹⁴ Such as: Basedow, *Weltkartellrecht: Ausgangslage und Ziele, Methoden und Grenzen der internationalen Vereinheitlichung des Rechts der Wettbewerbsbeschränkungen* 19.

¹¹⁵ Loewenheim et. al., *Kartellrecht: Kommentar IntKartR Ref. 76*.

¹¹⁶ *Motorola v. AU Optronics et. al.* (United States Court of Appeals Seventh Circuit, 2014) 19 ff.

the sources of the charges are slightly different. Consequently, even if the arm of the EU jurisdiction appears not to be longer than that of the US, still the arms of jurisdiction seem to be comparably long.

In conclusion, the so-called implementation test approach of the ECJ de facto appeared to be very similar to the effects doctrine as implemented in US jurisprudence.

(3.) Lex Loci Solutionis

However, compared to other legal areas of EU law, in competition law the ECJ extended EU jurisdiction by another legal approach: the lex loci solutionis approach. The lex loci solutionis approach refers to the interpretation of the economic term 'market' (which is certainly a term of increasing significance for international commercial law).¹¹⁷ The term 'market' is defined as the place where the interests of competitors collide and meet the opposite side; the place of competitive conflict of interests.¹¹⁸ The lex loci solutionis extends jurisdiction to every legal or natural person dealing within or with the EU market, therefore, it is also called the principle of the marketplace. Furthermore, it is only applicable when effects to the considered marketplace are, objectively, measurable. The ECJ established this loci solutionis doctrine in its Google case extending the jurisdiction of the EU data protection directive extraterritorially.¹¹⁹ The provisions of the data protection directive regarding jurisdiction of the EU (Art. 4 (1)(a)) were limited to data processing within the EU. Therefore, Google et al. were able to process the data in foreign countries, e.g. the US, referring to the territorial principle, claiming that US- and not EU law was applicable to the data processing procedures. As the data protection laws and the legal protection of the right of privacy were more comprehensive in the EU, the data processing firms were able to engage in forum shopping and benefit from these higher provisions. That is why the EU Parliament and Council implemented the lex loci solutionis approach to the General Data Protection Regulation, which came into effect in May 2018.¹²⁰

The similarities between the lex loci solutionis approach and the effects doctrine are quite remarkable. Both principles concentrate on the domestic market and extend jurisdiction to foreign conduct when it has an effect to the market. In fact, the principles are comparable to such an extent that lex loci solutionis is even called the sister of the effects doctrine by von Bar.¹²¹ The only differences seem to be that

¹¹⁷ Christian v. Bar and Peter Mankowski, *Internationales Privatrecht, Band I*, vol 2 (C.H. Beck 2003) § 7 I Ref. 61.

¹¹⁸ Ibid Ref. 62.

¹¹⁹ *Google Inc.*, C-131/12 (ECJ 2014) Ref. 100; Jürgen Kühling, Anastasios Sivridis and Christian Seidel, *Datenschutzrecht* (CF Müller GmbH 2015) 33 Ref. 66; See EU Data protection directive, 95/46/EC (1995).

¹²⁰ See Art. 3 EU General Data Protection Regulation, 2016/679 (2016) and its recitals 22, 23 regarding the territorial scope of the regulation.

¹²¹ v. Bar and Mankowski, *Internationales Privatrecht, Band I* §7 I Ref. 63.

the effects doctrine developed by antitrust law seeks to protect the functioning of the market, whereas the *lex loci* approach seeks to protect the consumer within the market.¹²²

Those similarities and the jurisprudence of the ECJ imply that the objections of the ECJ to extraterritorial jurisdiction has faded over time and it seems that there is no longer a reason for the application of the effects doctrine regarding EU jurisdiction. However, the ECJ is yet to issue a clear position statement on the matter.

(4.) Intermediate Result

Pseudo-territorial approaches to extraterritorial jurisdiction are either irrelevant or similar to the effects doctrine which is considered the prevailing approach to jurisdiction in antitrust law.

dd.) Measurement

States acknowledged the described problems of territoriality and developed reasonable solutions to it. Awareness of the problems – without direct measurement of the different solutions – is, in itself, also positive.

c.) Conclusion to Territorial Piercing Doctrines

The concept of territoriality is firmly anchored in international law, but extraterritorial approaches are also recognized and applied. The acceptance of extraterritorial jurisdiction very much depends on the area of law at issue.

3.) *Prescriptive Jurisdiction and Antitrust Law Concluded*

The extraterritorial application of prescriptive jurisdiction in antitrust law is – theoretically – meeting the needs of a disrupted and fragmented international antitrust system.

II) Jurisdictional Enforcement

One has to consider the practical effect of international antitrust application by its actual jurisdictional enforcement. The enforcement authorities of a state are obligated to observe the legal measures set up by the prescriptive branch of the state. Domestic judicial antitrust enforcement will not be part of discussion. Extraterritorial enforcement attracts attention. How do authorities deal with trans-border enforcement of a state's legal standards in antitrust law and how are disputes settled? To answer these questions examples of international disputes must be examined.

¹²² Ibid.

The most important two aspects of how states enforce their laws are: the system of government and the affiliation to a legal area, as these areas set the boundaries for a state's legal and political conduct. The executive branch of a state has to deal with the obligatory boundaries and set up the administrative rules that bind them.

1.) The Evolution of US Antitrust Enforcement Provisions

How state's antitrust agencies enforce the antitrust law, will be demonstrated by two aspects of the evolution of the US Antitrust Law Enforcement Guidelines.¹²³ First, the US antitrust law is the oldest functioning antitrust law system and, therefore, firmly implemented in the government enforcing executive branch. Second, as will be outlined, the US enforcement provisions link closely to the constantly changing common law precedents of the US Supreme Court and diplomatic events and, therefore, are of contemporary modern shape.

a.) The Structure of US Antitrust Enforcement Provisions

Before taking a closer look at the legal material measurements of the US Antitrust Enforcement Provisions, the remarkable structure of the provisions needs to be addressed. Every Enforcement Guideline has four chapters. Chapter One begins with an introduction to the guidelines, giving an insight to its motivations. Chapter Two gives an overview of the applicable antitrust law, e.g. Sherman Act, Webb-Pomerene Act, FTAIA etc. Chapter Three outlines the main principles of international conduct, such as the effects test, giving distinct examples for each case. Chapter Four outlines the actual procedural rules of the antitrust agencies. The structure shows that the enforcement guidelines enumerate the applicable law. To some extent it seems as the enumeration of a legal exposition.¹²⁴ Furthermore, the fact that the guidelines give a detailed overview to principles of antitrust law and an overview of procedural rules in antitrust law including detailed examples leads to the conclusion that: (1.) the Enforcement Guidelines provide neat and comprehensive instructions for the administrative agencies and (2.) the Enforcement Guidelines give a neat and comprehensive overview of the binding law and its implementation, creating a certain legal security for whoever is dealing with antitrust matters. The question, whether the Guidelines are setting up an administrative self-binding character (and corresponding title claims), can be left undetermined as part of private antitrust matters.

¹²³ Cf. U.S., Antitrust Enforcement Guidelines for International Operations (1988); U.S., Antitrust Enforcement Guidelines for International Operations (1995); U.S., Antitrust Guidelines for International Enforcement and Cooperation (2017) of the U.S. Department of Justice and Federal Trade Commission.

¹²⁴ Cf. Robert G Shimp, 'A Critical Review of the Justice Department's 1988 Antitrust Guidelines for International Operations' 14 *NCJ Int'l L & Com Reg* 1989 287, 288.

b.) US Antitrust Enforcement Guideline for International Operations
of 1977 and 1988

The 1977 Guidelines were implemented under the administration of President Carter and were “intended to help businesses plan transactions which the Department of Justice is not likely to challenge, and to see which transactions are likely to require detailed factual inquiry by the enforcement agencies”.¹²⁵ The Guidelines did not apply to private, state or foreign antitrust actions by US agencies, they were a simple overview to the Departments of Justice (DoJ) practice enforcing US antitrust law and an invitation for criticism and discussion.¹²⁶ The legal statements were vague, as legal certainty could not be established.¹²⁷ The Guidelines of 1988,¹²⁸ established under the administration of President Reagan, did not change in purpose, as they also sought to limit legal uncertainty for businesses. Legal uncertainty might limit unobjectionable transactions or ward off efficient arrangements that benefit consumers. Furthermore, the political utility of the Guidelines was to promote domestic investment by local and foreign firms.¹²⁹ Legally, the Guidelines represent the evolution of international jurisdiction within the US. Especially, the Guidelines show similarities to the Timberlane-Mannington Rule, which generally approves the effects doctrine, but showed a de facto limitation of the DoJ application:

Although the [Foreign Trade Antitrust Improvements Act of 1982] extends jurisdiction under the Sherman Act...the Division is concerned only with adverse effects on competition that would harm U.S. consumers by reducing output or raising prices.¹³⁰

Therefore, the competent authority not only enforced binding law through FTAIA, but also interpreted its extraterritorial application referring, to a limited extent, to highest judicial decisions.

¹²⁵ Ibid 289; U.S., Antitrust Enforcement Guidelines for International Operations (1977).

¹²⁶ Joseph P Griffin, ‘A Critique of the Justice Department’s Antitrust Guide for International Operations’ 11 Cornell Int’l LJ 1978 215.

¹²⁷ Ibid, 254; Shimp, ‘A Critical Review of the Justice Department’s 1988 Antitrust Guidelines for International Operations’ 289.

¹²⁸ U.S., Antitrust Enforcement Guidelines for International Operations (1988).

¹²⁹ The purposes can be considered to be part of the protectionist “America first” politics of *Ronald Reagan’s* advisory. Cf. also purposes of the author and former Assistant Attorney General and in charge of the Antitrust division of the DoJ Donald I. Baker: “*The risk of U.S. antitrust law deterring efficiency-promoting investments and efforts by domestic and foreign firms is high. A wordy but generally soothing restatement of federal enforcement policy may make a positive contribution in such circumstances.*” Donald I Baker and Bennett Rushkoff, ‘The 1988 Justice Department International Guidelines: Searching for Legal Standards and Reassurance’ 23 Cornell Int’l LJ 1990 405, 406.

¹³⁰ U.S., Antitrust Enforcement Guidelines for International Operations (1988).

c.) US Antitrust Enforcement Guideline for International Operations of 1995

In 1995, the DoJ and FTC published its reformed Antitrust Enforcement Guidelines for International Operations. As illustrated beforehand, the limited extraterritorial application of antitrust jurisdiction by the Timberlane-Mannington Rule was given up by the US Supreme Court in its Hartford case. Conversely, the sharp breach in the application of extraterritorial jurisdiction is displayed in 3.1. of the 1995 Guidelines.¹³¹ The agencies developed a new modern doctrine interpreting the extraterritorial reach of US antitrust jurisdiction. Sovereign public acts, such as licensing a product, can have economic effects upon another state. To avoid fundamental diplomatic and legal conflicts, those sovereign acts were excluded from the US judicial problems. In 3.33 they formulated the act of states doctrine,¹³² which prohibits jurisdiction of US courts if the matter concerns the sovereign public act:

It is a doctrine of judicial abstention based on considerations of international comity and separation of powers and applies only if the specific conduct complained of is a public act of the foreign sovereign within its territorial jurisdiction on matters pertaining to its governmental sovereignty. The act of state doctrine arises ...if ... (1) the specific conduct complained of is a public act of the sovereign, (2) the act was taken within the territorial jurisdiction of the sovereign, and (3) the matter is governmental, rather than commercial.

The act of states doctrine has its origin in the application of the above-mentioned separation of powers model.¹³³ As the separation of powers model refers to national legal matters, imposing containing reciprocal intervention, the Antitrust Guidelines extend interventions regarding sovereign acts internationally.¹³⁴

The triad of limitation of extraterritorial jurisdiction shows that the agencies interpreted the binding antitrust case law with detailed and specific awareness of problems.

aa.) Prevention of Diplomatic Disputes – US International Antitrust Enforcement Assistance Act of 1994

Diplomatic disputes only arise when there is a dispute between governments. Therefore, limiting the potential for conflict with foreign governments will lower the chance of diplomatic intervention. Hence, with respect to the limitation of conflicts, the US agencies directly referred to international cooperation agreements in its Enforcements Guidelines of 1995.

¹³¹ Gupta, 'After Hartford Fire: Antitrust and Comity' 2304f.

¹³² The *Act of States*- doctrine was established by common law and then codified in the above-mentioned. Cf. Peter-Tobias Stoll and Till Patrik Holterhus in Busche and Röhling, *Kölner Kommentar zum Kartellrecht Band 2* 1415 Ref 118.

¹³³ Ibid.

¹³⁴ Ibid.

Section 2.9 of the Guidelines mentions the direct intention of the US agencies to reduce diplomatic tension by improving international cooperation in antitrust and competition matters. Cooperation measures are generally referred to as “notifications, consultations, and cooperation in antitrust matters.”¹³⁵

As cooperation was limited to such an extent that the US competition authorities were not entitled to reveal confidential information to foreign competition authorities, the former DoJ’s antitrust division head, Joel Klein, and his team-initiated proposal that the US Congress enact a law enabling the DoJ to cooperate with foreign competition agencies on a mutual basis, namely via mutual legal assistance treaties (MLATs). In 1994, the US Congress passed the International Antitrust Enforcement Assistance Act (IAEAA), which gives the US FTC, the DoJ and the US competition authorities, the authority to enter into agreements with foreign antitrust authorities to exchange confidential information and foreign-located evidence on a reciprocal basis.¹³⁶ In section 2.91, the agencies present MLATs as the bilateral tool by which the US tries to improve cooperation.¹³⁷ In the referring footnote, several MLAT’s are displayed without further comment of the US agencies. At 2.92, the US refers to the forum of the OECD as a multilateralism cooperation forum and acknowledges the foreign interest procedures recommended by the OECD in 1986. Though, further detailed explanations of specific cases or procedures fail to appear.

bb.) Prevention of Legal Loopholes

Legal loopholes regarding US antitrust jurisdiction, such as the formation of a Public-Private-Partnership (PPP) concerning the act of state doctrine, still provide extraterritorial jurisdiction when conduct is of a commercial rather than a governmental character.

cc.) Intermediate Result

All in all, the agencies have a wide margin of discretion regarding the interpretation of extraterritorial antitrust jurisdiction. However, the wide scope of interpretation for the agencies necessitates international cooperation.

d.) US Antitrust Enforcement Guideline for International Operations and Cooperation of 2017

Prima facie the change in the title of the recently revised Enforcement and Cooperation Guidelines for US Antitrust law of 2017 demonstrates that the US Antitrust agencies seek to foster cooperation in competition law enforcement.¹³⁸ With

¹³⁵ U.S., Antitrust Enforcement Guidelines for International Operations (1995).

¹³⁶ Joel Klein and Preeta Bansal, ‘International Antitrust Enforcement in the Computer Industry’ Villanova Law Review 1997 172.

¹³⁷ Ref. 2.91 U.S., Antitrust Enforcement Guidelines for International Operations (1995).

¹³⁸ U.S., Antitrust Guidelines for International Enforcement and Cooperation (2017).

respect to the mentioned major legal dissents in the two merger cases, it seems as if the agencies wanted to use cooperation to dispel legal conflicts. How exactly the agencies imagine an international cooperation, and to which international points of regulation it is referred, is to be outlined.

Chapter Five of the Enforcement Guidelines explores the principles and sources for international cooperation in antitrust matters relevant for the enforcement of the US agencies. The agencies state that:

[the] cooperation contributes to convergence on substantive enforcement standards that seek to advance consumer welfare, based on sound economics, procedural fairness, transparency, and non-discriminatory treatment of parties.¹³⁹

This can be understood as a clear confession of the US agencies of a preference for international antitrust cooperation seeking consistent case outcomes. The US agencies seem to take the view that diplomatic disputes over antitrust matters harm the US economy.¹⁴⁰ The willingness of US agencies to settle disputes on the basis of cooperation is, therefore, evident.

The Enforcement Guidelines distinguish between regular investigation and cooperation (5.1) and special considerations in criminal investigations (5.2).¹⁴¹

In accordance with the legal basis for regular investigation, set forth in section 5.1.3 of the Guidelines, the agencies are obligated to cooperate with foreign antitrust divisions when the cooperation furthers the enforcement interests.¹⁴² The Guidelines state that cooperation may be regulated on a bi- or multilateral basis.¹⁴³ Notably, the agencies mainly refer to several different bilateral agreements with other states. That they state certain agreements in a footnote, without further comments, indicates that the agencies want to retain the freedom to conduct negotiations in cooperation agreements independently. Accordingly, the US agencies seek not to set up self-binding enforcement measures, which might limit them in negotiations.

However, the provisions of the Enforcement Guidelines state that the cooperation agreements are to be understood as a guidance for cooperation but do not require the agencies to cooperate without existing agreements.¹⁴⁴

Furthermore, specific forms of cooperation in antitrust cases are described: the exchange of information (5.1.4) and remedies (5.1.5) in the event of international cooperation. The exchange of information between authorities requires the consent of the examined economic entity. Therefore, the agencies count on the voluntariness of the firms and seek waivers of confidentiality.¹⁴⁵ This shows that the right

¹³⁹ Ibid 37.

¹⁴⁰ Ibid.

¹⁴¹ Ibid 38 and 49.

¹⁴² Ibid 42.

¹⁴³ Ibid.

¹⁴⁴ Ibid 43.

¹⁴⁵ Ibid 44; U.S., Model Waiver of Confidentiality (2013).

to confidentiality is an important principle for US commercial law, which has to be followed in international antitrust cooperation. The US agencies seek remedies for anticompetitive behavior that effectively addresses the harm affecting US commerce and consumers.¹⁴⁶ Still, the US agencies set a moderate tone by assuring that conflicts with other agencies ought to be avoided.¹⁴⁷ As in the other Enforcement Guidelines, the agencies illustrate the principle with specific examples.¹⁴⁸ It can, therefore, be assumed that the US competition agencies still try to set up the maximum amount of legal security they can hypothetically guarantee.

Positively, the revised Enforcement Guidelines show that the US agencies seem to have learned from their mistakes, fostering international cooperation by dedicated internally binding references.

The fact that the US agencies set a good example and openly admit their will to cooperate is also a positive sign for global cooperation in international antitrust law.

2.) *Intermediate Result*

Referring to the history of extraterritorial jurisdiction of US antitrust law, the enforcement of the US jurisdiction seems to be softened in a diplomatic sense. The fact that the US authorities are subsequently revising their Enforcement Guidelines, by continuously adapting new trends in international antitrust law supports the idea that the US agencies are a role model in international antitrust law.

III) Excursus: US Judicial Antitrust Review

Besides administrative competition law enforcement, also the possibility of private legal enforcement against market distortions and its negative effects on consumer welfare has led to an increase in private antitrust claims. With international cartels distorting competition, judicial enforcement did not end at a state's border. The most well-known incident was the case of the vitamin cartel where, following private claims in US courts, tort damages of more than 1 billion USD were awarded.¹⁴⁹ Since the US judicial system offers private injured parties treble damages – which are comparatively high (three times the indemnity value) – and lower evidential thresholds (within the discovery procedures), the US judicial system is very attractive to the victims of international cartels.¹⁵⁰

¹⁴⁶ U.S., Antitrust Guidelines for International Enforcement and Cooperation (2017) 47.

¹⁴⁷ *Ibid*; Cf. *United States v. General Elec. Co. et al.*, No. 15-cv-1460 (U.S. District Court for the District of Columbia 2015).

¹⁴⁸ U.S., Antitrust Guidelines for International Enforcement and Cooperation (2017) 46, 48.

¹⁴⁹ Stoll in *Münchener Kommentar für Wettbewerbsrecht* Rec 1694. ; Julian L Clarke and Simon J Evenett, 'The deterrent effects of national anticartel laws: evidence from the international vitamins cartel' *The Antitrust Bulletin* 2003 689.

¹⁵⁰ Stoll in *Münchener Kommentar für Wettbewerbsrecht* Rec 1694.

Upon private claims of victims of the vitamin cartel from Australia, Ecuador, Panama and Ukraine, the Court of Appeals for the D.C. Circuit in *Empagran SA v. F. Hoffmann-LaRoche Ltd.* ruled against the Swiss pharma company Hoffmann-LaRoche Ltd., finding the vitamin cartel to have violated the antitrust regimes of the US with significant adverse effects in the US.¹⁵¹ The ruling of the District Court underlined the deterrent effects to anticompetitive conduct of being sued within the US by foreign victims of the vitamin cartel. Contrary to this decision, the Court of Appeals for the 5th Circuit ruled differently in *Statoil*, holding that jurisdiction in external affairs should only be found, if the damages of anticompetitive conduct may be assigned to conduct within the US trade.¹⁵²

The conflict between the appellate bodies was settled with the US Supreme Court decision – also called *Empagran* – in 2004.¹⁵³ Since private judicial proceedings regarding private antitrust were about to spill over within the US, the Supreme Court ruled that US courts do not have jurisdiction concerning foreign antitrust matters: In cases where the private claim is based on independent spillover damages, so where the effects are only national in other countries and have independent spillover damages on foreign countries. The reason for the US Supreme Court ruling was mainly the principle of non-interference with international customary law to internal affairs of foreign states.¹⁵⁴ The Court saw a violation of this principle when US courts ruled on foreign antitrust claims without a reasonable connection to US territory.¹⁵⁵ For that reason foreign victims of cartel violations have to show that their damages are inseparably connected with effects to the US territory deriving from anticompetitive conduct.

Therefore, the US Supreme Court set similar rules for external application of private US law as to the direct application of US competition law to foreign entities by the effects doctrine.

IV) Conclusion

As shown, the development of extraterritorial jurisdiction in international antitrust law by the evolution and settlement of the effects doctrine dramatically increased diplomatic conflict. As the continuous adjustments of the US agencies towards

¹⁵¹ *Empagran SA v. F. Hoffmann-LaRoche Ltd.* – 315 F. 3d 338 (United States Court of Appeals, District of Columbia Circuit, 2003); Otto Graf Lambsdorff, 'Wettbewerbsrecht als Ordnungsfaktor einer globalisierten Marktwirtschaft Vortrag auf der XI. Internationalen Kartellkonferenz des Bundeskartellamtes am 19. 5. 2003 in Bonn.' *Wirtschaft und Wettbewerb* 2003 710.

¹⁵² *Den Norske Stats Oljeselkap AS v. HeereMac VOF* – 241 F. 3rd 420 (5th Cir. 2001), cert. denied, 534 U. S. 1127 (2002) (Court of Appeals for the 5th Circuit, 2001).

¹⁵³ *F. Hoffman-La Roche Ltd. v. Empagran S. A.*, 542 U.S. 155 (USSC, 2004).

¹⁵⁴ Stoll in *Münchener Kommentar für Wettbewerbsrecht* Rec 1696.

¹⁵⁵ *Ibid.*

international cooperation in antitrust matters show, cooperation in international antitrust law is indispensable. And the only way to prevent diplomatic disputes a priori, is to soften the dissents by roundtable compromises.

B) Market Interdependencies

National authorities have the right to regulate their domestic markets only within their jurisdiction. Yet, interconnection of states led to an interconnected economic world. Therefore, as market interdependencies rise, there is a greater need for international cooperation of antitrust authorities.

As a useful backdrop, short introduction to the historical evolution of international market interdependencies (I) as well a comprehensive discussion regarding the balance of market interdependencies (II) shall be provided.

A basic determination has to be made: International market interdependencies rose because of several different aspects.¹⁵⁶ This procedure is often considered as and described with the vague and polarizing term ‘globalization’.¹⁵⁷ To agree with Baetge, the term is a major part of political argument and is perceived either positively or highly negatively.¹⁵⁸ It is assumed that a single term does not meet the complexity of international economic interdependence and therefore, the term ‘globalization’ has been avoided, as far as possible, throughout this work.

¹⁵⁶ Cf. Niklas Potrafke, ‘Das Zerrbild der Globalisierung’ FAZ 2014 18 (https://www.cesifo-group.de/de/ifoHome/policy/Staff-Comments-in-the-Media/Press-articles-by-staff/Archive/Eigene-Artikel-2014/medienecho_ifostimme-faz-13-01-2014.html): “The origin of Globalization are of economical nature. But Globalization is more... Economical Globalization e.g. includes variables, such as foreign trade or foreign direct investments. Social Globalization describes the exchange of information and ideas between humans and displays cultural similarities... Political Globalization counts memberships in international organizations.”

¹⁵⁷ Baetge, ‘Globalisierung des Wettbewerbsrechts: eine internationale Wettbewerbsordnung zwischen Kartell- und Welthandelsrecht’ 7.

¹⁵⁸ Cf. pro e.g.: Christoph Sprich, ‘Globalisierung und Nachhaltigkeit sind kein Widerspruch’ BDI 2016 (<http://bdi.eu/artikel/news/globalisierung-und-nachhaltigkeit-sind-kein-widerspruch/>) states that the increase of global trade by quintupled from 1990 to 2014. This led to greater wealth globally; Potrafke, ‘Das Zerrbild der Globalisierung’ gives several examples for advantages of globalization, such as the clear increase of women’s rights globally or the decrease of poverty in developing countries; Hans-Werner Sinn, ‘Lob der Globalisierung’ Handelsblatt 2016 20f. (<http://www.handelsblatt.com/my/politik/konjunktur/nachrichten/gastbeitrag-von-hans-werner-sinn-lob-der-globalisierung/14452006.html?ticket=ST-3466022-GaniVdoSbvZ0xZltxFO-ap2>) states that the majority of the world population benefit from globalization, e.g. the subjugated population of the failed community states; Jagdish Bhagwati, *In defense of globalization: How the new world economy is helping rich and poor alike* (Oxford University Press 2004) Refers to the riot-torn WTO meeting in *Seattle* in 1999 and disenchant the major criticism against globalization. E.g. he states that international economic interdependence does not lead to a reduction of cultural variety but increases cultural connections. Cf. contra e.g.: Dani Rodrik, ‘Has globalization gone too far’ Washington, DC: Institute for International Economics 1997 : States that there is a difference between winners and losers of globalization. The losers of globalization are increasingly anxious about their

I) Historical Development

After colonialization, trade between nations increased and led to interdependence and the need for international cooperation – that is until the First World War brought international trade to a halt.¹⁵⁹ Following the global collapse of the world market that began with Black Friday of 25 October 1929 at the New York Stock Exchange (NYSE) triggering a global market recession until the mid-1930's, the rise of protectionist politics especially in Europe, and finally the catastrophe of the Second World War, global economic interdependence was kept to a minimum. After the cruel dictatorship of the German Nazi Regime was defeated, Europe was left tattered. However, the pessimistic economic race to the bottom came to an end as the rebuilding of social and economic structures within Europe led to an awakening of economic positivity and, therefore, a reawakening of global interdependence. The impetus to global interdependence can be traced back to several “adjusting screws”. These can be put into two categories: ones to trigger political- and others the economic interdependence. Thus, regarding the former, we may point to the formation of the United Nations on 24 October 1945 with its aim of upholding global peace through diplomatic means.¹⁶⁰ The latter is the formation of the General Agreement on Tariffs and Trade (GATT) in 1947, marking the beginning of a comprehensive global market and trade liberalization.¹⁶¹ Accordingly, the tariffs in industrialized states were set at low rates of about 4%,¹⁶² before the implementation of GATT they were at about 35%.¹⁶³ Following the GATT, the World Trade Organization (WTO) was formed in 1994 after seven years of consolida-

standard of living and their “precarious place in the in an integrated world economy”. The result is severe tension between markets and broad sectors of society; Jürgen Habermas, ‘Der europäische Nationalstaat unter dem Druck der Globalisierung’ *Blätter für deutsche und internationale Politik* 1999 425, 427 states that an internationally interdependent state loses autonomy and democratic substance; Noam Chomsky and David Barsamian, *The prosperous few and the restless many* (Odonian Press Berkeley 1993): Even the topic of the book describes the imagination of Chomsky regarding globalization. The winners of globalization are an elite whilst the majority is suffering.

¹⁵⁹ Before WWI and following the economic crises of “Black Friday” 25.10.1929 until 1933 and later WWII led to a global economic breakdown, especially the development of the *Gold Standard* from 1870-1914 increased international economic interdependence cf. Baetge, ‘Globalisierung des Wettbewerbsrechts: eine internationale Wettbewerbsordnung zwischen Kartell- und Welthandelsrecht’ 11; Rolf Caspers, ‘Globalisierung der Wirtschaft und Anpassungsdruck in Deutschland’ in Thomas Apolte, Rolf Caspers and Paul Welfens (eds), *Standortwettbewerb, wirtschaftliche Rationalität und internationale Ordnungspolitik* (1999) 51.

¹⁶⁰ Cf. Preamble of the UNCh. .

¹⁶¹ The GATT, as a provisional agreement for the failed Havana Charter, inter alia intended to prevent protectionist trends which occurred after the economic crises in the 1930's (especially in Germany et.al.), and to promote global economic welfare: Baetge, ‘Globalisierung des Wettbewerbsrechts: eine internationale Wettbewerbsordnung zwischen Kartell- und Welthandelsrecht’ 13 ff. ; John H. Jackson, *World Trade and the Law of GATT* (Lexis 1969) 46 ff.

¹⁶² Baetge, ‘Globalisierung des Wettbewerbsrechts: eine internationale Wettbewerbsordnung zwischen Kartell- und Welthandelsrecht’ 14; Roderick Meiklejohn, ‘An international competition policy: Do we need it? Is it feasible?’ 22 *The World Economy* 1999 1233, 1234.

¹⁶³ *Ibid.*

tion in the GATT Uruguay Round.¹⁶⁴ The WTO represents a widespread structural reformation and institutionalization of global trade law. This institutionalization is a centralization of world trade supervision, which highlights the ongoing process of international interdependence. The fact that the WTO regime not only regulates tariffs but also focuses on subject areas such as service, intellectual property, and investment law, shows that it is driven by the image of an ever-accelerating global economic interdependence.¹⁶⁵ Whilst the GATT was originally looking at minimization of actual tariff barriers (so called tariff only maxim), market liberalization is focusing more and more on the minimization of non-tariff barriers. With the aim of reducing both, tariff and non-tariff barriers, Free Trade Agreements (FTAs) have been introduced as the 'new tools' in international law.¹⁶⁶ Correspondingly, there is an ongoing discussion about trade politics and its linkage to other political areas, with the question: To what extent may trade policy interfere with core elements of the society?¹⁶⁷ These different themes led to a highly emotional political debate concerning FTAs and their meaning globally. Especially the debates surrounding the project of the EU and US Transatlantic Trade and Investment Partnership (TTIP) and the EU and Canada Comprehensive Economic and Trade Agreement (CETA), initiated protest around Europe.¹⁶⁸

Furthermore, the main historical events boosting international economic interdependence were the collapse of the Soviet Union and the end of the cold war, and afterwards the rise of the digital era.

In an economically interdependent world, there is always a risk of a rising protectionist wave, trying to limit global economic interdependence. A constant adjustment between the side effects of economic interdependence, such as peace but also exploitation and war (so between the winners and the losers of economic interdependence) has to happen to bring them to a balance in the long run.

¹⁶⁴ For a neat overview to the background of the WTO cf. Peter-Tobias Stoll, 'Die WTO: Neue Welthandelsorganisation, neue Welthandelsordnung: Ergebnisse der Uruguay-Runde des GATT' 54 ZaöRV 1994 241ff.

¹⁶⁵ The General Agreement on Trade and Services (GATS) was signed in 1995, whilst the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) was added to the GATT in 1994. Both are part of the WTO regime: cf. organigram in Peter-Tobias Stoll and Frank Schorkopf, *WTO-Welthandelsordnung und Welthandelsrecht* (Heymanns 2002) 19.

¹⁶⁶ FTAs are actually not new, but of high debate nowadays and, therefore of current interest. Originally, the theory of free trade derived from studies of Adam Smith and David Ricardo, cf. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Methuen and Co Ltd. London 1776) e.g. 716 ; also cf. Wilfried Ver Eecke, *Ethical reflections on the financial crisis 2007/2008: making use of Smith, Musgrave and Rajan* (Springer Science & Business Media 2013) 13; cf. David Ricardo, *On the principles of political economy, and taxation* (Dover Publications 1817) e.g. Ch 7.1.

¹⁶⁷ The so-called "Trade- and"- debate relates trade politics to areas such as environmental-, work-, social-, health-, culture- and human rights-politics as well as competition politics.

¹⁶⁸ On 10.10.2015 about 200.000 people demonstrated against the mentioned FTAs in Berlin which is comparable to the Monday-Peace demonstrations of 23.10.1989 against the socialist DDR regime in Berlin; cf.

II) The Balance of Market Interdependencies

The perceptions of how to deal with the private economy and as such, also with international economic interdependence and trade differ depending on the political perspective. The main political perceptions are attached to the theories of communism, socialism, liberalism and conservatism. Whilst communist and socialist political views oppose outgoing international economic interdependence and instead want to steer private economics for the sake of the greater welfare of their people, liberalism and conservatism stick to capitalism and see the positive sides of international economic interdependence. Without validation of either of those views, and without delving into the different political viewpoints within those political convictions, international economic interdependence is increasing. Without trying to regulate the challenges of it, the results would be severe.

First, one may imagine a world where global socio-economic interdependence rises without state interference. This would result in different aspects of the society prevailing and certain economic models dominating the world market. In the end, one would not ponder over cultural and economic diversity but would rather look at the globe as a functioning market as a whole. The impact on individualities or minorities would be justified by the efficiency of the market. A world of protectionist economies would harm cultural individuality and inhibit the efficiency of the market. This would also result in less welfare and less sustainability.

The different perceptions show that the “right way” is the golden mean: state authorities have to take part in the process of socio-economic interdependence and model it to a point of social compatibility and democratic acceptance within their societies. To reach the goal of this balancing act, international state cooperation is vital. With widespread international cooperation, states can refer to their special social and cultural needs and model economic interdependence to reach the level of welfare their societies need – regardless of which political considerations or economic theory they follow.

C) Intermediate result

In a rapidly interconnecting world, where the arm of national jurisdiction does not end at the state’s border, the need for international cooperation of regulating authorities could not be greater. Especially when aspirations towards free trade collide with aspirations regarding economic and political protectionism, the round table of dialogues and compromises should not be abandoned. Such abandonment would potentially lead to commercial wars, resulting in severe deteriorations for economies and consumers globally. This should be avoided by all means.¹⁶⁹

¹⁶⁹ Cf. ‘Deutsche Ökonomen warnen vor Trumps Kurs’ FAS 2017 (<http://www.faz.net/aktuell/wirtschaft/ttip-und-freihandel/f-a-s-exklusiv-deutsche-oekonomen-warnen-vor-trumps-kurs-14781109.html>).

§ 4 The Status Quo of International Cooperation in Competition Matters

Before the status quo of international interstate co-operation in antitrust matters can be identified, the notion of ‘international cooperation’ needs to be clarified and explained.

A) The Meaning of International Antitrust Co-operation and Enforcement

At a first glance, international antitrust co-operation looks like a dialogue concerning international legal regime between sovereign states. At a second glance, this profound dialogue appears more diverse than anticipated. To break down the different facets, one has to consider the theme of ‘co-operation’ before taking the legal sphere of antitrust into account. International co-operation of states appearing as informal diplomatic dialogues may have different outcomes. The topics of co-operation can be classified into law-setting co-operation and law-enforcing co-operation. The outcomes of these considerations lead to substantive and procedural provisions, which may be informal and non-binding or formal and binding. Binding refers to the interstate promise to hold its vow, meaning a state will act in accordance with its vow.

Therefore, in this context the theme of ‘co-operation’ directly addresses the state and its administration bodies, whilst citizen or economic undertakings may only be affected indirectly.

In considering the specific legal sphere of antitrust law, state co-operation may have different appearances. States may develop core values of antitrust law towards binding substantive provisions,¹⁷⁰ establish rules regarding the scope of this substantive law, e.g. the effects doctrine, or establish provisions concerning how to procedurally enforce antitrust law internationally, e.g. by mutual assistance. It has to be noted that the development of the level of obligation of the provisions are sometimes complex, fluid transitions.¹⁷¹

The communication of states may be conducted via various methods: as states may choose to communicate either only with another state – bilaterally, or in bigger fora with more states – multilaterally. The consensus of the state communications may be formal, as states have the capacity to conclude international law treaties. Binding treaties are agreements between two or more subjects of international law, which are determined as such by international law and sustained by a legally binding will.¹⁷² Informal consensus may only be considered as binding law if the strict requirements of international customary law are fulfilled. Binding law will be considered ‘hard law’ while non-binding considerations will be considered ‘soft law’.

Those different fora of bi- or multilateral communication regarding the lack of international cooperation were described in three theories of the harmonization of international competition law: the theory of the “Competition of Competition Law Approach”, the “Convergence Approach” and the “Convention Approach.”¹⁷³

Within the “Competition of Competition Law Approach”, harmonization within competition law was criticized as hindering a supreme self-regulating market of competition laws.¹⁷⁴ Harmonization processes would ignore the multiple facets of competition laws, which inherently limit harmonization.¹⁷⁵ The legal systems were considered as competing with each other, all taking references from different specifications of competition law and this “rivalry of laws” would lead to ideal competition law enforcement in the end.¹⁷⁶

¹⁷⁰ Cf. e.g. Art. 101, 102 TFEU.

¹⁷¹ More complex than the maxim *ubi ius ibi remedium* cf. Jörg Phlipp Terhechte, *International Competition Enforcement Law – Between Cooperation and Convergence* (2011) 6.

¹⁷² v. Arnauld, *Völkerrecht* 78 Ref. 188.

¹⁷³ Dietmar Baetge, ‘Competition Law and Perspectives for Harmonization’ *Uniform Law Review* 2004 502.

¹⁷⁴ Karl Matthias Meessen, ‘Competition of Competition Law’ 1989 17.

¹⁷⁵ *Ibid* 18f.

¹⁷⁶ *Ibid* 29.

The “Convergence Approach” seeks to find convergence of national competition laws and their interpretation by the states through soft-law recommendations, rather than making proposals of binding international competition law.¹⁷⁷ This approach is also considered a bottom-up approach.

The “Convention Approach” seeks to find what the name of the approach suggests: a convention, an international legal framework with a clear focus towards the WTO.¹⁷⁸

The sum of substantive rules of international competition law are described as “International Competition Law”. The enforcement or procedural application of imminent competition measures are to be described with a relatively newly created legal area of “International Competition Enforcement Law”.¹⁷⁹ As different jurisdictions are to be analyzed in this thesis, the term competition law and antitrust law are used interchangeably¹⁸⁰ – the same applies to the terms of “enforcement” and “procedural”.¹⁸¹

In order to best understand the notion and the status quo of international state co-operation, both its historical developments as well as the accompanying international legal obligation in antitrust law need to be outlined.

B) Multilateral Cooperation

Multilateral understandings of states regarding competition law and the regulation of antitrust closely link with the stabilization of the international economic interdependence and its development. For that reason, a historical evaluation of multilateral approaches aiming to regulate antitrust cooperation highlights the desires and differences of the interacting states. The question of whether these multilateral approaches fulfill the highlighted theoretical needs of international antitrust cooperation will be addressed in the following: First the historic formation of international cooperation will be outlined by examining the period between the formation of the League of Nations and the GATT (I.). Secondly, the section will turn to the

¹⁷⁷ Baetge, ‘Competition Law and Perspectives for Harmonization’ 504.

¹⁷⁸ Ibid 506.

¹⁷⁹ *Terhechte* defines the term as follows: “International Competition Enforcement Law is to be understood as the sum of legal norms and this established by development of law by courts that concern – at a national, supranational or international level – the execution of rules which relate to: – Horizontal and vertical restraints of competition, – Abuse of dominant positions and/or, – Merger control as their subject matter.” *Terhechte, International Competition Enforcement Law – Between Cooperation and Convergence* 5f.

¹⁸⁰ It is further the attempt to avoid a classification of competition law to be either administrative, private or criminal law, as it is the aim to get a grasp of an international picture of competition law and its antitrust cooperation of states; see also *ibid*.

¹⁸¹ Similar cf. *Ibid*.

developments of the United Nations (UN) (II.), before explaining the approaches of the OECD (III.) and the WTO (IV.). Finally, the more modern concepts like the International Competition Network (ICN) (V.) will be outlined.

I) Historical Development of International Cooperation

As mentioned before, after a gradual liberalization of international trade in the late 19th century, First World War brought this trend to a halt. As liberal trade movements could be detected after thereafter, the protectionist movements conferring with the ‘Gold Standard’ and following Black Friday were on the rise. Therefore, the gap between the two World Wars is considered as a time of global trade disturbance lacking in any great international cooperation.

1.) *League of Nations International Economic Conference*

Even in the time of uncertainty, states came together to form the League of Nations. This organization, formed as the result of the Peace Treaty of Versailles in 1919 and 1920, is considered the first multilateral forum in the world. It started its work on 10 January 1920. Its Founding Fathers, the victorious states of the First World War, desired mainly to re-instate peace in the world. However, the economic stabilization of global economic matters was also part of their ambition.¹⁸² To accomplish this goal, they set up the League of Nations International Economic Conference of 1927 in Geneva. Part of the Conference was the removal of barriers to international trade – and conferring to the works of preparatory committee of the conference, the debate about the phenomenon of international cartels.¹⁸³ Scholars and state officials attending the conference on behalf of different Member States, argued about the benefits and deficits of cartels. Hirsch even suggested the establishment of an international committee on antitrust matters.¹⁸⁴ As it was impossible to find consensus on antitrust matters in the League of Nations, the final decision regarding this topic was declared:

The League of Nations should closely follow these forms of international industrial cooperation and their effects upon technical progress, the development of production, conditions of labor, the situation regards supplies, and the movement of prices, seeking in this connection the collaboration of the various Governments. It should collect the relevant data with a view to publishing from time to time such information as may be of general interest. The

¹⁸² Cf. Luis Palma Martos, José Luis García Hildalgo and Christian Chase Solán, ‘The Controversy over International Cartels in the League of Nations (1925-1927)’ (European Society for the History of Economic Thought Conference 2015, 2015) 5.

¹⁸³ Ibid.

¹⁸⁴ Ibid; Cf. Julius Hirsch, ‘National and International Monopolies from the point of view of labour, the consuming public, and rationalization’ (League of Nations International Economic Conference, 1927) 24.

Conference is of the opinion that the publicity given in regard to the nature and operations of agreements constitutes one of the most effective means, on the one hand, on securing support of public opinion to agreements which conduce to the general interest and, on the other hand, of preventing the growth of abuses.¹⁸⁵

The sole recognition of the economical antitrust matters shows the rise in the awareness of the problem, even if the League of Nations International Economic Conference did not succeed in setting up of a multilateral forum regulating antitrust matters. Unfortunately, the League of Nations was confronted with and eventually failed because of the ensuing international economic crisis, which led to widespread protectionist politics and in the end the outbreak of the Second World War.

2.) *Bretton Woods Conference 1944 and Havana-Charter 1947*

It took the harsh catastrophe of Second World War for the states to realize that peace can only be reached by international trade entanglements. To restore the global economic order, the 44 members of the Bretton Woods Conference in 1944 (under the lead of the USA) established a new order of international financial relations and global credit system: The World Bank and the International Monetary Fund (IMF).¹⁸⁶ Furthermore, as the main ambition of this conference was to rebuild and restructure the world in the aftermath of war and to prevent the world economy from the repetition of the economic crisis,¹⁸⁷ the system of fixed exchange rates and currency convertibility was invented.¹⁸⁸ After the foundation of the United Nations in 1945, the United Nations Economic and Social Council (ECOSOC) was intended to restore global trade by joint policy accordingly.¹⁸⁹ Therefore, in 1947 the ECOSOC set up the United Nations Conference on Trade and Employment. Its outcome was the UN resolution called Havana-Charter founding an International Trade Organization (ITO).¹⁹⁰ Besides far-reaching chapters concerning trade, the Havana Charter supplied its own chapter concerning competition law.¹⁹¹ The Charter's ambition to

¹⁸⁵ Martos, Hidalgo and Solán, 'The Controversy over International Cartels in the League of Nations (1925-1927)' (European Society for the History of Economic Thought Conference 2015, 2015) 13.

¹⁸⁶ Stoll and Schorkopf, *WTO-Welthandelsordnung und Welthandelsrecht* 11.

¹⁸⁷ Martos, Hidalgo and Solán, 'The Controversy over International Cartels in the League of Nations (1925-1927)' (European Society for the History of Economic Thought Conference 2015, 2015) 14.

¹⁸⁸ Ibid; Matthias Herdegen, *Internationales Wirtschaftsrecht* vol 11 (C.H. Beck 2017) 3 regarding Art. VIII Sec. 2 lit. b Bretton Woods Agreement, binding the Member States to observe foreign currency regulations.

¹⁸⁹ Stoll and Schorkopf, *WTO-Welthandelsordnung und Welthandelsrecht* 11.

¹⁹⁰ UN, *United Nations Conference on Trade and Employment, Resolution E/971* (1948); cf. Stoll and Schorkopf, *WTO-Welthandelsordnung und Welthandelsrecht* 12.

¹⁹¹ Stoll and Schorkopf, *WTO-Welthandelsordnung und Welthandelsrecht* 12; Peter Mozet, 'Internationale Zusammenarbeit der Kartellbehörden' (Müller, Jur. Verl. 1991) 17: Chapter V Art. 46-54

liberalize trade had two forms: The prevention of anticompetitive business practices by state and private businesses (Art. 46) and the elimination of state trade restraints (Art. 52).¹⁹² In Art. 46 (1) Havana Charter obliges the Member States to:

[...] take appropriate measures and shall co-operate with the Organization to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other objectives set forth in Article 1.

The provision of Art. 46 sought to prevent harmful restraint of competition, the limitation of market access, and monopolistic behavior in general – all of which are general antitrust principles. Therefore, it can be considered as a general norm of substantive antitrust law. The fact that the harmful practices of Art. 46 (1) are shown in more detail but not limited to the extent of Art. 46 (3), supports this assumption. These provisions did not criminalize the harmful conduct per se, as they were only considered illegal when the Member States subsumed conduct to be illegal.¹⁹³

Furthermore, Art. 46 (2) Havana Charter provided procedural antitrust measures by reference to Art. 48. Art. 48 (1) provided a Member State the opportunity to: “present a written complaint to the Organization that in any particular instance a practice exists...which has or is about to have the effect indicated in paragraph 1 of Article 46”. The Member State was able to complain either on its own behalf or on the behalf of any affected person, enterprise, or organization within its jurisdiction. To support these material and procedural antitrust measures, Art. 47 Havana Charter invited the states to cooperate on a free basis with the support of the UN.¹⁹⁴ Different types of cooperation by the authorities were not outlined in the provision.

The Charter encouraged states to eliminate state trade restraints by affirming their individual capacity to take legal measures (Art. 52 Havana Charter). Clearly, this ‘affirmation’ was not a really strong measure to achieve the elimination of state trade restraints (e.g., customs etc.).

The fact that anticompetitive behavior was, for the first time, faced with legal measures internationally was quite progressive. Yet, due to the fact that harmful conduct was continuously exposed to the legal disputes of the Member States, and due to the fact that the Havana Charter was considered as going far beyond the standard trade liberalizing approach,¹⁹⁵ it failed to be ratified by many Member States.¹⁹⁶

Havana-Charter.

¹⁹² Also cf. Anna Petersen, *Die Internationale Zusammenarbeit der Wettbewerbsbehörden* (LIT Münster 2005) 14.

¹⁹³ Mozet, ‘Internationale Zusammenarbeit der Kartellbehörden’ 17.

¹⁹⁴ *Ibid.*

¹⁹⁵ Stoll and Schorkopf, *WTO-Welthandelsordnung und Welthandelsrecht* 12.

¹⁹⁶ Cf. Mozet, ‘Internationale Zusammenarbeit der Kartellbehörden’ who called the legal dispute of the Member States a “strained relation between liberalism and dirigisme”.

3.) The ECOSOC Cartel Commission Proposal of 1953

Following the failed Havana Charter, the ECOSOC did not abandon its work. Upon request of the US, in 1951 ECOSOC appointed the UN Cartel Commission, which was to find the way of preventing anticompetitive conduct in global trade.¹⁹⁷ Nearly two years later, the Cartel Commission presented two reports. One report analyzed the different forms of anticompetitive behavior and the possible state measures fighting this behavior, while the other report suggested an international convention concerning restrictive business practices.¹⁹⁸ In the draft convention, the cartel commission of ECOSOC mainly adopted the material and procedural antitrust provisions already contained in the Havana Charter.¹⁹⁹ The one innovative provision of the draft convention, concerned the introduction and the functioning of an international cartel authority.²⁰⁰ The new provisions of an international cartel agency were to be found in Arts. 10-17 of the draft convention. According to Art. 10 each Member State was supposed to have a seat in a Member State Body, which were to elect the Executive Board (Art. 11). The Executive Board was supposed to steer the rights and obligations of the Representative Body as per Arts. 1-9. To create a balance within the Executive Body, Art. 11 (5) dictated that the composition of the Executive Board should have had the objective of including Members from different types of economies in terms of geography, development, etc. While an Executive Secretary should have managed the Executive Board (Arts. 12, 14), the Advisory Staff, which would have been voted by the Representative Body, would have advised the Executive Secretary (Arts. 13, 15). The Representative Body, in turn, would have controlled the activities of the agency officials (Arts. 16). With that democratic structure the authority should detect the existence of anticompetitive behavior and determine if it is harmful (Art. 4 (1)(a)), it would also have had the capacity to consult the Member States on how to deal with these harmful restraints (Art. 3 (8)). Furthermore, in line with Art. 4 (1)(a), the Agency ought to conduct investigations about the existence of anticompetitive behavior in general. To accomplish these tasks, the Agency ought to have the capacity to ask Member States for specific information (Art. 3 (3), Art. 4 (1)(b)). The Agency was not supposed to have the power of direct intervention in the event of detecting harmful conduct.²⁰¹

The fact that the ECOSOC Cartel Commission not only indicated the need for international cooperation, but presented a serious proposal suggesting the establishment of an international antitrust agency, makes the proposal a very progressive one. Still, the material and procedural needs of global antitrust solutions could not be satisfied. With respect to the different stages of antitrust laws within the Member

¹⁹⁷ Also cf. *Ibid* 18.

¹⁹⁸ *Ibid*; *Wirtschaft und Wettbewerb (WuW)* 1953, 479 ff.

¹⁹⁹ The Cartel Commission was instructed to directly refer its recommendations to the Havana-Charter cf.

²⁰⁰ *Ibid* 479, 487.

²⁰¹ Mozet, 'Internationale Zusammenarbeit der Kartellbehörden' 18.

States, and with respect to the lack of a joint antitrust assessment scale, the objections concerning the Havana Charter did not vanish. It was the US Administration who stated that the draft resolution was “neither satisfactory nor effective”.²⁰² Therefore, the proposal was not ratified by any of the Member States and the ECOSOC abandoned its vision of a joint cartel agency.

4.) *The Intention of the European Council*

Concurrent to the ECOSOC Cartel Commission proposal, similar aspirations can be detected in Europe, namely within the European Council. As a regional trade agreement, the Member States²⁰³ sought economic and social convergence by cooperation in different political areas, especially in the areas of law and administration (Art. 1 (a) European Council Charter).²⁰⁴ The structure of the European Council proposal was comparable to the anticipated cartel agency created by the ECOSOC Cartel Commission. It had a Committee of Ministers like the Member State Body, and a Consultation Assembly which had administrative functions like the Executive Board and these authorities were supported by the Secretary (Art. 10). On 2 March 1951, the Committee of Ministers presented a draft of the “European Convention for the Control of International Cartels”.²⁰⁵ The material antitrust provisions “restrictive practices” and “harmful practices” were defined and structured similarly to Art. 46 of the Havana Charter. The clear influence of the Havana Charter can thus be detected. Like in the ECOSOC proposal, the approach of the European Council sought to establish a European Cartel Board (Art. 5). However, compared to the ECOSOC proposal, the European proposal went slightly further. The Member States were to be obligated to notify and register anticompetitive conduct with the Board (Art. 14), while the omission of this duty ought to lead the conduct at issue to be considered as harmful (Art. 15). The burden of proof concerning the matter was, therefore, reversed. Moreover, the Board was entitled to demand information of the Member States (Art. 16). If the conflicting parties were not able to settle the dispute regarding the anticompetitive conduct themselves, the Board was entitled to pursue its own investigation and to draw its own conclusions concerning the harm of the conduct (Art. 28). If the conflicting parties would not agree with this procedure, they would be entitled to a judicial hearing at the European Court of Human Rights in Strasbourg (Art. 30).

The further reaching capabilities of the established European Cartel Board reflect the innovative ambit of the European Council, which are highly supportable in terms of international cooperation of antitrust divisions. Yet, compared with the

²⁰² Ibid.

²⁰³ Belgium, Denmark, France, Italy, Ireland, Luxembourg, Netherlands Norway, Sweden and the United Kingdom; BGBl. 1950 p. 263.

²⁰⁴ Mozet, ‘Internationale Zusammenarbeit der Kartellbehörden’ 19; BGBl. 1950 p. 263.

²⁰⁵ Committee of Ministers (Sevens Session) 02.03.1951, see: *Wirtschaft und Wettbewerb (WuW)* 1952, 296.

ECOSOC, the limits of global multilateral round tables become clear. The European Council Members are not only geographically adjacent, but have similar historical, cultural and political influences. Therefore, their forum cannot be exactly compared to the UN. Still, it shows the opportunity and the desire for international antitrust regulation.

As the European Council proposal was concurrent to the ECOSOC, its development was initially abandoned. After the ECOSOC proposal failed, the development was not resumed. The political development emerged towards the European Economic Union in 1957 and towards the European Free Trade Association (EFTA) in 1960.²⁰⁶

5.) *The GATT*

The General Agreement on Tariffs and Trade (GATT) was supposed to act as an intermediate tariffs and trade solution, until the Havana Charter was ratified as the fundamental rights Charter for the entire international economic conduct.²⁰⁷ The preparatory consultations on the minimization of tariffs and customs of the 23 “GATT states” led to the precious application with the protocol of 30 October 1947. The GATT was put in force from 1 January 1948 because of the desire of the states to overcome the aftermath of the great economic crisis and to nurse the war economy back to a fair, normal market.²⁰⁸ The former interim commissioner managing the GATT was declared the Secretary of the GATT and after the Havana Charter and the International Trade Organization (ITO) aspirations failed, the GATT developed into a de facto organization coordinating and arbitrating conflicts of the Member States according to its statutes.²⁰⁹ Besides the minimization of state trade restraints, such as the minimization of customs, antidumping measures and non-tariff measures, in 1960 the GATT appointed an expert group. The problem was that private trade restraints have had the ability to de facto eliminate the state measures taken by the GATT. Therefore, the expert group was appointed to research the abilities of the GATT to lower the private trade restraints.²¹⁰ After long consultations about establishing an international cartel agency limiting such restraints, the expert group concluded that there was no consensus amongst the Member States to establish a joint agency. Therefore, they agreed to a process of consultation in November 1960, if disagreements regarding private trade restraints arose. But the

²⁰⁶ Mozet, ‘Internationale Zusammenarbeit der Kartellbehörden’ 20.

²⁰⁷ Stoll and Schorkopf, *WTO-Welthandelsordnung und Welthandelsrecht* 12; Mozet, ‘Internationale Zusammenarbeit der Kartellbehörden’ 20.

²⁰⁸ UNTS 1955, Protocol of Provisional application of the General Agreement of Tariffs and Trade 308; Stoll and Schorkopf, *WTO-Welthandelsordnung und Welthandelsrecht* 12.

²⁰⁹ Stoll and Schorkopf, *WTO-Welthandelsordnung und Welthandelsrecht* 12.

²¹⁰ Petersen, *Die Internationale Zusammenarbeit der Wettbewerbsbehörden* 15.

consultation practice was never used and lost its meaning and importance. In the end, the progressive approaches of the Havana Charter regarding an international cartel agency could not be realized.

6.) *Intermediate Result*

Following historical approaches regarding international antitrust cooperation before and after the Second World War, it became clear that the desire for global cartel regulation already existed and was waiting to be materialized. The main reasons why these aspirations never realized were of a political nature. From the League of Nations to the GATT, expert groups proposed closer cooperation and tried to create a greater awareness of global risks associated with private trade restraints especially anticompetitive conduct. Albeit the recommendations were not realized, they are of great value, as the awareness of the problems was present even when global economic interdependence was eroded by the Second World War and have not vanished since.

II) The United Nations

From the foundation of the UN in 1945 to the 1960s, the discrepancies between developed and undeveloped countries did not fade. Conversely, the divergence increased. The developed countries acted contrary to what they expected to be a risk during the expert consultations in GATT. The maxim of non-discrimination was disobeyed, and the developed states subsidized their exports, so that the ratio of developing countries in the global export rate decreased from 31.6% in 1950 to 16.3% in 1974.²¹¹ With the referendum of 19 December 1961, the UN General Assembly decided to declare the 1960s the first development decade of the UN. Therefore, in 1964 the Group of 77 (the former 77 developing countries) united to advance their intentions politically. In the same year this very group founded the United Nations Conference on Trade and Development (UNCTAD).²¹²

1.) *The UNCTAD*

The UNCTAD is a permanent body of the UN located in Geneva. It is affiliated with the UN Secretary reporting to the UN General Assembly, the Economic and Social Council. It has its own budget and leadership, serving 194 countries to fight their poverty and strive for their development.²¹³ The UNCTAD consists of the UNCTAD Secretary and the Trade and Development Board. The main conference of the parties takes place every four years, while the committees, groups, and boards of the UNCTAD work continuously. The UNCTAD is also part of the United Nations Development Group.

²¹¹ Mozet, 'Internationale Zusammenarbeit der Kartellbehörden' 32.

²¹² Also cf. Ibid.

²¹³ Cf. Website of the UNCTAD: <http://unctad.org/en/Pages/aboutus.aspx> (last visited on: 30.3.21).

a.) The Development of a UN Codex Regarding Restrictive Business Practices

After the failure of the Havana Charter and the ECOSOC recommendations, the UNCTAD was the first forum within the UN to re-evaluate the approaches preventing private restrictions of trade.

Whilst there were political disagreements between industrialized- and developing UN Member States about how to deal with global firms and the risk of anticompetitive behavior, the states agreed that there was a need for global regulation. Politically, the Organization of the Petroleum Exporting Countries (OPEC) strengthened the political position of the developing countries after the oil crisis in 1973 and prevailed in the 29th UN General Assembly by putting through the “Charter of Economic Rights and Duties of States”.²¹⁴ Besides structural reformation of the global economic order, UN General Assembly recognized a right of compensation for colonial exploitation.²¹⁵ The imbalance between the two opponents was solved by an attenuated resolution called the Resolution of “Development and International Cooperation, opening the door for further discussion within the Nairobi UNCTAD in 1976.”²¹⁶ Within this main conference, the UNCTAD appointed the so-called third ad-hoc Group of Experts on Restrictive Business Practices.²¹⁷ This Group of Experts was told to design an international codex of practices regulating international trade. Furthermore, the Group of Experts was told to develop a specific model for states to exchange information. Moreover, the Group of Experts was also to develop a model of a global cartel law. Therefore, the UNCTAD agreed that there is a specific need regarding the development of minimum standards in material and procedural antitrust- and competition law. Four years later, the Group of Experts was able to present a draft resolution of the codex on restrictive business practices to the United Nations Conference on Restrictive Business Practices. On 5 December 1980, the UN General Assembly unanimously accepted the compromised codex and established the UN Codex on Restrictive Business Practices.²¹⁸ The Codex is universally applicable to all economic entities, states, regional organizations and services and all transactions of goods.²¹⁹

b.) Overview

The UN Codex includes different areas concerning restrictive business practices and is much more detailed and comprehensive than any other previous attempt in anti-trust law.²²⁰ After the objectives of the codex are named (part A.) and defined (part

²¹⁴ Mozet, ‘Internationale Zusammenarbeit der Kartellbehörden’ 34.

²¹⁵ Ibid.

²¹⁶ Ibid; Joel Davidow, ‘The UNCTAD Restrictive Business Practices Code’ *The International Lawyer* 1979 587, 589.

²¹⁷ UN, *United Nations Conference on Trade and Development, (IV) Resolution 96* (1976).

²¹⁸ UN, *Restrictive business practices, Resolution 35/63* (1980); Davidow, ‘The UNCTAD Restrictive Business Practices Code’ 590.

²¹⁹ Cf. Stoll and Schorkopf, *WTO-Welthandelsordnung und Welthandelsrecht* 241.

²²⁰ Davidow, ‘The UNCTAD Restrictive Business Practices Code’ 590.

B.), basic codes of business conduct of states and businesses are determined (part C.). Following, the main material antitrust provisions are outlined (part D.), before the procedural principles on regional and sub-regional state basis are defined (part E.). Finally, the Codex lists different parts of cooperation in antitrust matters and the abilities of the UNCTAD to support this cooperation (part F.).²²¹

Regarding the preamble of the Codex, its ambit is to guarantee trade liberalization and to prevent states and businesses from interfering with this ambit with anti-competitive behavior. Likewise, the Codex tries to increase global market efficiency by its measures, taking consumer welfare into account.

c.) Material Provisions

The UN Codex addresses private businesses to refrain from active trade-restraining business practices such as agreements fixing prices, collusive tendering, market or customer allocation arrangements,²²² and trade restraints by the abuse of its market position, e.g. by predatory behavior towards competitors, such as using below-cost pricing to eliminate competitors, or by discriminatory pricing etc.²²³ The Codex calls for businesses to cooperate with state agencies²²⁴ and to obey the national competition law provisions.²²⁵ Altogether, it becomes clear that the UN Codex includes a material understanding of what business practices are and that they need to be prevented. However, the provisions are not binding,²²⁶ nor do the “calls to order” to the private businesses really seem to have any effect. Therefore, the UN Codex seems more to be a code of conduct in terms of an etiquette, rather than a clear legal provision. However, even just rising the awareness of these provisions internationally is a positive development.

d.) Regional Procedural Principles

The “Principles and Rules for States at National, Regional and Sub-regional levels” (part E.) describe principles of a national procedural antitrust “infrastructure”. Before addressing specific aspects of antitrust procedure, the Codex calls for states to adopt, improve or effectively enforce appropriate legislation and judicial and administrative antitrust procedures,²²⁷ making direct reference to the material Codex provisions described.²²⁸ The Codex requests the Member States to provide provisions guaranteeing a fair legal hearing for infringing businesses,²²⁹ as well as appropriate

²²¹ For an overview of the different provisions cf. Ibid.

²²² UN, *Restrictive business practices, Resolution 35/63 D.*) No.3 lit. a-g.

²²³ Ibid D.) No.4 lit.a-f.

²²⁴ Ibid D.) No. 2.

²²⁵ Ibid D.) No.1.

²²⁶ Also cf. Stoll and Schorkopf, *WTO-Welthandelsordnung und Welthandelsrecht* 241.

²²⁷ UN, *Restrictive business practices, Resolution 35/63 E.*) No.1.

²²⁸ Ibid E.) No.2.

²²⁹ Ibid E.) No.3.

remedial provisions for trade-restraint-affected parties.²³⁰ Concerning the prevention of trade-restraining behavior, the Codex addresses the acquisition of information about anticompetitive conduct. It encourages states to find mechanisms for obtaining secret information from enterprises (e.g. leniency programs) and to treat them confidentially.²³¹ When they obtain information concerning other Member States, the Codex encourages the states to enact suitable procedures to exchange information – states who apply a more developed antitrust system should support the less developed, and particularly developing, Member States on their own initiative.²³² Clearly, because the suggestions of the Codex lack detailed provisions, they do not represent a profound proposal. The Codex tries to establish its vision of a smooth working antitrust system and the non-binding procedural principles can be understood as development suggestions, drawing an ideal picture of an efficient procedural antitrust system. As the Codex represents the consent of the UN Member States in 1980, the clear vision towards a smooth working antitrust system is to be considered as positive development. Politically though, the implementation of such a system appears to be a lengthy process.

e.) UNCTAD Assistance to International Cooperation

After principles of a general nature, the UN Codex highlights specific provisions of international state cooperation which can and should be supported by the UNCTAD. The Codex confers to the previous general material and procedural provisions and seeks to improve the international cooperation of antitrust divisions by the promotion of the exchange of information and consultation.²³³ The Codex affirms that the improvements and measures taken by the Member States should be reported annually to the UNCTAD Secretary, who in turn presents these anti-trade-restraining developments to the United Nations Centre on Transnational Corporations and other competent authorities, also on annual basis.²³⁴ Regarding the consultation of Member States, the UNCTAD wants to act as a forum for communication: If requested, the UNCTAD Secretary is supposed to provide mutually agreed upon conference facilities.²³⁵ With respect to its aim of supporting developing countries, the UNCTAD recalls these aims in the Codex too. The UNCTAD should propose appropriate legislation to developing countries, as well as providing experts in antitrust law, seminars regarding this topic, or creating a handbook of restrictive business practices. Furthermore, the UNCTAD is ought to supply books and materials to the developing states and arrange the exchange of state representatives.²³⁶

²³⁰ Ibid E.) No. 4.

²³¹ Ibid E.) No.5 and 6.

²³² Ibid E.) No 7, 8, 9.

²³³ Ibid F).

²³⁴ Ibid F.) No. 1-3.

²³⁵ Ibid F.) No. 4 lit. a. and c.

²³⁶ Ibid F.) No.6 lit. a-g.

To provide a framework for these provisions the Codex establishes a “Group of Experts on Restrictive Business Practices” working closely with the UNCTAD committee. The Group of Experts, where every UN Member State has one seat, is supposed to meet on annual basis.

f.) Reforms and Developments of the UN Codex

The first years of the UN Codex were characterized by the support of UN Member States in antitrust matters, even though, within the UNCTAD, the disputes and divergence between industrialized and developing states were very much still present. Accordingly, the UNCTAD conference was marked by political dispute of a basic nature.²³⁷ Thankfully, the UNCTAD did not cease to improve the Codex. It was revised five times: in 1990, 1995, 2000, 2005, 2010 and 2015. The first ten years of the Codex turned out not to be as effective as expected. It took the WTO Uruguay Round to bring back an emphasis to the restrictive business practices and their bad influence on the world market, and for the UNCTAD Member States to realize that cooperation is vital, especially for the sake of the developing countries.²³⁸ Having these elaborations in mind, the Member States resumed their work on and reaffirmed the matters the Codex highlighted in 1980.²³⁹ Within the third review conference, the Member States agreed to foster the support of the UNCTAD Secretariat conferring to section F of the Codex in the fourth review of the Codex in 2000, the secretary review noted ongoing – more rapid²⁴⁰ – progress in technical assistance.²⁴¹ Several developing countries were supported in antitrust matters, e.g. through the 1999 and 2000 UNCTAD workshops on the Codex issues in Zambia, Thailand, Vietnam and Madagascar.²⁴² Additionally, the UN Secretariat was deliberately used as an international forum acquiring technical assistance in specific antitrust issues, e.g. by 12 mainly developing countries between 1995 and 2000 regarding specific questions in antitrust law development.²⁴³ The Codex revision of 2005 highlighted the relevance of best practice cases for international cooperation of states.²⁴⁴ Those cases consist of two types: cases concerning anticompetitive practices and cases of mergers and acquisitions. The separation of the cases shows the reflection and cat-

²³⁷ Mozet, ‘Internationale Zusammenarbeit der Kartellbehörden’ 43.

²³⁸ Stated in the Review of 15 years of application and implementation of the set [codex]: UN, *UNCTAD, 3rd Report to Review all Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, TD/RBP/CONF.4/15 (1995) para. 13.

²³⁹ See *ibid* Annex I: Resolution adopted by the Review Conference in 1995.

²⁴⁰ UN, *UNCTAD Review of all aspects of the set of multilaterally agreed equitable principles and rules for the control of restrictive business practices – TF/RBP/CONF.5/3* (2000) para. 25.

²⁴¹ UN, *UNCTAD Review of Technical Assistance, Advisory and Training Programmes in Competition Law and Policy – TD/RBP/CONF.5/5* (2000).

²⁴² *Ibid* para. 13,14.

²⁴³ *Ibid* III. B.).

²⁴⁴ UN, *UNCTAD Recent important Cases involving more than one Country – TD/RBP/CONF.6/5* (2005) para. 3.

egorization of anticompetitive conduct described in the principles of the Codex. The fact that the cases mainly come from industrialized countries displays that even if some developed countries enacted competition policy, there still exists a need for further efforts enforcing their laws.²⁴⁵ Furthermore, the review of 2005 highlighted the importance of fighting hardcore cartels and decided that the group of experts should consider a better enforcement of the Codex on that issue.²⁴⁶ In the sixth review of the codex in 2010, the antitrust enforcement against such hardcore cartels was supplemented by a detailed analysis of leniency programs especially in developing countries.²⁴⁷ The analysis of the review conference considers leniency programs to be the most efficient way of fighting anticompetitive behavior²⁴⁸ and makes specific suggestions about the design of leniency programs.²⁴⁹ Most significantly, the sixth review session of the Codex proposed detailed drafts regarding the Model Competition Law proposed therein.²⁵⁰ The different chapters (I-XIII) include the various provisions contained in the Codex in a more detailed way. Every chapter includes different examples and commentaries of states which enacted the specific provision into their national law. Hence, the Model Competition Law concludes the “best” provisions of global antitrust provisions. As described in the Codex, the Model Law is intended to act as a blueprint for least-developed countries. Yet, it is not supposed to bind the UN Member States.²⁵¹ In addition to the Codex principles of 1980 and to the Codex review of 2005, the Model Law includes a merger control provision including specific commentary.²⁵² The last revision of the codex in 2015 specifically tried to foster global consumer protection law by presenting a revision of the UN Consumer Protection Guideline to the UN General Assembly. The revisions are mainly based on developments of consumer protection law from the point of view of competition law expertise.²⁵³ Additionally, the Codex review in 2015 highlighted the importance of antitrust laws benefitting consumer protection with the example of the pharmaceutical sector, as patents are an exemption to the antitrust provisions regarding the abuse of a dominant market position.²⁵⁴

²⁴⁵ Cf. *Ibid.*

²⁴⁶ UN, *UNCTAD Review of all aspects of the set of multilaterally agreed equitable principles and rules for the control of restrictive business practices – Resolution TD/RBP/CONF.6/14* (2005) para. 12.

²⁴⁷ UN, *The use of leniency programmes as a tool for the enforcement of competition law against hardcore cartels in developing countries – TD/RBP/CONF.7/4* (2010).

²⁴⁸ *Ibid.* in intro.

²⁴⁹ *Ibid.* para.3.

²⁵⁰ UN, *Restrictive business practices, Resolution 35/63 F.) No. 5.*

²⁵¹ UN, *UNCTAD Review of all Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices – Resolution TD/RBP/CONF.7/L.16* (2010) para. 3.

²⁵² UN, ‘Model Law on Competition Chapter VI – TD/RBP/CONF.7/L.6’ 2010.

²⁵³ UN, *UNCTAD Review to all Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices – Resolution TD/RBP/CONF.8/RES* (2015).

²⁵⁴ UN, *UNCTAD Report to Review all Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices – TD/RBP/CONF.8/11* (2015) B.) para. 2.

The review conference highlighted the need for agencies to act as transparently as possible – not only on the external side towards businesses, but internally as well – to strengthen competition law enforcement and advocacy.²⁵⁵ On the international level, the review conference outlined the importance of both formal and informal administrative cooperation for a working international competition law, especially regarding the regulation of mergers and acquisitions.²⁵⁶ Notably, the conference even responded to digitalization by lining out the importance of states developing their competition laws regarding e-commerce activities.²⁵⁷ The Member States consented to work together to examine various fields such as: the interface between competition law and intellectual property, the enforcement of competition law in the retail sector, the enhancement of legal certainty between competition authorities and the judiciary, and the opportunities fostering private sector capacities regarding the implementation of competition compliance programs.²⁵⁸ The next UNCTAD revision of the Codex will take place in 2020 and it can be presumed that the UNCTAD aspirations for creating a better working antitrust system will remain.

2.) *Legal Classification and Efficiency Check*

The UN Codex regarding restrictive business practices was the first and remains the only multilateral agreement in competition law and politics. Legally, the Codex and all its revisions are not binding on the Member States. Consequently, because of the lack of normative functions, the Codex does not represent a competition law point of reference in international law. It is considered to be a soft law instrument. This fact led commentators to call the Codex a rather political, even weak, mechanism, as the enforcement of the Codex is dependent upon the political will of the Member States.²⁵⁹ Taking into account the revisions of the Codex and the accompanying discussions, the impression of the Codex seems not to be weak at all. The codex and the conferences concerning it go beyond boosting up awareness towards the problems of anticompetitive behavior and its trade restraining effects. The whole UNCTAD multilateral process can be characterized as a bottom-up process. This is comprehensible for several reasons: First, the objective of the UNCTAD is to strengthen developing countries economically. Therefore, the UNCTAD would not be the ideal forum establishing substantive law in competition matters. Rather the UN itself or other fora specifying on economics, would be appropriate fora estab-

²⁵⁵ Ibid B.) para. 1.

²⁵⁶ Ibid B.) para. 3.

²⁵⁷ Ibid B.) No.4 para. 32.

²⁵⁸ UN, *UNCTAD Review to all Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices – Resolution TD/RBP/CONF.8/RES para. 20.*

²⁵⁹ Mozet, 'Internationale Zusammenarbeit der Kartellbehörden' 40: He assumed the code to have minor relevance in international cooperation of antitrust divisions, as the codex is more a political document than a legal one; Petersen, *Die Internationale Zusammenarbeit der Wettbewerbsbehörden* 27: She argues that the relevance of the codex is only of political nature, as the enforcement depends upon the political will of the Member States.

lishing substantive law. Consequently, the UNCTAD not only should refrain from establishing substantive law but must actively choose a bottom-up (i.e. developing and empowering), soft law approach. Second, competition law is a relatively young legal area. The global awareness of anticompetitive behavior and its market effects is rising, yet it seems not to have grown enough to force the establishment of a substantive law bottom-down approach, e.g. a binding International Competition Law. Moreover, before the emphasis of legal internationalization in competition law is feasible, the differences of a more basic nature, e.g. poverty or war have to be eliminated. Third, the aim of bottom-up soft law approaches is to create consent on the specific topic. This consent is the inevitable condition for creating substantive law. This fact changes the angle of perception from 'weak' approach to 'the strongest possible' approach creating binding substantive law. The above-described developments over the past 37 years support such assumption. The awareness of competition law problems and of the subjects covered by competition law have been rising steadily. Therefore, it can be assumed that the Member States increasingly converge with each other regarding competition matters. Admittedly, this process is time consuming, especially when the reviews of the UN Codex take place only once every 5 years.

Concluding, it can be said that the UN Codex regarding restrictive business practices of 1980 represents a realistic approach to regulating such a sensitive matter as competition law. The UN Codex is considered a transitional soft law instrument, building the basis for substantive law in the long run. To dissent with the commentaries mentioned, especially with Petersen, the UN Codex is not of a weak (legal) nature. Especially in international law, politics and law coincide and often cannot be reasonably separated.

To make a comment on possible improvements: Whilst economic interdependence is rapidly increasing, more frequent conferences reviewing the Codex – e.g. annually – are desirable.

III) The Recommendations of the OECD

After the Second World War Europe was shattered. To rebuild the economic interdependence within Europe, on 5 July 1947, the US Secretary of State George C. Marshall presented the European Recovery Program (ERP) to the European States. With this ERP commonly known as the "Marshall Plan" the US wanted to rebuild the European economy and to prevent the USSR from advancing communism in Europe. The only condition for the US to support the European states was that they unite, building a joint regime of economic competition. In July 1947, at the Marshall Plan Conference, 16 European states agreed to build the forum required. To administer the enforcement of the Marshall Plan, on 16 April 1948, the Organization for European Economic Co-operation (OEEC) was founded with 18 Member States (including Western Germany). Subsequently, the US provided 12.4 Billion

USD which were used by the European states to rebuild their infrastructure.²⁶⁰ The US urged the OEEC Member States to liberalize trade within Europe. In 1959, approximately 89% of European trade was liberalized.²⁶¹ After the initial purpose of the OEEC was attained, the Member States agreed to continue to cooperate. For that purpose, the OEEC was reformed and superseded by the newly founded Organization for Economic Co-operation and Development (OECD). The OECD was founded as a global economic and development cooperation forum. Besides the founding members of the OEEC, Canada and the US were involved in the establishing of the OECD. Nowadays, the OECD has 35 Member States from industrialized states around the globe.²⁶² These are economically relevant because they encompass more than 70% of global trade and produce more than 50% of all goods in the world.²⁶³

1.) *The Legal Basis of the OECD*

The OECD, as an international organization, is considered to be a subject of international law.²⁶⁴ Conferring Art. 1 of the OECD treaty, the objective of the OECD is to promote policies designed:

- (a) to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;
- (b) to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and
- (c) to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.²⁶⁵

Rather than establishing binding international law, the focus of the OECD is to coordinate the monetary and economic policies of its Member States. The agreements of the OECD are delivering on the Member States aspirations for the establishment of legal innovation and political enforcement. Hence the OECD works on a large variety of topics concerning global economics. It ranges from agriculture and fishing policies to education, health and more. An important subject of the OECD is competition and corporate governance. To deal with this variety of topics, the OECD

²⁶⁰ For an overview cf. Andreas Grau, Regina Haunhorst and Markus Würz, 'Marshall-Plan und Währungsreform' (*Lebendiges Museum Online, Stiftung Haus der Geschichte der Bundesrepublik Deutschland*, 2014) accessed 22.09.17.

²⁶¹ OECD, 'Organisation for European Economic Co-operation' (2017) accessed 22.08.17.

²⁶² Herdegen, *Internationales Wirtschaftsrecht* 61.

²⁶³ *Ibid.*

²⁶⁴ *Ibid.*; v. Arnauld, *Völkerrecht* 47.

²⁶⁵ OECD, *Convention on the Organisation for Economic Co-operation and Development* (1960).

can make decisions which may be binding on its Member States²⁶⁶ it may also make (non-binding) recommendations, and enter into agreements with members, non-members and International Organizations (Art. 5).

The structure of the OECD can be compared with the ECOSOC Cartel Commission proposal. The OECD Council is the highest organ of the OECD. The OECD Secretary and the Executive Committee are the steering body of the OECD (Arts. 7, 10). Secondary to the Executive Committee, Expert Committees, like the Committee of Experts on Restrictive Business Practices, are working on their specific topics.

2.) Recommendations

In the area of restrictive business practices, the Expert Committee established steady publications on competition matters as outlined below.

a.) Recommendation of the Council Concerning Cooperation Between Member

Countries on Restrictive Business Practices Affecting International Trade of 1967

After the effects doctrine emerged with the US Alcoa case and the USA started to apply their domestic competition laws to foreign businesses, objections and dissents were rising and ended up with blocking jurisdiction.²⁶⁷ Besides these problems of international law, dissents in material competition law were also increasing. As an example, the shipping industry had a firm practice of organizing and guaranteeing stable cargo rates. With the concurrence of all shipping companies, the shippers contractually established agreed timetables, served harbors, fares, and the distribution of cargo among themselves.²⁶⁸ Consumers choosing a member of the shipping conferences received discounts in shipping fees.²⁶⁹ This conduct was practically exempted from antitrust provisions all over Europe.²⁷⁰ Conforming to the US Shipping Act of 1916, the US shipping companies had to ask the Federal Maritime Commission (FMC) for confirmation of such agreements with other shipping companies and the FMC was restrictively allowing such conduct.²⁷¹ Since the effects doctrine had to be applied by all US federal competition authorities, in 1960 the FMC asked 190 foreign shipping companies to reveal every agreement affecting US trade. Resulting protests of European states ended in the official statement of European officials urging the European shipping companies to disobey the claim of

²⁶⁶ Binding by means of derived sovereignty in specific areas. *v. Arnould* states that International Organizations are not predestinated to establish binding international law, but states can decide to transfer sovereignty to IO's cf. *v. Arnould, Völkerrecht* 47.

²⁶⁷ See under § 1 B. I.

²⁶⁸ Hans Würdinger, 'Konferenzen der Linienenschiffart und GWB' *Wirtschaft und Wettbewerb (WuW)* 1969 655; Mozet, 'Internationale Zusammenarbeit der Kartellbehörden' 23.

²⁶⁹ Würdinger, 'Konferenzen der Linienenschiffart und GWB' 656.

²⁷⁰ Mozet, 'Internationale Zusammenarbeit der Kartellbehörden' 23.

²⁷¹ *Ibid.*

the FMC. The officials decided to take the case to the OECD to discuss the conflict with the US.²⁷² It was the US taking the first step towards a relaxation of tensions with the European states. The US proposed a feasibility report on the question whether cooperation in competition matters is possible.²⁷³ As the compromise regarding the shipping matters, the US agreed to end investigations against European shipping companies, whilst the European OECD Member States agreed to supply statistical information about the shipping conferences without revealing specific details of their members.²⁷⁴ Concerning the cooperation in competition matters, the Committee of Experts found in 1967 that cooperation is feasible. On the one hand, the economic similarities of the OECD Member States – all industrialized and developed states – and on the other hand, the similarities of the legal treatment of anticompetitive behavior, namely the norms of antitrust law, allowed for the cooperation of these states.²⁷⁵ As previous dissents of political nature inhibited cooperation in competition matters, the Expert Committee suggested the OECD recommend to its Member States a cooperation of a voluntary nature in the form of information exchange.²⁷⁶ Those suggestions were enacted by the OECD Council on 5 October 1967.²⁷⁷

The voluntary information exchange of the Council's recommendation suggests a (pre-investigation) notification of states in antitrust matters. The voluntary notification was not meant to restrict the application of a state's material antitrust measures²⁷⁸ nor was the notification meant to specifically arbitrate disagreements. It was rather intended to lead states to enter the diplomatic process as immediately as possible and to coordinate their legal proceedings against misbehaving entities.²⁷⁹

It was problematic that the legal provisions of the majority of the OECD members prohibited the exchange of discrete information.²⁸⁰ Those problems did not inhibit the tool of notification to lower diplomatic disputes.

²⁷² Mozet, 'Internationale Zusammenarbeit der Kartellbehörden' 24; International Law Association, *Tokyo Conference Committee Report on the extraterritorial application of restrictive trade legislation* (1964) 201.

²⁷³ OECD, *Report by the Committee of Experts on Restrictive Business Practices concerning Cooperation between member countries on restrictive business practices affecting international trade – C(67) 53* (1967) 3.

²⁷⁴ Mozet, 'Internationale Zusammenarbeit der Kartellbehörden' 24.

²⁷⁵ OECD, *Report by the Committee of Experts on Restrictive Business Practices concerning Cooperation between member countries on restrictive business practices affecting international trade – C(67) 53* 4 Ref. 6,7.

²⁷⁶ Ibid.

²⁷⁷ OECD, *Recommendation of the Council concerning Co-operation between Member countries in restrictive business practices affecting international trade – C(67) 53 (Final)* (1967).

²⁷⁸ OECD, *Report by the Committee of Experts on Restrictive Business Practices concerning Cooperation between member countries on restrictive business practices affecting international trade – C(67) 53* Appendix 5 Ref. 1 lit. a.

²⁷⁹ Ibid Appendix 5 Ref. 1 lit. b.

²⁸⁰ Petersen, *Die Internationale Zusammenarbeit der Wettbewerbsbehörden* 38.

To conclude, the aim of the OECD recommendation went beyond lowering the risks of diplomatic conflict between OECD Members, especially the transatlantic trade relations. By channeling diplomatic togetherness, the recommendation made the first step framing cooperation in antitrust matters and therefore de facto lowered the risk of diplomatic inconsistencies.²⁸¹ Yet, notification by itself is not sufficient to end diplomatic dissents. Therefore, the recommendation can be considered as a political 'first step' in the right direction creating awareness of the problem of state cooperation.²⁸²

b.) Recommendation of 1973

Following the OECD Council Recommendation of 1967, diplomatic dissents could not be brought to an end.²⁸³ Even if the OECD Member States made use of the notification, a political conversation did not take place because the notifications by states informing other states about their antitrust investigations were single-sided. As mentioned, the US treated the notification provision of the OECD as a kind of comity. Therefore, diplomatic discussions about the cases concerned did not take part, even if the notified states intervened within the notifying state (e.g. by writs of certiorari). For that reason, the OECD Member States agreed that more developed cooperation in antitrust matters was vital to fight global trade restraints.²⁸⁴ Consequently, in 1971 the OECD Expert Group regarding trade restraints established a system of consultation and arbitration which was enacted by the Council in 1973.²⁸⁵ If a state desired antitrust proceedings against foreign businesses, the state could have notified the foreign state asking for consultation.²⁸⁶ The notified state should have the opportunity to investigate the notified case.²⁸⁷ If the notified state concluded that the economic entity behaved in an anticompetitive manner, the state is asked to pressure the private businesses to end the misconduct. Moreover, the states are asked to voluntarily end the anticompetitive conduct.²⁸⁸ If the investigations and proceedings of the states come to an unsatisfactory end, the states are asked to present the case to the OECD Group of Experts for restrictive business practices.²⁸⁹

²⁸¹ Between 1967 and 1975 the notification process was used 137 times. The USA and Canada were using the notification the most, whilst the US considered the OECD notification suggestion as a kind of comity, cf. Mozet, 'Internationale Zusammenarbeit der Kartellbehörden' 27.

²⁸² Similarly conclusion cf. Petersen, *Die Internationale Zusammenarbeit der Wettbewerbsbehörden* 38.

²⁸³ Mozet, 'Internationale Zusammenarbeit der Kartellbehörden' 27.

²⁸⁴ Recital 2 OECD, *Recommendation of the Council concerning a consultation and conciliation procedure on restrictive business practices affecting international trade – C(73)99 (Final)* (1973).

²⁸⁵ Ibid.

²⁸⁶ No. 1 Appendix to *ibid.*

²⁸⁷ No. 2 Appendix to *ibid.*

²⁸⁸ No. 4 Appendix to *ibid.*

²⁸⁹ No. 6 Appendix to *ibid.*

The arbitration recommendation represents a change of tonality. Rather than the single-sided notification provision, the states are instructed to ask for cooperation. The advantage is that this change of tonality instantly takes the edge off diplomatic disputes. However, the enforcement of the recommended arbitrational tool was not binding. Presumably that was the reason why the OECD Member States never utilized it.²⁹⁰ Rather, the Member States applied their antitrust laws extraterritorially.²⁹¹ Looking at the arbitration tool of the OECD recommendation, its non-use might be explained. The measures seeking to end anticompetitive conduct are taking place within a state's economy. Requesting the affected state to ask the state of the misbehaving entity to either pressure the businesses ending their conduct or end it by other antitrust means before an actual arbitration by the OECD Expert Group might take place is not only a long-lasting, inefficient, process. It omits a substantial part of administrative antitrust measures: the imposing of sanction against the misbehaving entity. Sanctioning measures are of a repressive character trying to prevent a repetition of the restraining conduct. They are the legal consequence of the interdiction of the specific conduct. Without them, antitrust measures would have no consequences and would, therefore, not work efficiently reaching their ambit.

To consider the different opportunities for fighting anticompetitive behavior, a state will always apply a cost-benefit calculation. If the application of the arbitration tool (to avoid diplomatic dissents) is accompanied by the forfeiture of profound parts of administrative efficiency, a state will probably accept the diplomatic dissents in favor of an efficient domestic antitrust regulation. The fact that the OECD Member States had a choice between three different antitrust enforcement policies did not strengthen the arbitrational approach.

c.) Recommendation of 1979

Conferring the described fragmentation of the different OECD recommendations, the recommendation of 1979 aimed to unite the different tools of cooperation.²⁹² The tools of reciprocal notification, exchange of information, and co-ordination of action are listed under part A of the recommendation, whilst the tools of consultation and arbitration are listed under part B.²⁹³ As the usage of the notification provisions was not expedient due to the mentioned differences in the interpretation of the notification tool, the recommendation of 1979 asked the Member States to notify at a time "deemed appropriate, if possible in advance and in any event at a time that would facilitate comments or consultations".²⁹⁴ This clarification of the notification tool does not represent an innovative provision but elucidates what

²⁹⁰ Petersen, *Die Internationale Zusammenarbeit der Wettbewerbsbehörden* 40; Mozet, 'Internationale Zusammenarbeit der Kartellbehörden' 28.

²⁹¹ Ibid.

²⁹² Mozet, 'Internationale Zusammenarbeit der Kartellbehörden' 28.

²⁹³ OECD, *Recommendation of the Council concerning Co-operation between Member countries on restrictive business practices affecting international trade – C(79) 154 (Final)* (1979) lit. A and B.

²⁹⁴ Ibid. A. No.1 lit. a.

the OECD meant by a proper notification tool. As Mozet points out, this clarification was new, yet axiomatic.²⁹⁵ Furthermore, the recommendation asks the Member States to exchange confidential information on restrictive business practices in the event of consultation as long as their legitimate interests allow them to disclose such information.²⁹⁶ Overall, the recommendation of 1979 unites the previous ones, yet does not introduce much innovative change. It is, therefore, considered as a structural reform rather than a new recommendation. The fact that this development took six years, makes the recommendation appear in a rather ineffective and uncreative light. On the positive side, however, the recommendation meets the needs of greater awareness towards notifications, as evidenced by the fact that at the time the number of notifications rose and is still rising.²⁹⁷

d.) Recommendation of 1986

Three years later, in May 1982, the OECD Council instructed the Committee of Experts to revise the recommendation of 1979 with respect to the strained relationship between competition and trade politics.²⁹⁸ Already at the time, the committee of experts assessed that the further revision of the 1979 recommendation will not include new material provisions, because the recommendations should not exceed their non-mandatory character.²⁹⁹ In 1986, the committee of experts presented two recommendations which are to be divided into two parts: the revision of the 1979 recommendation³⁰⁰ and the recommendation regarding international trade politics.³⁰¹

Rather than addressing the specific antitrust authorities, the latter “trade policy” recommendation was intended to address the administration of the Member States to cooperate in trade politics internationally. It urges administrations to take into account the interests of their trading partners in their own competition policies and give consideration to the effects of their measures and their effects on the concerned markets.³⁰² It can, therefore, be understood as a call for moderation of the use of international trade policy. Furthermore, the recommendation urges the Member State

²⁹⁵ Mozet, ‘Internationale Zusammenarbeit der Kartellbehörden’ 29.

²⁹⁶ OECD, *Recommendation of the Council concerning Co-operation between Member countries on restrictive business practices affecting international trade – C(79) 154 (Final) A. No.2.*

²⁹⁷ Cf. Petersen, *Die Internationale Zusammenarbeit der Wettbewerbsbehörden* 41: Between 1980 and 1981 in 200 competition cases notifications cf. to the recommendation took place. In 2001, only between the EU and the USA 115 reciprocal notifications took place.

²⁹⁸ OECD, *C(82) 58(Final)* (1982).

²⁹⁹ OECD, *Competition Law Enforcement: International Cooperation in the Collection of Information* (1984) Annex I.

³⁰⁰ OECD, *Revised Recommendation of the Council concerning Co-operation between Member countries on restrictive business practices affecting international trade – C (86) 44 (Final)* (1986).

³⁰¹ OECD, *Recommendation of the Council for Co-operation between Member countries in areas of potential conflict between competition and trade policies – C(86) 65 (Final)* (1986).

³⁰² *Ibid* I. A. lit.a No. 2.

administrations not to encourage the exercise of market power in foreign markets by the formation of export cartels.³⁰³ As well as in the antitrust co-operation recommendations, the trade policy recommendation suggests a notification and consultation system in trade policy matters if trade policies of a state severely affect another state's market.³⁰⁴ As the trade policy recommendation did not include efficiency checks by self-disclosing questionnaires, the effectiveness of the recommendation cannot be investigated.³⁰⁵

As stated by the committee of experts in 1984, the revision of the 1979 recommendation of 1986 did not supply new material provisions for international antitrust co-operation. The recommendation of 1986 rather supplied the OECD interpretation of what was meant by specific provisions: the appendix to the recommendation supplies "guiding principles" to the application of the previous recommendations. More specifically, the appendix lists the formal requirements (e.g. written form, content, and procedure of the notification process as well as the time it should take place). The principles address the consultation process and specifically taking reference to arbitration and the acquirement of information, especially addressing the questions of confidentiality³⁰⁶ – all of which faced considerable political contention. The foreign acquisitions of information relating to the anticompetitive business practices was considered as a breach of territoriality, nevertheless the US made extensive use of these methods. That was why the EU wanted the OECD to recommend that these be used in moderation. The OECD did not only want to prevent policy conflict but also explicitly wanted to prohibit the revival of the legal blocking status process.³⁰⁷ As the recommendation regarding moderate international investigation is formulated in a rather soft and unspecific way, it thus appears to be a compromise.³⁰⁸ Regarding the arbitration of co-operation dissents, the experts committee was convinced that even if the tool was never used, it might have relevance in the future.³⁰⁹ As the number of arbitration cases between OECD Member States cannot be identified it can be presumed that the Member States never let their diplomatic disagreements escalate to such an extent that the OECD Council had to arbitrate. Even so, the idea of arbitration was expressed.

³⁰³ Ibid I. A. lit. b No.7.

³⁰⁴ Ibid B. lit. b.

³⁰⁵ Petersen, *Die Internationale Zusammenarbeit der Wettbewerbsbehörden* 44.

³⁰⁶ OECD, *Revised Recommendation of the Council concerning Co-operation between Member countries on restrictive business practices affecting international trade – C (86) 44 (Final) Annex No.5-7.*

³⁰⁷ Mozet, 'Internationale Zusammenarbeit der Kartellbehörden' 30.

³⁰⁸ OECD, *Revised Recommendation of the Council concerning Co-operation between Member countries on restrictive business practices affecting international trade – C (86) 44 (Final) Annex No.6.*

³⁰⁹ Mozet, 'Internationale Zusammenarbeit der Kartellbehörden' 31.

e.) Recommendation of 1995

In 1995, the OECD Council agreed on a new revision of the competition co-operation recommendations.³¹⁰ Materially, the recommendation did not provide any reforms. After nine years of silence regarding the co-operation matter in antitrust law, the OECD wanted to revive their recommendations.³¹¹ With respect to the tool of consultation and arbitration, the Council asked the Member States to periodically report their progress and accomplishments in reciprocal consultation and, if possible, conciliation of disputes.³¹² This showcased the curiosity of the Council to detect the effective implementation of the previous recommendations and its tools, especially the tools of consultation and arbitration. As the recommendation of 1995 is the last to revise and reform the previous recommendations, the OECD maintains the framework of co-operation in antitrust matters ever since. The recommendations somewhat represent a basis of international administrative co-operation in antitrust matters for the OECD Member States. In the same year, the committee of experts – now called the OECD Competition Committee – set up a yearly roundtable best practice forum for antitrust matters. This roundtable is intended to promote the regular exchange of views and analysis on competition policy issues.³¹³ The OECD tries to keep up the co-operation dialogues of its Member States, supporting the enforcement of its recommendations with a self-created roundtable. This can be seen as a fostering step towards international co-operation.

f.) Recommendation Concerning Effective Actions Against Hardcore Cartels of 1998

The mentioned recommendations of the OECD Council mainly covered the procedural side of inter-administrative cooperation in antitrust matters. In 1998, the OECD Council detected hard-core cartels as the most egregious violation of competition laws with severe effects for consumers³¹⁴ and declared its intention to promote the fight against it internationally.³¹⁵ For that reason the OECD materially defined their understanding of hardcore cartels:

³¹⁰ OECD, *Revised Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade – C (95) 130 (Final)* (1995).

³¹¹ Cf. Petersen, *Die Internationale Zusammenarbeit der Wettbewerbsbehörden* 43.

³¹² OECD, *Revised Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade – C (95) 130 (Final)* III. No. 3.

³¹³ See OECD, 'Best Practice Roundtables on Competition Policy' (2017) <<http://www.oecd.org/competition/roundtables.htm>> accessed 14.09.17.

³¹⁴ See Recital 7 to the OECD, *Recommendation of the Council concerning Effective Action against Hard Core Cartels – C (98) 35 (Final)* (1998).

³¹⁵ See Recital 8 *ibid.*

an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce.³¹⁶

For the first time, the OECD Council agreed upon a substantive antitrust definition apart from just procedural co-operation. Because the definition of a hardcore cartel appears quite vague, it had a far-reaching scope. That was why the OECD Council limited the definition of a hard core cartel, while also leaving the Member State to implement their own domestic exceptions to the definition.³¹⁷ Aware of the far reaching consequences associated with the reduction of the term ‘hardcore cartel’, the OECD Council asked its Member States to design the exceptions to the definition to be transparent as possible and to review the need for the specific exception.³¹⁸ Apart from this material definition, the recommendation is divided into two parts: material recommendations for Member States on how to deal with hardcore cartels³¹⁹ and recommendations regarding the (procedural) international co-operation fighting those hardcore cartels.³²⁰ The material provisions are, apart from the mentioned definition of hardcore cartels, not detailed. The recommendations simply suggest effective sanctions for hardcore cartel participants as well as equipping the particular antitrust authority with the necessary legal competence enforcing antitrust law against hardcore cartels (e.g., powers to obtain documents and information and to impose penalties for non-compliance).³²¹ As before, the emphasis of the OECD recommendation is the improvement of procedural co-operation of its Member States on an administrative level.³²² Innovatively, the recommendation supplies a positive comity procedure to fight hardcore cartels without infringing the laws of another state involved.³²³ This awareness derives from ongoing conflicts between states on how to enforce domestic competition terms extraterritorially. Inversely, the bilateral competition agreement of 1998 between the EU and US implemented positive comity provisions in its agreement of 1991. The reasons behind this are examined below, but the assumption of Petersen that the EU and US reformed its agreement because of the 1998 OECD recommendation can neither be proven nor be reasonably argued for.³²⁴ It can rather be assumed that the positive co-

³¹⁶ Ibid I. A. No. 2 lit. a.

³¹⁷ Ibid I. A. No.2 lit. b.

³¹⁸ Ibid.

³¹⁹ Ibid I. A.

³²⁰ Ibid I. B.

³²¹ Ibid I. A. No.1 lit. a and b.

³²² See also Petersen, *Die Internationale Zusammenarbeit der Wettbewerbsbehörden* 45.

³²³ OECD, *Recommendation of the Council concerning Effective Action against Hard Core Cartels – C (98) 35 (Final)* I. B. No. 1 and 2.

³²⁴ Petersen, *Die Internationale Zusammenarbeit der Wettbewerbsbehörden* 46.

mity approach is based on the US competition law, as the US legal system provided for positive comity before.³²⁵ Therefore, the idea was most likely propagated by the US rather than the OECD.

Positive comity principles command the parties involved to obey the legal provisions of each other. It can be compared with the *ordre public* in international law, except that the *ordre public* secures the values and laws of a more basic nature. Whilst the *ordre public* is part of international custom, positive comity is not. Positive comity has to be specified by the individual contracting states concerned.

Regarding this individual definition of positive comity, Member States may reject requests to cooperate if the requested cooperation infringes either their legal provisions or their “legitimate interests”.³²⁶ Furthermore, the positive comity provisions of the 1998 recommendation address the exchange of information between Member States, as this exchange of information was not allowed due to widespread national legal prohibitions. For that reason, the recommendation asks the Member States to eliminate legal or actual obstacles regarding information exchange by consulting and discussing these matters.³²⁷ However, the recommendation is relativized by the statement that it is without prejudice and not meant to interfere with other recommendations or cooperation agreements in any way.³²⁸ The most innovative statement of the recommendation is that it suggests that Member States form networks of cooperation by the way of bi- or multilateral agreements. The evolution of the network theory will be described at another place, but the fact that the recommendation takes up the modern approaches makes it appear in a modern and innovative light.

In any case, the developments of other fora dealing with international antitrust cooperation (which will be discussed) have to be taken into account.

To rate the efficiency of the 1998 recommendation, one needs to address the mandate of the Competition Committee to steadily review the progress in fighting hardcore cartels. This mandate was extended until 2005 and the Competition Committee reported on the fight against hardcore cartels in 2000, 2002, 2003 and 2005.

In 2000, the Competition Committee detected that Member States enacted substantial material policy fighting hardcore cartels, e.g. stronger cartel rules in the Scandinavian Member States or more stringent sanctions in Germany.³²⁹ Therefore, first steps against hardcore cartels were established, even though the committee detected that the procedural cooperation in fighting hardcore cartels – especially the exchange of (confidential) information – was not satisfactory.³³⁰ It made significant

³²⁵ Cf. FTAIA and the reformation of § 6 of the Sherman Act in 1982, see above.

³²⁶ OECD, *Recommendation of the Council concerning Effective Action against Hard Core Cartels – C (98) 35 (Final)* I. B. No. 2 lit. c.

³²⁷ *Ibid.* I. B. No. 3.

³²⁸ *Ibid.* I. B. No. 4.

³²⁹ OECD, *Report on Hard Core Cartels* (2000) 6.

³³⁰ *Ibid.* 7.

suggestions on how to improve the efficiency of international cooperation, raising the awareness of how much monetary harm hardcore cartels produce by making reference to specific cases³³¹ and to specific policy approaches of Member States.³³²

In 2002, the Competition Commission with respect to an informal Roundtable in 2000 regarding leniency programs, came to the conclusion that leniency programs uncover conspiracies such as hardcore cartels that would otherwise go undetected and also make the ensuing investigations more efficient and effective.³³³ To measure the effects of leniency programs the Committee refers to US, EU, Canadian and UK leniency approaches – some more, some less strict – making special reference to the better accountability of remedies and sanctions, as well as pointing out the importance of special disclosure treatment.³³⁴ With a second report in 2002, the Competition Committee made special reference to the design of sanctions against hardcore cartels. It observed that while some states increased sanctions they did not do so in an appropriate way. Rather, the Committee concluded that sanctions have to exceed the harm done by the cartel and therefore, have to rise dramatically.³³⁵ With the second official report to the 1998 Council recommendation, the Competition Commission made reference to the 2002 reports and highlighted the progress made enacting leniency programs and more strict sanctions in the fight against hardcore cartels and the rising awareness regarding the need to fight hardcore cartels.³³⁶ Still, the Committee concluded that the harm done by hardcore cartels was hard to measure and detect and fundamental improvement to state co-operation in antitrust matters had to be achieved.³³⁷ Regarding leniency programs, the exchange of confidential information still appeared as a basic problem.³³⁸ The Competition Committee was convinced that its work was not done in 2003 and that it was its obligation to continue fighting hardcore cartels, especially by monitoring the improvements, advising and convincing the Member States on how to improve co-operation in antitrust matters especially by best practice roundtables.³³⁹ That was why the mandate of the Committee was extended. Two years later, in 2005, the Competition Committee presented what was meant to be its preliminary report on the international fight against hardcore cartels but was in fact its last report on the subject.³⁴⁰ Whilst the report reaffirms the positive contributions of the former reports to the 1998

³³¹ Ibid 20 ff.

³³² Ibid 25 ff.

³³³ OECD, *Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programs* (2002) 7.

³³⁴ Ibid.

³³⁵ OECD, *Report on the Nature and Impact of Hard Core Cartels and Sanctions against Cartels under National Competition Law – DAFNE/COMP 7* (2002) 17.

³³⁶ OECD, *Hard Core Cartels: Recent Progress and Challenges ahead* (2003) 8 ff. and 15 ff.

³³⁷ Ibid 44 f.

³³⁸ Ibid.

³³⁹ Ibid 48.

³⁴⁰ OECD, *Hard Core Cartels: Third report on the implementation of the 1998 Council Recommendation* (2005).

OECD Council recommendation regarding the fight against hardcore cartels, it concludes that more countries should expand their awareness program and work more extensively with procurement officials in an effort to fight bid rigging more effectively.³⁴¹ Whereas the Commission's work previously covered hardcore cartel conduct in the private sector, it observed that bid rigging in government procurement cases also affects private-public contracts.³⁴² Therefore, it can be said that the Commission detected the comprehensive risks of hardcore cartel conduct. Yet the problems in detecting and sanctioning hardcore cartels appear similar to the previous reports. New were the approaches to investigating plea bargaining procedures for more effective cartel prosecution, as well as examinations of private enforcement regarding remedies of cartel victims.³⁴³

As many of the described problems dealt with the exchange of information, findings of the Committee regarding the formal and confidential exchange of information between state authorities were summed up in a best practice guide by the Competition Committee in 2005.³⁴⁴ For the efficient acquisition of information in antitrust cases, the Committee concluded the following steps must be taken:

- Respecting the authority of another state to exchange information: The requesting and the requested antitrust authority should respect each other's authority to acquire information, especially the reasons why the requested authority might reject the request for supplying information.³⁴⁵
- Provisions of confidentiality regarding the use and disclosure of exchanged information: The provisions set a benchmark of confidentiality for the authorities. As the information are of highly sensitive nature, the Competition Committee tries to set the benchmark as high as possible. For example, the provisions suggest the requesting authority submit a statement keeping up utmost confidentiality.³⁴⁶
- The provisions provide a so-called "Protection of Legal Privilege" clause: The information supplying state has the fullest authority to deal with the information. The requesting state is ought to fully describe the need for the information and what it wants to prove with it.³⁴⁷
- The last provision deals with the notice to the source of the exchanged information: The requested state is not required to give notice to the source of the anticompetitive conduct information in a way that jeopardizes

³⁴¹ Ibid 4.

³⁴² E.g. the Hungarian Motorway Construction Cartel Case or the Swedish Asphalt Cartel Case see *ibid* 20 ff.

³⁴³ Ibid 40 f.

³⁴⁴ OECD, *Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations* (2005) No.3.

³⁴⁵ Ibid II. A. No. 1-4.

³⁴⁶ Ibid II. B. No. 1-5.

³⁴⁷ Ibid II. C. No. 1 and 2.

the investigations of the requesting state. In any case, the information supplying state should communicate with the investigating state before notifying the source.³⁴⁸

All these provisions are an expression of the attempt of the Competition Committee to promote a respectful (procedural) diplomatic dialogue. Overall, one may say that the recommendation of 1998 with all its reports and recommendations shows that progress can be made, even if the provisions are not binding on the Member States. The fact that a high-level group of experts not only displayed the 1998 Council recommendation but progressively contributed to its development suggesting both modern procedural and material antitrust provisions, – also archiving profound successes in prosecuting hardcore cartels – shows that this process is not only highly modern but, thus far, is the most efficient process within the OECD.

g.) OECD Reports and Recommendation Regarding Merger Review

As mentioned, building up monopolies is considered to be an anticompetitive behavior. For that reason, merger regulation is a substantial part of antitrust law. Whilst the described branches of antitrust law co-operation largely comply with the detection and sanctioning of existing cartels, merger review seeks the prevention of the formation of cartels. Within the OECD, the awareness of the regulation of merger reviews and its international difficulties in state cooperation rose in the 1990s. Under the authority of the Competition Committee, a case study was presented to the OECD Council in 1994 covering merger review cases drawing significant recommendations for action being done in the light of international state authority co-operation.³⁴⁹ The Competition Committee was mandated by the OECD Council in 1991 to review existing international pre-merger procedures and outline the convergences and differences between them.³⁵⁰ The experts examined nine different merger cases to draw distinct conclusions regarding international co-operation in merger regulation. Mainly, the experts found greater procedural co-operation, e.g. by coordinating timetables; by a more targeted exchange of (confidential) information (e.g. by reducing overlapping information requests); and by greater transparency of convergent co-operation in public documents.³⁵¹ They believed that greater procedural convergence in merger review state co-operation would lead to greater convergence of material provisions.³⁵² To develop their findings, the experts recommended the following:

³⁴⁸ Ibid II. D. No. 1-3.

³⁴⁹ OECD, *Merger Cases in the Real World – A Study of Merger Control Procedures* (1994).

³⁵⁰ Ibid 9.

³⁵¹ Ibid 14 lit. a.-c.

³⁵² Ibid 15 lit. d.

- To increase general co-operation pursuant to the OECD recommendation of 1986
- To introduce the idea of waivers by the affected and regulated parties regarding their rights of confidentiality
- To bring greater clarity to the information regarded in terms of the extent of confidentiality
- To distribute information in public domain more widely
- To create formal model filing forms for information, which would request information in one format
- To introduce notification requirements, creating greater legal certainty.³⁵³

Again, the Competition Committee highlighted its understandings and suggestions by the evaluation of actual cases. This underlined and clarified their point of view, making it more comprehensible for the OECD Member States. In 1999, the Competition Committee made reference to its case study and recommendations of 1994 pointing out that still huge differences in merger notification existed. For example, they pointed out the difference between the US and EU merger notifications. In 1999, fewer than 200 mergers have been notified to the EC, whereas in the US more than 3,700 mergers have been notified to the competent authorities.³⁵⁴ To lower the differences in the notification process, the Competition Committee designed a model filing form for merger notifications, as suggested in the 1994 recommendation.³⁵⁵ The Committee suggested that the OECD Member States adopt these notification forms to create harmonization in the long run.³⁵⁶ In the short run, the Committee encouraged the Member States to use the notification as guidance. While the fact that it took five years for the Committee to make these suggestions puts it in a bad light, the steady progress of the Committee highlights its commitment to continue the developing of international antitrust co-operation. Also in hardcore cartel matters, the Competition Committee organized high level expert roundtables on merger matters to outline specific best practices and discuss problems.³⁵⁷ The merger roundtable discussion investigated mergers in financial services to highlight the importance of distinguishing market branches and their specific market shares in national and international markets,³⁵⁸ making its merger regulation quite ambitious. Furthermore, some branches of the financial sector have such a great market and political relevance that they are 'too big to fail' and are afforded state aid more easily than other branches, which also has to be taken into account in merger regulation.³⁵⁹ Similar conclusions from roundtable summits regarding merg-

³⁵³ Ibid 15 f. Rec. 1-7.

³⁵⁴ OECD, *Notification of Transnational Mergers – DAFFE/CLP 2 (Final)* (1999) 3 No. 6.

³⁵⁵ Ibid 5 No. 11 and Appendix.

³⁵⁶ Ibid.

³⁵⁷ OECD, *Mergers in Financial Services – DAFFE/CLP 17* (2000).

³⁵⁸ See *ibid* 22.

³⁵⁹ Ibid 25f.

ers in the media industry were delivered by the Competition Committee in 2003.³⁶⁰ In the same year, the Competition Committee published a summary of a roundtable discussion regarding merger remedies.³⁶¹ The expert roundtables demanded remedies of a moderate sanctioning nature: They should not err to the overly strict side, as they might harm consumers by reducing the efficiencies expected from a merger.³⁶² Neither should remedies deal only with the harm done by anticompetitive behavior. They should go beyond compensating the harm and beyond “what is strictly necessary to maintain competition at, or restore competition to, the required level”.³⁶³ The remedies should neither be used to improve merger deals nor for any other purpose than to restore fair competition and establish sanctions. Furthermore, the roundtable expert group investigated the different possibilities of remedies and concluded that divestitures are the most effective form of remedies.³⁶⁴ The summary of the roundtable discussion shows ongoing and steady development towards the OECD recommendations.

In 2005, the OECD Council published its recommendation on merger review.³⁶⁵ In addition to the roundtable expert summaries, the recommendation of 2005 highly recommended that the states provide comprehensive legal provisions for the state authorities to co-operate in merger review cases in a similar way to the co-operation in the fight against hardcore cartels.³⁶⁶ Overall, the development of the roundtable groups found its way into an official OECD act. That is why one may say that the OECD recommendations are at the ravages of time. As stated before, the OECD recommendation of the Council is of a non-binding legal nature. The work of the expert roundtables regarding merger review did not cease after the 2005 Council recommendation. In 2007, the Competition Committee published the summary of the expert roundtables regarding the regulation of vertical mergers.³⁶⁷ Vertical mergers were considered hard to regulate, as they do not increase price efficiency, but non-price efficiency is realized by an increase in coordination.³⁶⁸ The expert committee analyzed that vertical mergers might have foreclosure effects with anti-competitive effects to competitors resulting in negative effects for the downstream consumer and how to identify such cases.³⁶⁹ The Committee recommended that the ex post merger review using “abuse of dominance” or “monopolization” provisions, is not always suitable for an ex ante vertical merger review.³⁷⁰ For that reason, the

³⁶⁰ OECD, *Media Mergers – DAF/COMP 16* (2003).

³⁶¹ OECD, *Merger Remedies – DAF/COMP 21* (2003).

³⁶² *Ibid* 7.

³⁶³ *Ibid*.

³⁶⁴ *Ibid* 8-10.

³⁶⁵ OECD, *Recommendation of the Council on Merger Review – C (05) 34* (2005).

³⁶⁶ *Ibid* B. 1-4.

³⁶⁷ OECD, *Policy Roundtable on Vertical Mergers – DAD/COMP (07) 21* (2007).

³⁶⁸ *Ibid* 7.

³⁶⁹ *Ibid* 7 f. No. 2-4.

³⁷⁰ *Ibid* 10 No. 7.

Committee suggested improving time and resources as well as the remedies available for successful antitrust enforcement against vertical mergers.³⁷¹ Again, the expert meeting explored challenging parts of antitrust regulation making substantial recommendations on how to handle them.

h.) Recommendation on Competition Assessment

In 2009, the OECD Council enacted the recommendation on state competition assessment.³⁷² The recommendation recognized that sometimes state policy might unintentionally restrict competition and these kind of policies can be reformed in a way that promotes market competition while achieving the public policy objectives.³⁷³ In 2014, the Committee reviewed the recommendation of 2009.³⁷⁴ It conducted a survey rating the improvements in public policy the results of which showed that the recommendations and the development of a competition assessment toolkit were highly positive in the promotion of efficient public policy.³⁷⁵ The recommendation does not directly address antitrust regulation or co-operation, even though the recommendation shows that the conviction of the OECD Council for a functioning fair market does not end at antitrust regulation, but extends to different areas with similar market effects. Hence, the recommendations of the OECD can be rated as consistent and coherent.

i.) Recommendation Concerning Structural Separation in Regulated Industries

In 2001, the OECD Council enacted its recommendation concerning structural separation in regulated industries. Mainly it recommended a careful balancing of the costs and benefits of structural against behavioral measures taken against economic entities. The Competition Committee pointed out the structural problems in regulating firms acting in competitive and non-competitive market branches³⁷⁶ and how to deal with them.³⁷⁷ The Committee reports followed the recommendation and checked the improvements made. Another efficiency summary of the Competition Committee was published in 2016. The recommendation and the efficiency reports of the Committee show that the OECD tried to demonstrate its recommendation underlining them with hard facts, e.g. by the evaluation of cases.

³⁷¹ Ibid.

³⁷² OECD, *Recommendation on Competition Assessment – C (09) 130* (2009).

³⁷³ Ibid 1.

³⁷⁴ OECD, *Experiences with Competition Assessment* (2014).

³⁷⁵ Ibid 3.

³⁷⁶ OECD, *Restructuring Public Utilities for Competition –* (2001) 8.

³⁷⁷ Ibid 53-55.

j.) Recommendation on Fighting Bid Rigging in Public Procurement

As mentioned in the fight against hardcore cartels, the OECD Competition Committee continued to design practical ways to fight bid rigging in public procurement cases. In 2009, it published a Guideline leading the OECD Member States to fight bid rigging in their public procurement cases.³⁷⁸ The Guidelines not only indicate the problematic industries where bid rigging is common but also suggest designs of processes, which would substantially lower the risk of bid rigging by lowering the chance of bidder communication.³⁷⁹ Referring to the Guidelines adopted by the Competition Committee, the OECD Council adopted its recommendation on the fight against bid rigging in 2012.³⁸⁰ This official OECD act mainly embraced the different suggestions of the Committee regarding the fight against bid rigging and asked the Committee to revise the implementation of the recommendation presenting a report no later than five years after the adoption of the recommendation. In its report in 2016, the Committee attested that the OECD Recommendation was widely used by the Member States.³⁸¹ It not only raised the awareness of bid rigging in public procurement but it also helped Member States to detect bid rigging in public procurement.³⁸² The Competition Committee suggested closer co-operation of antitrust and anticorruption authorities to close loopholes in the fight against bribery and bid rigging.³⁸³ Overall the OECD examined a troubled part of antitrust regulation and developed distinct suggestions to be developed over the time.

k.) Recommendation Concerning International Co-operation on Competition Investigations and Proceedings

In May 2014, the OECD launched its Initiative on New Approaches to Economic Challenges (NAEC). Concerning the international co-operation of antitrust authorities, the Competition Committee was asked to report to the Council highlighting challenges and possible improvements in international co-operation. The Committee was especially asked to revise the 1995 recommendation concerning co-operation between Member Countries on anticompetitive practices affecting international trade in the light of existing challenges.³⁸⁴ The Committee presented its report “Challenges of International Co-operation in Competition Law Enforcement” to the Councils NAEC in May 2014.³⁸⁵ The report makes reference to the

³⁷⁸ OECD, *Guidelines for Fighting Bid Rigging in Public Procurement* (2009).

³⁷⁹ *Ibid* 7.

³⁸⁰ OECD, *Recommendation of the OECD Council on Fighting Bid Rigging in Public Procurement – C (15) 115* (2012).

³⁸¹ OECD, *Fighting Bid Rigging in Public Procurement: Report on implementing the OECD Recommendation* (2016).

³⁸² *Ibid* 7.

³⁸³ *Ibid* 28.

³⁸⁴ See introduction to OECD, *Challenges of International Co-operation in Competition Law Enforcement* (2014).

³⁸⁵ *Ibid*.

historical development of international antitrust co-operation and highlights the achievements and developments of the OECD in connection with the development of the global economy.³⁸⁶ Moreover, as mentioned above, the report underlines the necessity of international co-operation in antitrust matters deriving from international economic interdependence with specific reference to increase in international trade, foreign direct investments and cross-border M&A deals.³⁸⁷ The report sums up the development of international co-operation and mentions the different varieties of international co-operation. Besides the different varieties of multilateral co-operation by different fora such as the ICN or by FTAs,³⁸⁸ the report particularly highlights the improvements in bilateral co-operation in antitrust matters.³⁸⁹ Apart from that, the report highlights the improvement in public awareness of antitrust regulation with the development of international authorities.³⁹⁰ It discusses the harm stemming from an absence of international co-operation, especially with respect to cross-border mergers and cross-border cartels.³⁹¹ The report reasons that inconsistencies in international cross-border merger regulation originating in structural inefficiency will cost more than 100 million USD.³⁹² Furthermore, the more far-reaching and expansive the cross-border mergers are, the more clouded the multi-jurisdictional clearance and the transparency of the global economy will become.³⁹³ Regarding cross-border cartels, a lack of coordination in investigating anticompetitive conduct will lead to unavoidable harm to the efficiency of economies.³⁹⁴ For these reasons, the Committee presented its suggestions regarding the enhancement of international co-operation by the development of bilateral co-operation; the development of standards for legislative frameworks enabling the sharing of information; the development of common forms of waivers; the development of multilateral tools representing the most pressing needs for co-operation in antitrust matters; the development of international standards of comity in antitrust matters easing cross-border investigations; allowing authorities to choose to recognize another authority's decisions; and reaching a multilateral agreement for the exchange of information, comity, and deference standards between authorities.³⁹⁵

To summarize the report: The recommendations of the Committee were not innovative but summarize several different previous recommendations. It concluded the different OECD developments described and highlighted the positive and negative facts of international antitrust regulation.

³⁸⁶ Ibid 11 ff.

³⁸⁷ Ibid 21 ff. No. 3.1.1.

³⁸⁸ Ibid 18.

³⁸⁹ Ibid 7, 18.

³⁹⁰ Ibid 27 No. 3.2.1.

³⁹¹ Ibid 39 No. 4.1 and 45 No. 4.2.

³⁹² Ibid 42 No. 4.1.2.

³⁹³ Ibid 44 No. 4.1.3.2.

³⁹⁴ Ibid No. 4.2.2.

³⁹⁵ Ibid.

Within the NAEC the OECD Council discussed the report of the OECD Competition Committee and decided to replace and reform the 1995 recommendation by publishing the 2014 recommendation concerning international co-operation on competition investigations and proceedings.³⁹⁶ The recommendation reaffirms the described OECD works on co-operation in competition matters since 1995, highlighting the importance of international co-operation in antitrust matters between states especially in a time of ongoing global economic interdependence.³⁹⁷ Compared to the other recommendations, the 2014 recommendation directly advises Member States to adopt the recommendation in their “bilateral or multilateral arrangements”.³⁹⁸ Rather than only addressing the Member States generally, the Council directly recommends to the Member States the forum to design the interstate co-operation to minimize its legal and practical obstacles. This may be seen as a reaction of the OECD to the steady ongoing bilateralization of international competition law.

After the clearance and definition of practical legal terms, e.g. ‘anticompetitive practice’ or ‘waivers’, the Council directly recommended its adherents commit to effective international co-operation in antitrust matters by minimizing co-operation hindering state legislation; by providing sufficient understandable information about their national procedural rules, and by minimizing the differences in leniency and amnesty programs in antitrust law.³⁹⁹ Furthermore under the heading “Consultation and Comity”, the Council recommended that the adherents communicate with each other without prejudice, exchanging their different views on antitrust matters.⁴⁰⁰ Especially in merger reviews they should communicate to eliminate the possibility of diplomatic disputes.⁴⁰¹ As in the recommendation of 1995 under the heading “Notifications of Competition Investigations and Proceedings”, the Council recommended that Member States notify each other in competition proceedings when the proceedings can be expected to affect the interests of another state. For that reason, the Council listed cases which are considered to affect state interests. Additionally, it made suggestions to the form of notification and recommended a direct notification to the competent competition authority bearing its interests in mind.⁴⁰² Under the headline “Co-ordination of Competition Investigations or Proceedings”, the Council endorsed a co-ordination of competition proceedings and listed specific cases in which co-ordination in proceedings is vital and how to

³⁹⁶ OECD, *Recommendation concerning International Co-operation on Competition Investigations and Proceedings – C (14) 108* (2014).

³⁹⁷ *Ibid* 1.

³⁹⁸ *Ibid* 2.

³⁹⁹ *Ibid* 4 II. No. 1-3.

⁴⁰⁰ *Ibid* 4 f. III and IV.

⁴⁰¹ *Ibid*.

⁴⁰² OECD, *Recommendation concerning International Co-operation on Competition Investigations and Proceedings – C (14) 108 5 V No. 1-3*.

deal with these cases.⁴⁰³ The described provisions have similarities with the Guiding Principles of the 1986 recommendation. Addressing the most controversial part of international antitrust co-operation, the exchange of confidential information, the Council listed the outcomes of the OECD investigations including the best practice guidelines to the exchange of formal information in 2005.⁴⁰⁴ The recommendation suggested information exchange of confidential information be conducted through waivers or information gateways (meaning direct information exchange between authorities without authority consent) with specific confidentiality safeguards describing the specific model processes designed.⁴⁰⁵ In the end, the Council recommended investigative assistance of states and their competition authorities in general.⁴⁰⁶ Significantly, the Council asked the Competition Committee to develop co-operation models in competition matters for bi- and multilateral agreements.⁴⁰⁷ The Committee was asked to monitor and report the developments to the Council.⁴⁰⁸

Similar to the recommendations of the Committee, the recommendation of 2014 summarized the OECD understandings and developments regarding international competition co-operation establishing a benchmark for its Member States. Though it does not supply great innovative provisions, that does not mean that the Member States directly enacted the different steps. Positively, the OECD Member States have developed an awareness of the need for co-operation, steadily improving and reforming the understanding of a proper working co-operation of state authorities. This has led to up-to-date recommendations for the adherents meeting the needs of co-operation, deriving from the constant progress of international economic interdependence.

l.) Best Practice Roundtables Fighting the Barriers of Innovation

Apart from the several OECD Council recommendations regarding co-operation of state authorities in competition matters, the Competition Committee runs best-practice roundtables concerning the regulation of antitrust matters. These roundtables not only concern co-operation matters in antitrust cases but also work on current problems in antitrust law. As an example, the Competition Committee Roundtable published a summary of the public hearing in 2016 called “Big Data: Bringing competition policy to the digital era”.⁴⁰⁹ When discussing big data, a modern and commonly used term accompanied by the term ‘digitalization’, the Committee Members and its experts discussed what barriers arise especially with mass storage of personal data. Whilst traditional competition and antitrust law overlooked the

⁴⁰³ Ibid 5 f. VI.

⁴⁰⁴ Ibid ff. VII.

⁴⁰⁵ Ibid.

⁴⁰⁶ Ibid 10 VIII.

⁴⁰⁷ Ibid 11 X No. 4.

⁴⁰⁸ Ibid 11 X.

⁴⁰⁹ OECD, *Summary of Discussion on the Hearing on Big Data – DAF/COMP/M (06) 2/ANN2/Final* (2016).

fair allocation of markets in a traditional sense, data and its storage is not considered as market in a classic sense. The users of the digital platforms do not often pay for the services provided. Rather, the consumer permits the data provider to store his personal data, e.g. name, birthday, residence etc. With respect to the tremendous market powers of the leading digital firms such as Google and Facebook, the international competition authorities have to deal with new markets in new vestures.⁴¹⁰ Even if the new vestures of digitalization imply difficulties for the competition authorities in applying their traditional antitrust law systems, the problems of antitrust law are not necessarily new.⁴¹¹ However, the problems discussed concerned the possibility of the network phenomena, such Facebook, having monopolizing effects (“Winner-takes-it-all effects”). Along with competition issues, problems such as data protection law were discussed. The Roundtable agreed that co-operation of competition authorities with other consumer protecting agencies is vital when it comes to regulating digitalization.⁴¹² The fact that Member States communicate via the OECD Competition Committee roundtables, addressing current problems in antitrust regulation shows that soft law communication is flexible and can be innovative.

m.) Intermediate Result

The OECD Council recommendations not only highlight the need for state co-operation in antitrust matters, but the Council also supplies substantial suggestions for improvement in co-operation. By outsourcing the development of co-operation to the Competition Committee, a group of experts, the Council recommendations built upon the committee reports and the recommendations appear in a professional light. This nimbus of professionalism accompanies the recommendation of the Council regarding the OECD Member States, making it more probable that the Member States accept and implement the recommendations. The downside of the OECD recommendations is that they do not carry with them any legal obligations and that their scope of application is limited. As stated, the OECD Member States are representing developed, industrialized countries – amounting to only parts of the globe. Furthermore, the decisions of the OECD council are of no binding legal character.

On first sight the soft law character of the OECD does not seem to be strong enough to tackle the problems of international economic interdependence. Yet the bottom-up approach of the OECD attempts to avoid diplomatic disputes creating

⁴¹⁰ The holding of the Google conglomerate called Alphabet is, with approx.> 500 Billion USD, one of the most valuable economic entities on earth. Facebook Inc. crossed the value of 500 Billion USD in July 2017, and is one of the most valuable economic entities on earth, too. See: Matt Egan, ‘Facebook and Amazon hit \$500 billion milestone’ CNN 2017 (<http://money.cnn.com/2017/07/27/investing/facebook-amazon-500-billion-bezos-zuckerberg/index.html>). This illustrates the economic importance of the digital services for the global economy.

⁴¹¹ OECD, *Summary of Discussion on the Hearing on Big Data – DAF/COMP/M (06) 2/ANN2/Final 2*.

⁴¹² Ibid 7.

rejectionist attitudes regarding the proposed recommendations. For that reason, the OECD recommendations cannot simply be dismissed as being too weak. Similarly to the UNCTAD, the OECD aims to build up hard law in the long run. Therefore, with its profound developments and recommendations, the OECD is of a considerably strong legal nature.

3.) *Global Forum on Competition*

Besides the efforts of the OECD Council and its Competition Committee in designing recommendations for the OECD Member States, in 2001 the OECD Council founded the “OECD Global Forum on Competition” (in the following: the Forum).⁴¹³ It was founded to face the weakness of the OECD recommendations that only addressed the Member States by extending participation to non-Member States and organizations all over the globe. The Forum’s aim is to deliver to its wider recipients, useful legal and political input on the regulation of competition on a yearly basis. The OECD’s dialogue on competition covered all practical relevant competition topics discussed within the OECD Competition Committee and Council, e.g. the role and tools of competition authorities in implementing reforms, the instruments of interstate co-operation in competition matters such as in merger review etc.⁴¹⁴ Regarding the interstate co-operation in competition matters, the forum specifically addressed it in its 2002 and 2011 sessions on (cross-border) merger review; in its 2012 session regarding co-operation in cartel investigation, more generally in 2013 and especially regarding authority independence in 2016.⁴¹⁵ The fact that the OECD dealt with the topic of the independence of competition authorities from their states, not only structurally but also financially, highlights that this OECD forum tries to address more basic and structural competition-affecting problems. The reason for this divergence to the OECD internal recommendations stems from the lack of economic convergence between industrialized OECD Member States and Non-Member States. Compared with the internal OECD recommendations, the Forum’s emphasis is more of a political rather than legal nature – even if it can be considered as an intermediate phase eventually transforming to legal provisions.

IV) The World Trade Organization (WTO)

Even though the ITO aspirations failed, the GATT did not vanish. The GATT became a permanent body which developed into a de facto organization over time. The needs of the contracting parties, such as coordination, cooperation and arbitration are included in the GATT contract.⁴¹⁶ The multilateral rounds attended by

⁴¹³ OECD, *Global Forum on Competition –CCNM/GF/COMP (01) 2/REV 1* (2001).

⁴¹⁴ Cf. preface of *ibid*.

⁴¹⁵ Cf. Overview at “Previous Forums, Topics & Materials” at OECD, ‘Global Forum on Competition’ (2017) <<http://www.oecd.org/competition/globalforum/about/>> accessed 10.11.17.

⁴¹⁶ Stoll and Schorkopf, *WTO-Welthandelsordnung und Welthandelsrecht* 12.

GATT Member States played important role in the shaping and development of the principles in the GATT system. There were seven rounds held under the auspices of the GATT concluding with the Uruguay Round after which GATT was replaced by the WTO.⁴¹⁷ In these rounds the Member States not only executed the original GATT mandate of tariff reduction but also focused on non-tariff matters. Besides tariff concessions between the Member States, non-tariff measures included the establishment of subsidy and antidumping or government procurement codes.⁴¹⁸ The GATT system consisted of several different multilateral treaties. This led to the problem that states could choose to enforce only parts of the GATT provisions. Bearing in mind that the GATT system was meant to serve as a provision, it became clear that the GATT did not meet the wide-ranging needs of the global economy. The rising importance of the trade of services, as well as tacit tariff commitments between Member States, limited the possibilities of the GATT to guarantee a liberal global market. This fact led to a crisis of the GATT. For that reason, the ministerial conference in Punta del Este, Uruguay, initiating the eighth GATT round decided to reform the GATT at the so-called Uruguay Round in 1986, creating a new and more comprehensive world trade system.⁴¹⁹ To prevent Member States from ‘GATT treaty shopping’, the outcomes of the Uruguay Round were designed as a ‘single undertaking approach’, where Member States either had the opportunity to consent with all considerations of the round or not.⁴²⁰ That was the reason why in 1993 in Marrakesh the Member States had to examine about 46 agreements and 25 acts, of which the agreement establishing the World Trade Organization was the most significant.⁴²¹ With 76 ratifications of the WTO agreement, the WTO was established on 1st of January 1995.⁴²²

1.) Purpose and Structure of the WTO

Referring to Art. I of the preamble of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement), the WTO’s purpose is to balance the relations in the fields of trade and economic endeavor. The WTO especially seeks to ensure human welfare, such as sufficient standards of living, full employment, as well as steadily growing income. Regarding goods and services, the WTO seeks to ensure stable demands of goods and services, expanding the production

⁴¹⁷ Jeffrey S. Thomas and Michael A. Meyer, *The New Rules of Global Trade – A Guide to the World Trade Organization* (Carswell 1997) 5: 1946 in Geneva, Switzerland; 1949 in Annecy, France; 1950-51 in Torquay, England; 1955-56 in Geneva, Switzerland; 1960-61 the “Dillon Round” in Geneva, Switzerland; 1964-67 the “Kennedy Round” in Geneva, Switzerland and 1973-79 the “Tokyo Round” in Geneva, Switzerland.

⁴¹⁸ Mainly outcomes of the “Tokyo Round” cf. Ibid 10.

⁴¹⁹ Stoll and Schorkopf, *WTO-Welthandelsordnung und Welthandelsrecht* 13.

⁴²⁰ Ibid; Herdegen, *Internationales Wirtschaftsrecht* 161; v. Arnould, *Völkerrecht* 419 Ref. 941.

⁴²¹ Cf. WTO, ‘WTO Legal Texts’ (2017) <https://www.wto.org/English/docs_e/legal_e/legal_e.htm>.

⁴²² Ibid.

and trade with these goods and services. In that regard, the WTO pays attention to the sustainability of the world's resources with special respect to the development of the environment. Furthermore, in Art. II of the WTO agreement preamble, the WTO seek to support the needs and the development of less-developed countries. The WTO wants to ensure their economic growth proportional to international trade. To achieve these goals, as per Art. III preamble of the WTO agreement, the WTO is empowered, to an extent, to lower tariff and trade barriers, as well as to resolve the discriminatory conduct of states in international trade, which pursues the goal of mutual consent and profit.⁴²³ The institutional character and the competence of the WTO to regulate international trade matters is formalized in Art. II (1) WTO Agreement, whilst Art. III lists the tasks and duties of the WTO. The WTO is tasked to "facilitate the implementation, administration and operation" of the WTO agreements, and support and develop their objectives. Notably, the WTO is entrusted with dispute settlement as well as the periodic political review of the trade policy of the Member States.⁴²⁴ Therefore, the WTO is not only steering international trade, but also acting as the protector of liberal global trade. Besides the formal institutionalization of the WTO, it is intended to serve as an informal forum for interstate communication. According to Art. III (2) WTO Agreement these communications are explicitly not limited to WTO matters only. The WTO Member States are encouraged to use the WTO as a forum for other multilateral non-WTO matters regarding trade.⁴²⁵ They are even encouraged to enforce their considerations within the format of the WTO.⁴²⁶ In that context, in line with Art. V (1) WTO Agreement, the WTO is not only enabled to co-operate with other international organizations (e.g. the OECD) but explicitly encouraged to co-operate with the World Bank and International Monetary Fund creating convergence in international economic policy.⁴²⁷ Consequently, the WTO may theoretically be a suitable forum to create dialogues on private trade restraints and their regulation, as well as the international co-operation between the regulating states.⁴²⁸ To what extent this assertion is correct will be examined in the subsequent. By comparing the sole GATT treaties with the WTO, it becomes clear that the WTO is designed to act in a more diverse and dynamic way regarding global trade politics. This design is called "built-in-agenda", which also provides the opportunity for the Member States to assign special negotiation rounds to specific topics from their agenda (Art. III (2) WTO Agreement).⁴²⁹

⁴²³ Also cf. Stoll and Schorkopf, *WTO-Welthandelsordnung und Welthandelsrecht* 14.

⁴²⁴ Ibid.

⁴²⁵ Ibid 15.

⁴²⁶ Ibid.

⁴²⁷ Ibid.

⁴²⁸ Bruno Zanettin, *Cooperation between Antitrust Agencies at the International Level* (2002) 281 f.

⁴²⁹ Stoll and Schorkopf, *WTO-Welthandelsordnung und Welthandelsrecht*.

The WTO's structure is similar to that of the UN.⁴³⁰ The Ministerial Conference is the main representative body of the WTO (Art. IV (1) WTO Agreement). The executive body of the WTO is the General Council (Art. IV (2) WTO Agreement), whilst the WTO Secretary conducts the administrative matters of the WTO Conference (Art. VI WTO Agreement). The different committees dealing with executive matters of the WTO (e.g., TRIPS Council, the Council on Trade and Goods and their committees etc.) are affiliated with the WTO Council. Similarly, the OECD expert groups are affiliated with the OECD Council. With special respect to anti-trust law, the working group on trade and competition policy is affiliated with the WTO Council. However, this working group is listed as inactive, which means it does not have a mandate of the WTO Council at the moment. The fact that the working group is not liquidated shows that there is enough optimism for it to regain its mandate. The General Council follows its obligations and meets in the form of the Dispute Settlement Body (DSB) to arbitrate disputes between Member States, as well as in the form of the Trade Policy Review Body (TPRM) to review the steady policy development of the Member States.⁴³¹

2.) *Legal Character and Principles of the WTO*

The WTO is an International Organization with its own legal personality.⁴³² In that regard, the WTO is subject to international law and equipped with the rights and duties of international law. Referring to the purpose of the WTO to stabilize and institutionalize global economic relations, it has its own legal order. The legal order is diverse and dispersed through the 46 WTO treaties. The fact that DSB (WTO's own judiciary) was established shows that it is the aim of the WTO to treat its legal order as a general and equitable valid order regarding its Member States.

This section will first outline whether the WTO can be regarded as constituting free trade (a.) before broadly outlining the principles of the WTO (b.)

a.) Constituting Free Trade or Trade Liberalization?

Considering the mentioned purposes set down in the preamble of the WTO Agreement, one will notice that the liberalization of trade is not part of the constituting principles of the WTO, even though it is undisputed that one of the main objectives of the WTO is to decrease trade barriers limiting free trade.⁴³³ Whilst the term 'free trade' as a political term aims to diminish state regulation without regard to social or cultural matters, the principles set in the preamble reflect cultural and social matters.⁴³⁴ Therefore, it is not the aim nor the duty of the WTO to act in ac-

⁴³⁰ For an overview cf. WTO, 'WTO organization chart' (2017) <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org2_e.htm> accessed 08.11.17.

⁴³¹ Herdegen, *Internationales Wirtschaftsrecht* 160 f.

⁴³² For the prevailing opinion cf. v. Arnould, *Völkerrecht* 421 Ref. 946.

⁴³³ Stoll and Schorkopf, *WTO-Welthandelsordnung und Welthandelsrecht* 30.

⁴³⁴ *Ibid.*

cordance with Ricardo's theory of free trade. Trade liberalization is the outcome of the WTO main tool called tariff reduction. Therefore, the WTO treaties are not to be associated with a "free-trade-constitution". Yet Art. XXIV GATT constitutes the possibility for the WTO Member States to form reciprocal or unilateral preferential or free trade areas, provided that these areas do not discriminate against other WTO members and the WTO principles.⁴³⁵ Even if this exception may not be considered as a free trade constitution, it may be considered as the "gateway" of trade liberalization in the WTO system.

b.) The Principles of the WTO

Besides the "substantive" WTO law, the WTO legal order is marked by legal principles characterizing the global economic order. These legal principles are either set down in the preamble of the WTO Agreement summarizing the principles of the diverse WTO treaties, or are implicitly set down in the various other WTO agreements.⁴³⁶ Those core values can be summed up as the principles of trade liberalization, reciprocity, non-discrimination, preservation of sovereignty, sustainable development, co-operation and multilateralism, transparency, proportionality, and rule of law.⁴³⁷

Aside the goal of the liberalization of trade, it becomes clear that the tools of the WTO to reach its aims are meant to be of a reciprocal nature. The principle of reciprocity is one of the most significant structural issues qualifying the WTO and the mutual co-operation of its Member States. As a balancing element the principle not only guarantees a politically stable and balanced process of consolidation, law setting, and law enforcement (Art. XXVIII GATT 1994) but it also enables the Member States to find multilateral concessions on trade-related topics.⁴³⁸ Without the principle of reciprocity ensuring balanced concessions, the interstate dialogue would be aggravated by imbalanced possibilities of states.

Besides a decrease in tariffs and subsequent liberalization of global trade, the main focus of the WTO is to diminish interstate discrimination in international relations.⁴³⁹ The principle of non-discrimination is composed of internal and external codes for conducts: The principle of "most-favored nation treatment" (e.g., Art. I (1) GATT, Art. II (1) GATS) and the principle of national treatment (e.g., Art. III GATT, Art. 3 TRIPS). The principle of most-favored nation treatment can be understood as an external principle, as it requires the WTO Member States to differ-

⁴³⁵ Cf. Art. XXIV.6 GATT.

⁴³⁶ Götsche in Meinhard Hilf and Stefan Oeter, *WTO Recht – Rechtsordnung des Welthandels*, vol 2 (2010) 116; WTO, *Ministerial Declaration of Doha – Doc. WT/MIN(01)/DEC/W/1* (2001) para. 25 regarding "core principles"; WTO, *Secretary Background Paper: Core Principles, Including Transparency, Non-Discrimination and Procedural Fairness – Doc. WT/WGTCP/W/209* (2002).

⁴³⁷ Hilf and Oeter, *WTO Recht – Rechtsordnung des Welthandels* 116-130.

⁴³⁸ Stoll and Schorkopf, *WTO-Welthandelsordnung und Welthandelsrecht* 40-43.

⁴³⁹ *Ibid* 45.

entiate in trade modalities with WTO trade partners.⁴⁴⁰ At the WTO, the principle of most-favored nation treatment is designed as an instantaneous and unconditional principle.⁴⁴¹ The principle tries to prevent a fragmentation of international trade relations with respect to structures of state powers.⁴⁴² The principle of national treatment is considered the “internal” element of the principle of non-discrimination, as it asks the WTO Member States for equal legal treatment of goods and services imported to a Member State and domestically produced goods and services. The principle tries to prevent states from imposing taxes or other restrictions upon imports diminishing the positive liberalizing effects of the WTO policies.⁴⁴³ This principle has exceptions, e.g. in government procurement processes.⁴⁴⁴

Just as the principle of sovereignty is deeply embedded to international law, the reciprocal preservation of state sovereignty is also a guiding principle of WTO law.⁴⁴⁵ Just as the veil of territoriality is pierced by the effects doctrine, the WTO law provides exceptions to the principle of territorial sovereignty, namely subsidies (Art. XVI (1) GATT), safeguards (Art. XIX GATT) and general exceptions such as important measures safeguarding society and environment (Art. XX GATT).⁴⁴⁶ With special respect to antitrust law concerning the creation of ‘national champions’ by the national enforcement of national antitrust law, the WTO system upholds state sovereignty to regulate the domestic market but limits the Member States in their sovereignty in a way consistent with the WTO law (cf. Art. II (4) GATT). The effects doctrine and the WTO law are, therefore, not contradictory, as the extraterritorial enforcement of antitrust law against foreign anticompetitive conduct may be considered to be in line with WTO law.

Moreover, the WTO has imposed the principle of sustainable development throughout its legal system. It is not part of international law but rather asks the Member States to design world trade in consideration of the sustainable use of global resources and environments.⁴⁴⁷

Multilateralism and international interstate co-operation have been the principles of international law since the enactment of the UN Charter (Art. 1 (3), Arts. 55, 56 UNCh).⁴⁴⁸ These principles are embedded in WTO law (cf. Recital 4 of the

⁴⁴⁰ Hilf and Oeter, *WTO Recht – Rechtsordnung des Welthandels* 118; *EC – Bananas* (WTO DSB 2012).

⁴⁴¹ Hilf and Oeter, *WTO Recht – Rechtsordnung des Welthandels* 119.

⁴⁴² Ibid; Stoll and Schorkopf, *WTO-Welthandelsordnung und Welthandelsrecht* 47.

⁴⁴³ Hilf and Oeter, *WTO Recht – Rechtsordnung des Welthandels* 119.

⁴⁴⁴ Ibid.

⁴⁴⁵ Ibid 121.

⁴⁴⁶ Ibid.

⁴⁴⁷ Ibid 122.

⁴⁴⁸ UN, *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations – A/RES/25/2625* (1970).

preamble of the WTO Agreement) and have been the guiding rules for international trade law since 1947.⁴⁴⁹ Therefore, it is the aim of the WTO to foster multilateralism and to hinder uni- or bilateralism in trade matters.⁴⁵⁰

The principle of transparency serves legal predictability and certainty.⁴⁵¹ Within WTO law the principle of transparency is divided into three levels of transparency: bilateral transparency between Member States regarding the reciprocal exchange of information (first level); internal transparency of the WTO body towards its Member States (second level); external transparency of the WTO regarding the communication with non-WTO Members such as NGO's (third level of transparency). The most significant level compared to other existing transparency ambitions within antitrust co-operation is the bilateral directive of transparency. The principle asks the Member States to disclose the information required to enforce the WTO treaties.⁴⁵² The required information include information about trade-related norms, judicial and administrative cases. They are meant to be published immediately to ensure that Member States as well as economic entities, have the opportunity to familiarize themselves with the information, creating legal certainty (cf. Art. X:1 No.1 and 2 GATT). Not included is certain information which requires a level of confidentiality (Art. X(1)(3) GATT). Furthermore, besides the basic obligations, several special obligations to foster the transparent exchange of information are provided (e.g., in the event of the creation of a free trade zone cf. Art. XXIV (7)(a) GATT).⁴⁵³ This principle appears to be similar to the described needs of transparency and confidentiality in international antitrust co-operation, as it ensures communication between states.

The WTO legal system is designed as a rule-oriented rather than a power-oriented approach.⁴⁵⁴ To ensure this rule orientation of the WTO law, its organization and enforcement is underpinned by the rule of law principle.⁴⁵⁵ The rule of law principle is not just a formality; it characterizes the relations of the Member States with one another, as well as the relations of the WTO body vis-à-vis its Member States.⁴⁵⁶ The WTO legal system is marked by rule of law characteristics, such as far

⁴⁴⁹ Hilf and Oeter, *WTO Recht – Rechtsordnung des Welthandels* 123.

⁴⁵⁰ John Howard Jackson, *The world trading system: law and policy of international economic relations* (MIT press 1997) 158; It will be outlined subsequently to what extent the WTO Member States follow this principle in regard to trade-related antitrust matters – especially with respect to the level of obligation.

⁴⁵¹ Hilf and Oeter, *WTO Recht – Rechtsordnung des Welthandels* 124.

⁴⁵² Ibid; Wolfgang Benedek, *Die Rechtsordnung des GATT aus völkerrechtlicher Sicht* (Springer 1990) 79.

⁴⁵³ Hilf and Oeter, *WTO Recht – Rechtsordnung des Welthandels* 128.

⁴⁵⁴ Stoll and Schorkopf, *WTO-Welthandelsordnung und Welthandelsrecht*.

⁴⁵⁵ Ibid; Hilf and Oeter, *WTO Recht – Rechtsordnung des Welthandels* 128.

⁴⁵⁶ Stoll and Schorkopf, *WTO-Welthandelsordnung und Welthandelsrecht* 39.

reaching procedural and material provisions of legal exercise, legal shaping, and legal enforcement – especially with regard to the institutional character of the WTO and its DSB.⁴⁵⁷

Safeguarding the principle of rule of law, the principle of proportionality ensures that the legal exercise shaping, and enforcement of the WTO law is appropriate, necessary, and reasonable, therefore proportional. It is not directly embedded in the WTO system, but with regard to the DSB judicial practice it is explicitly considered to be justified.⁴⁵⁸

The principle of peaceful arbitration of economic disputes is mainly embedded in the DSB provisions.⁴⁵⁹ The principle of solidarity was included to WTO law by request of the developing Member States.⁴⁶⁰ It includes the elementary in principle of substantive law quality and the principle of state solidarity, leading to the exception of the principle of reciprocity in favor of the developing countries called the special and differential treatment principle.⁴⁶¹

Other than directly embedded principles, general principles of international customary law also significantly guide WTO law. For example, the principle of effectivity, which urges the interpretation of the WTO legal treaties so that the original aims of the WTO are reached.⁴⁶² Furthermore, the principle of subsidiarity highlights the WTO legal order.⁴⁶³ The WTO law has to be interpreted to take reality into account.⁴⁶⁴ Furthermore, the principles of good faith (*bona fide*), including the principles of the doctrine of abuse of rights, the principle *pacta sunt servanda* and the principle *clausula rebus sic stantibus*, is used in the judicial practice of the DSB.⁴⁶⁵ Accordingly, procedural principles deriving from international law such as the principle of good faith, the principle of fundamental fairness etc., also guide the judicial practice of the DSB.⁴⁶⁶

⁴⁵⁷ Ibid.

⁴⁵⁸ *US – Cotton Yarn – WT/DS192/7* (WTO DSB, 2001) para. 119 ff.

⁴⁵⁹ Benedek, *Die Rechtsordnung des GATT aus völkerrechtlicher Sicht* 58; Hilf and Oeter, *WTO Recht – Rechtsordnung des Welthandels* 130.

⁴⁶⁰ Christian Tomuschat, 'Die Neue Weltwirtschaftsordnung' VN 1994 93 ff.

⁴⁶¹ Hilf and Oeter, *WTO Recht – Rechtsordnung des Welthandels* 130; Benedek, *Die Rechtsordnung des GATT aus völkerrechtlicher Sicht* 54; For detailed overview cf. Henning Jessen, *WTO-Recht und "Entwicklungsländer": "special and differential treatment for developing countries" im multidimensionalen Wandel des Wirtschaftsvölkerrechts*, vol 5 (BWV Verlag 2006).

⁴⁶² Hilf and Oeter, *WTO Recht – Rechtsordnung des Welthandels* 131.

⁴⁶³ Jacques Bourgeois, "Subsidiarity" in the WTO Context from a Legal Perspective Marco Bronckers and Reinhard Quick, *New directions in international economic law: essays in honour of John H. Jackson* (Kluwer Law International 2000).

⁴⁶⁴ Hilf and Oeter, *WTO Recht – Rechtsordnung des Welthandels* 132; Christine Godt, 'Der Bericht des Appellate Body der WTO zum EG-Einfuhrverbot von Hormonfleisch' 9 *Risikoregulierung im Weltmarkt, Europäisches Wirtschafts- und Steuerrecht* 1998 202, 207.

⁴⁶⁵ Hilf and Oeter, *WTO Recht – Rechtsordnung des Welthandels* 134 f.

⁴⁶⁶ Ibid.

c.) Measurement

The fundamental principles of the WTO legal system may be summed up as principles allowing and guaranteeing diplomatic dialogues of states. They are building the basis for co-operation in trade matters. Comparing the principles to the described struggles and needs of interstate co-operation in antitrust matters, the principles seem to be applicable to solve the problems of international antitrust co-operation. As described, especially within the evolution of the OECD recommendations, antitrust co-operation is in need of principles like the WTO principles, especially transparency, reciprocity, proportionality, and co-operation. For that reason, it appears that the WTO might be the right forum for regulating antitrust law. To what extent this is or was feasible will be outlined below.

3.) *WTO and Competition Law*

The question as to what extent competition and antitrust law is part of the WTO law cannot be answered without taking into account pre-WTO aspirations, as well as political development of the WTO. To get an idea of how the idea of the WTO to serve as an international forum for competition law, it will be chronologically outlined as follows: the idea of the Draft International Antitrust Code of 1993 (a.), the levels of its substantive and procedural antitrust provisions (b.), before implications for the WTO are drawn (c.).

a.) The Draft International Antitrust Code Initiative of 1993

On 10 July 1993, a private expert group of scholars called International Antitrust Code Working Group⁴⁶⁷ published its project and presented it to the former Director General of the GATT.⁴⁶⁸ The Draft International Antitrust Code (DIAC) was meant to close gaps in national competition law on a global scale.⁴⁶⁹ It was designed as a plurilateral trade agreement, which was designed to fit the WTO aspirations in the Uruguay Round.⁴⁷⁰ The DIAC's design is based upon five guiding principles specially selected by the DIAC working group creating political acceptance.

⁴⁶⁷ The privately organized working group of scholars led by *Prof. Wolfgang Fikentscher*† strived to make a proposal for a working international antitrust system, from an academics point of view. The Group contains a couple of the (former) most distinguished scholars in Antitrust Law, namely: *Prof. Josef Drexl*, Munich; *Prof. Wolfgang Fikentscher* †, Munich; *Prof. Andreas Fuchs*, Osnabrück; *Prof. Elenor M. Fox*; New York; *Prof. Ernst-Ulrich Petersmann*, Florence; *Prof. Ulrich Immenga*, Göttingen; *Prof. Andreas Heinemann*, Zurich; *Prof. Walter R. Schlupe*‡, Zurich; *Prof. Akira Shoda*, Tokyo; *Prof. Lawrence A. Sullivan*‡, Los Angeles; *Prof. Stansislav J. Soltysinski*, Poznan; as well as the (former) researcher *Dr. Hans Peter Kunz-Hallstein*, Munich.

⁴⁶⁸ Cf. Wolfgang Fikentscher and Ulrich Immenga, *Draft International Antitrust Code* (1995).

⁴⁶⁹ Wolfgang Fikentscher and Andreas Heinemann, 'Der "Draft International Antitrust Code" – Initiative für ein Weltkartellrecht im Rahmen des GATT' WuW 1994.

⁴⁷⁰ Ibid 97.

aa.) Five principles of the DIAC

Whilst three principles of the DIAC derive from the Paris Convention for the Protection of Industrial Property of 1883, two principles were added to design the DIAC.⁴⁷¹

(1.) National Law Approach

The goal of the authors of DIAC was to create an internationally tolerated policy climate as such DIAC's aim was to build an antitrust codex of coexisting national antitrust laws rather than a maximum harmonized single antitrust codex.⁴⁷² The DIAC wanted to achieve a certain level of convergence whilst upholding the different 'specialties' of the different national antitrust regimes.

(2.) Non-Discrimination

Similar to the mentioned WTO non-discrimination maxim (Art. III GATT), the DIAC includes a maxim of non-discrimination. The DIAC dictates that states are to apply their antitrust laws the same whether the "targets" of antitrust enforcement are foreign or domestic.⁴⁷³ The implementation of this maxim is a precautionary measure against political conflicts and possible blocking statuses of afflicted or discriminatory measures.

(3.) Consensus Wrongs

Furthermore, referring to the national law approach, the authors implemented a maxim of minimum standards to avoid fundamental mistakes in antitrust matters.⁴⁷⁴ The authors strived to design the DIAC to be as 'free' as possible and as mandatory as required to set international standards in antitrust law.

(4.) International Procedural Initiative (IPI)

The implementation of an International Procedural Initiative – a completely new mechanism of legal applicability and enforceability, was the most innovative aspect of DIAC.⁴⁷⁵ In Art. 19 DIAC the states addressed were obliged to form a Joint Antitrust Committee.⁴⁷⁶ This Joint Committee was formed to persuade (potential) Member States to obey the set principles when enforcing their national antitrust laws, with the capacity to force national antitrust authorities to terminate revealed

⁴⁷¹ The fact that the majority of the DIAC principles derives from the Paris Convention for the Protection of Industrial Property of 1883 shows that the DIAC is not to be understood as a renunciation of the industrial property rights legal system, cf. *Ibid* 101.

⁴⁷² *Ibid*.

⁴⁷³ Art. II Sec. 2 DIAC in Fikentscher and Immenga, *Draft International Antitrust Code* 73.

⁴⁷⁴ Fikentscher and Heinemann, 'Der "Draft International Antitrust Code" – Initiative für ein Weltkartellrecht im Rahmen des GATT' 102.

⁴⁷⁵ See Art. 19 DIAC in Fikentscher and Immenga, *Draft International Antitrust Code* 103 f.

⁴⁷⁶ *Ibid*.

anticompetitive conduct within their territory.⁴⁷⁷ Also the DIAC proposed to enable the Joint Authority to be able to take extraordinary legal remedies within judicial procedures of which it was not officially a part.⁴⁷⁸ Yet it was not intended to have direct law enforcing competences against antitrust tortfeasors.⁴⁷⁹ For that reason, the proposed Joint Antitrust Authority may rather be considered an ordo-political monitoring committee rather than a fully enabled antitrust authority. If discrepancies arise between the Joint Committee and national antitrust authorities, the authors proposed to enable an International Antitrust Panel, which is structurally assigned to the DSB of the WTO formerly and at the time of the proposal the GATT dispute settlement system.⁴⁸⁰ This International Antitrust Panel was meant to be staffed with unbiased antitrust experts.⁴⁸¹ The panel was intended to serve as a proper judicial body, where two procedural actions were intended by the authors: an action for failure to act by the International Antitrust Authority against inactive, non-enforcing national antitrust authorities; and an action of the national authorities against other national authorities concerning a breach of contract.⁴⁸² The jurisprudence of the International Antitrust Panel follows the relevant national antitrust laws and is not meant to facilitate political arbitration.⁴⁸³

Overall, the IPI appears as a balanced approach of procedural enforceability on the one hand, whilst obeying the administrative and judicial independence of the addressed Member States on the other.

(5.) Trans-Border-Only Maxim

Last, the authors limited the DIAC to trans-border cases only, which means that national antitrust authorities maintain their sole competence to regulate solely national, non-trans-border antitrust law.⁴⁸⁴

(6.) Measurement

Altogether, the principles of the DIAC seemed politically similar to the approaches of the GATT and WTO legal systems, yet with a direct procedural enforceability.

⁴⁷⁷ Cf. Art. 19 Sec. 2 lit. a.) and b.); The authors also took an implementation of a Joint Antitrust Committee as a GATT-sub panel into account cf. Fikentscher and Heinemann, 'Der "Draft International Antitrust Code" – Initiative für ein Weltkartellrecht im Rahmen des GATT' 102.

⁴⁷⁸ Art. 19 Sec. 2 lit. c.) and d.) in Fikentscher and Immenga, *Draft International Antitrust Code* 104.

⁴⁷⁹ Ibid 106.

⁴⁸⁰ Art. 20 DIAC cf. Ibid.

⁴⁸¹ Fikentscher and Heinemann, 'Der "Draft International Antitrust Code" – Initiative für ein Weltkartellrecht im Rahmen des GATT' 103.

⁴⁸² Art. 19 Sec. 2 lit. e.) cf. Fikentscher and Immenga, *Draft International Antitrust Code* 104.

⁴⁸³ Fikentscher and Heinemann, 'Der "Draft International Antitrust Code" – Initiative für ein Weltkartellrecht im Rahmen des GATT'.

⁴⁸⁴ Art. 3 Sec. 1 DIAC.

bb.) Substantive and Procedural Antitrust Provisions

Following the described maxims of the DIAC, in order to clarify the development approach of the DIAC, the content of the DIAC has to be evaluated. The DIAC is divided into eight different parts. These parts may be assigned to either substantive principles, procedural principles, and overlapping provisions containing both procedural and substantive provisions.

(1.) Substantive Antitrust Provisions

In its part two the DIAC found clear definitions for horizontal and vertical anticompetitive restraints. Those definitions imply that such restraints are illegal: e.g. Art. 4(1) for horizontal restraints: “Agreements, understandings and concerted practices (hereafter “agreements”) between or among competitors that fix prices, divide customers or territories, or assign quotas are illegal”.

Therefore, the DIAC clearly wanted to establish international substantive antitrust law (hard law). Though, as stated in Art. 2 (2)(a) DIAC, the potential Members of the Agreement were intended to be “free to provide for and to apply stricter antitrust rules in its national legislation”.⁴⁸⁵ For that reason, the DIAC’s substantive antitrust measures appear to, at a minimum, harmonize the antitrust code for international antitrust cases.⁴⁸⁶ This is not only the case for the definition of vertical and horizontal anticompetitive conduct, but also for cases concerning M&A, abuses of dominant market positions, and state enterprise cases.⁴⁸⁷ Furthermore, the DIAC defines the legal consequences of anticompetitive conduct expected by the national competition authorities.⁴⁸⁸

(2.) Procedural Antitrust Provisions

Procedural antitrust provisions addressing the national antitrust authorities and potential Member States of the DIAC already appeared in the description of the DIAC principles, mainly with the establishment of the International Antitrust Authority and the International Antitrust Panel. The Code wanted to establish a decentralized system of antitrust application monitored by a centralized authority overseeing the decentralized application of antitrust.⁴⁸⁹ For that reason the code does not address interstate cooperation with comity principles etc., but mandates the potential Member States to cooperate with the established international antitrust authority (e.g., notification of concentrations with international dimension from the national antitrust authority to the international antitrust authority⁴⁹⁰). The procedural provisions in the Code rather encourage the national antitrust authorities to obey certain

⁴⁸⁵ Art. 2.1 DIAC cf. Ibid 74.

⁴⁸⁶ Ibid 74.

⁴⁸⁷ Cf. Part 3, part 4 and 6 of the DIAC cf. Ibid 82 ff.

⁴⁸⁸ Cf. part 5 of the DIAC ibid 97 ff.

⁴⁸⁹ Cf. Art. 18 DIAC ibid.

⁴⁹⁰ Cf. Art. 10 DIAC ibid 86.

standards of antitrust procedure, especially towards affected economic entities, e.g. by notifying private entities of the enforcement procedure or to obey certain standards of the rule of law.⁴⁹¹

(3.) Measurement

Overall, it has to be noted that the DIAC appears as a moderate attempt to create a minimally consistent antitrust code fixing certain foundations of antitrust law. Trying not to limit the political decisions of a potential member state was an attempt to encourage states to ratify the agreement and make shifts of sovereignty bearable.⁴⁹²

cc.) Implications for the WTO

The DIAC was meant to be ratified as a plurilateral agreement and to be partly implemented within the WTO legal system. Although it was clear to the authors of the DIAC that the GATT and subsequent WTO system were still trade-only fora and thus, a full implementation of the DIAC to the WTO was an impossible task. It has to be noted that this positive attempt did not meet with approval and was never ratified. Yet the creation of the DIAC managed to initiate a political discussion about the creation of an internationally convergent antitrust system.

b.) Report of the EU Group of Experts – Competition Policy in the New Trade Order of 1995

In 1995, a Group of Experts of the European Commission initiated by the former commissioner for competition Karel van Miert, released a report on competition policy in the newly created trade order of the WTO.⁴⁹³ Also part of this group of experts were Ernst-Ulrich Petersmann and Ulrich Immenga both initiators of the DIAC.⁴⁹⁴ Following the DIAC initiative, the EU Group of Experts discussed the creation of an international antitrust code with a competent international antitrust authority.⁴⁹⁵ Though the Group of Experts made clear that an establishment of such a common antitrust authority along with sacrificing parts of sovereignty was not a politically feasible “short or mid-term option”.⁴⁹⁶ Rather, they recommended a harmonization of antitrust law via soft law initiative e.g. the OECD.⁴⁹⁷ They supported the idea of developing closer cooperation of antitrust authorities to make sovereignty sacrifices bearable in the long run.⁴⁹⁸ Subsequent to the expert’s report, it

⁴⁹¹ Cf. Art. 17 DIAC *ibid* 100 f.

⁴⁹² Cf. *Ibid* 102.

⁴⁹³ EC, *Competition policy in the new trade order: strengthening international cooperation and rules – Report of the Group of Experts COM (59) 359 final* (1995).

⁴⁹⁴ Annex A *ibid*.

⁴⁹⁵ *Ibid* 12.

⁴⁹⁶ *Ibid*.

⁴⁹⁷ *Ibid*.

⁴⁹⁸ *Ibid*.

was fully endorsed by the European Commission and they advocated the reinforcement of bilateral cooperation as well as the adoption of a multilateral agreement.⁴⁹⁹ The Commission ended up supporting the creation of a WTO competition working group and the implementation of such a multilateral antitrust agreement in the WTO legal system within the Ministerial Conference of Singapore in December 1996.⁵⁰⁰

c.) Working Group Trade and Competition

Shortly after the creation of the WTO, its Member States confirmed that the WTO's emphasis should include the topics which are affecting and affected by trade, namely: labor, environment, and competition.⁵⁰¹ This consent to deal with the trade-related matters de facto enlarged the legal sphere of the WTO from a 'trade-only' organization to a 'trade- and' organization, which resulted in much debate.⁵⁰² With respect to competition law, and according to the legal character of the WTO, the WTO appears to be limited. It is only mandated to directly bind its Member States and not private actors. Nevertheless, the WTO legal system includes regulations, which are functionally classifiable as antitrust and competition law, directly regulating private conduct (e.g. Art. VI GATT).⁵⁰³

To clarify the correlation of trade and competition, in 1996 at the Ministerial Conference in Singapore, the WTO Council, following the initiative of the European Commission, decided to create the "WTO Working Group on the Interaction between Trade and Competition Policy".⁵⁰⁴

The purpose of the Working Group was to "identify any areas [of trade and competition policy – especially with regard to anti-competitive practices] that may merit further consideration in the WTO framework".⁵⁰⁵ Its work was supposed to take notice of other governmental fora, especially the works of the UNCTAD.⁵⁰⁶

⁴⁹⁹ EC, *Towards an International Framework of Competition Rules – Communication to the Council COM(96) 284 final* (1996); Cf. Zanettin, *Cooperation between Antitrust Agencies at the International Level* 235.

⁵⁰⁰ EC, *Towards an International Framework of Competition Rules – Communication to the Council COM(96) 284 final* 14.

⁵⁰¹ Joel Davidow and Hal Shapiro, 'The Feasibility and Worth of a World Trade Organization Competition Agreement' 2003 49.

⁵⁰² Andrew T Guzman, 'Global Governance and the WTO' 45 *Harvard Int'l LJ* 2004 303, 306; For labor see generally: Raj Bhala, 'Clarifying the Trade-Labor Link' 37 *Colum J Transnat'l L* 1998 11 ff.; for environmental issues: Thomas J Schoenbaum, 'International trade and protection of the environment: the continuing search for reconciliation' 91 *American Journal of International Law* 1997 268 ff.; For competition and trade issues see generally: Eleanor M Fox, 'International antitrust and the Doha Dome' 43 *Va J Int'l L* 2002 911 and Pierre-Hugues Verdier, 'Transnational Regulatory Networks and Their Limits' *Yale J Intl L* 2009 113.

⁵⁰³ Terhechte in Hilf and Oeter, *WTO Recht – Rechtsordnung des Welthandels* 653.

⁵⁰⁴ WTO, *Singapore Ministerial Declaration – WT/MIN(96)/DEC* (1996) para. 20.

⁵⁰⁵ *Ibid.*

⁵⁰⁶ *Ibid.*

Its “clarifying” mandate was meant to be reviewed by the WTO Council, whilst considerations towards a binding WTO legal framework were limited to a full consensus of the WTO Member States.⁵⁰⁷

Regarding a multilateral antitrust codex within the WTO, the council concluded that further elaborations had to be made covered and investigated by a working group.⁵⁰⁸ In that regard, the WTO Council reaffirmed the importance of the prior works of the UNCTAD and its Midrand declaration with its references to the needs of developing countries.⁵⁰⁹

d.) Kodak-Fuji Case

After the Ministerial Singapore declaration, in 1998 the DSB had to decide the WTO dispute settlement case called Kodak-Fuji.⁵¹⁰ Kodak was a US photo paper firm which tried to enter the Japanese market. The Japanese Trade Commission left loopholes in their policy strengthening their Japanese domestic photo paper firm Fuji. Hence, Kodak requested the US DoJ to initiate extraterritorial antitrust proceedings under their antitrust regime. In turn, the DoJ filed suit against the Japan Fair Trade Commission at the newly established WTO DSB claiming that Japan’s antitrust policy was violating GATT provisions – especially Art. III and Art. X GATT.⁵¹¹ The DSB ruled in favor of the Japanese Fair Trade Commission and Fuji, saying that there was no evidence that the Japanese authorities did not meet GATT regulations and that the tolerance of private anticompetitive conduct was not interpreted as a state trade restriction.⁵¹² In the aftermath of the Kodak-Fuji case there were wide discussions about the WTO DSB having a trade bias.⁵¹³ This furthered the question of whether competition law should be implemented within the WTO legal system.

e.) Dogma of an International Antitrust Code

Following the works of the DIAC and the recommendations of the European Commission and its expert groups, and bearing the DSB Kodak-Fuji case in mind, the theory of international antitrust was highly debated within the WTO Antitrust

⁵⁰⁷ Ibid.

⁵⁰⁸ Ibid.

⁵⁰⁹ Ibid; Cf. UNCTAD, *Midrand Declaration – TD/L.360* (1996).

⁵¹⁰ *Japan – Film, Panel WT/DS44/R* (WTO DSB 1998).

⁵¹¹ Peter-Tobias Stoll in Joachim Bornkamm, Frank Montag and Franz Jürgen Säcker, *Münchener Kommentar für Europäisches und Deutsches Wettbewerbsrecht*, vol 1 (2011) Band I Einl. L Rec. 1880 ; Davidow and Shapiro, ‘The Feasibility and Worth of a World Trade Organization Competition Agreement’ 65.

⁵¹² Stoll in Bornkamm, Montag and Säcker, *Münchener Kommentar für Europäisches und Deutsches Wettbewerbsrecht Band I Einl. L Rec.* 1880.

⁵¹³ Guzman, ‘Global Governance and the WTO’ 331.

Working Group. Politically, the European Commission was promoting the idea of international antitrust within the WTO with two proposals set forward in the respective WTO Competition gatherings.

aa.) European Commission Proposals Establishing an International Antitrust Code
 The first proposal set forth by the European Commission was presented and intended to be discussed at the WTO Seattle conference in 1999.⁵¹⁴ This first proposal was quite wide ranging and suggested that the WTO Member States adopt general substantive antitrust law addressing anticompetitive business conduct. Second, the proposal suggested that an agreement within the WTO would include up-to-date common rules concerning cooperation between antitrust agencies. The European Commission proposed that the WTO DSB should be applicable to such an antitrust agreement.⁵¹⁵ The Seattle Conference did not provide a fertile ground for the political aspirations of the European Commission which were subsequently deemed as politically not feasible. This was mainly because international competition law's time was not ripe for such a far-reaching proposal and because the WTO antitrust working group was only mandated to study the WTO's opportunities regarding international competition law. The second proposal of the European Commission was more moderate.⁵¹⁶ The proposal included general antitrust principles as well as core principles of agency cooperation to be adopted by the WTO Member States, though it did not include the application of the WTO DSB to such an agreement.⁵¹⁷ Furthermore, the European Commission drew more attention to the needs of developing countries and proposed that a single WTO Committee on Competition Law and Policy should be established to administer the framework of the proposed antitrust agreement.⁵¹⁸ With that second proposal, the European Commission attained approval of more WTO Member States. In 2001, at the ministerial conference in Doha the Member States held that further negotiations regarding a multilateral framework of competition law policy within the WTO legal system would be considered "after the Fifth Session of the Ministerial Conference, based on a decision

⁵¹⁴ WTO, *Communication from the European Community and its Member States – WT/WGTCP/1*, W/115 (1999); Sir Leon Brittan, *The need for a multilateral framework of competition rules – address of the Vice-President of the EC before the OECD Conference on Trade and Competition, Speech 99/102* (1999); Zanettin, *Cooperation between Antitrust Agencies at the International Level* 235.

⁵¹⁵ For an overview cf. Zanettin, *Cooperation between Antitrust Agencies at the International Level* 236.

⁵¹⁶ Cf. Mario Monti, *Cooperation between Competition Authorities – a Vision for the Future, address of EC Commissioner for Competition before the Japan Foundation Conference, Washington DC – SPEECH/00/234* (2000); Zanettin, *Cooperation between Antitrust Agencies at the International Level* 236.

⁵¹⁷ Zanettin, *Cooperation between Antitrust Agencies at the International Level* 236.

⁵¹⁸ WTO, *Report of the Working Group on the Interaction between Trade and Competition Policy to the General Council – WT/WGTCP/4* (2000) Rec. 33 f. 11.

to be taken by explicit consensus at that Session on modalities of negotiation.”⁵¹⁹ Clearly, the European Commission was able to officially initiate a political discussion regarding their proposal within the WTO. Yet this achievement can only be measured as partially successful. There was the risk that the launching of these negotiations may have been easily vetoed by a single Member State of the WTO – India was highly opposing the European Commission aspirations at that time.⁵²⁰ The postponed negotiations were meant to cover:

core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for multilateral cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building.⁵²¹

Apart from the developing countries, the USA and its representatives were strongly arguing against the proposals of the European Commission and instead wanted to find a soft law understanding in the form of a “Global Competition Initiative (GCI)”.⁵²² The US authority representative Klein made clear that the US authorities believed that a multilateral antitrust code within the WTO was not only premature, but that problems would arise from overlapping trade and competition matters, as they both have their own spheres.⁵²³ For that reason, Klein argued, multilateral convergence had to be created with an independent forum apart from the WTO.⁵²⁴

Following the 2001 declaration of the WTO, the negotiations initiated by the European Commission within the fifth session of the WTO ministerial meetings in Cancún in 2004 did not bear much fruit. The WTO Member States did not consent and in fact did not extend the mandate of the WTO Working Group on the Interaction between Trade and Competition Policy.⁵²⁵ This declaration in Cancún marks the failure of all aspirations to implement antitrust policy within the WTO. It therefore marks the failure of multilateral hard law, bottom-down aspirations regarding international competition law.

f.) Future WTO Competition Law – Problems and Possible Solutions

The future of a WTO Competition Law faces severe problems. The main problem is not even the political opposition to the WTO antitrust code but rather the political stagnation of the whole WTO system. Since the Doha conference, no significant

⁵¹⁹ WTO, *Ministerial Declaration of Doha – Doc. WT/MIN(01)/DEC/W/1* Rec. 23.

⁵²⁰ Zanettin, *Cooperation between Antitrust Agencies at the International Level* 236 footnote 26.

⁵²¹ WTO, *Ministerial Declaration of Doha – Doc. WT/MIN(01)/DEC/W/1* Rec. 25.

⁵²² Joel Klein, *Time for a Global Competition Initiative – Speech of the Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice at the EC Merger Control 10th Anniversary Conference Brussels, Belgium* (2000).

⁵²³ *Ibid.*

⁵²⁴ *Ibid.*

⁵²⁵ WTO, *Doha Work Programme, Decision Adopted by the General Council on 1 August 2004 – WT/L/579* (2004) lit. f.).

developments were achieved. Simultaneously, a severe rise of bilateral co-operation in trade matters took place. As the stagnation of the WTO lasted longer than the WTO was a working legal forum, the significance of the WTO for global economic interdependence decreased dramatically.⁵²⁶ Additionally, the protectionist wave from the US Trump-led administration inhibits the WTO DSB, ever since the US administration refused to replace justices within the DSB in Geneva and imposed tariffs on foreign states, dramatically deepening the WTO crisis.⁵²⁷ It appears, the US does not want the WTO to disappear entirely, but rather to hinder the WTO forming further legal provisions which may impede the sovereignty of the US.⁵²⁸

4.) *Intermediate Result*

Besides those fundamental political problems of the WTO, the main problem of its Competition Law was WTO's top-down policy approach. As described, the developing countries, though mainly also the US were not willing to give up sovereignty in competition law matters. Assuming that these fundamental problems ceased to exist, evident solutions to implementation questions regarding competition law within the WTO might be found in bottom-up approaches. Combining soft law approaches with a WTO DSB – arbitrational approach might become possible. Yet the emerging ICN approaches have to be considered before a subtle conclusion regarding the WTO may be reached.

V) The International Competition Network

Besides other fora of international co-operation, the International Competition Network (ICN) has to be mentioned. Originally the International Policy Advisory Committee (IPAC) was endorsed by the US Department of Justice in 1997 to address the:

global antitrust problems in the context of economic globalization and focused on issues such as multi-jurisdictional merger review, the interface between trade and competition, and the future direction for cooperation between antitrust agencies.⁵²⁹

⁵²⁶ For others cf. Marlies Uken, 'Importzölle – Welche Rolle spielt die WTO?' *Die Zeit Online* <<https://www.zeit.de/wirtschaft/2018-03/importzoelle-usa-europa-donald-trump-wto-perspektiven/seite-2>>.

⁵²⁷ For others cf. Laura von Daniels, 'Rumschrauben am Welthandel – US Regierung will WTO verändern' *Die Zeit Online* <<https://www.zeit.de/wirtschaft/2018-02/donald-trump-usa-handelsmassnahmen-china/seite-2>>.

⁵²⁸ Ibid.

⁵²⁹ Cf. at "About, History" at International Competition Network, 'ICN' (2017) <<http://www.internationalcompetitionnetwork.org/>>.

1.) Legal Basis and Dogma

The DoJ endorsed the IPAC because the US was not satisfied with the EU's WTO aspirations regulating competition issues at that time. As outlined, the real reason for the US DoJ to initiate a counterproposal dealing with international co-operation in antitrust matters was that the US advisory was not in favor of a multilateral competition order.⁵³⁰ Rather than a binding bottom-down approach, the US advisory wanted to co-operate in competition regulation on a soft law basis.⁵³¹ As said, the reasons for these hindering politics can be found in the US antipathy towards foreign influence in its political affairs. The IPAC was meant to develop a forum where state authorities, NGO's, and private companies communicate with each other exchanging information about issues of competition law.⁵³² This informal information exchange forum was intended to enlarge convergence in competition law and its analysis, creating a common understanding regarding competition problems to establish an international "culture of competition".⁵³³ First it was a counter-initiative of the US authorities against the WTO initiatives of the EU authorities. Since the EU authorities were not able to fruitfully establish their proposal within the WTO, they started to support the US initiative of the "Global Competition Initiative (GCI)".⁵³⁴ Accordingly, the so-called GCI was supported by the US and EU advisory. Regardless of the fact that the European Commission's representatives claimed the support of the GCI, it was supported complementary to the WTO aspirations. The WTO aspirations should set a common denominator of antitrust principles, while the European Commission saw the GCI as a forum reinforcing this common sense and extended it to other aspects of competition policy.⁵³⁵ Retrospectively, the GCI prevailed.

As the US and EU represented highly influential, developed states, the resonance to the initiative was positive. The Global Competition Initiative was founded in 2001 and subsequently renamed to International Competition Network (ICN).⁵³⁶ In the beginning the ICN consisted of a variety of more and less developed states.⁵³⁷ Today, it encompasses 132 Members States.⁵³⁸ Compared to the described fora of international antitrust co-operation, the ICN is designed to be non-bureaucratic

⁵³⁰ Zanettin, *Cooperation between Antitrust Agencies at the International Level* 236 f.

⁵³¹ Klein, *Time for a Global Competition Initiative – Speech of the Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice at the EC Merger Control 10th Anniversary Conference Brussels, Belgium*.

⁵³² U.S., International Competition Policy Advisory Committee – Final Report (2000) 281 ff.

⁵³³ Cf. under "About" at Network, 'ICN'.

⁵³⁴ EC, *Press release: EU Competition Commissioner outlines ideas for an international forum to discuss competition policy issues – IP/00/1230* (2000).

⁵³⁵ Zanettin, *Cooperation between Antitrust Agencies at the International Level* 238.

⁵³⁶ Also cf. Petersen, *Die Internationale Zusammenarbeit der Wettbewerbsbehörden* 58.

⁵³⁷ Founding Members were: Australia, Germany, the EU, France, UK, Israel, Italy, Japan, Canada, South Korea, Mexico, Zambia, South Africa and the USA.

⁵³⁸ Network, 'ICN'.

without its own financial budget or structural facilities or a secretary. The ICN has got a president, which rotates every five years between the Member States. The ICN steering group exists to plan the agenda of the ICN. The place of the yearly gathering of the ICN rotates between the Member States. Because of this equality of the organization, the informal dialogue of the ICN is more at eye-level than of the other fora.

Currently five different working groups exist within the ICN, some addressing more procedural and others a more substantive competition provisions. The Advocacy Working Group (AWG) was one of the first initiatives of the ICN.⁵³⁹ Its work is meant to address disproportionate state restrictions on competition matters. The AWG is “advocating” equal competition globally. The Agency Effectiveness Working Group tries to improve the comparability of the agencies to enforce competition rules more efficiently and effectively. The working group tries to enable the sharing of experience in reforming their institutional and operational agency structures.⁵⁴⁰ The Cartel Working Group’s ambit is to address the challenges of antitrust enforcement. It is focused on the different stages of anti-cartel enforcement of the ICN Member State agencies – both, nationally and internationally – such as detection, investigation, punishment of anticompetitive conduct, as well as prevention.⁵⁴¹ Its main focus is the fight against hardcore cartels committing price fixing, bid rigging, market allocation, and output restriction.⁵⁴² The Merger Working Group was one of the first initiatives of the ICN, founded in 2001. The working group tries to promote more efficient merger reviews by the Member State agencies by directing information exchange between them. It developed best practice models regarding merger review over time as practical guidance for the ICN Member States to develop convergence in merger notification, investigation, and analysis.⁵⁴³ Finally, the Unilateral Conduct Working Group, which was founded in 2006, is investigating the challenges of anticompetitive unilateral conduct and the ability to foster international co-operation in fighting the anticompetitive unilateral conduct. Formerly, other working groups such as Working Group for Antitrust Enforcement in Regulated Sectors (from 2002-2005), Competition Policy Implementing Working Group (2002-2009) or the Working Group on the Telecommunications Sector (2005-2006) existed. Comparing the different topics covered by the working groups one may say that the topics very much rely on the findings of the UNCTAD, OECD and WTO. The main differences between the mentioned fora and ICN is the very casual and informal character of the latter. This does not mean that the informal character makes ICN inefficient. Rather, the informal character promotes lively discussions between states because they do not need to watch their remarks

⁵³⁹ Cf. under “Current Working Groups” at *ibid.*

⁵⁴⁰ *Ibid.*

⁵⁴¹ *Ibid.*

⁵⁴² *Ibid.*

⁵⁴³ *Ibid.*

and their international political and legal effects. The works of the yearly conferences and their working groups became guiding principles or recommended practices by the ICN – their legal character is soft and depends on the consent of the Member States.⁵⁴⁴ Yet, as the guiding principles reflect the consensuses of the ICN Member States, the guiding principles have a comparably high level of authority.⁵⁴⁵

2.) *Insight to the ICN's work – The 16th ICN Conference in Porto in 2017*

The annual ICN conference in 2017 took place in Lisbon from 10-12 May 2017, when nearly 600 representatives of over 100 competition agencies, non-governmental advisors, and international organizations gathered to engage in discussions on competition law and policy.⁵⁴⁶ As the ICN President Andreas Mundt pointed out, the ICN was able to become a leading event in the “competition calendar”, which highlights the importance of the ICN.⁵⁴⁷ However, as Mundt pointed out, the ICN is faced with the “turbulent times” of digitalization and a world of accelerating technical development and the fact that companies became real global players is raising the awareness of policymakers around the world, especially within the ICN.⁵⁴⁸ Mundt was convinced that there is no better forum facing these struggles than the “virtual and highly flexible” ICN.⁵⁴⁹ Unlike other fora, the ICN is not about “teaching and being taught [but is] about sharing, discussing, exchanging experiences and developing solutions”.⁵⁵⁰ For that reason, the different mentioned working groups have developed topics which were discussed in plenaries and breakout sessions accordingly. All discussions included high level expert. To give an insight into the Working Groups and their work being reflected in the ICN Conference in Porto, two examples are to be outlined: The works of the Advocacy Working Group and the works of the Cartel Working Group.

a.) The Advocacy Working Group

The Advocacy Working Group (AWG) showcased its 2016-2017 activities by presenting five different projects it has been working on to improve the effectiveness of ICN Member's advocacy activities.⁵⁵¹ For example, the strategy projects aim of the AWG was to improve the way competition agencies define their advocacy strategies. For that reason, the AWG gathered information from the Member States on the different stages that precede and follow the national advocacy actions, e.g. analysis of

⁵⁴⁴ 28 recommended practices have been published by the ICN so far cf. Document library, recommended practices *ibid*.

⁵⁴⁵ Konrad Von Finckenstein, ‘International Antitrust Policy and the International Competition Network’ 2003 37, 38.

⁵⁴⁶ ICN, *Annual Conference Programme Book* (2017) 1.

⁵⁴⁷ *Ibid* 2.

⁵⁴⁸ *Ibid*.

⁵⁴⁹ *Ibid*.

⁵⁵⁰ *Ibid*.

⁵⁵¹ ICN, *Summary of ICN Work Product 2016-2017* (2017) 3.

the environment, priority setting, definition of advocacy objects etc. The AWG was consequently monitoring the information refining the strategies and carried out a Teleseminar in November 2016 assessing the results of the advocacy efforts.⁵⁵² Following, the AWG interviewed non-governmental advisors, as well as competition agencies, on their view and experience with internal advocacy processes followed by the agencies. Finally, the AWG summarized its findings in a short report, which is meant to identify guiding principles for the ICN Member State competition divisions.⁵⁵³ During the conference, discussions were carried out under the lead of the AWG. Directly addressing its work, the discussion “Advocacy Strategies to Preserve Open and Competitive Markets in a Changing World” has taken place within the Lisbon Conference.⁵⁵⁴ Remarkably, the discussion was taking place at tables discussions in smaller groups to encourage lively debates. Other discussions under the guidance of the AWG were focusing on how to carry out market studies in innovation-based and novel markets, how to assist procurement officials in designing and implementing competitive bids, or on innovative tools to advocate and promote competition.⁵⁵⁵

b.) The Cartel Working Group

The Cartel Working Group (CWC) is divided into two subgroups: subgroup one “legal framework” and subgroup two “enforcement techniques”.⁵⁵⁶ The legal framework subgroup addresses legal and conceptual challenges of cartel enforcement, whilst the enforcement techniques subgroup addresses how to improve the procedural effectiveness of antitrust authorities enforcing the material provisions building a shared ICN agenda.⁵⁵⁷ Between 2016 and 2017 the CWC subgroups had various different projects.⁵⁵⁸ The framework subgroup followed four projects: the development of a checklist for efficient and effective leniency programs, the revision of previous reports regarding the setting of fines against misbehaving entities, and the investigation of enforcement and policy efforts in different jurisdictions. On the one hand, the subgroup wanted to detect different investigative tools and detection models, on the other hand, they wanted to detect the disclosure and discovery tools regarding anticompetitive conduct. To accomplish these goals, subgroup one carried out five video calls addressing competition agencies and NGA’s to promote the lively exchange of experiences concerning cartel leads and informants, while three webinars only addressing agencies, devoted to discovering experiences of electronic

⁵⁵² Ibid.

⁵⁵³ Ibid.

⁵⁵⁴ ICN, *Annual Conference Programme Book* 15.

⁵⁵⁵ Ibid 13-15.

⁵⁵⁶ ICN, *Summary of ICN Work Product 2016-2017* 8.

⁵⁵⁷ Ibid.

⁵⁵⁸ For the following cf. Ibid 8 f.

searches during dawn raids and the collection of evidence after the dawn raids. Furthermore, addressing project four, the ways to secure sensitive leniency-based information in the event of court examination were discussed.

The framework subgroup also worked on five different projects in 2016-2017. The subgroup initiated a scoping study for new content reforming the ICN Anti-Cartel Enforcement Manual to explore, whether further manual topics would be beneficial and if it is timely to revisit and update the content of existing chapters.⁵⁵⁹ The next step of the subgroup is to utilize the information gathered in 2017-2018 and propose reforms of the Manual. Moreover, the subgroup followed the project on establishing a framework for the promotion of sharing of non-confidential information to assist competition agencies when seeking such information established in 2015-2016. The subgroup continued to promote the acquisition of this framework by the Member States.⁵⁶⁰ Additionally, the subgroup updated the publicly accessible Anti-Cartel Enforcement Templates monitoring the ICN Member States antitrust regimes. The reason for the template was to create greater transparency and legal certainty for international antitrust matters.⁵⁶¹ From 3-5 October 2016, the subgroup two organized the ICN Cartel Workshop in Madrid covering the theme “Enhancing Cartel Enforcement”.⁵⁶² 275 representatives from 66 different jurisdictions attended the event discussing the ways to improve the effectiveness of leniency programs, the strained relationship between corruption and cartel investigations, as well as the problem of combatting cartel bid rigging in public procurement.⁵⁶³ As with the conference in Porto, the workshop in Madrid was also organized informally in plenaries, mini-plenaries, and breakout sessions to promote the lively exchange of experience.⁵⁶⁴ Furthermore, subgroup two revised the ICN Compilation of Good Practices from 2011.⁵⁶⁵

The works of the CWC were covered with seven different discussions directed under the authority of the CWC at the ICN conference in Porto. The works regarding leniency programs were revived with a plenary on the topic “Leniency and Challenges for the Future” and a breakout session in “Incentives and Strategy When Making Leniency Applications” discussing detection and deterrence of cartels with special respect to the leniency applicants.⁵⁶⁶ The works on effective sanctions were covered with a breakout session on “Fines and Criminal Sanctions Against Cartels” for agencies and NGA’s comparing both sanctioning approaches, whilst a breakout session on “Sharpening Investigation Tools” discussing new investigative tools, such

⁵⁵⁹ Ibid 9.

⁵⁶⁰ Ibid.

⁵⁶¹ Cf. “Anti-Cartel Templates” at “Cartel Working Groups” under the theme “Working Group” at Network, ‘ICN’.

⁵⁶² ICN, *Summary of ICN Work Product 2016-2017* 10.

⁵⁶³ Ibid.

⁵⁶⁴ Ibid.

⁵⁶⁵ Ibid.

⁵⁶⁶ ICN, *Annual Conference Programme Book* 7 f.

as Open-Source Intelligence (OSINT) and forensic IT, was taking place for agencies only.⁵⁶⁷ The CWC works on bid rigging in public procurement, especially in terms of corruption, were also covered by a breakout session. The session dealt with methods to detect critical situation in the public procurement process, such as improper submissions, and the ways to inhibit such illicit conduct.⁵⁶⁸ Furthermore, a breakout session on “Fast Case Resolution Mechanisms” was covered by a breakout session under the authority of the CWC aiming for quicker processing of cartel cases.⁵⁶⁹ Most notably, the breakout session in “International Cooperation” was directed by the CWC, advocating international co-operation as a key to tackle cross border cartels.⁵⁷⁰ Within this session, the opportunities to improve the exchange of information between agencies and the key matters for coordination between agencies were discussed, especially whether simultaneous international action can be complementary, redundant, or counterproductive.⁵⁷¹

c.) Intermediate Measurement

The fact that the ICN Working Groups are divided into expert groups upon different objectives of international antitrust co-operation shows the ICN’s positive intent to meet the challenges of international antitrust co-operation.

3.) Conclusion

It is highly positive that the ICN’s aspirations to establish an alternative to the existing international co-operation approaches were fruitful. Even if the outcomes of the ICN conferences are not of a binding legal nature, they significantly develop Member States’ awareness of international co-operation in antitrust matters, as well as the creation of international antitrust convergence. Furthermore, the informal structure of the ICN is “less fearsome” to the states.⁵⁷² Compared to the practices of the UN, OECD, and WTO, it is regrettable that the outcomes of the ICN Conference are not publicly summarized. It would be useful to have at least an overview to the statements of the different panelists during the breakout sessions and plenaries. On the other hand, the participants in the ICN Conference are completely free to utilize the information gathered at the conference. Therefore, the Member States do not have to feel obligated to comply with a specific consent.

⁵⁶⁷ Ibid 8 f.

⁵⁶⁸ Ibid 16.

⁵⁶⁹ Ibid.

⁵⁷⁰ Ibid 10.

⁵⁷¹ Ibid.

⁵⁷² William Blumenthal, ‘The Challenge of Sovereignty and the Mechanisms of Convergence’ 72 *Antitrust LJ* 2004 267,276.

A growing number of ICN Member States declared that they want to harmonize their national competition laws with the recommendations and guidelines of the ICN.⁵⁷³ This declaration itself is a great achievement for the ICN.

It can therefore be concluded that the ICN follows an informal soft-law bottom-up approach establishing international antitrust law convergence in the long run.

VI) Co-Working Approach: OECD and ICN Survey on International Competition Enforcement Co-operation of 2013

With special respect to international co-operation of antitrust divisions, one may draw special attention to the joint publication of the OECD and ICN: The “Survey on International Competition Enforcement Co-operation of 2013”.⁵⁷⁴ The perspective of the survey was to find out how the work of the OECD and the ICN could help international competition enforcement, especially in regard with the two respective fora. For that reason, the OECD and ICN asked their members to respond to an extensive questionnaire regarding the state of competition enforcement cooperation.⁵⁷⁵ The survey gives a vast overview of cooperation in competition matters globally. Referring to the questionnaire, the interviewed states found some areas where cooperation could be strengthened by the ICN and OECD.⁵⁷⁶ Respondents mainly identified the procedures for the exchange of information as a key area of competition enforcement cooperation to be improved.⁵⁷⁷ Many of the respondents suggested that the states find a common legal framework for the exchange of confidential information. To that end they found that the frameworks of the ICN and the OECD should identify the type of information that can be exchanged, the conditions for its transmission to another enforcement agency, and the permitted use of the information by the receiving agency.⁵⁷⁸ In that regard the OECD and ICN annexed the OECD recommendation “Best practices for the formal exchange of information between competition authorities in hardcore cartel investigations”, reaffirming their recommended procedures.⁵⁷⁹ These procedures are basically a sum of considerations a national authority should take within the procedure of the exchange of information from the request to the disclosure, including safeguards of confidentiality.⁵⁸⁰

⁵⁷³ Ibid 270; Ulf Böge, ‘Die Herausforderungen einer internationalen Wettbewerbspolitik in Zeiten globalisierter Märkte’ 55 *Wirtschaft und Wettbewerb* 2005 590, 597.

⁵⁷⁴ OECD and ICN, *Survey on International Competition Enforcement Co-operation cf. OECD Secretariat Report on the Survey* (2013).

⁵⁷⁵ Annex I of *ibid.*

⁵⁷⁶ *Ibid* 172.

⁵⁷⁷ *Ibid.*

⁵⁷⁸ *Ibid.*

⁵⁷⁹ Annex IV *ibid* 223.

⁵⁸⁰ Annex IV *ibid* 226.

Overall it is positive that the two fora joined their forces and tried to use the synergies of their cooperation. The fact that many Member States responded to the questionnaire underlines the potential for further development of competition enforcement cooperation.

VII) Results and Perspective on Multilateral Cooperation

The discovery of multilateral approaches to foster cooperation on competition law shows that bottom-up soft law approaches prevailed, while top-down hard-law approaches failed. Even if many commentators wished the WTO to be the global forum for competition regulation, an implementation of such provisions within the WTO 16 years after the failure of such incorporation in 2002 is highly unlikely. Not least because of an inflexibility of the top-down maximum solutions, the bottom-up approaches are more likely to fit the needs of the cooperating states.⁵⁸¹ The fact that the OECD and the ICN continue to try to foster cooperation shows that states seem to appreciate their work. On a multilateral basis soft-law roundtables are, therefore, the feasible and most effective way to find convergence in competition law application in the long run.

C) Bilateral Competition Law Cooperation

Other than on a multilateral basis, where several states seek to find consent on certain topics, the smaller and more diverse forum is a bilateral understanding between two states.

I) Legal Basis of Bilateral Antitrust Cooperation

To find bilateral consent states have the option to manifest their diplomatic will via various different “tools” of international law such as treaties; Memoranda of Understandings (MoU), Joint Declarations or Mutual Legal Assistance Treaties (MLATs) etc. Whilst international treaties are binding, the degree of obligation of MoU and Joint Declarations and MLATs depends on the design of the very document.

Clearly the mass of global bilateral understandings regarding competition law is overwhelming, and a detailed overview of every single understanding would exceed the scope of this thesis. Yet to get an idea of the political possibilities and legal diversity of bilateral understandings in antitrust law, examples provided shall underline the different possibilities of diplomatic communication. Over the years, the number of bilateral competition law agreements have grown significantly, in the 80s only 20 jurisdictions had a system of competition law yet by now the majority of global

⁵⁸¹ Karl M Meessen, ‘Das Für und Wider eines Weltkartellrechts’ 50 *Wirtschaft und Wettbewerb* 2000 5, 10 ff.; Daniel K Tarullo, ‘Norms and institutions in global competition policy’ *American Journal of International Law* 2000 478.

states do so.⁵⁸² In this development of competition law agreements basic distinctions regarding the development stages of those treaties have been made. Joel Klein – the former Assistant Attorney General of the US DoJ and Head of the US Antitrust Division from 1995 to 2000, on the behalf of the US Antitrust Agreements divided the US Agreements into two categories: “Soft” and “hard” antitrust agreements.⁵⁸³ Those soft antitrust agreements, Klein noted, do not supersede national competition law with respect to confidential information and thus do not allow the exchange of confidential information which affects the efficiency of antitrust cooperation as antitrust evidence is confidential in the majority of cases.⁵⁸⁴ However, soft antitrust agreements were considered to have the capacity to establish mechanisms which allow the corresponding contracting states and their competition enforcement agencies to communicate with another having different jurisdictional effects.⁵⁸⁵ The agencies were allowed to notify, consult, and even share investigation information with another within the boundaries of confidentiality.⁵⁸⁶ Within this category another distinction must be made. On the one hand, there are antitrust agreements enabling notification of upcoming enforcement actions; enabling consultations over investigations and cases; and enabling an exchange and regular meetings of agency officials.⁵⁸⁷ On the other hand, there are antitrust agreements including procedures of positive comity enabling the competition agencies to directly and actively communicate with another.⁵⁸⁸

The second described stage of “hard” antitrust agreements are Mutual Legal Assistance Treaties (MLATs). Those agreements are originally considered criminal enforcement treaties of mutual assistance enabling criminal investigations within another state’s territory.⁵⁸⁹ By expanding those criminal MLATs to antitrust law the states directly enabled their antitrust divisions to exchange investigative confidential information with another.⁵⁹⁰

⁵⁸² Brendan Sweeney, ‘International competition law and policy: a work in progress’ *Melbourne Journal of International Law* 2009 58.

⁵⁸³ Klein and Bansal, ‘International Antitrust Enforcement in the Computer Industry’ 183.

⁵⁸⁴ *Ibid.*

⁵⁸⁵ *Ibid.*

⁵⁸⁶ *Ibid.*

⁵⁸⁷ Donald I. Baker, ‘US International Cooperation on Competition Law Policy’ *International Business Lawyer* 1997 474; *Baker* gave the examples of the US Antitrust Agreements with Australia, Canada and Germany.

⁵⁸⁸ *Ibid.*; *Baker* especially referred to the EU and US Competition Agreement of 1991 initiating the procedure of positive comity.

⁵⁸⁹ Klein and Bansal, ‘International Antitrust Enforcement in the Computer Industry’ 182.

⁵⁹⁰ *Klein* explicitly referred to the thermal fax paper antitrust investigation proceeding in the above-mentioned Nippon paper case. In 1995 the indictment charged that the conspirators Appleton Papers, Wallace and Ichida conspired to increase prices of jumbo rolled thermal fax paper sod in the US and Canada, between July 1991 and February 1992. Those investigations were steered by the US and Canadian Antitrust divisions enabled to investigate by the “US-Canada MLAT on criminal matters of 1985”, cf. *Ibid.*

II) Examples of Bilateral Competition Law Agreements

To display the developments of bilateral competition law agreements those three different stages will be outlined: (1.) “soft” competition agreements including negative comity; (2.) positive comity agreements; and (3.) “hard” MLAT concerning competition law.

1.) “Soft” Bilateral Competition Law Agreements

The first bilateral competition agreement of the US and one of the first competition agreements ever concluded is the US-Germany Competition Agreement of 1976.⁵⁹¹ The agreement’s aim is to reduce restrictive business practices within the contracting states and thus, to improve the effectiveness of antitrust enforcement by cooperation.⁵⁹² To reach this goal the parties generally agreed that they cooperate and render mutual assistance in connection with antitrust investigations or proceedings, studies of competition policy and possible changes in policy, and activities regarding restrictive business practices within international organizations.⁵⁹³ They agreed to provide each other with significant information regarding anticompetitive behavior having a substantial effect to their respective or international markets, when the information comes to their attention.⁵⁹⁴ Such information is specified as including reports, documents, memoranda, expert opinions, legal briefs and pleadings, decisions of administrative or judicial bodies, and other written records.⁵⁹⁵ Other than providing such information the parties agreed to provide advice and assistance by exchanging other information relating to antitrust law e.g., a summary of experience relating to particular antitrust enforcement practices the authorities have dealt with, including the practice of public officials giving information to antitrust enforcement activities.⁵⁹⁶ If the parties want to acquire voluntary compliance information within the other’s territory, they agreed to notify the other that they seek such information. In that event the notified party will transmit such information and notify the natural and legal persons concerned that it has no objection to voluntary compliance disclosure.⁵⁹⁷ Furthermore, they generally agreed to consult upon request of either party concerning antitrust enforcement matters.⁵⁹⁸

⁵⁹¹ US-Germany, *Agreement relating to Mutual Cooperation regarding Restrictive Business Practices* (1976).

⁵⁹² Rec. 1 and 2 *ibid.*

⁵⁹³ Art. 2.1 lit. a-c *ibid.*

⁵⁹⁴ Art. 2.2 *ibid.*

⁵⁹⁵ Art. 1 lit. b *ibid.*

⁵⁹⁶ Art. 2.3 *ibid.*

⁵⁹⁷ Art. 2.4 *ibid.*

⁵⁹⁸ Art. 2.5 *ibid.*

Notably, the parties agreed a negative traditional comity provision.⁵⁹⁹ The term ‘comity’ was neither named nor defined but it can be described as a standard of diplomatic courtesy for the sake of better understanding of the contracting states. Negative comity describes the courtesy of a contracting state to take into account the important interests of the other contracting party within a state’s competition enforcement measures.⁶⁰⁰ The parties essentially agreed to avoid extraterritorial application of their respective competition laws in a manner triggering diplomatic disagreement. For that reason, the parties agreed not to inhibit or interfere with any antitrust investigation or proceeding of the other party, and if a conflict may be predicted, one will notify the other and they will consult and coordinate enforcement activities to the greatest extent possible.⁶⁰¹ Yet the negative comity provisions are neither binding nor very specific and the parties retain a great margin of interpretation.

Nevertheless, the parties agreed to formal requirements for their requests (e.g., how specific a request has to be) and that the exchanged information has to fully comply with their national legal confidentiality requirements.⁶⁰²

Altogether the agreement between the US and Germany of 1976 imposes general obligations on the states. Those “obligations” are too vague and general to be considered as binding international law. Rather, the agreement may be considered as a Memorandum of Understanding between the US and Germany. For that reason, the categorization afforded to it by Klein, as a “soft” agreement, is correct.

2.) Bilateral “Positive Comity” Competition Agreements

The first bilateral competition law cooperation agreement containing positive comity provisions was the Competition Law Agreement the EU concluded with the US in 1991.⁶⁰³ The parties agreed to conclude the agreement to “lessen the possibility or impact of differences between the Parties in the application of their competition laws”, namely diplomatic dissents deriving from extraterritorial competition law application.⁶⁰⁴ This procedure of comity may, from that point, be divided into classical or negative comity and positive comity. To specify important interests the EU and the US agreed to list examples of such “important interests” at any stage of enforcement of the other party, particularly when the authorities move from investigating anticompetitive behavior to prohibiting or penalizing such conduct negative

⁵⁹⁹ Art. 4 *ibid*; OECD, *Competition co-operation and enforcement – Provisions on Negative Comity* (2015) 12.

⁶⁰⁰ Cf. Art. VI.1 EU-US, *Agreement regarding the application of their competition laws – L 95/47* (1991).

⁶⁰¹ Art. 4.1 and 4.2 US-Germany, *Agreement relating to Mutual Cooperation regarding Restrictive Business Practices*.

⁶⁰² Art. 5 and 6 *ibid*.

⁶⁰³ Art. V and VI EU-US, *Agreement regarding the application of their competition laws – L 95/47*; Baker, ‘US International Cooperation on Competition Law Policy’ 474.

⁶⁰⁴ Art. I.1 EU-US, *Agreement regarding the application of their competition laws – L 95/47*.

comity.⁶⁰⁵ If it becomes clear to one party that its enforcement activities may affect the other party's interests, the parties agreed to take into account different factors of relevance⁶⁰⁶:

- The significance of its enforcement activity within its own territory compared to the territory of the other contracting state
- The tendency of an enforcement activity affected entity to harm consumers, supplier's, or competitors within its territory
- The relative significance of anticompetitive effects of the enforcing party's interests compared to the other party's interests
- The presence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities
- The degree of conflict or consistency of the enforcement activities with the other party's laws and economic policy
- The extent of the enforcement activities of the other party regarding the same person, activities, etc., may be affected by its external enforcement activities.

Those principles appear as a “rule-of-reason” before risking diplomatic conflict with another state. This rule of reason principle very much reminds one of the US Supreme Court *Timberlane-Mannington* Rule of 1979 and the corresponding US FTAIA of 1982. The FTAIA was binding on the US administration to obey the *Timberlane-Mannington* rule when applying antitrust law externally. For that reason, the negative comity principles of the EU-US Agreement of 1991 show the hand of the US and its experience with external antitrust conflicts, urging the EU and the US to apply a degree of caution to its external competition law enforcement. Compared to the US-Germany competition agreement of 1976, the negative comity provisions are far more specific. For that reason, a clear and positive development of interstate cooperation has to be noted.

Additionally and innovatively, the parties agreed to implement a positive comity procedure into the agreement of 1991.⁶⁰⁷ The term ‘positive comity’ describes the option for a competition authority of a contracting state to actively request the other contracting state's authority to take appropriate measures regarding anti-competitive actions conducted on its territory and which affect the important interests of the requesting party.⁶⁰⁸ To enable the other party to effectively take appropriate competition enforcement measures against highlighted anticompetitive behavior, the parties agreed that the request shall be “as specified as possible about the nature of the anticompetitive activities and their effects on the interests of the notifying

⁶⁰⁵ Art. VI.2 *ibid.*

⁶⁰⁶ Art. VI.3 lit a-f *ibid.*

⁶⁰⁷ Art. V *ibid.*

⁶⁰⁸ Art. V.2 *ibid.*

Party”.⁶⁰⁹ Furthermore, the requesting party shall offer the requested party such further information and other cooperation as they are able to provide.⁶¹⁰ Following the requested party should have discussed possible enforcement activities against the notified anticompetitive conduct and agreed with the requesting party that it should advise the requesting party whether or not they want to take or expand requested antitrust enforcement activities. Also, if possible, to update one another about interim developments in the enforcement procedure.⁶¹¹ Yet the positive comity procedure described in the agreement of 1993 does not limit the notified party’s decision whether or not to undertake enforcement activities nor does it preclude the notifying party from taking enforcement measures against external anticompetitive behavior.⁶¹² For that reason, the courtesy procedure of comity is courtesy soft law and not compulsory binding law. Still, compared to the negative provisions of this agreement and compared to the comity provisions of the US-Germany Competition Agreement of 1976, the codification of the opportunity to active requestable comity is a very positive development.

To further reach the goal of better understanding the parties agreed upon reciprocal cooperation mechanisms concerning the enforcement of competition law. They agreed that they shall actively notify another “if they become aware that their enforcement activities may affect important interest of the other Party.”⁶¹³ This provision reflects the input of the positive comity procedure described. To specify such occurrences the parties gave examples of enforcement activities which normally affect the interests of another, e.g. extraterritorial antitrust enforcement activities, merger review concerning a corporation being located within another’s territory, when their competition authorities take part in judicial proceedings etc.⁶¹⁴ Furthermore, the parties specifically agreed upon times of notification for merger concerning enforcement activities and other competition enforcement activities.⁶¹⁵ Both provisions describe times which are either legally required by national law (e.g. according to 15 USC § 18 a (e) “not later than the time its competition authorities request additional information or documentary material concerning the proposed transaction”) or at stages far in advance to enable the other party to note its views.⁶¹⁶ Additionally the parties agreed to notify one another in enough detail to permit an initial evaluation by the notified party of any effects on its interests.⁶¹⁷

⁶⁰⁹ Ibid.

⁶¹⁰ Ibid.

⁶¹¹ Ibid.

⁶¹² Art. V.4 *ibid.*

⁶¹³ Art. II.1 *ibid.*

⁶¹⁴ Art. II.2 *ibid.*

⁶¹⁵ Art. II.3 and 4 *ibid.*

⁶¹⁶ *Ibid.*

⁶¹⁷ Art. II.6 *ibid.*

Besides notification, the parties agreed to exchange information facilitating an effective application of their reciprocal competition law and promoting a better understanding between them.⁶¹⁸ The parties want their competition officials to meet at least twice a year.⁶¹⁹ To enable a regular exchange of information concerning their enforcement activities, on economic sectors of common interest and to discuss possible policy changes in competition law and other areas of common interest in competition law. This positive comity procedure further enables the parties to provide one another with “significant information that comes to their attention [that] may warrant, enforcement activity by the other agency”.⁶²⁰

They agreed that when it furthers their mutual interest to cooperate by coordinating their competition enforcement provisions in cases where both parties have an interest in pursuing enforcement activities with regard to related situations, they are enabled to do so by comity procedures.⁶²¹ They may agree to make more efficient use of their resources, to obtain information necessary to conduct the enforcement activities, to enable both parties to achieve the objectives of their enforcement activities, and to reduce costs of enforcement by avoiding parallel enforcement activities against a single anticompetitive conduct.⁶²² Yet even if the parties agree to a joint coordination of competition law enforcement, they have the right to limit or terminate such coordination proceedings.⁶²³ Again, this reflects the optional character of the competition enforcement cooperation measures.

Moreover, the parties agreed to consult with another upon request so that the requested party will promptly answer the request concerning matters of interest.⁶²⁴ With that consultation mechanism, the parties want to reach mutually agreeable results in extraterritorial competition enforcement.⁶²⁵

However, all provisions of the 1991 Competition Agreement are limited to the extent that they have to be in line with their domestic legal confidentiality provisions.⁶²⁶ This limitation is why the respective competition agencies were not entitled to directly exchange confidential information in antitrust investigations without the specific consent of the misbehaving entities.⁶²⁷

Overall, the positive comity procedures are constructive and enabled the EU and US agencies to deepen competition enforcement cooperation. For example, it was extensively used in M&A procedures concerning EU and US entities.⁶²⁸ For ex-

⁶¹⁸ Art. III.1 lit a and b *ibid.*

⁶¹⁹ Art. III.2 *ibid.*

⁶²⁰ Art. III.3 *ibid.*; Baker, ‘US International Cooperation on Competition Law Policy’ 474.

⁶²¹ EU-US, *Agreement regarding the application of their competition laws – L 95/47.*

⁶²² Art. IV.2 lit. a-d *ibid.*

⁶²³ Art. IV.4 *ibid.*

⁶²⁴ Art. VII *ibid.*

⁶²⁵ *Ibid.*

⁶²⁶ Art. VIII *ibid.*

⁶²⁷ Klein and Bansal, ‘International Antitrust Enforcement in the Computer Industry’ 183.

⁶²⁸ Baker, ‘US International Cooperation on Competition Law Policy’ 474.

ample, in the Microsoft antitrust cases the agencies were enabled by positive comity provisions of the EU-US Competition Agreement to coordinate antitrust investigations within the computer industry against Microsoft.⁶²⁹ Still, the investigations between US and the EU were disparate – the investigations and its litigation within the EU took much more time than in the US.⁶³⁰ This shows that comity enables cooperation yet does not harmonize competition enforcement procedures. Because the provisions of the 1991 Competition Agreement are non-binding, the agreement may be considered a non-binding Memorandum of Understanding between the EU and the US. For that reason, Klein's classification of the comity agreement as a "soft" agreement has to be approved.

In 1998, the EU and US agreed upon a subsequent supplementary Competition Agreement specifying the positive comity principles.⁶³¹ For example, the parties agreed to dismiss antitrust enforcement activities in favor of the enforcement activities of the other party if the anti-competitive activities at issue have such an impact on the requesting party's consumers and they occur principally in and are directed principally towards the other party's territory.⁶³² Still, the specifications of the positive comity procedures did not change the degree of obligation of the competition agreement as, again, nothing in the articles of the 1998 agreement precludes the respective competition agencies from taking enforcement measures.⁶³³ For that reason, the supplementary agreement of 1998 does not lift the 1991 Competition Agreement to levels of greater obligation.

It has to be concluded that comity procedures enable competition authorities to directly discuss competition enforcement matters with each other, though has to be noted that those comity procedures complement and do not replace cooperation provisions like ordinary coordination procedures. Still, as pointed out in the OECD's Working Group 3 recommendation on comity, there may be two kinds of limitations on the usefulness of positive comity.⁶³⁴ First, the Working Group 3 noted that since the concept relates to possible enforcement action by the requested country, it applies only to conduct that is illegal in that country.⁶³⁵ It limits the competition agencies to precautionary cooperation. Second, the Working Group 3 noted that with respect to such illegal conduct there are several limitations on positive

⁶²⁹ Ibid; Klein and Bansal, 'International Antitrust Enforcement in the Computer Industry' 174 For the US investigation, complaint and consent decree cf. *United States v. Microsoft Corp.*, No. 94-1564 (United States District Court, Dist. Columbia, 1994).

⁶³⁰ John P. Jennings, 'Comparing the US and EU Microsoft Antitrust Prosecutions: How Level is the Playing Field?' Erasmus Law and Economics Review 2006 81.

⁶³¹ Cf. Art. VI EU-US, *Agreement on the Application of Positive Comity Principles in the Enforcement of their Competition Laws* – L 173/28 (1998).

⁶³² Art. IV.2 lit. a ii *ibid*.

⁶³³ Art. IV.4 *ibid*.

⁶³⁴ OECD, *Report on Positive Comity* – DAF/CLP 19 (1999) Ref. 50.

⁶³⁵ *Ibid*.

comity's potential.⁶³⁶ These limitations relate to (1) the described bans on competition agencies' sharing of confidential investigatory information; (2) the requesting country's need for confidence that the requested country's competition agency has the legal tools, resources, and independence necessary to remedy illegal conduct that it finds; and (3) the need for the requested country to agree to investigate.⁶³⁷

For that reason, positive comity is a useful measure boosting competition law enforcement cooperation yet is not enabling the agency's capacity to exceed the boundaries of "soft" cooperation.

3.) "Harder" Bilateral Competition Agreements – MLATs

The US concluded several MLATs regarding criminal investigations. Yet, in the early 90's the US-Canada MLAT was the only MLAT making reference to antitrust law.⁶³⁸ Within the agreement, the US and Canadian competition agencies were enabled to directly communicate and exchange confidential information.⁶³⁹ Those MLATs may be called first generation MLATs.

Still, to include antitrust measures into MLATs on criminal matters the states have to consent that antitrust law relates to criminal matters (rather than e.g. public law matters). The majority of states do not do that. Furthermore, the struggles of non-binding comity competition agreements providing no direct communication between agencies and no exchange of confidential information were noted by the Antitrust Division of the US DoJ. The DoJ initiated the adoption by the US Congress of the IAEEA of 1994. With the possibility to directly communicate with foreign competition authorities and exchange confidential information in competition law enforcement matters, the US competition authorities managed to sign competition MLATs to strengthen antitrust enforcement cooperation.⁶⁴⁰ Still the possibility of exchanging confidential information by the IAEEA was limited to cases not concerning M&A revision.⁶⁴¹ Such MLATs are called "second generation MLATS".

The US and EU are yet to sign an MLAT on competition matters. However, the 1999 US-Australia MLAT on antitrust enforcement assistance is a good example of a working MLAT in competition matters.

The US and Australia agreed to cooperate in competition law enforcement on a reciprocal basis by providing or obtaining antitrust evidence which may assist the other in their respective antitrust enforcement activities.⁶⁴² For that reason, the contractors agreed upon both negative and positive comity provisions allowing each party to inform the other party on antitrust enforcement policies, investigative an-

⁶³⁶ Ibid.

⁶³⁷ Ibid.

⁶³⁸ Baker, 'US International Cooperation on Competition Law Policy' 474 f.

⁶³⁹ Cf. Annex US-Canada, *Treaty on Mutual Legal Assistance in Criminal Matters – E101638* (1990).

⁶⁴⁰ See Ref. 2.91 U.S., *Antitrust Enforcement Guidelines for International Operations* (1995).

⁶⁴¹ Para. 6204.1 U.S., *International Antitrust Enforcement Assistance Act – 15 USC Ch. 88*.

⁶⁴² Art. II.A Australia-US, *Agreement on Mutual Antitrust Enforcement Assistance* (1999).

itrust activities taken, and other important interests.⁶⁴³ Also the parties agreed that they may have the opportunity to actively and directly request the other's competition authority to cooperate and assist in antitrust enforcement activities.⁶⁴⁴ Those provisions may be compared with the positive comity provisions described. Compared to the previous "soft" competition agreements, the MLAT between US and Australia provides an innovative mutual assistance procedure. The respective competition authorities are directly enabled to communicate with another. Antitrust assistance covers but is not limited to the following:

- (1.) disclosing, providing, exchanging, or discussing antitrust evidence in the possession of an Antitrust Authority;
- (2.) obtaining antitrust evidence at the request of an Antitrust Authority of the other Party, including
 - (a) taking the testimony or statements of persons or otherwise obtaining information from persons,
 - (b) obtaining documents, records, or other forms of documentary evidence,
 - (c) locating or identifying persons or things, and
 - (d) executing searches and seizures, and disclosing, providing, exchanging, or discussing such evidence; and
- (3.) providing copies of publicly available records, including documents or information in any form, in the possession of government departments and agencies of the national government of the Requested Party.⁶⁴⁵

The request of a party to cooperate should be detailed and specific regarding the particular cooperation activity. For example:

a general description of the subject matter and nature of the investigation or proceeding to which the request relates, including identification of the persons subject to the investigation or proceeding and citations to the specific antitrust laws involved giving rise to the investigation or proceeding...

The purpose for which the antitrust evidence, information, or other assistance is sought and its relevance to the investigation or proceeding to which the request relates etc.⁶⁴⁶

However, the MLAT is limited in several ways. The evidence obtained is only to be used and disclosed by the competition authorities.⁶⁴⁷ Other state authorities of the contracting parties may only use the acquired antitrust evidence if the disclosure of the evidence is essential to a significant law enforcement objective and the infor-

⁶⁴³ Art. II.B and C *ibid.*

⁶⁴⁴ Art. III.A *ibid.*

⁶⁴⁵ Art. II.E *ibid.*

⁶⁴⁶ Art. III.B *ibid.*

⁶⁴⁷ Art. VII *ibid.*

mation providing competition authority has given its prior written consent to the disclosure.⁶⁴⁸ Publicly obtained, exchanged, and used antitrust evidence is not limited by the consent of the other party.⁶⁴⁹ Furthermore, the parties agreed that if the Australian competition authority provides antitrust evidence to the US competition authorities, this evidence may not be used in a criminal proceeding against a tortfeasor within the US.⁶⁵⁰ This relates to the fact that antitrust proceedings do not belong to criminal matters in Australian law,⁶⁵¹ although, if the Australian competition authority gives its consent to the use of obtained evidence in prospective proceedings within the US, those proceedings are approved.⁶⁵² Moreover, the contracting parties agreed that they should have the opportunity to decline mutual antitrust assistance if formal requirements are not met or if the requested act of assistance does not comply with national procedural law or the public benefit of the requested authority.⁶⁵³ If a competition authority declines mutual assistance, it should consult with the other competition authority as to what extent mutual assistance would be possible.⁶⁵⁴ If a competition authority requests mutual assistance in antitrust matters, the assistance will be enforced within the boundaries of the requested competition authority's national law.⁶⁵⁵ The agents of the requesting competition authority may support the requested assistance activity as long as the mutual assistance request is simplified.⁶⁵⁶ Ultimately, the MLAT makes specific reference to the confidentiality of the competition enforcement assistance activities.⁶⁵⁷ The parties agreed that they will apply the highest confidentiality measures to the fullest extent possible within their respective national laws to obtained antitrust evidence.⁶⁵⁸ The contractors agreed upon a safeguard provision in case confidential information is accidentally disclosed. In that so-called "illegal" event the competition authorities shall promptly consult concerning how to minimize the harm done by this illegal disclosure.⁶⁵⁹ The parties noticed that illegal disclosure of confidential antitrust evidence may even lead to a unilateral termination of the MLAT.⁶⁶⁰ If national law requires the respective competition authorities to disclose information, the authorities are obliged to notify the other competition authority at least 10 days before disclosure.⁶⁶¹ Alto-

⁶⁴⁸ Art. VII.C *ibid.*

⁶⁴⁹ *Ibid.*

⁶⁵⁰ Art. III.B. *Ibid.*

⁶⁵¹ Cf. Petersen, *Die Internationale Zusammenarbeit der Wettbewerbsbehörden* 193.

⁶⁵² Art. III.B and VII.C Australia-US, *Agreement on Mutual Antitrust Enforcement Assistance*. Petersen, *Die Internationale Zusammenarbeit der Wettbewerbsbehörden* 193.

⁶⁵³ Art. IV.A Australia-US, *Agreement on Mutual Antitrust Enforcement Assistance*.

⁶⁵⁴ *Ibid.*

⁶⁵⁵ Art. V.C *ibid.*; cf. Petersen, *Die Internationale Zusammenarbeit der Wettbewerbsbehörden* 194.

⁶⁵⁶ Art. V.D and IX.C Australia-US, *Agreement on Mutual Antitrust Enforcement Assistance*.

⁶⁵⁷ Art. VI *ibid.*

⁶⁵⁸ Art. VI.A *ibid.*

⁶⁵⁹ Art. VI.C *ibid.*

⁶⁶⁰ Art. VI.D and XIII.C *ibid.*

⁶⁶¹ Art. VI.E *ibid.*

gether, the strict requirements for the confidentiality of antitrust evidence disclosed underlines the importance of confidentiality to the MLAT. Regarding the US, it is these high requirements the IAEAA set for mutual assistance in antitrust matters which are being reflected.

The acceptance and rejection provisions of the MLAT show that the MLAT between the US and Australia have binding legal character. The MLAT is a code of conduct in international competition law enforcement which clearly defines how, when and to what extent the authorities may provide assistance. The binding character is further underlined by the fact that the MLAT leaves only two backdoors for the competition authorities to decline mutual antitrust assistance. However, the margin of interpretation as to the extent of mutual antitrust assistance is still wide open. Especially notable is that the MLAT does not refer to any material antitrust law defining when certain behavior is considered as e.g. anticompetitive. Also notable is the fact that the contracting parties did not make rules on how promptly the assistance has to be provided. Therefore, it very much depends on the will of the competition authorities whether they decide to assist and if so, how fast. For that reason, and with specific respect to the importance of time in antitrust investigations, it would be desirable that the US and Australia extend their MLAT with material antitrust provisions and at least with a provision regarding the time and speed of mutual antitrust assistance.

Still, despite the several limitations of the Australia-US MLAT on antitrust law, the MLAT may be considered as a “hard” competition agreement. Compared to the cooperation measures of the “soft” agreements generally asking the competition authorities to cooperate by exchanging general information, to generally consult with another, and to notify each other when general interests are violated, the MLAT includes similar but far more specific cooperation provisions. Not only did the parties agree to disclose, provide, exchange, and discuss antitrust evidence, but the fact that they agreed to actively cooperate by identifying persons involved in antitrust enforcement activities and to cooperate by search and seizure in antitrust enforcement goes far beyond the “soft” agreement provisions. Researching antitrust dissents between the US and Australia from 1999 onwards, it is striking that no major disagreement in competition law enforcement between the two states could be detected. For that reason, the MLAT seems to positively shape antitrust assistance of the US and Australia. It would be highly desirable if other countries would enact legal provisions enabling their competition authorities to directly provide and request mutual antitrust assistance.

III) Examples of Bilateral Dissents in Competition Law

Referring to the three different stages determining how states deal with bilateral competition law understanding, it has to be noted that dissent in international competition law application and enforcement remains at least in the “soft” stages of cooperation. To get an understanding of such dissents and their political impact

specific cases have to be outlined. As stated, the US IAEEA explicitly excluded mutual antitrust assistance in M&A matters. Yet, M&A matters especially in large scale deals, have great political impact. As described, the US and EU could not agree upon a MLAT, except by soft law Memoranda of Understanding. Dissents were therefore preprogrammed. To highlight these preprogrammed diplomatic dissents in international antitrust law two super merger cases and their outcomes are to be displayed: the case of Boeing-McDonnell Douglas and the case of GE-Honeywell.

1.) *Boeing-McDonnell Douglas Case*

In July 1997 under the guidance of Chairman Pitkofsky the FTC omitted antitrust interdiction in the inquiry of the planned merger of Boeing and McDonnell Douglas. Boeing, which is one of the leading aircraft manufacturing corporations in the world, wanted to buy the small American commercial and defense aircraft manufacturer McDonnell Douglas. The latter was in a financial crisis, as they did not win an American Defense Department competition to develop the Joint Strike Fighter (JSF) – a contract worth up to 300 billion USD.⁶⁶² According to the FTC clearance certification, the merger of the two aircraft manufacturers would not result in an anticompetitive monopolistic entity. The FTC considered McDonnell Douglas to be of such high inefficiency that it could not maintain its 6% share in the global aircraft market.⁶⁶³ After extensive economic investigations the FTC stated that “there is no economically plausible strategy that McDonnell Douglas could follow, either as a stand-alone concern or as part of another concern that would change that grim prospect”.⁶⁶⁴

At the same time, the FTC tried to protect itself from foreign accusations and denied that it wanted to strengthen the US economy with its decision or that it tried to build a national aircraft manufacturing champion.⁶⁶⁵ The FTC stated that it would not have the power to allow anticompetitive but “good” mergers. It insisted, it looked at the two competitors objectively and not in a subjective manner.⁶⁶⁶

A final response to the FTC decision did not take long. Only three weeks later on 30th of July 1997, the European Commission took a stand against the FTC’s antitrust law interpretation and objected to it, according to Art. 8 II EU Merger Regulation. Before, in February 1997, the pending merger was notified pursuant to Art. 3 (I)(b) EU Merger Regulation. Subsequently, the European Commission investigated whether EU laws were affected by the merger project. On 7 March 1997 the European Commission decided to continue the suspension of the merger

⁶⁶² ‘Building a new Boeing’ *The Economist* 2000 (<http://www.economist.com/node/343468>).

⁶⁶³ FTC, Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger, Roscoe B. Starek III and Christine A. Varney in the Matter of The Boeing Company/McDonnell Douglas Corporation – 971 0051 (1997).

⁶⁶⁴ *Ibid.*

⁶⁶⁵ *Ibid.*

⁶⁶⁶ *Ibid.*

project until it reached its final decision on 17 March 1997 that the proposed concentration falls within the scope of the Merger Regulation.⁶⁶⁷ Serious doubts as to its compatibility with the common market were mentioned, therefore proceedings pursuant to Art. 6 (I)(c) EU the Merger Regulation were initiated.⁶⁶⁸ Regarding Art. 6 (I)(c), the EC proceeding according to Art. 8 EU Merger Regulation may take 90 days to perform a preliminary investigation as to what the merger is consistent or inconsistent with EU law. This investigation ended in the above-mentioned European Commissions declaration of 30 July 1997. The European Commission did not generally prohibit the merger but imposed conditions to the merger: Boeing had to meet the extensive suggestions made to dispel the antitrust law concerns of the European Commission and had to submit itself to the supervision of the Commission in these matters.⁶⁶⁹ The conditions were extensive because Boeing committed itself to long lasting provisions that: it would continue the business of McDonnell Douglas as a sole standing economic entity for 10 years and that it would not influence its consumers or the vendors.⁶⁷⁰ The European Commission wanted to ensure competitiveness in the aircraft manufacturing world market and to prevent Boeing from becoming a world monopoly.

Regarding the dispute between the FTC and the European Commission, the case highlights quite a severe limitation to transatlantic competition and antitrust enforcement cooperation. Whilst the FTC rejected accusations as mentioned, the European Commission elaborated to the contrary.

According to the European Commission decision, the Commission received a notification of the FTC and the US Department of Defense on behalf of the US Government. On 13 July 1997, a couple of days after the official statement allowing the merger of the two aircraft competitors, the agencies notified the European Commission⁶⁷¹ that the merger is of concern to the US Government because of three major issues:⁶⁷²

1. A Commission decision prohibiting the merger could harm serious defense interests of the US.
2. A prohibition of the McDonnell Douglas divestiture will end in tremendous job losses within the US.
3. A divestiture of McDonnell Douglas to a third party will lead to higher prices of manufactured aircrafts. As the company's main customers are US undertakings, US market prices will be affected.

⁶⁶⁷ EC, Boeing/Mc Donnell Douglas – Case No IV/M.877 (1997).

⁶⁶⁸ Ibid.

⁶⁶⁹ Ibid Art. I and recitals 114-119 and recital 123.

⁶⁷⁰ , 'Building a new Boeing'.

⁶⁷¹ Pursuant to the Art. II and IV EU-US, *Agreement regarding the application of their competition laws – L 95/47*.

⁶⁷² Recital 12 EC, Boeing/Mc Donnell Douglas – Case No IV/M.877 (1997).

The European Commission stated that it tried to take the arguments of the agencies into account to an extent consistent with community law.⁶⁷³ Nevertheless the Commission made clear that the merged aircraft champion would benefit from a higher budget deriving from US defense subsidies.⁶⁷⁴ Therefore, the merged firm would be able to cross-subsidize the private aircraft sector which would result in the ability to supply aircraft at lower prices.⁶⁷⁵ Also, the European Commission stated that the application of antitrust laws in that case has to refer to the global market as big jet-aircraft models are supplied around the world in similar market structures.⁶⁷⁶ Consequently, the Commission referred measures such as employment to a global not to a single national market.

Moreover, it is notable that the suggestions to solve the European Commission's concerns did not come from the FTC or another US department, but from Boeing itself. This implies that the US agencies were not poised to soften the diplomatic tone and eventually, they would likely be executing their will against that of the EU.

Retrospectively, Boeing gained a massive competitive advantage. It was able to minimize employment rates and raise its revenue from approximately 40 billion USD to around 60 billion USD.⁶⁷⁷ Indeed, Boeing was able to overcome crises in the private aircraft market just after the merger as they were able to widen their market by entering the defense and satellite markets.⁶⁷⁸ Their tight connection to the Pentagon allowed them to cross-subsidize their classic aircraft sector;⁶⁷⁹ therefore, the premonition of the European Commission can be confirmed to some extent.

Even if the US agencies or the European Commission notified each other and took their differing interpretations into account, the final decisions did not comply with each other. The dispute and its settlement show that political interests were preempting the "good will" of international cooperation in competition and anti-trust matters.

2.) *GE-Honeywell Case*

Whilst the European Commission presented a compromise to Boeing in the above-mentioned merger case under the authority of European Commission Commissioner Karel van Miert, the case of GE-Honeywell raised serious debates between EU and US antitrust officials about the way to deal with a conglomerate merger.⁶⁸⁰

⁶⁷³ Ibid.

⁶⁷⁴ Ibid at recital 72-75.

⁶⁷⁵ Ibid.

⁶⁷⁶ Ibid at recital 20.

⁶⁷⁷ 'Building a new Boeing'.

⁶⁷⁸ Ibid.

⁶⁷⁹ Ibid.

⁶⁸⁰ William J Kolasky, 'GE/Honeywell: Continuing the transatlantic dialog' 23 U Pa J Int'l Econ L 2002 513; for the term conglomerate merger cf. Ibid footnote 2 : "Conglomerate merger describes all mergers that are neither horizontal (between direct competitors) nor vertical (between firms that have a buyer-seller relationship). As such, it is a broad term that encompasses mergers

The former CEO of General Electrics (GE) Jack Welch intended to initiate a merger with Honeywell, as the possession of Honeywell in the aviation electronics sector would have completed the supply of GE, as it is supposed to be one of the biggest aviation engine producing entities.⁶⁸¹ The fact that two conglomerates of global economic importance wanted to merge raised the attention of the former EU Commissioner for Competition Mario Monti and his merger task force.⁶⁸² For the first time since the adoption of the EU merger regulation in 1991, the European Commission prohibited a globally relevant merger as incompatible with the EU market, whilst the US agencies would have allowed it.⁶⁸³

On 5 February 2001, the European Commission received a merger notification pursuant to Art. 4 EU Merger Regulation, and decided to initiate proceedings in this case in accordance with Art. 6 (I) (c) of the Merger Regulation and Art. 47 of the EEA Agreement. After intense and preliminary investigations, Mario Monti called Jack Welch to an oral hearing in Brussels. The European Commission presented its investigations and imposed strong requirements that GE had to meet in order to be allowed to merge with Honeywell. The requirements were so stringent and high that from the point of GE concessions would have wrecked the whole point of the merger and its synergies.⁶⁸⁴ Therefore, as Welch denied acceptance of the requirements, the European Commission declined its approval of the merger.⁶⁸⁵ After the Commission's decision the US DoJ Antitrust Division wrote a white paper and submitted it to an OECD Roundtable on Portfolio Effects in Conglomerate Mergers. The US agencies decidedly criticized the European Commission. As shown by Kolasky, the main topics on which the EU and US Antitrust Agencies disagreed were:

1. The dominant or not dominant position of GE in the large jet engine market
2. Whether or not bundling⁶⁸⁶ would be an exclusionary strategy
3. Whether the financial strength of GE would give Honeywell a decisive advantage
4. Whether GE Capital Activation Series ("GECAS") could be used to foreclose competitors

of complements and weak substitutes, as well as pure conglomerate mergers in which there is no relationship between the products of the merging firms."

⁶⁸¹ Michael Elliott, 'The Anatomy of the GE-Honeywell Disaster' TIME Magazine 2001, 1, (<http://content.time.com/time/business/article/0,8599,166732-2,00.html>).

⁶⁸² Ibid.

⁶⁸³ Kolasky, 'GE/Honeywell: Continuing the transatlantic dialog' 515; Cf. Art. 1 of the decision EC, GE Honeywell, Case COMP/M.2220 (2001).

⁶⁸⁴ Elliott, 'The Anatomy of the GE-Honeywell Disaster' 1.

⁶⁸⁵ EC, GE Honeywell, Case COMP/M.2220 (2001) Ref. 566.

⁶⁸⁶ Cf. Kolasky, 'GE/Honeywell: Continuing the transatlantic dialog' 522: "mixed bundling" is selling a bundle of components, e.g. engine and avionics, at a price lower than the total price of the components purchased separately.

5. Whether competitors are likely to exit the market after the merger of GE Honeywell
6. Whether the “harm” of the merger outweighs its benefits⁶⁸⁷

Without trying to retrace every step of EU and US investigations, the six different dissents show that the two agencies have major and substantial disagreement in their interpretation and understanding of antitrust law. Whilst the main goal of the US antitrust division is corporate efficiency to promote consumer welfare,⁶⁸⁸ the EU divisions try to keep up a certain market efficiency to reach the goal of consumer welfare.⁶⁸⁹

The fact that the US agencies promoted a dispute settlement at an OECD roundtable shows that the US is willing to promote legal cooperation with the EU and that the US agencies enforce their antitrust laws and corresponding dissents in line with Section 2.92 of its 1995 Antitrust Enforcement Guidelines. Consequently, one may say that the provisions of the 1995 Guidelines are too general and basic so that they did not have the capacity to prevent disputes with the EU. Nonetheless, the interest in detailed outlines of cooperation enforcement proceedings and (more generally) in international cooperation was signaled.

3.) *EU-US Administrative Arrangement of Attendance of 1999*

In 1999, the EU and US competition authorities concluded an Administrative Arrangement of Attendance (AAA) concerning reciprocal attendance in different competition enforcement stages.⁶⁹⁰ This AAA seeks to foster mutual cooperation between the competition authorities, especially involving the application of their respective competition laws.⁶⁹¹ Furthermore, the AAA seeks to lower the risk of diplomatic dissents in merger cases of mutual interest.⁶⁹² It wants to assure the possibility of the US competition authorities attendance as observers in appropriate cases of mutual concern and in oral hearings of competition enforcement proceedings before the European Commission,⁶⁹³ as well as the European Commission as the competent EU competition authority attending as observer in high level meetings of the US competition authorities (so-called “pitch meetings”) and in enforcement proceed-

⁶⁸⁷ Ibid; Cf. U.S., Antitrust Division Submission for OECD Roundtable on Profolio Effects in Conglomerate Mergers (2001).

⁶⁸⁸ Cf. U.S., Antitrust Division Submission for OECD Roundtable on Profolio Effects in Conglomerate Mergers (2001) 2.

⁶⁸⁹ Kolasky, ‘GE/Honeywell: Continuing the transatlantic dialog’ 516; Mario Monti, ‘Review of the EC Merger Regulation – Roadmap for the reform project, Speech/02/252’ 2002 5, 6.

⁶⁹⁰ EC, *Report from the Commission to the Council and the European Parliament on the application of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition – COM 618 final* (2000) 5.

⁶⁹¹ Ibid.

⁶⁹² Ibid.

⁶⁹³ Ibid.

ings of the US competition authorities applying US antitrust law.⁶⁹⁴ Furthermore, the parties agreed that such attendance may be granted upon request in cases of mutual interest,⁶⁹⁵ although attendance in investigations, the agencies note, is only possible with the consent of the investigation affected legal or natural person.⁶⁹⁶ The agreement was concluded within the framework of the EU-US competition agreements of 1991 and 1998 and was meant to complement them especially in the parts of coordination and cooperation stages.⁶⁹⁷ Yet it is only a “soft law” Memorandum of Understanding and not a binding MLAT on mutual assistance.⁶⁹⁸ It would be preferable for the agreeing parties to conclude an MLAT on antitrust assistance. Yet, the fact that the EU and US considered more mutual assistance through attendance is, nevertheless, a positive development.

4.) *EU-US Merger Working Group’s Best Practices on Cooperation in Merger Investigations of 2011*

In December 1999, the EU and US antitrust authorities further agreed to form the EU-US Merger Working Group.⁶⁹⁹ Its purpose was to enhance transatlantic cooperation of global mergers.⁷⁰⁰ The Merger Working Group was mandated to conduct an in-depth study of EU and US approaches, identifying and implementing remedies in merger investigations, as well as to monitor post-merger remedy compliance of the two states.⁷⁰¹ Moreover, the Merger Working Group was mandated to seek for further convergence of competition enforcement in cases treated by both jurisdictions.⁷⁰² Subsequently, in 2002, the Merger Working Group published a first paper of Best Practice on Cooperation in Merger Investigations, agreed on by the US competition agencies and the EU Directorate General for Competition of the European Commission.⁷⁰³ Two decades after starting competition law enforcement cooperation, this Best Practice Paper was updated by the Merger Working Group.⁷⁰⁴ The paper is an advisory framework for cooperation in merger investigations setting forth the best practices the EU and US competition authorities will seek to apply when they review the same merger.⁷⁰⁵ The restatement of the 2002 Best Practices on Merger investigation with its set out significant number of cases sets out the condi-

⁶⁹⁴ Ibid 6.

⁶⁹⁵ Ibid.

⁶⁹⁶ Ibid.

⁶⁹⁷ Ibid 5.

⁶⁹⁸ Ibid.

⁶⁹⁹ Ibid 6.

⁷⁰⁰ Ibid.

⁷⁰¹ Para. 4 lit. a *ibid* 6.

⁷⁰² Para 4 lit. b *ibid*.

⁷⁰³ EU-US, *Best Practices on Cooperation in Merger Investigations* (2002).

⁷⁰⁴ Rec. 1 EU-US, *Best Practices on Cooperation in Merger Investigations* (2011).

⁷⁰⁵ Rec. 4 *ibid*: The Best Practices apply to mergers that are subject to the EU Merger Regulation and to the Clayton Act, regardless any exemptions like the Hart Scott Rodino Act, 15 U.S.C. § 18a.

tions under which the competition agencies cooperate in “trans-Atlantic [and] inter agency...merger investigations”.⁷⁰⁶ Nothing in the paper is intended to modify or create any enforceable binding legal provision.⁷⁰⁷ It is therefore, considered merely a soft law Memorandum of Understanding. The parties seek consistent or non-conflicting outcomes of joint merger reviews, more effective enforcement establishing joint investigation timetables and promoting the cooperation of the merging parties and joint cooperation with other investigating parties within the ICN.⁷⁰⁸ To reach these goals, the parties agreed that they would communicate with one another by notifying and consulting with each other’s competition agency when they learn of a merger which needs to be reviewed by both states.⁷⁰⁹ In that regard, the parties set out examples of the different merger review phases and specified a cooperation timetable.⁷¹⁰ Pursuant to the principles of the AAA of 1999, this procedure of cooperation includes attendance of competition officials in line with the terms on attendance of the EU-US AAA of 1999.⁷¹¹ The parties further set out a coordination procedure regarding the phases of their respective investigation activities.⁷¹² They agreed to hold joint meetings and encouraged the merging parties to actively supply the competition authorities with relevant information on their intended mergers including their names and activities, the geographic areas they conduct business in sector or sectors involved etc.).⁷¹³ They agreed that the merging parties can also facilitate coordination between the competition authorities, if they learn that the competition authorities are in different stages of merger investigation.⁷¹⁴ The parties further reaffirmed that the exchange of non-confidential information is vital for effective and more complete antitrust cooperation.⁷¹⁵ To enable effective exchange of confidential antitrust information, the parties affirmed that it is their common firm practice to acquire “Waivers of Confidentiality” from the merging parties consenting to the exchange of this precious information.⁷¹⁶ Finally, the parties agreed to cooperate closely in approving remedies offered by the merging parties enabling a merger, as they noted that such remedies might affect another’s antitrust jurisdiction.⁷¹⁷ Also, in the case of requiring remedies of a merging party they agreed that they would try not to impose remedies which may present inconsistent or conflicting obligations to the merging parties.⁷¹⁸

⁷⁰⁶ Rec. 6 *ibid.*

⁷⁰⁷ *Ibid.*

⁷⁰⁸ Art. I *ibid.*

⁷⁰⁹ Art. II Ref. 5 *ibid.*

⁷¹⁰ Art. II Ref. 6 *ibid.*

⁷¹¹ *Ibid.*

⁷¹² Art. III *ibid.*

⁷¹³ Art. III Ref. 9 *ibid.*

⁷¹⁴ Art. III Ref. 11 *ibid.*

⁷¹⁵ Art. IV Ref. 13 *ibid.*

⁷¹⁶ Art. IV Ref. 14 *ibid.*

⁷¹⁷ Art. V Ref. 16 *ibid.*

⁷¹⁸ Art. V Ref. 17 *ibid.*

Altogether, it appears as if the parties learned from the major dissents in the Boeing-McDonnell Douglas and GE-Honeywell cases. The parties, through its Merger Working Group, clearly sought a greater involvement of the merging entities and to open a round table at the early stages of merger investigations. With this strategy in reviewing international relevant mergers the parties may be able to avoid major diplomatic dissents resulting in merger prohibition and possible negative economic results for their domestic markets and to achieve workable compromises. Even if this Best Practice on Cooperation in Merger Investigation is non-binding, it develops and furthers the practice of cooperation.

5.) Findings

Due to the great economic relevance of antitrust cooperation as illustrated by the two big merger cases, it would be desirable for the EU and the US to agree upon a competition MLAT and directly and bindingly coordinate their respective competition law enforcement procedures. It would be a great step for the EU and the US to include M&A matters into such an agreement even if M&A proceedings are a tough political tool. Yet, regrettably, such concessions by the EU and the US appear unrealistic in the time of the protectionist politics of the current US administration. The development of EU and US reciprocal antitrust cooperation towards greater mutual recognition even in soft law fora is to be considered as a positive step, even if the risk of political and economic conflicts between the EU and the US cannot be fully avoided.

IV) Intermediate Result

The elaboration of bilateral competition agreements is diverse. It very much depends on which states are involved in the bilateral discussions. As displayed by the example of highly developed US foreign competition law agreements, the different stages of bilateral competition agreements impose different obligations onto the contracting states. The further the development of US international competition cooperation went on, the more the US was able to agree upon more specialized and more binding cooperation provisions. The most elaborate stage of bilateral competition cooperation are MLATs. Yet, it appears the political will to implement antitrust MLATs on behalf of the US and globally has somehow decreased. Especially in M&A matters, the states want to maintain their jurisdictional power. They rather want to enhance competition cooperation within soft law fora and increase voluntary cooperation by best practice review etc. like the EU-US competition agreements. Still, diplomatic conflicts with severe economic harm may not be fully avoided, as states remain their interpretational margin when and how to apply their competition laws. To fully avoid such disputes, it is recommended that states agree to binding and enforceable mutual competition cooperation via MLATs.

D) Conclusion

It has to be concluded that the “Convergence Approach” and the “Convention Approach” of international competition law harmonization, soft-law bottom-up (mainly within the OECD and the ICN) and top-down (within the WTO and the UN), tried to find satisfying answers to the lack of international competition law cooperation. Yet, none of the described approaches of a bi- or multilateral nature managed to silence or satisfy the calls for international cooperation in competition law matters. The risk of diplomatic discord did not vanish. No top-down approaches to create an internationally applicable competition law code were successful. The bottom-up approaches especially under the OECD and the ICN enabled the states to enact competition laws and conduct dialogues about their competition law application. There is considerable convergence in severe cases of horizontal competition restraints (hard-core cartels), and some deliberate consent in vertical competition restraints between economic entities at several levels of the supply chain.⁷¹⁹ In addition, rules regarding the control of mergers and acquisitions are still developing.

Very positive note is that anticompetitive conduct is internationally most commonly referred to as being unlawful. This is very positive with regard to international economic interdependence, as most states try to find a status of undisturbed fair markets. Yet, such convergence does not mean that competition convergence goes as far or that the states want to shift their sovereignty to interpret and enforce competition law provisions to international levels as multilateral or bilateral fora.

The “Competition of Competition Laws Approach” seems not to appeal to the extent that states avowedly distanced themselves from the described fora, nor is it possible to directly verify a “Competition of Competition Laws”. However, within the ICN a global round table of competition laws with its best practice interaction might imply that effective competition enforcement is for the sake of a free and fair market benefiting the consumers. States follow role models and enact well created competition law systems. For that reason, the “Competition of Competition Laws” may not be seen as a complete working theory for the harmonization of international competition law, but rudiments of the theory may certainly be detected within the ICN.

Following the failure of multilateralism in competition law on a hard law basis, namely with the failure of a competition law implementation within the WTO at the ministerial conference of Doha, and following the ministerial declaration of Cancún, one might say that the “Convention Approach” failed, at least for the time. The ICN and the OECD reflect that the “Convergence Approach” has found approval of the competition law applying states.

⁷¹⁹ Cf. Terhechte, *International Competition Enforcement Law – Between Cooperation and Convergence* 23.

The convergence of national competition laws needs to find fora where procedural and substantive consent may be reflected by elaborate competition law cooperation internationally. Diplomatic dissents may only vanish when states find suitable mandatory agreements with a developed self-binding administration or by elaborate and enforceable international agreements.

As described within the bi- and multilateral developments of international competition law, top-down approaches, especially by finding substantive codici, were clearly rejected by the addressed states. Hence, the main focus on finding international convergence in competition law is rather to be found by a bottom-up approaches. To accomplish that goal, a suitable mechanism to regulate competition law internationally needs to be found and the existing cooperation patterns have to be described before specific recommendations regarding the development of the patterns towards more effectively working cooperation in international competition law can be made.

§ 5 Trade Agreements and International Cooperation in Competition Law

Following the developments of bi- and multilateral cooperation in competition law, trade agreements have become subject of increased interest in relation to the development of international cooperation in competition law. Today, they may even be considered to be the main political tool regulating international economic interdependence, as shall be outlined in the course of this section

A) Introduction

In a rapidly accelerating interconnected economic world, states want to take part in this acceleration process by liberalizing their trade conditions on reciprocal basis. In this process it appears as if states were taking part in a competition of trade liberalization and forming trade-bands. As already said, this process of unleashing national markets bears risks, one of which is international anticompetitive patterns of conduct. Consequently, the competition of trade liberalization is in need of an ordopolitical constant safeguarding the free market from discriminating risks. Therefore linking competition law and its antitrust regulation with trade agreements should be comprehensible. Besides these general considerations, two specific arguments

showcase why this interconnection of legal spheres within trade agreements is innovative.: the idea of antitrust law replacing antidumping (I.) and asserting anticompetitive conduct as a non-tariff barrier (II.).

I) Antidumping and Competition Law – Integration in Trade Agreements

Ever since the US Anti-dumping Act of 1916, which was directly linked to and enabled by the Clayton Act, anti-dumping measures⁷²⁰ have been associated with competition law.⁷²¹ Some even considered the early anti-dumping measures as the first attempts to apply international competition law.⁷²² Yet such measures were initially considered as political tools of protectionism, therefore, also as part of conduct detrimental to free and fair international competition.⁷²³ Anti-dumping measures, such as antidumping customs, are considered trade barriers because they impede foreign market access. States applying anti-dumping as trade barrier mainly seek to protect the competitors and factors of production (resources) within their respective markets. Similar, yet slightly different to antidumping measures are the measures of competition law – such as the application of antitrust measures. Whilst trade law wants to protect the competitors, competition law wants to support fair competition, thus economic efficiency. At first glance, trade policy consequently seems inconsistent with the application of competition law.⁷²⁴ Yet at second glance, whilst comparing the ambit of both trade- and competition law, it becomes clear that they both seek to abolish unfair practice – competition law: unfair anticompetitive con-

⁷²⁰ Antidumping measures like anti-dumping customs, taxes et.al. e.g. Art. VI GATT or Art. 14.1 EU, *Regulation on protection against dumped imports from countries not members of the European Union – L 176/21* (2016).

⁷²¹ Baetge, 'Globalisierung des Wettbewerbsrechts: eine internationale Wettbewerbsordnung zwischen Kartell- und Welthandelsrecht' 220; Overview to Antidumping history see: Martin Nettesheim, *Ziele des Antidumping- und Antisubventionsrechts: eine Darstellung am Beispiel des Rechts der USA mit Bezügen zum Recht der Europäischen Gemeinschaften* (C.H. Beck 1994) 200 f.

⁷²² Baetge, 'Globalisierung des Wettbewerbsrechts: eine internationale Wettbewerbsordnung zwischen Kartell- und Welthandelsrecht' 220; Rolf Friedrichs, *Die Bindung der Gemeinschaft an die Wettbewerbsordnung des EGV bei der Anwendung des Antidumpingrechts* (1998) 9.

⁷²³ Main opinion, cf. for others: Baetge, 'Globalisierung des Wettbewerbsrechts: eine internationale Wettbewerbsordnung zwischen Kartell- und Welthandelsrecht'; Tomer Broude, 'Antidumping to Be or Not to Be in Five Acts: A New Agenda for Research and Reform' 37 *J World Trade* 2003 305, 320; Gary Horlick and Michael Meyer, 'The International Convergence of Competition Policy' 29 *Int'l L* 1995 65, 72 et. al.

⁷²⁴ Also Governments apply trade policy for a variety of reasons: i.e. as a means to raise revenue, to protect industries, or simply to restrict the consumption of a specific good; cf. Bernard Hoekman and Petros Mavroidis, 'Dumping, antidumping and antitrust' 30 *J World Trade* 1996 27, 29; Kerrin M Vautier, 'Trans-Tasman trade and competition law' in Kerrin M Vautier, James Farmer and Robert Baxt (eds), *CER and Business Competition—Australia and New Zealand in a Global Economy* (1990) 89.

duct in general; anti-dumping trade policy: specifically unfair dumping.⁷²⁵ Whilst taking antitrust law into account, one may also categorize anti-dumping measures as import barriers.⁷²⁶ In Kodak-Fuji, the US DoJ argued that the lax application of antitrust laws permitted the photo paper industry to dump down prices in the US.⁷²⁷

While dumping is predominantly considered as an unfair trade practice, anti-dumping measures are mainly considered as economically inefficient, thus, the reformation of anti-dumping measures is a highly debated topic. Hoekman and Mavroidis presented three options for addressing this problem:

- applying existing antitrust legislation to terminate unfair dumping;
- invoking GATT non-violation complaints against dumping conduct;
- using more competition-friendly anti-dumping procedures.⁷²⁸

In accordance with the existing opportunities of the WTO legal system, the first option seems the most innovative suggestion, especially given the political stagnation of the WTO reformation (i.e. Doha and Cancún Rounds). As noted by Hoekman and Mavroidis, such replacement of anti-dumping law with antitrust measures may be accomplished by effectively applying the notion of positive comity:

[a] country's trade authority would turn a call for antidumping action into a request to exporters' competition authorities to investigate the contestability of the relevant markets based on its own standards and regulation. Depending on the finding, the case would either be closed, or a standard remedy applied. The exporting economy stands to gain (unless improvements in consumer surplus do not match the potential losses in producer surplus), and importing economies see the source of dumping addressed.⁷²⁹

With such a positive comity implementing anti-dumping strategy, states would shift their perspective from inefficient protectionist customs to precautionary application of antitrust law. The advantage would be that antidumping, which is widely considered to be unfair, would be replaced with a legal system seeking to diminish unfair practices. In that, the risk of protectionist trade wars would be dramatically diminished as states would choose to cooperate rather than to enact blocking legislation. Still, states would not abandon the option to impose anti-dumping legislation in cases when antitrust cooperation is unable to terminate unfair dumping. For that

⁷²⁵ Baetge, 'Globalisierung des Wettbewerbsrechts: eine internationale Wettbewerbsordnung zwischen Kartell- und Welthandelsrecht' 166.

⁷²⁶ Hoekman and Mavroidis, 'Dumping, antidumping and antitrust'.

⁷²⁷ Ibid.

⁷²⁸ Ralf Boscheck, 'The Governance of Global Market Relations: The Case of Substituting Antitrust for Antidumping' 24 *World Competition* 2001 41, 48; Hoekman and Mavroidis, 'Dumping, antidumping and antitrust' 36 ff.

⁷²⁹ Summarizing *Hoekman and Mavroidis* cf. Boscheck, 'The Governance of Global Market Relations: The Case of Substituting Antitrust for Antidumping' 48; Hoekman and Mavroidis, 'Dumping, antidumping and antitrust'.

reason, antitrust cooperation regarding anti-dumping is a precautionary and therefore, diplomatically preferable measure. Nevertheless, Hoekman and Mavroidis still saw barriers to the replacement of anti-dumping law by antitrust law deriving from non-harmonization of the antitrust law:

- [...] (i.) a number of policies or practices are identified that restrict the contestability of the market and enhance the market power of the exporting firm, but no action can be taken by the authorities under the existing law (e.g. the practices have been exempted on the basis of an efficiency defense);
- (ii.) there is no disagreement regarding the existence of an anti-competitive practice, but the importing country's government perceives that the remedy is ineffective in terms of dealing with the problem; and
- (iii.) there is disagreement between the competition offices of the exporting and importing countries, based upon the common facts that have been collected, as to whether the contestability of the market is significantly impeded.⁷³⁰

For that reason, Boscheck concludes that it is required that national trade authorities forego policy discretion, and “at least partly, rely on an exporter's competition authorities to apply competition standards in judging an exporter's alleged offence.”⁷³¹ In 1996, when Hoekman and Mavroidis made their point, as well as in 2001, when Boscheck did so, multilateralization in antitrust law and policy was still a major political discussion. Both authors supported the reformation of anti-dumping law within the WTO legal system, seeking multilateral solution. With respect to bilateral trade agreements, which dramatically increased since the stagnation of the WTO, one might ask whether the objections regarding the barriers to the workability of antitrust replacing anti-dumping might have now vanished.

Hoekman and Mavroidis referring to the European Economic Agreement (EEA) and European Community Agreements, as well as the Australian-New Zealand Closer and Economic Relations Trade Agreement (ANZERTA) of 1983, came to the conclusion that the replacement of anti-dumping law by antitrust law

- [...] not only requires concurrent, if not prior, agreement[s] to eliminate trade and investment restrictions (free market access), but also harmonization – or at least coordinated application – of competition laws and policies, and adoption of common disciplines on the use of State aids.⁷³²

As they proved at the time, such conditions were only found in highly integrated trade agreements, with not even NAFTA being able to accommodate such replacement.

⁷³⁰ Hoekman and Mavroidis, ‘Dumping, antidumping and antitrust’ 41.

⁷³¹ Boscheck, ‘The Governance of Global Market Relations: The Case of Substituting Antitrust for Antidumping’ 49.

⁷³² Hoekman and Mavroidis, ‘Dumping, antidumping and antitrust’ 41.

For that reason, the whole discussion of anti-dumping law being replaced by antitrust law induces one to ask, whether the bilateralization taking place since Cancún developed cooperation in antitrust matters sufficient enough for anti-dumping law to be replaced by antitrust law. In any case, it would be an interesting opportunity to counter protectionism and trade wars.

II) Anticompetitive Conduct as Non-Tariff Trade Barrier

The purpose of trade barriers is to protect the national markets from external effects. Trade barriers have the capacity to distort trade by impeding national market access whilst improving the competitive standing of their domestic economic entities in the global market. From a trade law point of view, market access designates the scope of market deregulation regarding foreign goods and services.⁷³³ Trade liberalizing approaches initially sought to diminish state trade barriers which were functioning “at the border” of a state (direct trade barriers). Indirect state trade barriers, such as state aid measures, which are working “behind the borders”, have the capacity to reduce market access.⁷³⁴ For that reason, following the concept of effective market access, modern trade liberalization approaches seek to diminish direct and indirect trade barriers.⁷³⁵ Competition law seeks to diminish anticompetitive conduct, namely horizontal, vertical or unilateral anticompetitive restraints, as well as impermissible corporate mergers and restrictions of intellectual property rights.⁷³⁶ Whether such private restraints may be considered indirect trade barriers is a controversial issue, yet the parallelism of state and private trade barriers is generally considered a common principle within EU law when the EU goal of common market integration is violated.⁷³⁷ The detrimental effects of private anticompetitive restraints and their comparability to state trade barriers is also widely evident in a global context.⁷³⁸ All empirical studies, which rely upon the inventory list of the WTO come to the conclusion that private anticompetitive practices may appear as non-tariff state trade measures. In that regard, as Baetge points out, all named

⁷³³ Cf. for others: Baetge, ‘Globalisierung des Wettbewerbsrechts: eine internationale Wettbewerbsordnung zwischen Kartell- und Welthandelsrecht’ 167.

⁷³⁴ Ibid 168.

⁷³⁵ Ibid.

⁷³⁶ Ibid 141.

⁷³⁷ Cf. *Consten and Grundig – C 56 and 58/64* (ECJ, 1966); EC, *First Report on Competition* (1971) 13; Ute Caspar, *Wettbewerbsrechtliche Gesamtwürdigung von Vereinbarungen im Rahmen von Art. 81 Abs. 1 EGV: Ein Beitrag zur Auslegung des Tatbestandsmerkmals der Wettbewerbsbeschränkung im europäischen Kartellverbotsrecht* (Heymann 2001) 96 ff.; Baetge, ‘Globalisierung des Wettbewerbsrechts: eine internationale Wettbewerbsordnung zwischen Kartell- und Welthandelsrecht’ 130.

⁷³⁸ E.g. ICPAC, *Final Report* (2000) 211 ff.; Robert D Anderson and Peter Holmes, ‘Competition policy and the future of the multilateral trading system’ *Journal of International Economic Law* 2002 531, 540; Baetge, ‘Globalisierung des Wettbewerbsrechts: eine internationale Wettbewerbsordnung zwischen Kartell- und Welthandelsrecht’ 136.

varieties of private anticompetitive behavioral patterns de facto complicate market access and are, therefore, considered “behind the borders” trade barriers, which have to be erased if they threaten global welfare.⁷³⁹ Following these assumptions implied by the free market theory, the minimization of non-tariff trade barriers such as anti-competitive conduct may only be achieved by competition law enforcement. Internationally this means that competition law and its enforcement cooperation should be included in bi- or multilateral trade agreements designed to liberalize trade. It would, therefore, be helpful if the states concluding such trade agreements would reaffirm the abovementioned widely held opinion that private anticompetitive conduct is considered a non-tariff trade barrier.

III) Intermediate Result

Both findings regarding anti-dumping generally and regarding the non-tariff trade barrier question specifically, attract interest in the evaluation of trade agreements and help to frame the question as to what extent is competition law implemented in international trade agreements. The higher the integration of trade agreements, the more widespread and developed the answers should be to the problems hindering a fair and free global market. If a certain level of innovation is achieved, it is to be displayed. The main focus of this thesis will be to carve out procedural enforcement cooperation. With respect to the harmonization processes so far it is very likely that the states prefer to establish procedural understandings before finding substantive rules. The analysis is thus, to be understood as following a “bottom-up” approach. Notably, the analysis may also be understood as applying Terhechte’s call for the jurisprudence to establish global structures in Competition Enforcement Law.⁷⁴⁰ For this reason, the analytic focus will be placed on the competition enforcement provisions fostering cooperation in competition law.

⁷³⁹ The different patterns are described as follows: 1. Horizontal and unilateral anticompetitive conduct both have the capacity to minimize global welfare; in any case not increasing global welfare. 2. Vertical restraints (like the ones in *Kodak/Fuji*) are difficult to be determined, yet they might induce positive aspects regarding global welfare. Though these positive aspects have to be determined in every single case respectively. Positive aspects for global welfare rather seem to be the exception than the rule. 3. International mergers also have ambivalent effects to global welfare which require a systematic merger review. 4. The use of intellectual property rights also has flexible outcomes to global welfare which is why a constant and particular case review is vital. General categorizations as legal or illegal are to be avoided; see Baetge, ‘Globalisierung des Wettbewerbsrechts: eine internationale Wettbewerbsordnung zwischen Kartell- und Welthandelsrecht’ 141 ff.

⁷⁴⁰ Terhechte, *International Competition Enforcement Law – Between Cooperation and Convergence* 77.

B) Trade Agreements – Status Quo Analysis

There are different stages of integration of trade agreements. This integration depends on the intentions behind the trade agreement. The lowest integration status of trade agreements are agreements which unilaterally seek to develop one trade partner economically. Those trade agreements of the lowest rank are called Development Agreements. More advanced trade agreements seek to establish preferential trade between trade partners by diminishing direct trade barriers concerning particular goods. Those trade agreements are called Preferential Trade Agreements (PTAs) and seek to partly liberalize trade between the contractors. Most developed and fully liberalizing trade agreements seek to establish a free trade market between the contractors. Those trade agreements not only seek to diminish direct trade barriers like customs on certain goods but also indirect trade barriers such as national state aid. These maximum trade liberalizing trade agreements are called Free Trade Agreements (FTAs).

I) Preliminary Considerations

Following a statistical analysis from the World Trade Institute Bern from Switzerland called “Design of Trade Agreements” (DESTA), the competition data set presents 648 trade agreements since 1945.⁷⁴¹ Not every trade agreement remains still in force. The trade agreements are not sorted by their stage of integration. Clearly, the amount of trade agreements is overwhelming, and a subtle analysis of every single trade agreement would exceed the scope of this thesis. In order to fulfill the aim of this thesis, which is to explore innovation in cooperation in international competition law, the trade agreements were filtered and only trade agreements containing a “competition chapter” were analyzed.⁷⁴² Trade agreements bundling competition law provisions within a competition chapter attach a deliberate degree of importance to competition law. Consequently, the trade agreements with more developed competition law chapters were filtered. Trade agreements containing sole “Competition Clauses” may be considered as being less developed in terms of competition law.⁷⁴³ All in all 139 trade agreements between 1945 and 2018 were identified. This data was filtered further, as only trade agreements in force and in English were of interest for the analysis.⁷⁴⁴ The different stages of integration were analyzed accordingly as

⁷⁴¹ Cf. Competition Data Set of Andreas Dür, Leonardo Baccini and Manfred Elsig, *The Design of International Trade Agreements: Introducing a New Dataset* (2014).

⁷⁴² Applied Filter “comp_chap coded 1” in Competition Data Set *ibid*; cf. Andreas Dür, Leonardo Baccini and Manfred Elsig, *DESTA Codebook Competition* (2017) 1.

⁷⁴³ Cf. “Explanations” to the filter “comp_art” at Andreas Dür, Baccini and Elsig, *DESTA Codebook Competition* 1: The existence of a competition chapter does not mean that the trade agreement does exclude the existence of competition articles which is why trade agreements which include a competition chapter “comp_chap” coded 1 is always coded 0 in “comp_art”.

⁷⁴⁴ Applying the DESTA filter “comp_chap” coded as “1”, 138 trade agreements appear and are considered as including a competition chapter. The newly agreed NAFTA agreement is not

trade agreements within DESTA were categorized from low to high integration. It must be noted that trade agreements considered as Customs or Currency Union are categorized separately. Therefore, 89 trade agreements are analyzed in the following.

Furthermore, it must be noted that the various trade agreements are international treaties. These international treaties are formally binding, so that the contracting parties must adhere to the content of their agreements. Apart from that, the binding nature of international treaties depends on the actual content of the treaties. The more precisely the agreed content is defined and the less discretionary scope the respective states have, the more binding the treaties are.

Subsequently, various forms of international treaties have developed: Memoranda of Understanding (MoU) as mere declarations of intent; mutual legal assistance treaties (MLAT) as procedural administrative agreements and binding treaties that create binding substantive law.

In the following, the Development Agreements, the Preferential Trade Agreements and the Free Trade Agreements will be examined with regard to the degree of binding force of their respective competition chapters.

The boundary between soft law and hard law is only crossed at the creation of substantive law.

At this point it should already be noted that none of these agreements is capable of creating binding substantive international competition law – rather, the competition chapters remain mere declarations of intent in a form comparable to mere memoranda of understanding, therefore soft law.

II) Provisions Concerning Substantive Competition Matters in Trade Agreements

As already stated, cooperation in competition law matters may be differentiated into procedural law enforcing and substantive law setting cooperation. Two groups of substantive competition levels were listed and coded in DESTA: General declarations for undertakings not to distort competition and monopoly and merger

included, but was taken into account additionally. Though, some curtailments had to be made to the 139 trade agreements: Due to language barrier, 13 trade agreements fully in Spanish have not been analyzed. Furthermore, 31 trade agreements since 1945 which are not in force anymore, meaning they too were not analyzed. The highest form of trade agreement integration – customs unions – shall be analyzed separately, 3 trade agreements of that stage were not included into the analysis. Moreover, 3 trade agreements were analyzed differently to the DESTA analysis: the Afghanistan-India FTA of 2003 and the Central America-EU FTA of 2003 do not include a sole competition chapter, whilst the New Zealand-Taiwan FTA of 2013 does not include characteristics considered as “comp_info” within the DESTA competition code book. Therefore, 89 trade agreements of the three different following phases were discovered in the following: Development Trade Agreements, Preferential Trade Agreements and Free Trade Agreements.

provisions.⁷⁴⁵ The subsequent sections shall outline the extent to which levels of convergence of substantive competition law provisions may be found within trade agreements and what exact stage of obligation they have.

1.) *General Declaration for “Undertakings Not to Distort Competition”*

All trade agreements through all stages of integration, include a provision defined as a “provision for undertakings not to distort competition”.⁷⁴⁶ This category relates to general competition references. These references may be considered as reflecting the importance of competition law of the respective contracting states. Therefore, the fact that they unanimously support the importance of competition law leads one to assume that the states to the respective trade agreements have competition law regimes in place and the reaffirmation within the trade agreements is their lowest common denominator. Yet the different declarations within the trade agreements not to distort competition do not represent the establishment of international binding competition law standards. This claim will be supported by the subsequent analysis of such general declarations in the different integration phases of trade agreements integration.

An example of a development agreement containing such a general declaration is the EU-South Africa Agreement of 1999. Within the competition policy chapter of the agreement, the parties define such a general declaration for undertakings not to distort competition as follows:

The following are incompatible with the proper functioning of this Agreement, in so far as they may affect trade between the Community and South Africa:

(a) agreements and concerted practices between firms in horizontal relationships, decisions by associations of firms, and agreements between firms in vertical relationships, which have the effect of substantially preventing or lessening competition in the territory of the Community or of South Africa, unless the firms can demonstrate that the anti-competitive effects are outweighed by pro-competitive ones;

(b) abuse by one or more firms of market power in the territory of the Community or of South Africa as a whole or in a substantial part thereof.⁷⁴⁷

⁷⁴⁵ Provisions regarding undertakings not to distort competition (general competition law declarations) are coded as “comp_not_distort” and “1” if existent. Provisions directly referring to monopolies are coded as “comp_monopoly” and the ones referring to M&A coded as “comp_merg-er” – both coded “1” if existent in trade agreements; Cf. Andreas Dür, Baccini and Elsig, *DESTA Codebook Competition* 1 ff.

⁷⁴⁶ When trade agreements all include “comp_chap coded 1”, those trade agreements all show “comp_not_distort coded 1” in Andreas Dür, Baccini and Elsig, *The Design of International Trade Agreements: Introducing a New Dataset*; Cf. Andreas Dür, Baccini and Elsig, *DESTA Codebook Competition* 1.

⁷⁴⁷ Art. 35 EC-South Africa, *Agreement on Trade, Development and Cooperation* (1999).

This article represents the foundation of the competition law understandings of the contracting states. Conduct, which is either considered vertical or horizontal, substantially preventing or lessening competition in the territory of the contracting states, or conduct considered as monopoly building and the corresponding abuse of market power, is considered as affecting trade between the states, and therefore, as incompatible with the Agreement. In short: anticompetitive conduct is considered as an incompatible conduct – a reflection of the state’s understanding that anti-competitive conduct is harmful. Yet the declaration and definition of incompatible conduct does not reflect binding law, as it lacks a clear prohibition against the misconduct. It does not reflect a proscription of the conduct. This assumption may be compared to Art. 101 TFEU: it literally prohibits incompatible conduct and reflects binding EU law.

Similar declarations may be found in the Preferential Trade Agreements (PTAs). For example, in the 2008 European Community-CARIFORUM PTA, the basic declaration for undertakings not to distort competition is very similar to the EU-South Africa Development Agreement. Art. 126 in the competition policy chapter provides:

The Parties recognize the importance of free and undistorted competition in their trade relations. The Parties acknowledge that anti-competitive business practices have the potential to distort the proper functioning of markets and generally undermine the benefits of trade liberalization. They therefore agree that the following practices restricting competition are incompatible with the proper functioning of this Agreement, in so far as they may affect trade between the Parties:

- (a) agreements and concerted practices between undertakings, which have the object or effect of preventing or substantially lessening competition in the territory of the EC Party or of the CARIFORUM States as a whole or in a substantial part thereof;
- (b) abuse by one or more undertakings of market power in the territory of the EC Party or of the CARIFORUM States as a whole or in a substantial part thereof.⁷⁴⁸

In the EU-South Africa Agreement the wording of the declaration is nearly identical, which shows that the EU is exporting its competition law philosophy. Though, the level of legal obligation is not the same: the declaration is not representing binding international law but reflects a basic MoU on competition law, as the distortion of competition law may only be considered as incompatible with the very agreement. Such declarations may also be found in non-EU PTAs. For example, in the 2002 Japan-Singapore PTA of 2002 the parties agreed that:

⁷⁴⁸ Art. 126 EC-CARIFORUM, *Economic Partnership Agreement* (2008).

1. Each Party shall, in accordance with its applicable laws and regulations, take measures which it considers appropriate against anti-competitive activities, in order to facilitate trade and investment flows between the Parties and the efficient functioning of its markets.
2. Each Party shall, when necessary, endeavor to review and improve or to adopt laws and regulations to effectively control anti-competitive activities.⁷⁴⁹

It has to be noted that the Republic of Singapore did not enact competition laws at the time the PTA with Japan was concluded. The fact that Singapore enacted national competition law shortly after that implies the effectiveness of such general declarations.

With that declaration the parties acknowledged the importance of regulatory measures against anticompetitive conduct, as they consider such conduct to influence the effectiveness of the functioning of their market. This declaration is also to be considered as a basic MoU regarding the existence of competition law, which is further to be highlighted by the declaration of the contracting states to set up conferring national law provisions and regulations. The declaration made within the PTAs are thus not distinguishable from one another in terms of legal design and obligation.

This is also true for Free Trade Agreements (FTAs). For example, the competition chapter of the EU-Canada Comprehensive Economic and Trade Agreement (CETA), states that:

1. The Parties recognize the importance of free and undistorted competition in their trade relations. The Parties acknowledge that anti-competitive business conduct has the potential to distort the proper functioning of markets and undermine the benefits of trade liberalization.
2. The Parties shall take appropriate measures to proscribe anti-competitive business conduct, recognizing that such measures will enhance the fulfilment of the objectives of this Agreement.⁷⁵⁰

As in previous trade agreements, in Art. 17.1.1 CETA the parties acknowledge the importance of undistorted and free trade and the negative effects of anticompetitive conduct. Therefore, to fulfill the objectives of CETA, the parties declare to counter this conduct with appropriate pro-competitive measures. Yet the parties did not want to impose international competition provisions, but rather to informally conclude a Memorandum of Understanding regarding competition law matters.

These common declarations regarding competition law reflect a common denominator of national substantive competition law convergence. Yet the interpretation and enforcement of these measures is fully dependent on the respective states.

⁷⁴⁹ Art. 103 Japan-Singapore, *Agreement for a New-Age Economic Partnership* (2002).

⁷⁵⁰ Art. 17.2.1 and 17.2.2 EU-Canada, *Comprehensive Economic and Trade Agreement (CETA)* (2017).

No international substantive competition law measures could be created within trade agreements. One might think about the evaluation of the common declarations as international customary law standard, however such discussion would go beyond the boundaries of this thesis.

2.) *Monopoly and Merger Provisions*

Besides the general declarations regarding competition law, trade agreements include more detailed classical competition law declarations regarding the building of monopolies and cartels⁷⁵¹ and declarations regarding M&A.⁷⁵²

a.) Provisions Regarding Monopolies

There is a large number of trade agreements containing a competition chapter and including provisions which make reference to monopolies and cartels and their effects on markets. 117 trade agreements including such provisions have been concluded since 1945.⁷⁵³ Given the trade agreements that are still in force and belong to either of the integration stages of trade agreements discussed above,⁷⁵⁴ in total 93 trade agreements meet the filtered criteria.⁷⁵⁵ Furthermore, trade agreements were considered as matching the criteria when they referred to cartel-forming when they addressed the immanent competition law conduct of cartels and monopolies, which are different forms of the abuse of market dominance.⁷⁵⁶ When analyzing the trade agreements matching the criteria, it became clear that these provisions were designed differently, some less and some more developed. The more developed trade agreements tried to specify the events of immanent conduct and reflected a substantive competition law convergence. For example, in the EU agreements, more elaborate

⁷⁵¹ Within DESTA, such provisions or declarations are coded “1” as “comp_monopoly”, cf. Andreas Dür, Baccini and Elsig, *DESTA Codebook Competition 2 f.*

⁷⁵² Such provisions are coded “1” as “comp_merger” within the DESTA data set, cf. Ibid 3.

⁷⁵³ If “comp_chap” is coded “1” and “comp_monopoly” is also coded “1”, then 117 trade agreements appear in the competition data set of DESTA, cf. Andreas Dür, Baccini and Elsig, *The Design of International Trade Agreements: Introducing a New Dataset.*

⁷⁵⁴ Development Agreements, PTAs or FTAs – Customs and Currency Unions are analyzed separately.

⁷⁵⁵ Within those trade agreements the North American Free Trade Agreement (NAFTA) is included – its effectiveness is pending due to political uncertainties, due to reconsiderations of NAFTA by the US Administration.

⁷⁵⁶ Cf. Andreas Dür, Baccini and Elsig, *DESTA Codebook Competition 3*: “all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition” or “abuse by one or more undertakings of a dominant position in the territories of the Parties as a whole or in a substantial part thereof.” – the conduct may be therefore considered as market affecting horizontal- and vertical agreements of undertakings.

provisions regarding monopolies and cartels may be found in all three stages of integration: Development Agreements, PTAs and FTAs. Yet, the provisions mostly seem to overlap with the general declarations for undertakings not to distort competition.

In the competition chapter of the EC-Israel EuroMed Agreement, the parties referred to monopoly and cartel building of undertakings as following:

1. The following are incompatible with the proper functioning of the Agreement, in so far as they may affect trade between the Community and Israel:
 - (i) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;
 - (ii) abuse by one or more undertakings of a dominant position in the territories of the Community or Israel as a whole or in a substantial part thereof.⁷⁵⁷

Nearly identically to the general declaration for undertakings not to distort competition, the parties declared all practices whose objectives or effects prevent, restrict or distort competition within the existent market, as well as the abuse of dominant positions in the market, as incompatible with the EuroMed Agreement. To declare certain conduct as incompatible with the very agreement does certainly not establish binding international law as there is no judicial body which might apply or enforce the law. Hence, similar to the general declaration in the EC-South Africa Development Agreement, the declarations regarding monopolies and cartel-building do not reflect substantive international competition law provisions. Though it has to be noted that the step further-defining incompatible conduct is a step into the right direction. Therefore, the agreements appear as an MoU of an advanced level.

A similar conclusion may be drawn regarding the EC-CARIFORUM PTA. The general declaration for undertakings not to distort competition entirely overlaps with the declaration that cartel and monopoly-building conduct is incompatible with the agreement.⁷⁵⁸ The wording is nearly identical to the EuroMed Agreement. The export of EU's understandings about competition law is thus striking. Yet the declaration does not establish substantive international competition law as the declaration may only be considered an MoU regarding national convictions about substantive competition law.

Within CETA, directly linking to the described general declarations for undertakings not to distort competition with anti-competitive business conduct, the parties further defined the term "anti-competitive business conduct" as follows:

[...] anti-competitive business conduct means anti-competitive agreements, concerted practices or arrangements by competitors, anti-competitive practices by an enterprise that is dominant in a market, and mergers with substantial anti-competitive effects.⁷⁵⁹

⁷⁵⁷ Art. 36 EC-Israel, *Euro-Mediterranean Agreement* (1995).

⁷⁵⁸ Art. 126 lit. a and lit. b EC-CARIFORUM, *Economic Partnership Agreement*.

⁷⁵⁹ Art. 17.1 EU-Canada, *Comprehensive Economic and Trade Agreement (CETA)*.

This definition forms the preface to the whole competition chapter of CETA. The definition of anticompetitive conduct includes monopoly and cartel-building. Reading this provision together with the described general declaration for undertakings not to distort competition, it becomes clear that the provisions may be similarly categorized as a basic MoU on substantive competition law maxims. Therefore, neither the general declaration, nor the definitions of the parties regarding anticompetitive conduct have the capacity to build substantive international competition law rules.

Overall, the majority of trade agreements include a competition chapter which declare anti-competitive conduct of cartel and monopoly building and their effects to be incompatible with the trade area they build. Yet they fail to establish any substantive rules outlawing such behavior.

Trade agreements which do not include such declarations do not even have the capacity to reflect common understandings of competition law. In fact, they fail to take advantage of trade agreements as fora for the implementation of competition law, even if the provisions only reflect a basic MoU. This is the reason why they are not outlined in this thesis in more detail.

b.) Provisions Regarding Mergers

Since it was always problematic for states to agree on M&A regulation on international level,⁷⁶⁰ it is not surprising that only a few trade agreements include “merger provisions” in their competition chapters. Only 28 trade agreements in force and matching the above criteria and including a competition chapter, also include merger provisions.⁷⁶¹ The only trade agreement with a competition chapter not including monopoly and merger provisions is the ASEAN, Australia, New Zealand FTA (AANZFTA).⁷⁶² All 28 agreements belong to the integration stage of FTAs, the highest stage of a liberalizing trade agreement bar that of customs and currency unions. All FTAs containing a merger provision also include a provision on monopolies and cartel building. Those facts support the thesis that the higher the integration stage of a trade agreement, the more developed the competition law provisions therein. However, following the analysis of the merger provisions, it has to be noted that they are very similar to the monopoly and cartel provisions: The majority of the trade agreements including merger provisions do so in a basic way. For example, in CETA the described definition reflects the only reference to mergers: “anti-competitive business conduct means... mergers with substantial anti-competitive effects”.⁷⁶³ Which, as already stated, is a non-binding MoU which does not establish substantive competition law. Besides this majority of trade agree-

⁷⁶⁰ As displayed within § 4.

⁷⁶¹ The presence of a provision regarding mergers and acquisitions is coded “1” in the DESTA filter “comp_merger”, if provisions refer to “anticompetitive business conduct” which relate to M&A, those provisions were included; cf. Andreas Dür, Baccini and Elsig, *DESTA Codebook Competition* 3.

⁷⁶² Cf. Ch. 14 “Australia-ASEAN-New Zealand”, *Free Trade Agreement (AANZFTA)* (2009).

⁷⁶³ Art. 17.1 EU-Canada, *Comprehensive Economic and Trade Agreement (CETA)*.

ments directly including merger provisions, some trade agreements implicitly refer to M&A provisions. For example, within the Japan-Switzerland FTA of 2009, the contracting parties declared that:

[...] “anticompetitive activity” means any conduct or transaction that may be subject to penalties, sanctions or other relief under the competition laws and regulations of either Party. In particular, it includes: (a) private monopolization, unreasonable restraint of trade and unfair trade practices under the competition laws and regulations of Japan; and (b) unlawful agreements between enterprises and unlawful practices of enterprises having a dominant position under the competition laws and regulations of Switzerland.⁷⁶⁴

For that reason, they further agreed that: “each Party shall take measures which it considers appropriate against anticompetitive activities, in accordance with its laws and regulations.”⁷⁶⁵ Those agreements implicitly refer to M&A regulation, as they are meant to hinder the creation of unfair market dominance. Furthermore, the parties directly refer to the FTA implementing agreement, regulating the implementation of the FTA provisions, especially of the competition chapter.⁷⁶⁶ Within this implementing agreement the parties state that as M&A regulations may adversely affect the interests of the other party, they agree to notify one another of such regulations.⁷⁶⁷ No other references to M&A related subjects have been made. For that reason, the implicit referrals to M&A provisions are very basic. One may even presume that the application of M&A is understood as affecting the interests of the other state. In any case, the referrals are a basic MoU and do not create any substantive law. It would be preferable if the parties made direct reference to M&A within their FTA, specifying that mergers may have the power to distort competition.

Within one of the FTAs, the TPSEPA, the contracting parties did not directly mention M&A regulation in their competition chapter. Yet they formulated backdoors for the application of competition laws: “Competition law shall apply to all commercial activities. However, each Party may exempt specific measures or sectors from the application of their general competition law”.⁷⁶⁸ The exempted provisions were entered in Annex 9 A, yet the parties stated that “[t]hose exemptions shall not have the objective of negatively affecting trade among the Parties.”⁷⁶⁹ Within the mentioned Annex, Singapore exempted its approved M&A regulation those being: “Mergers and acquisitions (M&As) approved under any written law or any code of practice issued under any written law relating to competition, and M&As relating

⁷⁶⁴ Art. 103.3 Japan-Switzerland, *Free Trade Agreement* (2009).

⁷⁶⁵ Art. 103.1 *ibid.*

⁷⁶⁶ Art. 10 *ibid.*

⁷⁶⁷ Art. 10.2 lit. c Japan-Switzerland, *Implementing Agreement pursuant to Art. 10 of the Agreement on Free Trade and Economic Partnership* (2009).

⁷⁶⁸ Art. 9.2.3 Chile Brunei, New Zealand, Singapore ‘Transpacific Strategic Economic Partnership Agreement (TPSEPA)’ 2005.

⁷⁶⁹ *Ibid.*

to any of the above activities/sectors.”⁷⁷⁰ Not only were the parties unable to agree that M&A regulation should be part of the competition chapter, but this special exemption of Singapore reflects the deep skepticism of states about including M&A in their competition law agreements.

Overall, it has to be noted that the recognition of M&A as a regulatory tool of competition law is not yet highly developed. It would be preferable if a greater number of trade agreements took advantage of their competition chapters and included more elaborate provisions with reference to M&A.

3.) Intermediate Result

Neither monopoly and cartel provisions nor M&A provisions have the ability to create international substantive competition law measures. Yet moderate and fairly unspecified levels of competition law convictions may be detected, which reflect a constant international harmonization of substantive competition law resulting in national competition law convergence.

III) Competition Enforcement Provisions in Trade Agreements

Procedural provisions concerning the co-operation in competition regulation between states appear in many different variations. Compared to such multilateral trade fora as the WTO, bilateral trade agreements give the contractors the opportunity to negotiate the terms of their agreement in a more liberal way. Therefore, bilateral trade agreements may also be considered as providing a more individual and flexible way of regulating interstate trade.⁷⁷¹ Whilst evaluating trade agreements, certain repetitive patterns appear. On one hand, we find co-operation fostering provisions, including provisions regarding the interstate exchange of information concerning competition law, provisions regarding interstate notification in competition matters, and provisions regarding interstate competition law consultation, as well as comity principles. On the other hand, we find institution building provisions, including provisions creating national or joint or common competition authorities. Finally, we find procedural core principles that the states agreed upon. To what extent these co-operation patterns differ, and which similarities appear is discussed below.

1.) Co-operation Fostering Provisions

The most basic way to cooperate in competition law on an administrative level is to hold a dialogue concerning competition law with another state. To reach this goal the stages of competition law cooperation recur in similar vestures: as soft co-

⁷⁷⁰ Annex 9.A. under Singapore para. 7 *ibid.*

⁷⁷¹ Yet their conformity with WTO law (Art. XXIV GATT) is assumed.

operation agreements, as soft comity agreements, and as “advanced” MLATs – all of them are non-binding soft law agreements though the elaboration of the agreements differs (often due to the partaking states).

Trade agreements regulate competition cooperation matters through provisions establishing obligations to i.e. exchange information with or to notify another state. The subsequent study will focus on trade agreements which include a competition chapter in order to illustrate the stages of cooperation within the different levels of trade agreement integration.

The hypothesis that needs to be examined is that the higher the level of integration of a trade agreement, the more likely it is that the parties will agree on higher levels of competition cooperation.

Within 139 trade agreements confining competition matters to a competition chapter, 89 trade agreements containing provisions concerning cooperation in such matters were identified. Within these, both the similarities and the differences will be outlined to evaluate how any given agreement developed competition and cooperation.⁷⁷² For that reason, the various stages of trade agreements are categorized into different stages of competition and cooperation.

a.) Trade Development Agreements

The Economic Development Agreements form the lowest integrated group of trade agreements. Nevertheless, they still contain competition chapters establishing cooperation and fostering mutual understandings in that matter. Development Agreements are considered unilateral trade preferences whereby the higher developed party contributes to the development of the economy of the other (less developed) party.⁷⁷³ Out of the 89 trade agreements identified, 7 trade agreements may be considered Development Agreements meeting the set criteria of including cooperation passages in their competition chapters. Remarkably, all of these Development Agreements were concluded by the EU. The Development Agreements of the EU may be categorized as binding international treaties. From a formal perspective, they do not exceed the soft law basis. Though one has to take the practical view into account: Developing states will not prioritize competition law. However, if they do not follow the set rules on competition law the payments and development investments may be blocked. So, on the one side the treaties are somehow binding, on the other side the

⁷⁷² DESTA includes different cooperation stages: the filters “comp_info” and “comp_coop_autho” are considered as procedural cooperation mechanisms. Yet these two categories may not easily be separated from another. Hence the separation of the two filters was ignored and it was the aim to read competition enforcement cooperation stages together. Therefore, it was the aim to display a coherent picture of the development of cooperation mechanisms; cf. Andreas Dür, Baccini and Elsig, *DESTA Codebook Competition* 1 f.

⁷⁷³ Within WTO law the term Preferential Trade Agreement (PTA) is used for that kind of Agreements (cf. https://www.wto.org/english/tratop_e/region_e/rta_pta_e.htm). To underline the ambit of economic development of these treaties, the term “Development Agreement” is used in the following.

effectiveness of competition law chapters very much depends to the willingness of the developing country to really enact competition law provisions. Furthermore, the level of obligation depends to whether the developing state has low or high levels of discretion to apply the set rules of the treaty. Lax wording and high levels of discretion will lower the actual effectiveness of the competition law provision.

The majority are Membership Agreements within the Euro Mediterranean Agreements of the EU establishing the Union for the Mediterranean (UfM). The main ambit of this intergovernmental organization is to stabilize the political boundaries adjoining the Mediterranean Sea. As the EU was the promoter of the UfM, its political incentive was to stabilize its relations with neighboring Non-Member States by regulating the economic interconnection with these states, especially in terms of trade.⁷⁷⁴ The first agreements establishing the UfM were set up in the so-called Barcelona Process.⁷⁷⁵ The agreements of the Barcelona Process relating to competition law are the EU-Israel EuroMed Association Agreement of 1995 as well as the EU-Tunisia EuroMed Association Agreement of 1995.

The two agreements make reference to competition cooperation in their Art. 36. Concerning the interstate exchange of information between the EuroMed Member States in competition matters, the Agreements identically declare:

Notwithstanding any provisions to the contrary... the Parties shall exchange information taking into account the limitations imposed by the requirements of professional and business secrecy.⁷⁷⁶

The declaration is of a general character pointing out the mutual understanding of the EuroMed Member States. The fact that it does not include any examples pointing out the importance of cooperation, leaving the margin of discretion wholly to the Member States, underlines the optional character of the co-operation. In the end the efficiency of such a declaration fully depends on the actual practical application in the interstate competition administration process.

Additionally, the agreements apparently include provisions concerning reciprocal duties to notify EuroMed Member States. The Israel EuroMed Agreement in its Art. 36.3, as well as the Tunisia EuroMed Agreement in its Art. 36.6 identically instruct the Member States that they

shall ensure transparency in the area of public aid... by reporting annually to the other Party on the total amount and the distribution of the aid given and by providing, upon request, information on aid schemes.

⁷⁷⁴ On the legal basis for “European Neighborhood Policy” according to Art. 8 TEU and Art. 206 ff. and 216 ff. TFEU.

⁷⁷⁵ Stoll in Münchener Kommentar für Wettbewerbsrecht Rec. 1845.

⁷⁷⁶ Art. 36 EC-Israel, *Euro-Mediterranean Agreement*; Art. 36 EC-Tunisia, *Euro Mediterranean Agreement* (1995).

Moreover “Upon request of one party” the states “shall provide information on particular individual cases of state aid”.⁷⁷⁷ These provisions, one active and the other one passive in tone, ask Member States to provide specific information of interest on demand. Therefore, notification duties reflect specific consensus for interstate exchange of information. Yet, these “duties to notify” are not legally binding, but simply reflect the loose consent of the EuroMed Member States. The fact that the notification provisions only cover the parts related to competition law, namely state aid, shows the important role that state aid plays in the EuroMed Development Agreements.

Apart from the general declaration to exchange information on competition matters and the specific declaration to actively notify one another, the mentioned EuroMed Agreements lack provisions for the Member States to consult each other in competition matters by means of a specific administrative assistance. In order to prevent diplomatic disputes regarding intellectual, industrial, and commercial property rights (competition related fields), the Agreements provide that “either Party may request urgent consultations to find mutually satisfactory solutions”.⁷⁷⁸ These provisions – to actively consult in competition related matters to prevent diplomatic disputes – may be considered as positive comity provisions. The general cooperation mechanisms in the two development agreements containing a general positive comity clause falls into the category of “positive comity” MoUs.

After the establishment of the EuroMed Agreements, other treaties followed: The EC-Morocco EuroMed Establishment Agreement of 1996, the EC-Jordan EuroMed Establishment Agreement of 1997, and the EC-Egypt and EC-Lebanon EuroMed Establishment Agreements of 2001 and 2002. The Moroccan, Jordan, and Egyptian EuroMed Agreements included the exact wording regulating competition co-operation by exchange of information and reciprocal notification and comity as the Israeli and Tunisia Agreement.⁷⁷⁹ Whilst the EC-Lebanon EuroMed Agreement includes a similar provision regarding the exchange of information, it does not include any notification provisions.⁷⁸⁰ The EC-Algeria, Palestine, and Syria EuroMed Agreements do not include either of the co-operation provisions. Therefore, the EuroMed development agreements may be considered different in their designs and standards in competition cooperation matters. Notably, the different stages in economic and political development of the EuroMed Member States justify the differences in their legal elaboration.

Aside from the EuroMed Development Agreements, the EC-South Africa Development Agreement of 1999 makes reference to competition matters by including co-operation provisions.⁷⁸¹ In Art. 40 of the Development Agreement the identical

⁷⁷⁷ Ibid.

⁷⁷⁸ Art. 39.2 EC-Tunisia, *Euro Mediterranean Agreement* ; Art 39.2 EC-Israel, *Euro-Mediterranean Agreement*.

⁷⁷⁹ Cf. Art. 34.3 and Art. 34.6 EC-Egypt, *Euro Mediterranean Agreement* (2001).

⁷⁸⁰ Art. 35.2 EC-Lebanon, *Euro-Mediterranean Agreement* (2002).

⁷⁸¹ Art. 40 Africa, *Agreement on Trade, Development and Cooperation*.

wording as in the EuroMed Agreements asks the EU and South Africa to co-operate by exchanging information on a free basis, paying due attention to business secrecy. Likewise, in the EuroMed Agreements in Art. 43 the EC-South Africa Agreement pays specific attention to state aid matters and provides the identical duty of the Member States to notify each other. Different from the EuroMed Agreements, the EC-South Africa Agreement includes a consultation provision in Art. 38.4:

When the Commission or the Competition Authority of South Africa decides to conduct an investigation or intends to take any action that may have important implications for the interests of the other Party, the Parties must consult, at the request of either Party and both shall endeavor to find a mutually acceptable solution in the light of their respective important interests, giving due regard to each other's laws, sovereignty, the independence of the respective competition authorities and to considerations of comity.

The provision seeks to minimize diplomatic discord in foreign competition law application by obliging the parties to actively consult with one another. For that reason, the provision may be considered as a positive comity provision. The wording of this positive comity provision is similar to the EuroMed provisions demonstrated above. In the EC South Africa Agreement, the word "must" reflects the "compulsory" duty of the parties to communicate with each other. The fact that the provision does not leave discretionary backdoors to the states, strengthens the duty of the states to find co-operational consent. Therefore, it may be considered a stronger provision fostering international competition co-operation. Yet again, the provision does not demand that the States reach specific outcomes in the consultation process. It rather covers the "if" regarding the consultation not the "how" the "when" or the "to what extent". The competition cooperation provision may therefore be considered a stronger soft comity MoU. Within their Development Agreement the parties did not agree upon binding mutual legal assistance in competition law matters.

Overall, it can be concluded that Development Agreements discussed here show a remarkable diversity of competition co-operation, ranging from no competition cooperation to strong memoranda of understanding. The fact that these Development Agreements bear the signature of the EU, displays the will to integrate competition co-operation at an early stage of interstate trade dialogue. One may draw the conclusion that the EU's influence on the Development Agreements is marked by the Union's desire to export its legal conviction about the importance of competition law with regard to trade matters. In the context of global competition law development, this awareness-creating approach of the EU is highly positive.

b.) Preferential Trade Agreements

The next step of trade agreement integration are the so-called Preferential Trade Agreements (PTAs). PTAs seek to improve trade relations between two or more developed economic entities by the negotiation and codification of trade conces-

sions.⁷⁸² In the analysis of Trade Agreements containing a competition chapter, 12 out of 89 trade agreements are to be considered as PTAs. Within these PTAs, the duties of competition cooperation agreements are regulated directly and indirectly.

aa.) Direct Provisions

The Development Agreements are marked by different stages of competition law co-operation provisions, different development and implementation phases may be detected within PTAs.

Less developed enforcement provisions are designed in a more general way, in order to try to avoid implementing legally binding declarations. For instance, in the Japan-Vietnam PTA of 2008 in its competition chapter, Art. 101 entitled “Cooperation on Promoting Competition by Addressing Anti-competitive Activities”, the contracting states agree to cooperate in competition enforcement matters “avoiding or lessening the possibility of conflicts between the Governments of the Parties in all matters pertaining to the application of the competition law of each party”. This provision may be considered as a negative comity principle. To reach the goal of better understanding, the Member States declare that cooperation “may take the form of exchange of information, notification [...] of enforcement activities, and consultation”.⁷⁸³ The Member States leave it to the general declaration and do not further define the different stages of cooperation, which is why the provision cannot be considered as an active positive comity principle. The general declaration of Art. 101 does not impose any legal obligation, which is why the cooperation provisions regarding competition law are to be categorized as soft agreements. Negative comity declarations of courtesy to avoid dissents between the contractors, pay respect to the analyzed problems and according to the needs of international cooperation in sensitive competition matters. This supports the problem awareness found in the international perception. The fact that such declarations are dependent upon the perception of the agreeing contractors is demonstrated by the Japan-India PTA of 2011. The parties could obviously neither agree to declare to fight intergovernmental dissents in competition law by comity, nor agree upon different stages of cooperation by, for example, the exchange of information. In Art. 118 the parties merely agree to cooperate in competition enforcement within “their respective available resources”.⁷⁸⁴ The direct comparison of these Japanese Trade Agreements not only shows how diverse and individual bilateral trade agreements are but also shows the drastically different strength of agreements regarding competition enforcement

⁷⁸² Within the WTO legal system, the term Regional Trade Agreements is used to characterize these kind of trade agreements (cf. https://www.wto.org/english/tratop_e/region_e/rta_pta_e.htm). As the WTO term (due to its regional reference) includes preferential and free trade agreements as well as customs unions alike, the different stages of trade agreements are used separately. For the reason of clarification, the term Preferential Trade Agreements (PTAs) is used specifying those treaties, granting reciprocal trade concessions (in line with Art. XXIV GATT).

⁷⁸³ Art. 101 Japan-Vietnam, *Economic Partnership Agreement* (2008).

⁷⁸⁴ Art. 118 Japan-India, *Comprehensive Economic Partnership Agreement* (2011).

cooperation. Still, even gradually specified phrases have the power to indicate the determination of the contractors to fight the problems arising from the lack of cooperation.

The Hong Kong China-New Zealand PTA of 2010 is another PTA that includes a competition chapter, demonstrating direct degrees of competition enforcement cooperation.⁷⁸⁵ With reference to the principles of the APEC Principles to Enhance Competition and Regulatory Reform, the Hong Kong – New Zealand Closer Economic Partnership attempts to act in line with these principles. A key element of the Agreement is the promotion of competition by “fostering appropriate cooperation between trade and competition officials”.⁷⁸⁶ Accordingly, the parties agreed to “exchange information on the development of competition policy” encouraging their competition authorities to cooperate with one another by technical assistance, consultation, and exchange of information.⁷⁸⁷ To specify this general declaration the parties agreed that they may consult upon reciprocal (on demand) request concerning “particular anticompetitive practices adversely affecting trade or investment between the parties”.⁷⁸⁸ This provision may be considered to be a positive comity clause. The cooperation measures are designed as a non-compulsory basic MoU. The direct reference to the named APEC Principles is a mere reaffirmation and recital which does not create any binding provision.

It appears that the EC-CARIFORUM Economic Partnership Agreement of 2008 is a more elaborate PTA, as it includes a direct reference to cooperation in competition law matters like comity, the exchange of information, notification, and consultation. The Agreement seeks a closer economic partnership between the 15 Caribbean States along with the Dominican Republic and the EU.⁷⁸⁹ In its Art. 128 called “Exchange of Information and Enforcement Cooperation”, the parties agree that their respective competition authorities may generally agree to cooperate in competition enforcement matters as long as their right to autonomous decisions in competition enforcement is not disrupted.⁷⁹⁰ To that end, the authorities are entitled to exchange non-confidential information with the proviso that they must observe confidentiality whilst exchanging this sensitive information.⁷⁹¹ Furthermore, the parties to the Agreement agreed that their competition authorities may have the opportunity to notify each other if “anticompetitive business practices... [are] taking place in the other Party’s territory.” The competition authorities are asked to decide whether it is necessary to notify another with regards to best practice experiences.⁷⁹² Moreover, while investigating in a foreign territory, the authorities shall not only

⁷⁸⁵ Hong Kong – New Zealand, *Closer Economic Partnership Agreement* (2010).

⁷⁸⁶ Ch. 9 Art. 2.1 lit. f.) Hong Kong- New Zealand, *Closer Economic Partnership Agreement*.

⁷⁸⁷ Ch. 9 Art. 4.1 and 4.2 *ibid.*

⁷⁸⁸ Ch. 9 Art. 5 *ibid.*

⁷⁸⁹ Cf. Rec. 20 of EC-CARIFORUM, *Economic Partnership Agreement*.

⁷⁹⁰ Art. 128.1 *ibid.*

⁷⁹¹ Art. 128.2 *ibid.*

⁷⁹² *Ibid.*

inform one another when they acquire knowledge about anticompetitive behavior but they shall also notify the competent authorities about the likely remedies to be imposed and about the degree of investigative conduct believed to be required, encouraged, or approved by the other authority.⁷⁹³ The Agreement does not include specific procedures for consultation in competition enforcement matters, nor positive comity principles. Overall, the fact that enforcement cooperation matters are bundled into one article and the fact that the different enforcement cooperation stages are structured in subsequent paragraphs (from general declarations to more specific elaborations of the cooperation provisions), represents the determined intention of the Member States to develop an effective enforcement cooperation. In turn, this expressed intention pays respect to the problems arising from an absence of international competition enforcement cooperation.

It has to be noted that the agreement does not include explicit comity principles (neither negative, nor positive). On first glance, referring back to the developed categories of cooperation, the competition law provisions of the EU-CARIFORUM agreement appear to be a basic MoU. Yet, compared to other basic MoUs these provisions are innovative in that they allow direct authority cooperation, as the parties agreed to provide mutual assistance in competition law matters. This direct mutual cooperation of competition agencies strengthens cooperation as the administrative process is minimized on the one hand and on the other hand the competent authorities (as experts in their field) have the opportunity to directly influence cooperation with their expertise. However, the discussed provisions of enforcement cooperation do not exceed the optional character of a soft competition cooperation agreement. It does not represent an “advanced” MLAT in competition matters for various reasons. The agencies cannot exchange confidential information such as antitrust evidence; the whole cooperation process of the competition agencies is limited, as they retain their full powers to decide if and how to enforce their competition laws; and no obligation to cooperate derive from the agreement. Yet the cooperation mechanisms in competition law fully relate to direct agency cooperation, especially as the parties agreed to foster their respective competition agencies by training key officials.⁷⁹⁴ For that reason, besides the developed categories of soft competition law MoU (negative and positive comity) and advanced competition law MoU, a new category has to be developed: basic MoU of mutual agency assistance (MoU similar to an MLAT). Furthermore, it is remarkable that the EC-CARIFORUM PTA is the only one involving a competition chapter formulating “duties” to exchange information, notification, and consultation in a more specific way.

⁷⁹³ Art. 128.3 lit. i-iii. Ibid.

⁷⁹⁴ Art. 130.2 lit. d. *ibid.*

bb.) Indirect Reference

Apart from direct references concerning competition law cooperation, PTAs containing a competition chapter outsource the problem of competition enforcement cooperation. Notably, the Japanese PTAs between 2002 and 2015 include a competition chapter outsourcing cooperation provisions. To figure out whether references to spin-off agreements change the degree of cooperation by increasing the legal obligation, certain spin-off agreements have to be outlined in the light of the corresponding PTA. With the Japan-Singapore Agreement for a New-Age Economic Partnership of 2002, the parties were determined to create between themselves a legal framework for an economic partnership in a globalizing new age world. The Agreement includes a competition chapter (chapter 12) where the parties generally agree to cooperate in the field of controlling anti-competitive activities.⁷⁹⁵ Yet the details and procedures of competition enforcement cooperation are not specified within the PTA. The parties agreed to specify these provisions within an “Implementation Agreement” regarding the PTA.⁷⁹⁶ In Chapter 5 of the Implementation Agreement, the Parties not only generally agreed to cooperate in competition enforcement as set forth in the Art. 104 of the PTA,⁷⁹⁷ they further agreed upon notification, exchange of information, and consultation mechanisms. They want to notify one another in enforcement activities of interest to the other party – reflecting courtesy for better understanding.⁷⁹⁸ This courtesy is further specified by examples, such as if nationals of another state are involved in a competition enforcement, if merger and acquisitions are subject of interest, etc.⁷⁹⁹ Regarding the timing of notification, the parties agreed that notification between contact points of the states (e.g. government officials) shall be conducted promptly and be as detailed as possible.⁸⁰⁰ Regarding the exchange of information, the parties agreed that they would exchange information of interest regarding their competition activities. They agreed that they may provide one another with more detailed information regarding specific enforcement processes and, upon request, supply one another with relevant information for the other’s enforcement activities.⁸⁰¹ They approved that exchanged information has to meet the criteria of confidentiality and may not be used in criminal proceedings by a court or a judge.⁸⁰² Moreover, the parties (quite superficially) decided to consult upon “any matter which may arise under this [competition] chapter”.⁸⁰³ Specific

⁷⁹⁵ Art. 104.1 Japan-Singapore, *Agreement for a New-Age Economic Partnership*.

⁷⁹⁶ Art. 104.2 *ibid*; Japan-Singapore, *Implementing Agreement pursuant to Article 7 of the Agreement for a New-Age Economic Partnership* (2002).

⁷⁹⁷ Art. 15 Japan-Singapore, *Implementing Agreement pursuant to Article 7 of the Agreement for a New-Age Economic Partnership*.

⁷⁹⁸ Art. 17.1 *ibid*.

⁷⁹⁹ Art. 17.2 lit. a.)-f.) *ibid*.

⁸⁰⁰ Art. 17.3 and 17.4 *ibid*.

⁸⁰¹ Art. 18 *ibid*.

⁸⁰² Art. 20 and 21 *ibid*.

⁸⁰³ Art. 24 *ibid*.

comity principles are not included. Yet, the parties also mentioned the option to further discuss the implementation of coordination measures as well as positive and negative comity in the implementation agreement fostering competition enforcement cooperation.⁸⁰⁴

Overall, one may note that the implementation agreement quite specifically details the stages of competition enforcement cooperation, even if the provisions are all optional. On first and second glance the political will of Japan and Singapore to cooperate in competition enforcement matters appears to be quite strong. However, in the joint press release on the first anniversary of the PTA, the statement regarding competition policy sounds reticent:

[The] Ministers noted that notification systems between the respective competition authorities of Japan and Singapore under the JSEPA had begun its operation. Both authorities will continue to encourage co-operation under the JSEPA.⁸⁰⁵

To interpret that statement, neither the fact that the “notification process has started”, nor the fact that the parties wanted to “encourage cooperation under the JSEPA” reveals overwhelming political optimism regarding the fostering of development of competition enforcement cooperation provisions. The implementation agreement appears to be a soft law MoU concerning mutual assistance in competition law, as the authorities are directly mandated to enforce competition matters. This reflects a development and fostering of competition enforcement cooperation even if the Implementing Agreement does not include classical comity provisions.

Further Japanese PTAs which indirectly refer the competition enforcement cooperation matters to corresponding implementation agreements include those concluded with Mexico (2004), Malaysia (2005), Philippines (2006), Thailand (2007), Indonesia (2007), Peru (2011), and with Mongolia (2015). It is true that all mentioned PTAs have corresponding implementation agreements. Yet only the implementing agreements contained in the PTAs with Mexico, Philippines, and Thailand include references to competition law and its enforcement cooperation, whilst the other do not.

The references to competition law matters in the PTA Implementing Agreements are similar to the references demonstrated above in the Japan-Singapore PTA Implementing Agreement.

The Japan-Mexico Implementing Agreement solely addresses the specifications of competition law matters.⁸⁰⁶ The provisions are very similar to the specifications of the Japan-Singapore Implementing Agreement for notification in M&A cases,

⁸⁰⁴ Art. 23 *ibid.*

⁸⁰⁵ Japan-Singapore, *Joint Statement of the Japanese and Singapore Ministers at the Ministerial Review Meeting on the Agreement between Japan and the Republic of Singapore for a New-Age Economic Partnership* (2003) 4.

⁸⁰⁶ Art. 1.1 Japan-Mexico, *Implementing Agreement pursuant to 132 of the Agreement between Japan and the United Mexican States for the strengthening of the Economic Partnership* (2004).

but include further specifications concerning the time during which each party's notification has to take place.⁸⁰⁷ The parties agreed that their competition agencies should take the state's reciprocal interest into account when enforcing competition law (negative comity), and that the state's competition authorities may have the opportunity to request one another's competition authorities to initiate appropriate enforcement activities against anticompetitive conduct within its territory (positive comity).⁸⁰⁸ The comity provisions further specify that when considering to impose competition enforcement activities, the parties should take into account the degree of conflict or consistency between the enforcement activities by one party and the laws, regulations, policies or important interests of the other.⁸⁰⁹ Correspondingly, the different stages of cooperation such as notification and the exchange of information are outlined below.⁸¹⁰ Overall, the competition law matters of the Implementing Agreement appear as authority addressing "soft" MoU. The main goal of the parties is to avoid diplomatic disputes. It has a high yet not binding legal standard of competition enforcement cooperation.

Similarly, (yet not in as much detail as the Japan-Mexico Implementing Agreement) the Japan-Philippines and Japan-Thailand Implementing Agreements specify the competition enforcement cooperation provisions. The Japan-Thailand Implementing Agreement is a positive comity agreement.⁸¹¹ The Japan-Philippines Implementing Agreement does not provide comity provisions. Yet both Implementing Agreements focus on technical competition law enforcement cooperation, such as facilitating the exchange of experts between competition authorities for training purposes.⁸¹² The Japan-Thailand Implementing Agreements includes provisions specifying the way information is to be supplied with regards to confidentiality, which reflects that the competition authorities are mandated to act within a specified courtesy.⁸¹³ The Japan-Philippines Implementing Agreement does not include such a provision but is more detailed in its (authority addressing) transparency provisions, for example in those concerning when and how authorities are obligated to inform one another.⁸¹⁴ Both of the Implementing Agreements mainly address the reciprocal competition authorities rather than their governments and may, therefore, also be specified as basic MoUs on mutual assistance in competition law enforce-

⁸⁰⁷ Art. 2 *ibid.*

⁸⁰⁸ Art. 4.3 and Art. 5.1 *ibid.*

⁸⁰⁹ Art. 6.3 lit. e *ibid.*

⁸¹⁰ Art. 3, 5 and 6 *ibid.*

⁸¹¹ Art. 17 Japan-Thailand, *Implementing Agreement pursuant to Article 12 of the Agreement for an Economic Partnership* (2007).

⁸¹² Art. 15 Japan-Philippines, *Implementing Agreement pursuant to Article 12 of the Agreement for an Economic Partnership* (2006); Art. 15 Japan-Thailand, *Implementing Agreement pursuant to Article 12 of the Agreement for an Economic Partnership*.

⁸¹³ Art. 18 Japan-Thailand, *Implementing Agreement pursuant to Article 12 of the Agreement for an Economic Partnership*.

⁸¹⁴ Art. 14 Japan-Philippines, *Implementing Agreement pursuant to Article 12 of the Agreement for an Economic Partnership*.

ment. The differences in mutual competition law assistance within the Implementing Agreements derive from the different levels of competition law enforcement of a state, as not every state has the same level of authority enforcement.

Whilst the three agreements make reference to competition matters, the declarations of the other PTAs appear to be lip services, as for example the cooperation provisions of the Japan-Indonesia FTA of 2007 competition chapter. The parties include an indirect reference to “the implementation agreement”.⁸¹⁵ Still, no specifications can be found in such an agreement.⁸¹⁶ This lack of the implementation process of the agreement shows that an MoU concerning competition law could not be concluded. Additionally, concerning the non-competition law, it is striking that the parties were able to agree upon cooperation stages like the exchange of information in other legal spheres such as investment policy but not in the area of competition law.⁸¹⁷

Comparing the competition law and spin-off agreements, it appears that they are designed unequally – especially with respect to comity provisions.

For that reason, PTAs including a competition chapter referring to spin-off agreements do not always have a greater effect on fostering competition enforcement cooperation than PTAs directly specifying the levels of cooperation. The weakness of such indirect references to a basic MoU on mutual competition law assistance is that the references have to be fully implemented into another treaty, whereas the former PTA already provides the capacity to regulate the competition enforcement cooperation matters directly. The strength of such MoUs is that they are more flexible and open for innovation and development of reciprocal competition law enforcement cooperation. In the end, it is a positive development when states agree upon greater cooperation and specify the extent of cooperation.

cc.) Measurement

The evaluation of competition enforcement cooperation provisions within PTAs, leads to the conclusion that indirect references are inferior to direct regulations. Overall, the study of the PTAs reveals that there is a developing awareness regarding the needs of cooperation in competition enforcement matters. Still, it becomes clear that such cooperation is not a matter of great political interest. It may be noted that the PTAs with provisions for the enforcement cooperation in competition matters are in the minority, also that (as demonstrated) these provisions lack a level of obligation. The needs of more binding competition enforcement cooperation (e.g. by the agreement of a “hard” MLAT) are not fulfilled. However, positive

⁸¹⁵ Art. 127.2 Japan-Indonesia, *Economic Partnership Agreement* (2007).

⁸¹⁶ Cf. Japan-Indonesia, *Implementing Agreement regarding the Operational Procedures referred to in Chapter 2 and Chapter 3 of the Economic Partnership Agreement* (2008).

⁸¹⁷ E.g. c.f. Ch. 14 of the Japan-Mexico, *Agreement for the Strengthening of the Economic Partnership* (2004).

steps in the right direction may be observed in some PTAs, especially in the form of (non-binding) mutual assistance provisions, as contained in, for example, the New Zealand – Thailand PTA.

c.) Free Trade Agreements

The majority of trade agreements with a competition chapter are Free Trade Agreements (FTAs). FTAs are trade agreements trying to create free trade markets by reducing direct trade barriers, such as customs, as well as indirect trade barriers.⁸¹⁸ Therefore, FTAs have a greater ambit than PTAs or Development Agreements and consequently have to be examined separately.

Since 1945, 73 out of 138 Trade Agreements are specified as FTAs (52%).⁸¹⁹ Notably since 2002, 62 FTAs were concluded.⁸²⁰ This shows a clear trend towards global free trade on a bilateral basis and, at least for now, underlines the assumption that multilateralism failed. That is the reason why the evaluation of FTAs regarding competition law is of great interest. Regarding competition enforcement cooperation, during the course of the study, both less and more developed stages of interstate cooperation in competition law matters were encountered. The most prominent examples are outlined accordingly. Whilst PTAs were evaluated by their direct or indirect references to competition enforcement cooperation, FTAs have to be categorized differently, as only a few FTAs make indirect references. Furthermore, due to the described failure of multilateralism within the WTO in 2002, there exists a chronological differentiation in FTAs before and after 2002.

aa.) FTAs from 1945-2002

Only 9 FTAs from 1945 until 2002 include a competition chapter. It is notable that the oldest FTA is the North American Free Trade Agreement (NAFTA) of 1992 between the USA, Canada and Mexico.⁸²¹ Besides general declarations, NAFTA also includes competition enforcement cooperation provisions which regulate the likes of exchange of information, consultation, or notification. The parties to NAFTA agreed to consult on the effectiveness of general measures taken against anticompetitive conduct “from time to time”. Moreover, the parties recognized the importance of cooperation in competition matters.⁸²² They specified this cooperation to involve

⁸¹⁸ Within the WTO legal system, FTAs are characterized by the Regional Trade Agreement (RTA) term (cf. https://www.wto.org/english/tratop_e/region_e/rta_pta_e.htm). FTAs are considered to be in line with Art. XXIV GATT in the following.

⁸¹⁹ Cf. Competition codebook and date in Andreas Dür, Baccini and Elsig, *The Design of International Trade Agreements: Introducing a New Dataset* (DESTA). The evaluations of FTAs depend on- and are referred to the DESTA evaluation. Yet the interpretations of the data fully depend to the author of this thesis.

⁸²⁰ The amount of FTAs concluded since 2002 is 84% of all FTAs concluded since 1945.

⁸²¹ Cf. Ch. 15 of Canada-Mexico-USA, *North American Free Trade Agreement* (1992); Current political dissents regarding NAFTA are not taken into account.

⁸²² Art. 1501.2 *ibid.*

“mutual legal assistance, notification, consultation and exchange of information relating to the enforcement of competition laws and policies in the free trade area”.⁸²³ This may be considered an indirect (and unspecified) reference of NAFTA to the US-Canada MLAT of 1990 and corresponding existent bilateral competition agreements of Mexico and Canada.⁸²⁴ Yet no further direct specifications are made within NAFTA. For that reason, cooperation provisions within NAFTA alone refer to existent and grown competition law enforcement cooperation, but these provisions do not develop these procedures. Consequently, the competition chapter of NAFTA appears rather basic.

The Canada-Chile and Canada-Israel FTAs of 1996 do not provide more elaborate competition enforcement cooperation provisions. Similar to the NAFTA provision, the parties agreed that they “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”.⁸²⁵ Again it may be presumed that the parties indirectly referred to equivalent existing competition agreements. Further specifications and developments have not been made within these FTAs. Therefore, the competition law cooperation provisions are likewise limited.

Subsequently, the Chile-Mexico FTA of 1998 adopted competition enforcement provisions nearly identical to those of NAFTA and the Canada FTAs of 1996.⁸²⁶ On the other hand, the Mexico-Israel FTA of 2000 goes a little deeper by generally requiring consultations from time to time about the effectiveness of their respective antitrust enforcement effectiveness.⁸²⁷ Furthermore, the parties declared that they intend to cooperate in competition enforcement matters including notification, consultation, and the exchange of information related to enforcement matters.⁸²⁸ Still, the Mexico-Israel FTA, in its competition chapter, does not specify further any of the provisions relating to competition enforcement cooperation. Corresponding (positive) comity provisions are not to be found in the competition chapter either but are agreed upon in the subsequent chapter on Administration of Laws. The competition law enforcement cooperation provisions are therefore categorized as basic comity MoUs.

⁸²³ Ibid.

⁸²⁴ As described cf. US-Canada, *Treaty on Mutual Legal Assistance in Criminal Matters – E101638*.

⁸²⁵ Art J-01 Canada-Chile, *Free Trade Agreement* (1996); Art. 7.1.2 Canada-Israel, *Free Trade Agreement* (1996).

⁸²⁶ Art. 14-02.2 Chile-Mexico, *Free Trade Agreement* (1998).

⁸²⁷ Art. 8-02.2 Mexico-Israel, *Free Trade Agreement* (2000).

⁸²⁸ Art. 8-03 *ibid*.

More precise provisions regarding the competition enforcement cooperation may be found in the EFTA-Mexico FTA of 2000. Besides comparable general declarations to cooperate with the exchange of information, notification, consultation etc.,⁸²⁹ the parties agreed to specialized duties for active notification in competition matters of reciprocal interest, specifying

investigations that involve: anticompetitive business conduct, remedies and seeking of information in the territory of the other Party, as well as mergers and acquisitions in which a party to the transaction is a company of a Party controlling a company established in the territory of the other Party.⁸³⁰

Furthermore, the parties agreed to specify that notification must enable the notified party “to make an initial evaluation of the effect of the enforcement activity within its territory” whilst obeying confidentiality.⁸³¹ These competition law provisions are also categorized as a basic MoU, as the agreement does not supply more detailed provisions. In the Canada-Costa Rica FTA of 2001, in force since 2002, the competition enforcement cooperation measures are similar to those found in other Canadian FTAs. The states agreed to cooperate in “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”.⁸³² In that regard, the parties wanted to consult from time to time to figure out the effectiveness of the enforcement measure undertaken.⁸³³ As no further cooperation mechanism may be found, including comity principles or provisions relating to exchange of information etc., the cooperation provisions regarding competition law enforcement are fairly basic. For that reason the Canadian FTAs are to be considered as basic MoUs. The EFTA-Singapore is of a similarly basic and general nature, as it includes general declarations but lacks specifics.⁸³⁴ However, the EC-Chile FTA, in the usual EU manner, includes more elaborate provisions regarding competition enforcement cooperation. It is a clear objective of the parties to cooperate in competition enforcement matters.⁸³⁵ The different stages of the desired competition enforcement cooperation are notification, consultation, exchange of non-confidential information, and technical assistance.⁸³⁶ The contractors have agreed to give specific examples for the different stages, which are outlined following the general declarations con-

⁸²⁹ Art. 52.1 EFTA-Mexico, *Free Trade Agreement* (2000).

⁸³⁰ Art. 52.2 *ibid.*

⁸³¹ Art. 52.2 and 52.03 *ibid.*

⁸³² Ch. J Art. 1.2 Canada and Costa-Rica, *Free Trade Agreement* (2002).

⁸³³ Ch. J Art. 1.1 *ibid.*

⁸³⁴ Cf. Art. 50 EFTA-Singapore, *Free Trade Agreement* (2002); In fact the DESTA Competition data codes a lack of a provision regarding the exchange of information in competition matters. Yet a difference to general provisions displayed before (or even an absence of such a provision) cannot be detected.

⁸³⁵ Art. 172.1 EC-Chile, *Free Trade Agreement* (2002).

⁸³⁶ Art. 172.3 *ibid.*

cerning competition enforcement cooperation. The parties agreed upon the duty of active notification in the event that one party's competition enforcement activity affects the territorial sovereignty of the other.⁸³⁷ Moreover, the parties agreed to notify each other, at early stages and with as much detail as possible, of their competition enforcement activities and to consider one another's opinions in the investigation process.⁸³⁸ Thus, not only did the parties agree on the "when" but more specifically also on the "how" of notification. The heading of the provision relating to the consultation is specific: "Consultations when the important interests of one Party are adversely affected in the territory of the other Party".⁸³⁹ The fact that the headline of the consultation article already includes the intention of the parties to consult at times when important territorial interests of another party are affected, underlines the will of the parties to preserve territorial interests and avoid corresponding diplomatic disputes. Such a procedure may be considered to be a negative comity principle. Correspondingly, the parties clarified that the consultation duties are without prejudice, yet highly preferable.⁸⁴⁰ The parties not only agreed to exchange non-confidential information on competition matters ("if to exchange") but more specifically named the exchangeable information, which encompasses information regarding sanctions and remedies applied to cases affecting another territory, as well as the grounds leading to those enforcement activities if requested by the other party.⁸⁴¹ Furthermore the parties shall, on an annual basis, supply each other with information regarding granted aid. The parties are entitled to request specific information concerning certain aid cases.⁸⁴² Confidentiality is pointed out as a highly precious asset avoiding diplomatic disagreements deriving from extraterritorial application of antitrust law.⁸⁴³ Overall, the EC-Chile FTA makes quite elaborate references to the importance of competition enforcement cooperation by specifying the different stages of cooperation, giving examples of certain events calling for cooperation. The competition enforcement cooperation agreements may therefore be categorized as basic MoUs between the contracting parties.

bb.) FTAs between 2002-2019

After the failure of multilateralism in international competition law following the WTO ministerial convention of Cancún in 2003, 61 FTAs containing a competition chapter were concluded. Consequently, one may ask, whether a trend of moving away from multilateral regulation towards bilateral regulation entails improvements

⁸³⁷ Art. 174.1 lit. a.)-d.) *ibid.*

⁸³⁸ Art. 174.2 and Art. 174.3 *ibid.*

⁸³⁹ Art. 176 *ibid.*

⁸⁴⁰ Art. 176.1 and Art. 176.2 *ibid.*

⁸⁴¹ Art. 177.2 *ibid.*

⁸⁴² Art. 177.3 *ibid.*

⁸⁴³ Art. 177.4-6 *ibid.*

for the regulation of international competition law enforcement cooperation. In order to answer this question, the FTAs concluded after 2003 are laid out below in a chronological order, with further elaboration of the ones that are more developed.

(1.) FTAs of 2003

In 2003, five FTAs were concluded. The most developed FTA regarding competition enforcement cooperation provisions is the US-Singapore FTA. It includes not only a general declaration of the importance of cooperation in competition enforcement matters but also a declaration of the parties to actually cooperate in such matters.⁸⁴⁴ Rather than naming the different stages of cooperation, the FTA includes several provisions which describe different stages of cooperation. For example, upon request, the state concerned shall make publicly available information on its enforcement matters (and its exceptions from it), this can be considered as a positive comity notification provision.⁸⁴⁵ Furthermore, the parties agreed to consult on specific matters arising under the competition chapter and agreed that requests to consult shall specify how the matter affects reciprocal trade or investment between the parties, with the other party being required to take full notice thereof. The consultation process reflects further specified positive comity principles. Whilst the notification and consultation provisions are quite general, the parties further agreed to “provide written notification, in advance wherever possible, to the other Party of the designation and any such condition[s]” where a party designates a monopoly.⁸⁴⁶ Additionally, Singapore shall, at least annually, make public a consolidated report that details each listed government enterprise entity and upon the receipt by the US, provide the US with the specialized information regarding the percentage of shares and voting rights that it and its government enterprises cumulatively hold.⁸⁴⁷ This provision constitutes an optional, unilateral, and quite specific duty for Singapore to notify the US. Presumably the US included this duty in the FTA because Singapore only enacted antitrust provisions regarding government enterprises in 2004, which was after the FTA was already concluded.⁸⁴⁸ Nonetheless, compared to other US Agreements, this FTA is more elaborate in terms of competition enforcement cooperation provisions. Still, these provisions may be categorized as soft comity MoU between the states.

The EFTA-Chile FTA of 2003 is similar to the previously mentioned EFTA-Singapore FTA. It includes a general declaration of the parties to cooperate in competition matters including the exchange of information notification and consultation.⁸⁴⁹ The positive comity notification provisions are more general as no anticompetitive

⁸⁴⁴ Art. 12.4 US-Singapore, *Free Trade Agreement* (2003).

⁸⁴⁵ Art. 12.5 *ibid.*

⁸⁴⁶ Art.12.3.1. lit. b. *Ibid.*

⁸⁴⁷ Art. 12.3.2 lit. g. *Ibid.*

⁸⁴⁸ Cf. Singapore Competition Act of 2004.

⁸⁴⁹ Art. 72.2 Chile-EFTA, *Free Trade Agreement* (2003).

conduct affecting the interests of another state was specified.⁸⁵⁰ The EFTA-Chile FTA includes more detailed provisions concerning the consultation process, as consultation mechanisms require, inter alia, that the requests for consultations have to attain a specific degree of accuracy, etc.⁸⁵¹ Besides a general declaration to exchange information within the boundaries of confidentiality, the parties agreed to exchange information about sanctions and remedies applied against anticompetitive conduct.⁸⁵² The FTA, therefore, enters a more developed cooperation enforcement level. Yet provisions of the FTA are designed as basic comity MoU.

Similar highly specific cooperation mechanisms for competition law enforcement cooperation may be found in the Chile-Korea FTA of 2003. Besides basic declarations regarding the importance of cooperation in competition law enforcement – that is to avoid the benefits of a trade liberalization being diminished by anticompetitive conduct – the parties agreed on specific stages of cooperation.⁸⁵³ They agreed to courteously take the interests of the other into account when enforcing competition law negative comity and to consult upon those issues upon the request of the other.⁸⁵⁴ To that end, they agreed that the parties will give full and sympathetic consideration to the requests of the other party.⁸⁵⁵ They agreed to notify each other when specific interests (of one party) are affected by anticompetitive conduct in the other's territory,⁸⁵⁶ the parties want to coordinate their enforcement activities⁸⁵⁷ and they want to exchange non confidential information, such as information on sanctions issued, which might have negative effects on the other party.⁸⁵⁸ Lastly, the parties agreed to support one another with technical assistance to aid and foster the implementation of the competition law measures.⁸⁵⁹ Even if the cascade of competition law enforcement cooperation is included within the competition chapter of the FTA, as none of the cooperation measures are of a binding nature, they may be considered as a (fairly highly) developed MoU.

The Singapore–Australia FTA of 2003 includes general declarations of the parties to cooperate in competition matters in order to promote fair competition within the created free market.⁸⁶⁰ The parties agreed that they would consult upon the request of either party with a view of eliminating anticompetitive conduct affecting trade and the investment of the parties.⁸⁶¹ Yet the parties did not note that cooperation

⁸⁵⁰ Art. 73 *ibid.*

⁸⁵¹ *Ibid.*

⁸⁵² Art. 75.3 and 76 *ibid.*

⁸⁵³ Art. 14.2 Chile-Korea, *Free Trade Agreement* (2003).

⁸⁵⁴ Art. 14.5 *ibid.*

⁸⁵⁵ *Ibid.*

⁸⁵⁶ Art. 14.3 *ibid.*

⁸⁵⁷ Art. 14.4 *ibid.*

⁸⁵⁸ Art. 14.6 *ibid.*

⁸⁵⁹ Art. 14.7 *ibid.*

⁸⁶⁰ Art. 2 Australia-Singapore, *Free Trade Agreement* (2003).

⁸⁶¹ Art. 6.1 *ibid.*

in competition law matters may lead to a lower risk of arguments by taking into account the interests of another with comity provisions. Although the FTA contains a provision enabling the review and further development of the consultation mechanisms,⁸⁶² such reviews were never carried out by the states. In addition, the parties also agreed on competitive neutrality regarding state aid and general transparency.⁸⁶³ The competition enforcement cooperation provisions are optional and basic, thus the FTA shall be categorized as a basic MoU.

Similarly, the Panama-Taiwan FTA contains rather basic cooperation provisions on competition law enforcement. The parties declared the importance of cooperation and correspondingly stated the stages of competition enforcement cooperation such as the exchange of information.⁸⁶⁴ Yet further specifications to the stages have not been made. The provisions are, therefore, considered basic MoU of the contracting states.

While the 2003 FTAs of US-Singapore and EFTA-Chile are more precise than ever before, providing more specified provisions with which the states agree to cooperate, they still fail to create any legally binding provisions due to the discretionary nature of the Agreements. Consequently, putting these FTAs in the category of basic MoUs.

(2.) FTAs of 2004

The most notable FTA of 2004 concerning competition enforcement cooperation is the US-Australia FTA. Besides basic declarations of the Member States to cooperate in competition matters (i.e. through the exchange of information)⁸⁶⁵ the FTA makes direct reference to previous Competition Cooperation Agreements: namely the US-Australia Agreement relating to Cooperation on Antitrust Matters of 1982 and the (previously discussed) US-Australia Agreement on Mutual Antitrust Enforcement Assistance of 1999.⁸⁶⁶ With regards to the former of the two, it is notable that already in 1982, the US and Australia recognized the problems deriving from international antitrust measures and the corresponding lack of cooperation, mainly diplomatic conflicts.⁸⁶⁷ To avoid such conflicts with respect to mutual sovereignty, the parties concluded the 1982 Agreement and agreed on principles of cooperation in antitrust matters. Consequently, the parties approved that within certain antitrust matters, reciprocal notification shall be required to be made at early stages and as detailed as possible via diplomatic channels.⁸⁶⁸ Furthermore, the parties agreed on consultation in the event of reciprocal interests regarding antitrust matters.⁸⁶⁹ Both

⁸⁶² Art. 6.2 *ibid.*

⁸⁶³ Art. 4 and Art. 7 *ibid.*

⁸⁶⁴ Art. 15.02 Panama-Taiwan, *Free Trade Agreement* (2003).

⁸⁶⁵ Art. 14.2.3 US-Australia, *Free Trade Agreement* (2004).

⁸⁶⁶ Art. 14.2.3 lit. a. *Ibid.*

⁸⁶⁷ Rec. 1 US-Australia, *Agreement relating to Cooperation on Antitrust Matters* (1982).

⁸⁶⁸ Art. 1 *ibid.*

⁸⁶⁹ Art. 2 *ibid.*

cooperation mechanisms have to obey national restrictions of confidentiality.⁸⁷⁰ The Agreement of 1982 is a basic MoU. As demonstrated, the provisions regarding cooperation in competition law enforcement of the MLAT of 1997 went beyond the basics. They set further mechanisms of competition enforcement cooperation, enabling a substantive legal nature. The mutual legal assistance mechanisms are even considered an instructive framework showing how to cooperate to prevent political conflicts. The fact that the FTA of 2004 makes specific reference to these competition agreements does allow for the conclusion that the two states do not merely recognize the importance of cooperation in antitrust enforcement, but also include their well-developed enforcement framework into their FTA. Yet the parties do not leave competition law cooperation solely to the still-developing mutual cooperation procedures. The 2004 FTA further strengthens cooperation by providing, first, that each party's interests in competition law enforcement shall be taken into account and, second, that upon the request of a party, appropriate enforcement measures shall be taken (which may be considered a positive comity principle).⁸⁷¹ Furthermore, the FTA advances the cooperation in competition law enforcement between the US and Australia by examining the scope for strengthening support for and minimization of the effectiveness of their respective competition laws and their enforcement.⁸⁷² The Joint Working Group established under the FTA, allows the parties to find further convergence of their competition laws.⁸⁷³ Furthermore, aside from agreeing upon competitive neutrality the parties further specified the positive comity principles. Upon request, the parties allow for the information concerning their enforcement activities regarding state enterprise as well as exemptions and immunities to its competition laws, to be made publicly available.⁸⁷⁴

Moreover, it has to be noted that the FTA states the following:

The Parties recognize that policies related to matters covered by this Chapter can be a force for open and competitive markets domestically and internationally...Accordingly, the Parties shall cooperate... to promote policies related to matters covered by this Chapter that foster free trade and investment and competitive markets.⁸⁷⁵

By stating that policies against anticompetitive behavior foster free trade in a competitive market, the parties may seem to imply that anticompetitive behavior restricts free trade. Without naming it, it seems as if the parties consider anticompetitive behavior to have such a sensitive influence on their free market that they

⁸⁷⁰ Ibid.

⁸⁷¹ Art. 14.2.3 lit. b US-Australia, *Free Trade Agreement*.

⁸⁷² Art. 14.2.4 *ibid*.

⁸⁷³ *Ibid*.

⁸⁷⁴ Art. 14.8.2 lit a-c *ibid*.

⁸⁷⁵ *Ibid*.

might be considered non-tariff trade barriers. For this reason, it marks a step in the development of problem awareness towards more specified competition enforcement provisions within FTAs.

Within the Turkey-Tunisia FTA of 2004, besides general declarations to cooperate it is notable that the parties agreed to take measures against anticompetitive conduct in conformity with those measures agreed to with the EU. Moreover, even if certain provisions as agreed with the EU were to change, the FTA provides that such changes may be directly applicable between the parties.⁸⁷⁶ This confirms the notion of EU concept-export (e.g. as noted in the EuroMed Agreements). Innovatively, the contracting parties agreed to consult with one another within 30 days of either party detecting anticompetitive conduct.⁸⁷⁷ This optional time frame is new within antitrust enforcement cooperation in trade agreements, urging the parties to cooperate within a reasonable time. It can be considered as another (small) development in international antitrust enforcement cooperation. The cooperation provisions regarding competition law enforcement of the FTA may be categorized as a basic MoU.

The Australia-Thailand FTA of 2004 also includes basic provisions for the contracting parties to co-operate (“The parties shall cooperate, where appropriate, on issues of competition law enforcement, including...the exchange of information... [etc.]”).⁸⁷⁸ This co-operation also included the possibility to discuss amendments to the competition chapter, however, no such amendments were ever concluded. Compared to the US-Australia FTA, the Australia-Thailand FTA is of a fairly basic nature regarding competition enforcement cooperation. The consequent assumption that the US-Australia FTA was mainly influenced by the developed structure of the US-Australian grown structures of mutual antitrust cooperation could be supported by this comparison. As no comity principles are included within the competition chapter of the FTA, the competition concerning agreements may be categorized as basic and soft MoUs on cooperation.

The CARICOM-Costa Rica FTAs competition chapter includes very basic declarations of intent to cooperate in competition law matters, but no stages of cooperation have been named.⁸⁷⁹ To develop cooperation in competition law enforcement, the parties agreed to establish a future work program within two years and to discuss the implementation of cooperation mechanisms,⁸⁸⁰ but no such amendments to the FTA may be found. The cooperation mechanisms of the FTA are, therefore, very basic.

⁸⁷⁶ Art. 25.2 Turkey-Tunisia, *Free Trade Agreement* (2004).

⁸⁷⁷ Art. 25.3 *ibid.*

⁸⁷⁸ Art. 1205 Australia-Thailand, *Free Trade Agreement* (2004).

⁸⁷⁹ Art. XIV.01 CARICOM – Costa Rica, *Free Trade Agreement* (2004).

⁸⁸⁰ Art. XIV.02 *ibid.*

Overall, the competition enforcement provisions of the 2004 FTAs represent developments leading towards more consequential cooperation compared with the competition provisions of the previous trade agreements. No provisions on cooperation in competition law matters exceed the basic (and non-binding) MoU legal nature. However, it has to be noted that the US-Australia FTA with its reference to previous binding mutual cooperation agreements in competition law reflects a fostering step for cooperation provisions within FTAs. Nevertheless, it also has to be noted that the parties did not incorporate their agreements into the FTA, reflecting the weakness of the FTA on the one hand, while providing for flexibility to the mutual legal assistance treaty on the other. The fact that they include phrases into their FTA which may be interpreted as a (cautious) declaration to classify anticompetitive behavior as an indirect trade barrier is highly positive.

(3.) FTAs of 2005

In 2005 five FTAs were ratified.

The New Zealand-Thailand FTA in its competition chapter, per Art. 11.6 (a general provision headlined “Cooperation and Exchange of Information”) declares that:

The Parties recognize the importance of cooperation and coordination in achieving effective enforcement outcomes under their respective competition laws. The Parties also recognize the importance of confidentiality in respect of these arrangements. Accordingly, the Parties shall cooperate, where appropriate, on issues of competition law enforcement, including through the exchange of information, notification, consultation, and coordination of enforcement matters that are cross-border in nature.⁸⁸¹

By stating the importance of cooperation and coordination regarding competition enforcement between the contractors, New Zealand and Thailand draw special attention to the need for international co-operation in competition matters. The restriction of confidentiality reflects their problem awareness of the sensitivity of interstate interventions into another economy. By listing the exchange of information, notification, and consultation in competition matters of cross-border relevance together, the possibilities to co-operate are described more precisely. Though the fact that the parties “shall cooperate, where appropriate” shows that the parties did not want to establish compulsory cooperation provisions. Following this general declaration, the different options of co-operation in competition matters are outlined more precisely in Art. 11.8. The article headlined “Consultation” specifies in its sec.1:

At the request of either Party, the Parties shall consult on particular anti-competitive practices and other competition issues adversely affecting trade or investment between the Parties, consistent with the aims of this Chapter.⁸⁸²

⁸⁸¹ Art. 11.6 New Zealand-Thailand, *Closer Economic Partnership Agreement* (2005).

⁸⁸² Art. 11.8 *ibid.*

Sec.2 highlight the high importance of confidentiality. The provision may be considered as a positive comity clause asking the contracting parties to actively request the other to consult in competition enforcement matters. Even if Art. 11.8 imposes the duty to consult in competition matters, it lacks profound specifications of the positive comity principle, in what areas and in what specific examples the consultation process has to be carried out. Eventually, the described cooperation mechanisms are dependent on the administrative practice of the competent authorities and their considerations. The competition enforcement provisions are therefore considered a soft positive comity MoU.

In the Egypt-Turkey FTA, the parties agreed on general cooperation in competition law enforcement and to annually notify each other on aid granted to their national economy.⁸⁸³ The FTA also stipulates that parties may request further specific information concerning aid granted.⁸⁸⁴ By only agreeing with regards to “notification on a specific area”, the Agreement does not have the capacity to establish comity principles. The FTA’s competition provisions are, therefore, categorized as basic MoUs.

Without providing any further specification, the Korea-Singapore FTA, prescribes consultation in competition law matters upon request of either party.⁸⁸⁵ This is to be categorized as a general and not further specified positive comity principle. As the Singapore competition legal system was, at the time, fairly new, the parties agreed to discuss amendments to the competition provisions within the FTA.⁸⁸⁶ Nonetheless, official amendments or MLATs regarding competition law were never ratified.

The Korea-EFTA FTA of 2005 includes general declarations that the parties recognize the importance of cooperation,⁸⁸⁷ and it also allows for parties to notify each other as well as exchange information on competition matters.⁸⁸⁸ Yet no further specifications as to which cases require the parties to cooperate have been made, which is why the competition related matters are also considered as basic MoU.

The Transpacific Economic Partnership Agreement (TPSEPA) of Brunei, Chile, Singapore and New Zealand includes basic competition enforcement cooperation provisions, recognizing the importance of cooperation and providing for the exchange of information, notification and consultation in competition matters within the boundaries of confidentiality and within the boundaries of respective national laws.⁸⁸⁹ The parties shall notify each other, including at early stages⁸⁹⁰ if the “enforce-

⁸⁸³ Art. 22.3 and 22.5 Egypt-Turkey, *Free Trade Agreement* (2005).

⁸⁸⁴ *Ibid.*

⁸⁸⁵ Art. 15.5 Korea-Singapore, *Free Trade Agreement* (2005).

⁸⁸⁶ Art. 15.6 *ibid.*

⁸⁸⁷ Art. 5.1.4 and 5.1.5 Korea-EFTA, *Free Trade Agreement* (2005).

⁸⁸⁸ *Ibid.*

⁸⁸⁹ Art. 9.3 and 9.5 Brunei, ‘Transpacific Strategic Economic Partnership Agreement (TPSEPA)’.

⁸⁹⁰ Art. 9.4.2 *ibid.*

ment activity is liable to substantially affect another Party's important interests".⁸⁹¹ These provisions can be specified as positive comity principles. Yet no further binding clauses may be found, justifying the categorization of the competition provisions to be as soft positive comity MoU.

Overall, the 2005 FTAs do not further the development of competition enforcement cooperation provisions to any great extent. Having said that, some of the provisions do reach certain standards and overall, do not represent setbacks in cooperation.

(4.) FTAs of 2006

In 2006, the US concluded two FTAs with South American states, namely Colombia and Peru. The wording of the competition enforcement cooperation provisions of the two FTAs is identical, with the parties declaring cooperation in the competition policy area and recognizing the importance of such cooperation for the sake of effective of competition law enforcement.⁸⁹² The FTAs name the different stages of competition enforcement cooperation including the exchange of information, notification and consultation⁸⁹³ and specify the stages. Upon request parties agreed to exchange information concerning their respective competition law enforcement activities, state enterprise activities, and information concerning export associations.⁸⁹⁴ Even if these specified areas are quite general, they reflect the specific areas of interest of the contracting parties. To foster diplomatic understanding between them, the FTAs facilitate that parties may enter an on-request consultation when a matter of interest arises.⁸⁹⁵ The areas of interest can be further determined, as the FTAs allow for the exchange of more specific information upon request, indicating the entities or localities involved in a competition enforcement process, specifying certain goods and services concerned, and indicating practices usually held liable under the respective national competition law.⁸⁹⁶ Those provisions may be considered more specified positive comity principles. Moreover, the parties are required to indicate exemptions from their respective competition law enforcement.⁸⁹⁷ The notifications and exchange of information mainly seeks to increase transparency in governmental notions of competition law enforcement. The fact that the agreements are identical in their competition law provisions goes back to the fact that Peru and Colombia are both members of the Andean Community with similar expectations regarding competition law. Both of the FTAs may be considered as soft positive comity MoU on cooperation in competition matters.

⁸⁹¹ Art. 9.4.1 *ibid.*

⁸⁹² Art. 13.3.1 US-Colombia, *Free Trade Agreement* (2006) and Art. 13.3.1 US-Peru, *Free Trade Agreement* (2006).

⁸⁹³ Art. 13.3.2 US-Colombia, *Free Trade Agreement* and Art. 13.3.2 US-Peru, *Free Trade Agreement*.

⁸⁹⁴ and US-Peru, *Free Trade Agreement*.

⁸⁹⁵ US-Colombia, *Free Trade Agreement*.

⁸⁹⁶ *Ibid.*

⁸⁹⁷ Art. 13.8.3 US-Colombia, *Free Trade Agreement*.

The Panama-Singapore FTA of 2006 includes both, general declarations of the parties to cooperate in competition enforcement matters, and more specified provisions regarding the consultation mechanisms which are similar to the US-Colombia and US-Peru provisions in wording and structure.⁸⁹⁸ As no further provisions are included, the cooperation agreements in competition law of the FTA are also categorized as soft positive comity MoU.

The Taiwan-Nicaragua FTA of 2005 includes a basic declaration to cooperate in competition enforcement matters and specifies the cooperation provisions.⁸⁹⁹ The parties are required to notify one another when either designates a monopoly and this designation affects the interests of the other party.⁹⁰⁰ Regarding the designation of monopolies, the parties agreed to take their reciprocal interests into account (negative comity).⁹⁰¹

Even if the FTAs of 2006 do not substantially develop global standards of competition enforcement cooperation, it can be observed that a similar level of integration of economic interdependence, namely the Colombian and Peru interdependence, allows the US to export its interpretation of competition enforcement to foreign countries and to set up similar competition enforcement provisions.

(5.) FTAs of 2007

In 2007 the US-Korea FTA was concluded which included competition enforcement cooperation provisions similar to the previous US FTAs.⁹⁰² As such, the contractors recognized the importance of cooperation in competition law enforcement and agreed to cooperate by mutual assistance, notification, consultation, and exchange of information in competition law matters.⁹⁰³ Likewise, the wording of the notification, consultation and exchange of information provisions is similar.⁹⁰⁴ It does not provide notable developments regarding the degree of obligation of cooperation in competition law enforcement. Still, at that time the cooperation provisions were state-of-the-art regarding the standards of competition enforcement cooperation. Evidently, there was a big influence of the US concluding similar treaties at the time, which provided comparable standards of cooperation.

The Japan-Chile FTA is no different from the Japanese PTAs discussed before. Besides the recognition of the importance of competition enforcement cooperation, the parties specify this cooperation with a basic declaration to cooperate in competition enforcement areas.⁹⁰⁵ The FTA does not provide indirect references to possible

⁸⁹⁸ Art. 7.3 – Art. 7.5 Panama-Singapore, *Free Trade Agreement* (2006).

⁸⁹⁹ Art. 16.01 Taiwan-Nicaragua, *Free Trade Agreement* (2006).

⁹⁰⁰ Art. 16.03.2 *ibid.*

⁹⁰¹ Art. 16.03.2 lit. a and Art. 16.03.3 lit. a *ibid.*

⁹⁰² US-Korea, *Free Trade Agreement* (2007).

⁹⁰³ Art. 16.1.7 *ibid.*

⁹⁰⁴ E.g. the “transparency” provisions of cooperation of Art. 16.2 and 16.7.

⁹⁰⁵ Art. 167 Japan-Chile, *Economic Partnership Agreement* (2007); even if the agreement is also called an “Economic Partnership Agreement” a free trade area between the countries is created. For

implementation agreements nor further specifications regarding the distinct stages of competition enforcement cooperation. For that reason the Japan-Chile FTA may be considered superior to the more detailed Japan PTAs and is therefore considered a (very) basic MoU on competition law enforcement cooperation.

The Georgia-Turkey FTA includes basic declarations on competition law. In a rather basic way, the parties agreed to cooperate through consultation and exchange of information.⁹⁰⁶ The consultations are required to take place within a set time frame within an established Joint Committee. The cooperation provisions are very basic and non-binding, which is why they have to be considered as basic MoU.

The EFTA-Egypt FTA only provides very basic declarations regarding competition enforcement cooperation led by a Joint Committee without any specifications and thus, the provisions shall be considered as basic MoU.⁹⁰⁷

Overall, the FTAs of 2007 do not represent notable developments of competition enforcement cooperation.

(6.) FTAs of 2008

In 2008, Canada concluded three FTAs, all of which contain a competition chapter and corresponding enforcement cooperation provisions. Similar to the US-Colombia and US-Peru FTAs, the Canada-Colombia and Canada-Peru FTAs have identical competition provisions. To that end, the FTAs acknowledge the importance of cooperation in competition enforcement as well as provide for such cooperation through (on-request) consultation, exchange of information etc.⁹⁰⁸ Moreover, the FTAs provide that the other party shall give full sympathetic consideration to the inquiry of the requesting party (positive comity).⁹⁰⁹ More specifically a party shall notify another if it intends to designate a monopoly and such designation may affect the other party's interests.⁹¹⁰ These provisions meet the up-to-date cooperation criteria of the period, but do not develop them further, as no new provisions regarding the competition enforcement cooperation may be detected. The provisions on cooperation in competition law of the two FTAs are considered as basic MoU.

As concluded before, Peru and Colombia seem to have identical perception on how competition laws should work. Just as the US, Canada too may be considered a more developed state in international cooperation of competition law enforcement matters. Consequently, the Canada-EFTA FTA includes cooperation enforcement provisions. The parties agreed that they may give notice of anticompetitive conduct within another's territory affecting its market and ask for effective competi-

that reason the Agreement is considered as a FTA cf. Art. 1 of the Agreement.

⁹⁰⁶ Art. 20.3-20.5 Georgia-Turkey, *Free Trade Agreement* (2007).

⁹⁰⁷ Art. 31 ff. EFTA-Egypt, *Free Trade Agreement* (2007).

⁹⁰⁸ Art. 1304 of Canada-Colombia, *Free Trade Agreement* (2008) and Canada-Peru, *Free Trade Agreement* (2008).

⁹⁰⁹ Ibid.

⁹¹⁰ Art.1305.2 *ibid.*

tion enforcement against the misconduct (positive comity).⁹¹¹ The provisions of the Canada-EFTA FTA are, therefore, very similar to the previous Canadian FTAs and PTAs. No distinctive development of competition enforcement cooperation can be detected, which accordingly justifies the categorization of the provisions as basic MoU. The same can be said about the EFTA-Columbia, the clauses of which concerning cooperation are nearly identical.⁹¹²

Likewise, the Peru-Singapore FTA contains almost the same competition enforcement stipulations as the Canada-Peru FTA.⁹¹³ As in 2007, the 2008 FTAs were not able to develop the competition enforcement cooperation provisions. All provisions on competition law cooperation belong to the same category of basic MoU.

Finally, also the Australia-Chile FTA was concluded in 2008. Its competition chapter includes not only just a basic declaration to cooperate,⁹¹⁴ but also a declaration to do so in multi- and plurilateral fora,⁹¹⁵ which is a clear reaffirmation of the parties' cooperation in the OECD, UNCTAD and ICN. The parties specified their cooperation mechanisms similarly to those of other FTAs, including notification, consultation, and exchange of information measures, as well as a provision to assist one another technically.⁹¹⁶ The cooperation mechanisms were state-of-the-art in 2008, but still do not exceed the non-binding nature of the basic MoU category.

(7.) FTAs of 2009

In 2009, five FTAs were concluded.

Canada-Panama FTA incorporated similar basic declarations and recognitions to cooperate in competition enforcement, including the different stages of cooperation such as notification, consultation etc.⁹¹⁷ The parties also agreed to notify one another (in writing) when intending to designate a monopoly in another's territory.⁹¹⁸ The provisions of the Canada-Panama FTA are therefore nearly identical to those of the other Canada FTAs. Consequently, they too may be categorized as basic MoU.⁹¹⁹

⁹¹¹ Canada-EFTA, *Free Trade Agreement* (2008).

⁹¹² Art. 8.3 EFTA-Colombia, *Free Trade Agreement* (2008).

⁹¹³ Cf. Art. 14.3-14.6 Peru-Singapore, *Free Trade Agreement* (2008).

⁹¹⁴ Art. 14.2.3 Australia-Chile, *Free Trade Agreement* (2008).

⁹¹⁵ Art. 14.2.4 *ibid.*

⁹¹⁶ Art. 14.6-14.8 and 14.10 *ibid.*

⁹¹⁷ Art. 14.02.3 and 14.02.4 Canada-Panama, *Free Trade Agreement* (2009).

⁹¹⁸ Art. 14.03.2 *ibid.*

⁹¹⁹ Notably, the DESTA does not code the existence of competition information provisions. As displayed, the provisions concerning competition enforcement cooperation are not different to the other Canadian competition provisions which are recognized as competition information provisions within DESTA. For that reason, this differentiation of DESTA is inconsistent.

The Japan-Switzerland FTA of 2009 also includes a recognition of the importance of cooperation and a declaration to cooperate to avoid or lessen the possibility of diplomatic schisms (negative comity).⁹²⁰ Again, the parties agreed to indirectly specify the stages of competition enforcement cooperation in the corresponding implementation agreement of the FTA.⁹²¹ Chapter 3 of the Implementation Agreement quite elaborately specifies the different stages of cooperation, directly addressing the reciprocal competition authorities, including notification, exchange of information etc.⁹²² Moreover, in cases that the mutual enforcement cooperation provisions fail to prevent diplomatic schisms, the parties agreed to consult one another in a Joint Committee to arbitrate and dispel their dissents.⁹²³ Again, the Implementing Agreement may be specified as an soft agreement of mutual competition law assistance. Due to the high level of detail, the degree of competition enforcement cooperation is relatively highly developed, yet not binding. Still, the quite general reference to competition enforcement cooperation in the implementing agreement (including soft mutual assistance MoUs) presents weaknesses. Even though the parties never agreed on standards of competition enforcement cooperation, the possibility remains for them to alter the mutual understandings of the implementing agreement, lessening cooperation standards. It would be preferable for the parties to use the capacity of the FTA to agree upon as many binding values and mechanisms of cooperation as plausible.

The EFTA-GCC (Cooperation Council of the Arab States of the Gulf) FTA of 2009 includes a basic declaration concerning cooperation by the exchange of information, consultation, and notification in competition law matters, all within the boundaries of confidentiality.⁹²⁴ Furthermore, the parties agreed to consult with one another in competition matters of interest (positive comity).⁹²⁵ The requests to consult need to be detailed enough to indicate the reason for the consultation and the parties are required to consult promptly after the request.⁹²⁶ The competition enforcement cooperation provisions of the FTA are fairly basic as no further specifications have been made. For that reason, the provisions may be categorized as soft positive comity MoU.

Similarly basic is the Turkey-Jordan FTA, which includes provisions reflecting the will of the contractors to cooperate in competition enforcement by notifying, consulting, and exchanging information and providing mutual technical assistance in competition matters.⁹²⁷ More specifically, the parties agreed to notify one another

⁹²⁰ Art. 104.1 Japan-Switzerland, *Free Trade Agreement*.

⁹²¹ Art. 104.2 *ibid.*

⁹²² Ch. 3 Japan-Switzerland, *Implementing Agreement pursuant to Art. 10 of the Agreement on Free Trade and Economic Partnership*.

⁹²³ Art. 105 Japan-Switzerland, *Free Trade Agreement*.

⁹²⁴ Art. 4.2 EFTA-GCC, *Free Trade Agreement* (2009).

⁹²⁵ Art. 4.4 *ibid.*

⁹²⁶ *Ibid.*

⁹²⁷ Art. 25.3 Turkey-Jordan, *Association Agreement establishing a Free Trade Area* (2009).

in matters concerning state aid.⁹²⁸ Still, the FTA does not include any more specific, nor any binding competition enforcement cooperation provisions. For that reason, the FTA has to be considered as a fairly basic MoU in terms of competition enforcement cooperation.

The competition chapter of the Malaysia-New Zealand FTA includes a basic declaration of the contractors to cooperate in competition matters.⁹²⁹ The different stages of the competition enforcement cooperation are specified, including exchange of information, technical assistance, exchange of officials for training purposes, etc.⁹³⁰ Rather than agreeing upon specific notification or consultation processes, the parties quite generally agreed upon the possibility of discussing matters of competition law on demand (positive comity).⁹³¹ Apart from the agreement that the requested state should answer to the request promptly, no further specifications or examples are given. The FTA's competition chapter is rather basic in terms of competition enforcement cooperation matters, therefore can be categorized as a positive comity MoU.

Similarly, the Australian-ASEAN-New Zealand FTA (AANZFTA) includes the agreement of the contracting parties to cooperate in competition matters.⁹³² The different stages are displayed equivalently and reflect a focus on technical assistance such as the exchange of experience regarding the promotion and enforcement of competition law and policy; the exchange of consultants and experts on competition law and policy; the participation of officials as lecturers, consultants, or participants at training courses on competition law and policy, etc.⁹³³ Besides the technical development possibilities, the parties agreed upon a classic cooperation-fostering mechanism, exchanging information on competition law matters.⁹³⁴ Notably, no consultation and notification provisions regarding competition enforcement cooperation are included in the AANZFTA. The parties agreed to establish contact points within their states to ensure cooperation on technical basis and exchange of information.⁹³⁵ As these contact points are not specified, presumably the competition enforcement authorities are directly entrusted with these tasks. Rather than establishing competition enforcement cooperation provisions, it seems that the parties wanted to agree to cooperate on a soft law basis comparably to the ICN and

⁹²⁸ Art. 26.3 *ibid.*

⁹²⁹ Art. 12.3.1 Malaysia-New Zealand, *Free Trade Agreement* (2009).

⁹³⁰ Art. 12.3.2 *ibid.*

⁹³¹ Art. 12.4.1 *ibid.*

⁹³² The AANZFTA is the FTA is the largest free trade area established so far. It contains of 12 Member States. The ASEAN members are Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam.

⁹³³ Ch. 14 Art. 2.1 Zealand", *Free Trade Agreement (AANZFTA)*.

⁹³⁴ Cf. Art. 2.2 lit.b *Ibid* ; The DESTA coded an absence of such an information exchange provision. Even if the provision is rather basic, it is similar to the discovered exchange of information provisions concerning competition law.

⁹³⁵ Ch. 14 Art. 3 Zealand", *Free Trade Agreement (AANZFTA)*.

develop their competition enforcement authorities by the exchange of best practices. The provisions are too vague to assume that the parties wanted to conclude a MLAT regarding competition enforcement cooperation. For that reason, the AANZFTA competition enforcement cooperation provisions have to be categorized as soft mutual assistance MoU. Compared to the ANZERTA, the influence of the mutual technical assistance (as an MLAT) into the FTA, as well as the regional neighborhood of the contracting states have to be noted.

Within the Korea-India FTA of 2009 the parties included a recognition of the importance of cooperation in competition matters, as well as a declaration to cooperate including capacity building, exchange of information, notification and consultation, including positive comity principles.⁹³⁶ Yet those general declarations are not specified in any sense. For that reason, the competition enforcement cooperation provisions are considered as basic MoU.

Overall, the FTAs of 2009 do not significantly develop competition enforcement cooperation standards. The perception in AANZFTA towards a non-binding cooperation by technical exchange and corresponding practical development in the shape of a mutual assistance MoUs recurs.

(8.) FTAs of 2010

In 2010 four FTAs with a competition chapter were concluded. The largest and economically most pertinent FTA concluded was the EU-Korea FTA. The provisions of its competition chapter include basic declarations of the Member States regarding the importance of cooperation in competition enforcement matters, as well as a basic provision for the parties to consult on questions arising under the competition chapter.⁹³⁷ Regarding the enforcement of competition matters the parties agreed to cooperate by consultation, notification, and exchange of non-confidential information.⁹³⁸ Rather than further specifying these stages of competition enforcement cooperation, the parties referred to the EU-Korea Agreement concerning cooperation on anti-competitive activities of 2009.⁹³⁹ The aim of this cooperation agreement was to create convergence in antitrust enforcement between the EU and Korea to avoid or lessen the possibility of conflicts in competition enforcement matters comity.⁹⁴⁰ The agreement directly addresses the reciprocal competent competition authorities and urges them to act consistent with the specified cooperation stages negative comity. The different stages of competition enforcement cooperation are correspondingly designed as positive comity codes of conducts. As the understandings are not of a binding nature, the agreement may be considered a soft mutual assistance MoU

⁹³⁶ Art. 11.3 and 11.4 Korea-India, *Free Trade Agreement* (2009).

⁹³⁷ Art. 11.6.1 and 11.7 EU-Korea, *Free Trade Agreement* (2010).

⁹³⁸ Art. 11.6.2 *ibid.*

⁹³⁹ *Ibid.*

⁹⁴⁰ Cf. Rec. 1 of EC-Korea, *Agreement concerning cooperation on anti-competitive activities – L 202/36* (2009).

on competition law cooperation. As before, the agreement is of a more elaborate nature: the parties are urged to notify one another with respect to their enforcement activities. These enforcement activities are specified by subsequent examples e.g.:

enforcement activities which involve a concentration in which one or more parties to the transaction is a company incorporated or organized under the applicable laws and regulations of the territory of the other Party.⁹⁴¹

The parties are urged to have regard for each other's interests when coordinating their enforcement activities (negative comity). These interests are further specified in positive comity provisions.⁹⁴² The boundaries of confidentiality are also specified.⁹⁴³ Furthermore, they agreed that their competition authorities should meet on annual basis to consult on competition enforcement matters and to exchange information.⁹⁴⁴ Compared to Japan's PTAs, the weakness of the EU-Korea FTA reference to a mutual assistance MoU on competition cooperation becomes apparent when looking at the termination possibilities of the agreement itself: It may be unilaterally terminated by the sole written notification of one party.⁹⁴⁵ Even if it is unlikely that the parties terminate well-developed competition enforcement cooperation, the agreement provides the possibility for altering the standards of cooperation. As stated, corresponding strengths and weaknesses arise from such a flexible design of the agreement. It would be preferable to implement these competition enforcement cooperation standards to the FTA to ensure that free trade and antitrust regulation are deeply interwoven for the sake of a well-functioning free market.

The Costa Rica-Singapore FTA of 2010 includes a basic recognition of the importance to cooperate and a declaration to cooperate in competition matters.⁹⁴⁶ To develop their understanding, the parties sought to enhance better direct communication between their competition enforcement authorities.⁹⁴⁷ Specifically the parties agreed to consult upon request of one party in arising interest in competition matters positive comity, obeying confidentiality.⁹⁴⁸ Furthermore, the parties agreed to notify one another in matters "that may affect the requesting Party's trade or investment within the free trade area".⁹⁴⁹ Again, in taking direct reference to anticompetitive behavior affecting the free trade area implies that the parties seem to have agreed that anticompetitive behavior is a barrier to the creation of a free market. Yet the provisions are not specified by examples and are thus considered as rather basic and basic MoU.

⁹⁴¹ Art. 2.2 lit. c *ibid.*

⁹⁴² Art. 4-6 *ibid.*

⁹⁴³ Art. 7 *ibid.*

⁹⁴⁴ Art. 8 *ibid.*

⁹⁴⁵ Art. 11.2 *ibid.*

⁹⁴⁶ Art. 9.3.1 Costa Rica-Singapore, *Free Trade Agreement* (2010).

⁹⁴⁷ Art. 9.3.2 *ibid.*

⁹⁴⁸ Art. 9.4 *ibid.*

⁹⁴⁹ Art. 9.5 *ibid.*

In its competition chapter the EFTA-Peru FTA of 2010 includes a general article called “cooperation”. Besides a basic declaration of the parties to cooperate in competition enforcement, the parties are encouraged to notify one another when reciprocal interests are affected.⁹⁵⁰ Moreover, the parties agreed to obey one another’s interests in their enforcement activities and, when they detect affecting anticompetitive behavior in another territory that they may request the other party to initiate appropriate enforcement activities (positive comity).⁹⁵¹ Additionally the FTA provides for the exchange of information, including information which is not publicly available within the boundaries of confidentiality.⁹⁵² Moreover, the parties agreed to consult within their established Joint Committee.⁹⁵³ As all those different stages of cooperation in competition enforcement matters are quite general it is positive that the parties recognized and agreed upon a possibility to further specify these stages in a cooperation agreement.⁹⁵⁴ Still it would be advantageous to directly include any further specifications in the FTA itself. The cooperation provisions on competition law are therefore considered as basic MoUs.

The EFTA-Ukraine FTA of 2010 also includes very basic provisions concerning competition enforcement. The parties recognized the importance of cooperation in those matters and agreed to cooperate.⁹⁵⁵ The different stages of cooperation are only specified as an exchange of information.⁹⁵⁶ For the sake of a better understanding between the parties they agreed to request and supply one another with such information, in a Joint Committee when their interests are affected positive comity.⁹⁵⁷ Further specifications have not been made, which is why the competition enforcement provisions of the FTA are contemplated as rather basic and soft MoUs.

Overall it has to be noted that there is a slight trend towards referring to MoUs of mutual assistance, instead of directly developing competition enforcement cooperation provisions within the FTAs.

(9.) FTAs of 2011

In 2011 only two FTAs including a competition chapter were concluded: The EFTA-Hong Kong China and the Korea-Peru FTA. To achieve effective competition enforcement Korea and Peru generally agreed upon cooperation in competition matters.⁹⁵⁸ The different stages of cooperation are specified by the parties subsequently. The parties agreed to notify one another, consult with one another, offer technical assistance in competition enforcement, and exchange non-confidential information

⁹⁵⁰ Art. 8.3.1 and 8.3.2 EFTA-Peru, *Free Trade Agreement* (2010).

⁹⁵¹ Art. 8.3.3 and 8.3.4 *ibid.*

⁹⁵² Art. 8.3.5 *ibid.*

⁹⁵³ Art. 8.4 *ibid.*

⁹⁵⁴ Art. 8.3.6 *ibid.*

⁹⁵⁵ Art. 7.5 EFTA-Ukraine, *Free Trade Agreement* (2010).

⁹⁵⁶ *Ibid.*

⁹⁵⁷ Art. 7.6 EFTA-Ukraine, *Free Trade Agreement*.

⁹⁵⁸ Art. 15.3.1 Korea-Peru, *Free Trade Agreement* (2011).

and to further develop these (familiar) stages of cooperation.⁹⁵⁹ The specified stages mandate that notification and consultation concerning competition law enforcement activities shall take place upon the request of a party, promptly and as detailed as possible within the boundaries of confidentiality.⁹⁶⁰ For the sake of consumer protection laws, the parties agreed that they may cooperate applying the different stages of cooperation in cases of mutual concern to safeguard consumer protection laws, especially consumer welfare.⁹⁶¹ This outline highlights the importance of international cooperation in competition enforcement regarding the welfare idea of a free market which might easily be infringed by anticompetitive behavior. As it is the first direct recognition of this topic within FTAs supporting the idea of cooperation, it is considered as a small development of competition enforcement cooperation. Yet the level of obligation does not exceed the basic MoU level.

The parties to the EFTA-Hong Kong China FTA agreed, very lacklusterly, to “cooperate and consult” in matters facing anticompetitive behavior.⁹⁶² If they are unable to resolve dissents in enforcement activities, they may call the Joint Committee of the FTA.⁹⁶³ Other specifications have not been agreed upon, which justifies a rather basic consideration of the competition enforcement cooperation provisions of the FTA in the shape of a basic soft MoU.

(10.) FTAs of 2012

In 2012, both Korea and Hong Kong China concluded FTAs where competition issues are regulated in more elaborate competition chapters.

The Hong Kong China-Chile FTA includes a declaration of the parties to cooperate regarding the enforcement of competition issues via technical assistance, the exchange of information, consultation, and notification.⁹⁶⁴ Yet the parties only rather simplistically specified the provisions on how to consult with another: The parties want to consult upon request regarding enforcement activities (positive comity) and if the consultation process does not solve the inquiry they may request the common FTA enforcing committee.⁹⁶⁵ In that event the parties agreed that they should supply the committee with the necessary assistance for the committee to examine the inquiry.⁹⁶⁶ Those provisions are rather basic because they are not accompanied by corresponding examples. Furthermore, the provisions to cooperate are non-binding, as the parties merely seek to facilitate the agreement without further specifying cooperation mechanisms. The agreement to review the competition enforcement cooperation provisions 3 years after the implementation of the FTA is without effect,

⁹⁵⁹ Art. 15.3.2 and 15.3.3 *ibid.*

⁹⁶⁰ Art. 15.4, 15.5 and 15.6 *ibid.*

⁹⁶¹ Art. 15.8.1 *ibid.*

⁹⁶² Art. 7.1.3 EFTA- Hong Kong China, *Free Trade Agreement* (2011).

⁹⁶³ Art. 7.1.4 *ibid.*

⁹⁶⁴ Art. 13.2 lit. d and Art. 13.3 Hong Kong China-Chile, *Free Trade Agreement* (2012).

⁹⁶⁵ Art. 13.4 *ibid.*

⁹⁶⁶ *Ibid.*

as no review of the clauses can be found in amendments or implementation agreements of the FTA.⁹⁶⁷ The understandings of cooperation on competition law matters are therefore categorized as soft positive comity MoU. The Korea-Turkey FTA in its competition chapter includes a basic declaration regarding the importance of cooperation and regarding the different stages of competition enforcement cooperation alike.⁹⁶⁸ Not only consultation but notification matters are generally specified by the parties. They agreed to consult with one another upon request within the boundaries of confidentiality (positive comity) and to notify the another concerning competition enforcement activity affecting the other's interests.⁹⁶⁹ These understandings too can be categorized as soft positive comity MoU.

The contents of the Colombia and Peru competition provisions were discussed before, however, in 2012 these two states surprisingly come together as contracting partners with the EU in a single FTA: the EU Colombia Peru Free Trade Agreement. Notably both states have been Member States of the Andean Community since 1969.⁹⁷⁰ Regarding the competition law provisions in their FTA with the EU, in its competition chapter a basic declaration of the parties to cooperate in the enforcement of competition matters is included.⁹⁷¹ The different stages of cooperation are subsequently described. The parties agreed that their respective competition authorities may request one another to cooperate in competition enforcement activity without prejudice.⁹⁷² Further, the FTA states that the parties shall exchange information in order to facilitate effective competition enforcement within the boundaries of their respective legal systems.⁹⁷³ If the parties detect anticompetitive conduct within another's territory affecting their (bilateral trade-) interests, they may request the other party to initiate antitrust enforcement activities against the offender (positive comity).⁹⁷⁴ More specifically the parties agreed upon provisions concerning consultation, notification, and technical assistance. As in other FTAs, the parties agreed that they should notify one another with respect to their competition enforcement activities affecting important interests for the other party at times as soon as possible.⁹⁷⁵ In a footnote to this provision the parties specified that enforcement activities affecting important interests in particular means "when the notification could contribute to achieve the objectives of the enforcement activities of the notified competition authority".⁹⁷⁶ This footnoted specification is a change of perspective for the competition authorities: Rather than just simply declaring to

⁹⁶⁷ Art. 13.4 *ibid.*

⁹⁶⁸ Art. 3.4 Korea-Turkey, *Free Trade Agreement* (2012).

⁹⁶⁹ Art. 3.5 and 3.6 *ibid.*

⁹⁷⁰ <http://www.comunidadandina.org> (last visited on:30.11.20).

⁹⁷¹ Art. 261.1 EU-Colombia Peru, *Free Trade Agreement* (2012).

⁹⁷² Art. 261.2 *ibid.*

⁹⁷³ Art. 261.3 and 4 *ibid.*

⁹⁷⁴ *Ibid.*

⁹⁷⁵ Art. 262 *ibid.*

⁹⁷⁶ Footnote 77 concerning Art. 262 *ibid.*

cooperate in the interests of another or to cooperate in the specific event, the parties agreed to notify one another altruistically, to support the effectiveness of another's competition enforcement activities. In accordance with this change of perspective, the parties agreed to technically assist each other "with a view [of] developing a competition culture".⁹⁷⁷ To achieve this goal, the FTA states that the initiatives of the Agreement shall focus on strengthening the technical and institutional capacities of the Member State's competition authorities and training of their human resources by the exchange of experiences.⁹⁷⁸ The tonality to develop a "competition culture" rather than simply cooperate in those matters shows the deep conviction of the Member States to foster competition law for the sake of a well-functioning free market. The consultation provision of the FTA are similar to other consultation provisions. The parties agreed to consult without prejudice upon request for the sake of a better common understanding.⁹⁷⁹ Furthermore, within the consultation process the parties agreed to identify how the issues under consultation are affecting the proper functioning of the free markets, as well as affecting the interests of consumers, trade, and the investments of the parties.⁹⁸⁰ Those specifications highlight the importance of cooperation in competition matters for the different areas and reflect the determination of the Member States to secure those stages with an effective competition law enforcement cooperation. Even if the provisions are non-binding and do not significantly develop the competition enforcement cooperation provisions, the displayed change of perspective marks a cooperation fostering development of competition policy. For that reason, the EU-Colombia Peru FTA's competition provisions are considered as comparatively strong positive comity and mutual assistance MoU.⁹⁸¹

In a rather basic form, the Australia-Malaysia FTA of 2012 also includes competition enforcement cooperation provisions in its competition chapter.⁹⁸² Besides a simple declaration regarding the importance of competition enforcement cooperation, the parties agreed to cooperate fostering both consumer protection and competition law enforcement, the latter through the exchange of information, notification, consultation and coordination of cross-border enforcement.⁹⁸³ The provisions to notify and consult with one another are not different nor more specific than previously discussed provisions in various FTAs, which is why the competition enforcement cooperation provisions of the Australia-Malaysia FTA are rather basic soft MoU. Though it has to be noted that, again, consumer protection appears to find more awareness in the competition law.

⁹⁷⁷ Art. 264.1 *ibid.*

⁹⁷⁸ Art. 264.2 *ibid.*

⁹⁷⁹ Art. 265.1 *ibid.*

⁹⁸⁰ Art. 265.2 *ibid.*

⁹⁸¹ Ecuador joined the EU-Colombia Peru FTA in 2016, cf. EC, *Press release – IP/16/3615* (2016).

⁹⁸² Art. 14.6.1 Australia-Malaysia, *Free Trade Agreement* (2012).

⁹⁸³ Art. 14.6.2 *ibid.*

(11.) FTAs of 2013

In 2013, five competition FTAs with competition chapters were concluded. The Colombia-Korea FTA of 2013 includes all elaborated stages of cooperation, from basic declarations listings the different applicable tools of competition enforcement to a more elaborate specification of these stages within the boundaries of confidentiality.⁹⁸⁴ Notably within the provisions regarding technical assistance the idea to promote a competition culture similar to the EU-Colombia Peru FTA of 2012 recurs.⁹⁸⁵ Apart from that, the competition law enforcement cooperation provisions are very similar to the Korea-Peru FTA of 2011. The cooperation measures regarding competition law are, therefore, categorized as basic MoU of positive comity and mutual assistance. Other than that, China concluded two other FTAs in 2013 – one with Switzerland and one with Iceland, although the competition law enforcement cooperation provisions are rather basic: Within the China-Switzerland FTA of 2013 the parties declared that competition law enforcement cooperation may have a significant effect on matters of trade between the parties and that their competition authorities shall cooperate in that regard.⁹⁸⁶ That implies that the parties see anti-competitive behavior as a trade barrier. Apart from the fact that the parties did not specify this cooperation whatsoever, they agreed that they may request consultation upon trade affecting matters within the Joint Committee asking for resolution (positive comity).⁹⁸⁷ In the China-Iceland FTA of 2013 the competition enforcement cooperation provisions are similarly general. The FTA simply states, without any reference to its importance that cooperation in competition matters may include exchange of information.⁹⁸⁸ Further, the parties agreed that they will consult with each other on pertinent matters.⁹⁸⁹ Yet in both FTAs no further specifications have been made. For that reason the competition enforcement cooperation provisions are considered as fairly basic soft MoU.

Within the EFTA-Central America (Costa Rica, Panama) FTA the parties agreed that their competition authorities shall cooperate on competition enforcement with the aim of putting an end to anticompetitive practices.⁹⁹⁰ For that reason the parties wanted their competition authorities to exchange information within the boundaries of confidentiality and to foster a diplomatic understanding of the parties to consult on any matter arising regarding competition law.⁹⁹¹ No provision of this agreement specifies nor in any form develops international competition enforcement cooperation. The provisions are therefore categorized as basic soft MoU.

⁹⁸⁴ Art. 13.3-13.6 Colombia-Korea, *Free Trade Agreement* (2013).

⁹⁸⁵ Art. 13.6 *ibid.*

⁹⁸⁶ Art. 10.4 China-Switzerland, *Free Trade Agreement* (2013).

⁹⁸⁷ Art. 10.5 *ibid.*

⁹⁸⁸ Art. 62.4 China-Iceland, *Free Trade Agreement* (2013).

⁹⁸⁹ Art. 62.5 *ibid.*

⁹⁹⁰ Art. 8.2.1 EFTA-Central America, *Free Trade Agreement* (2013).

⁹⁹¹ Art. 8.2.2 and 8.3 *ibid.*

Finally, in the Canada-Honduras FTA, the parties declared that they should endeavor to find mutual understanding in competition enforcement and that they “shall make every attempt through cooperation and discussions to resolve, to their mutual satisfaction, a matter that might affect the operation”.⁹⁹² This provision reflects the will of the contracting parties to cooperate in competition law matters but does not go beyond that memorandum. For that reason the competition enforcement cooperation provisions are considered as very basic soft MoU.

Overall, in 2013 the FTAs were not able to significantly develop international competition enforcement cooperation. It even has to be noted that the majority of the FTAs were falling behind the achieved standards of international competition enforcement cooperation of previous years.

(12.) FTAs of 2014

In 2014, five FTAs and three EU Accession Agreements (associated as FTAs) were concluded. Korea again concluded two FTAs, both including a competition chapter. To promote competition by the cooperation of their enforcement authorities, Korea and Australia in their FTA agreed to combat anticompetitive conduct which would have the potential to restrict bilateral trade and investment.⁹⁹³ As mentioned before, such a statement implies that the contracting states consider anticompetitive behavior as a trade barrier. To eliminate such barriers the parties further specified their cooperation. They not only wanted to enforce competition laws in convergence but to develop the different stages of cooperation such as exchange of information, notification, technical cooperation, and coordination of cross border competition matters.⁹⁹⁴ The FTA provides that parties shall utilize their existing competition mechanisms, which is highlighted by the reference to the existing competition agreement between Australia and Korea.⁹⁹⁵ The nature of that competition agreement (whether an MoU or an MLAT) deserves to be assessed. The Australia-Korea Competition Agreement is directly concluded and signed by the state’s competition authorities.⁹⁹⁶ The agencies agreed that they will share information, cooperate with and provide assistance in competition law enforcement to each other within their capacity and when compatible with their essential interests.⁹⁹⁷ The fact that the agencies want to apply their arrangement to all agency activities and that they will provide information and assistance (as long as the requested agency does not consider the request for assistance either as prejudicial or as conduct against its national law), shows that the agencies want to attribute a level of obligation to their arrange-

⁹⁹² Art. 15.5 Canada-Honduras, *Free Trade Agreement* (2013).

⁹⁹³ Art. 14.1 Australia-Korea, *Free Trade Agreement* (2014).

⁹⁹⁴ Art. 14.5.2 *ibid.*

⁹⁹⁵ *Ibid.*; Cf. para. 2 Australia-Korea, *Cooperation Arrangement regarding the application of their Competition and Consumer Protection Laws* (2002).

⁹⁹⁶ Preface and para. 1 Australia-Korea, *Cooperation Arrangement regarding the application of their Competition and Consumer Protection Laws*.

⁹⁹⁷ Para. 2 *ibid.*

ment.⁹⁹⁸ Furthermore, the agencies agreed on a clear set of rules of cooperation and a corresponding “procedure for assistance”.⁹⁹⁹ The agreed rules of cooperation specify the exchange of information, notification, and assistance in enforcement related activities. Information which will be exchanged is specified as information facilitating effective application of the competition and consumer protection laws, avoiding unnecessary duplication between the agencies, facilitating coordinated investigations, research and education, promoting a better understanding of the agencies including their economic and legal conditions and relevant theories and keeping each other informed of developments within their jurisdictions.¹⁰⁰⁰ The parties agreed that they will notify one another whenever an investigation or enforcement of related activity may affect important interests of the other party especially when they want to make inquiries in competition matter concerning persons located in the other’s territory.¹⁰⁰¹ Moreover, they want to notify one another in a detailed way enabling the notified agency to pursue a proper investigation.¹⁰⁰² Additionally and most notably, the parties agreed to assist one another by sharing confidential information.¹⁰⁰³ The agreed procedure of assistance includes specifications on how requests for assistance shall look between the parties, including a description of the parties involved in the investigation process, a description of the type of assistance required etc.¹⁰⁰⁴ Lastly, the parties agreed to settle disputes by consulting promptly.¹⁰⁰⁵ Overall the agreement between the agencies is to be considered an elaborate MLAT on competition law matters. The perspective directly linking cooperation provisions to developed mutual legal assistance, rather than just trying to develop cooperation stages, shows that the parties encourage innovation in competition enforcement cooperation. The MLAT by the parties fosters the development of international competition enforcement cooperation alike, as they set an example for other states. However, the FTA does not include such innovative approaches. The competition enforcement stages such as notification and the exchange of information are similar to other provisions and do have the capacity for innovations.¹⁰⁰⁶ The direct provisions of the FTA concerning cooperation in competition law are therefore considered as basic MoUs MoU.

In the Canada-Korea FTA of 2014, nearly identically to previously discussed Canadian FTAs, the parties acknowledged the importance of cooperation in competition enforcement matters by the different known stages of enforcement cooperation (“mutual legal assistance, notification, consultation and exchange of information

⁹⁹⁸ Para 3 *ibid.*

⁹⁹⁹ Para. 5 and 6 *ibid.*

¹⁰⁰⁰ Para 5.1 lit. a *ibid.*

¹⁰⁰¹ Para 5.2 lit. a *ibid.*

¹⁰⁰² Para. 5.2 lit b *ibid.*

¹⁰⁰³ Para. 5.3 *ibid.*

¹⁰⁰⁴ Para. 6.2 *ibid.*

¹⁰⁰⁵ *Ibid.*

¹⁰⁰⁶ Art. 14.6 and 14.7 Australia-Korea, *Free Trade Agreement*.

relating to the enforcement of competition laws and policies”).¹⁰⁰⁷ More specifically, the parties agreed to notify one another when they want to designate a monopoly and the enforcement measures taken against the monopoly may interfere with the interests of the other party.¹⁰⁰⁸ No other specifications have been made and no references to MLATs may be found. The FTAs competition enforcement cooperation provisions are, therefore, rather basic soft MoU.

Similarly, the Australia-Japan FTA of 2014 includes a basic declaration of the parties to cooperate in competition enforcement by exchanging information etc.¹⁰⁰⁹ Notably, and different to the previous competition cooperation provisions in Japanese FTAs, the parties did not agree to further specify the stages of competition (as exchange of information etc.) within the FTA implementation agreement.¹⁰¹⁰ Also further competition agreements between Japan and Australia cannot be found, which justifies the assumption that the political will to develop strong competition enforcement cooperation provisions decreased. For that reason the Australia-Japan FTA represents a step back from the previously higher developed standards in competition law cooperation as no significant developments in the FTA may be detected. The provisions are, therefore, categorized as basic MoUs.

Furthermore, in 2014 the Association Agreements (AA) EU-Ukraine, EU-Georgia and EU-Moldova were concluded. Their economic parts together have built the basis for forming the so-called “Deep and Comprehensive Free Trade Area” (DCFTA), as the Association Agreements incorporate FTA-like provisions.¹⁰¹¹ Yet, whilst comparing the provisions and specifications of the different competition chapters of the three Association Agreements, including cooperation in competition law matters, it has to be noted that they do differ.

The EU-Ukraine AA includes a general declaration regarding the importance of a free and undistorted competition for a free market.¹⁰¹² Furthermore, the contracting parties declared that anticompetitive conduct may have the potential to distort the proper functioning of a market and generally undermine the benefits of trade liberalization.¹⁰¹³ To reach this goal of undistorted competition in their free market, the parties agreed to maintain competition agencies equipped to effectively enforce their competition laws. In that regard they agreed that they will take notice of their reciprocal competition laws and enforcement activities (negative comity) and upon request supply one another with information on their enforcement activities (posi-

¹⁰⁰⁷ Art. 15.1.3 Canada-Korea, *Free Trade Agreement* (2014).

¹⁰⁰⁸ Art. 15.2.2 *ibid.*

¹⁰⁰⁹ Art. 15.5.1-3 Australia-Japan, *Free Trade Agreement* (2014).

¹⁰¹⁰ Art. 15.5.4 *ibid.*

¹⁰¹¹ Comparable to the EuroMed Agreements, the DCFTA and its corresponding Association Agreements are considered to be in line with the EU legal basis for Neighborhood Policy acc. to Art. 8 TEU and Art. 206 ff. and 216 ff. TFEU.

¹⁰¹² Art. 254 EU-Ukraine, *Association Agreement – L 161/3* (2014).

¹⁰¹³ *Ibid.*

tive comity).¹⁰¹⁴ They underlined the importance of effective cooperation in competition law matters and agreed that with a view of facilitating effective competition law application of their competition laws they will exchange information on competition legislation and corresponding enforcement activities (and other matters arising in that regard) on the request of the other.¹⁰¹⁵ Furthermore, the parties agreed to begin prompt consultations upon request of one another.¹⁰¹⁶ The aim of such consultations would be to foster mutual understanding by e.g. sharing non-confidential information in the course thereof.¹⁰¹⁷ The Agreement is more specific on cooperation regarding state aid matters, including what state aid is considered to be compatible with the proper functioning of the agreement and what transparency measures have to apply.¹⁰¹⁸ Yet, overall, the parties agreed that they will not be limited in their own considerations regarding competition law application by the agreement.¹⁰¹⁹ For that reason the cooperation provisions regarding competition law application are considered basic MoU.

The EU-Moldova AA made similar declarations regarding the importance of competition law in a free and undistorted market.¹⁰²⁰ And thus, they chose to maintain competition agencies effectively enforcing their respective competition laws.¹⁰²¹ To foster the mutual understanding of the parties for the sake of an effective working market, the parties also agreed to cooperate in competition matters.¹⁰²² Similarly to the EU-Ukraine AA, the parties agreed to exchange non-confidential information within the boundaries of confidentiality.¹⁰²³ More specifically, the parties agreed upon the handling of the granting state aid – they chose to cooperate by providing (on-request) one another with information regarding state aid.¹⁰²⁴ The provisions of the Agreement are not binding, hence it is considered a “soft” MoU.

The EU-Georgia AA's competition law cooperation provisions in its competition law chapter are very similar to the EU-Ukraine and EU-Moldova competition law provisions in its basic considerations regarding the importance of competition law and the effects of anticompetitive conduct to trade, effects which undermine the benefits of trade liberalization.¹⁰²⁵ Yet the parties did not agree upon a specific cooperation provision in competition law, but only agreed to, when requested, promptly

¹⁰¹⁴ Art. 255.1-5 *ibid.*

¹⁰¹⁵ Art. 259.1 and 3 *ibid.*

¹⁰¹⁶ Art. 260 *ibid.*

¹⁰¹⁷ *Ibid.*

¹⁰¹⁸ Art. 262 and 263 *ibid.*

¹⁰¹⁹ Art. 259.2 *ibid.*

¹⁰²⁰ Art. 334 EU-Moldova, *Association Agreement – L 260/4* (2014).

¹⁰²¹ Art. 335 *ibid.*

¹⁰²² Art. 337.1 *ibid.*

¹⁰²³ Art. 337.3 *ibid.*

¹⁰²⁴ *Ibid.*

¹⁰²⁵ Art. 204 f. EU-Georgia, *Association Agreement – L 261/84* (2014).

supply each other with information regarding state aid and respond to questions pertaining to particular subsidies.¹⁰²⁶ This reflects the importance of state aid provisions for the parties. Still the cooperation provisions are very basic MoUs.

It has to be noted that the elaboration of the AAs is different because the three AA states very much differ in their development. Even if it is the aim of the EU to form the DCFTA within their (eastern-) neighborhood policy, the AAs are mixed agreements, partly full trade agreements, partly development agreements. As mentioned in the EuroMed Agreements, the neighborhood agreements of the EU are once again marked by the hand of the EU. After comparing the three agreements, it becomes clear that the EU wanted to export their basic principles of competition law and cooperation in these matters.

(13.) FTAs of 2015

The China-Korea FTA was the only FTA to be concluded in 2015. In its competition chapter the parties basically recognized the importance of cooperation in competition enforcement and agreed to cooperate by the exchange of information, consultation, notification, and technical cooperation.¹⁰²⁷ The specifications of the different stages of competition enforcement cooperation are similar to provisions already discussed (e.g. notification about enforcement activities affecting the other party's interests and at early stages (positive comity)) and do not provide innovative concepts of cooperation.¹⁰²⁸ Regarding technical cooperation, aside from the exchange of experiences and capacity building cooperation, the FTA provides for the establishment of workshops and research collaborations for the authorities on competition enforcement matters – without naming it a tool enabling the development of a competition culture similar to the International Competition Network's aim.¹⁰²⁹ In its transparency provisions, the FTA provides that the parties shall publish their procedural investigation rules (also online). While new, due to the presence of the internet, this provision is not overwhelmingly innovative.¹⁰³⁰ The optional competition cooperation provisions of the FTA are up-to-date but cannot be considered as developing competition cooperation further. Therefore, the provisions are categorized as basic MoU.

(14.) FTAs of 2016

In 2016 the EU and Canada concluded their highly debated Comprehensive Economic and Trade Agreement (CETA). The CETA agreement was not considered as a EU-only agreement, although the ratification on the EU's side depends on the approval of all EU Member States, as the European Council had no right to conclude

¹⁰²⁶ Art. 206.3 *ibid.*

¹⁰²⁷ Art. 14.6.1 China-Korea, *Free Trade Agreement* (2015).

¹⁰²⁸ Art. 14.7-9 *ibid.*

¹⁰²⁹ Art. 14.10 *ibid.*

¹⁰³⁰ Art. 14.4.1 *ibid.*

CETA without the specific consent of all Member States.¹⁰³¹ The competition chapter of CETA is applied provisionally in line with Art. 218 TFEU.¹⁰³² Recognizing the importance of free, undistorted competition in the free trade area, the competition chapter of CETA provides that agencies of the parties to the agreement should cooperate in competition matters.¹⁰³³ Consequently, the parties to CETA are advised to “take appropriate measures to proscribe anti-competitive business conduct”.¹⁰³⁴ Yet instead of directly describing the different areas of cooperation in competition matters, the parties refer to their competition agreement of 1999.¹⁰³⁵ This means that the EU-Canada Competition Agreement of 1999 is directly incorporated within CETA.¹⁰³⁶ The 1999 agreement is considered an administrative soft law MoU between the contracting states and lacks the provision on legal exchange of confidential information regarding antitrust enforcement measures, which is why the states wanted to update it.¹⁰³⁷ The quite extensive competition cooperation mechanisms provided in the ECs proposal, including positive comity,¹⁰³⁸ detailed notification,¹⁰³⁹ consultation,¹⁰⁴⁰ and especially the direct exchange of confidential antitrust evidence between the member state’s authorities were promising.¹⁰⁴¹ Yet, the revised competition agreement was not designated to be a binding MLAT but a basic MoU.¹⁰⁴² The political process to revise the Agreement seems to have stagnated, as the European Council did not establish such an agreement with Canada to replace the 1999 agree-

¹⁰³¹ For further information regarding constitutional problematics of CETA with special respect to German law cf. Till Patrik Holterhus, ‘Eilanträge in Sachen CETA – Europäische Außenhandelspolitik im Mehrebenengeflecht von Verfassungs-, Unions- und Völkerrecht’ *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)* 2016, 896; Till Patrik Holterhus, *Schriftliche Stellungnahme zur öffentlichen Anhörung des Ausschusses für Wirtschaft und Energie am 5. September 2016 – Verfassungs- und europarechtliche Fragestellungen im Kontext des Ratifikationsprozesses des Umfassenden Wirtschafts- und Handelsabkommens (CETA); insb. zu den Einwirkungsmöglichkeiten des Deutschen Bundestages, 2016*, Ausschuss-Drks. 18(9)927 (2016).

¹⁰³² Cf. EU, *Press release STATEMENT/17/1959* (2017); Vgl. EU Ratsbeschluss v. 16.9.2017 Abl.–L 238/9.

¹⁰³³ Art. 17.1 and 17.3 EU-Canada, *Comprehensive Economic and Trade Agreement (CETA)*; cf. also Fabian Stancke, ‘TTIP, CETA und die Rolle des Wettbewerbsrechts in internationalen Freihandelsabkommen’ *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)* 2016, 569.

¹⁰³⁴ Art. 17.2 EU-Canada, *Comprehensive Economic and Trade Agreement (CETA)*.

¹⁰³⁵ *Ibid.*

¹⁰³⁶ Cf. EU-Canada, *Agreement between the European Communities and the Government of Canada regarding the application of their competition laws* (1999).

¹⁰³⁷ Cf. Para. 1 and para. 2 EC, *Proposal for a Council Decision on the signing, on behalf of the European Union, of the Agreement between the European Union and the Government of Canada regarding the application of their competition laws – COM(2016) 421 final* (2016).

¹⁰³⁸ Artt. V and VI of the Annex to *ibid.*

¹⁰³⁹ Art. II of the Annex to *ibid.*

¹⁰⁴⁰ Art. III of the Annex to *ibid.*

¹⁰⁴¹ Art. VII.2 of the Annex to *ibid.*

¹⁰⁴² Para. 2 *ibid.*

ment. CETA does not provide for other direct provisions regarding cooperation in competition matters, which is why the cooperation mechanisms of CETA are to be considered as a relatively basic soft MoU.

(15.) FTAs of 2017

In October 2014, the EU concluded its negotiations with Singapore regarding a comprehensive FTA (the so-called EUSFTA). Following the negotiations and due to ambiguities regarding updated investment protection within the EU, the European Commission sought an opinion of the ECJ.¹⁰⁴³ The European Commission wanted the ECJ to deliver an opinion outlining which parts of the EUSFTA fall within the EU-only competence, which parts of the EUSFTA fall within shared competencies of the EU Member States and which remain exclusively within the Member States competencies.¹⁰⁴⁴ In the opinion, the ECJ stated that the EUSFTA in its negotiated form of 2014 also covered shared competencies, therefore the EUSFTA was not considered as an EU-only FTA.¹⁰⁴⁵ Naturally, obtaining of political consent from all EU Member States would have been too time consuming, as such in April 2018 the European Commission proposed splitting the EUSFTA into two agreements: a “Free Trade Agreement” and an “Investment Protection Agreement”.¹⁰⁴⁶ The European Commission noted that they strived for the EU-Singapore agreements to be ratified before the end of its mandate in 2019.¹⁰⁴⁷ The Agreement was signed by the parties on 13 February 2019. However, it is yet to be ratified.

The competition part of the EUSFTA of 2014 is now part of the unratified EU-Singapore Free Trade Agreement.¹⁰⁴⁸ The European Council has not yet decided on the FTAs provisional application in line with Art. 218 TFEU.¹⁰⁴⁹

Besides general declarations of the importance of competition law, the parties negotiated to agree to cooperate in competition enforcement, especially by coordination and consultation regarding enforcement matters.¹⁰⁵⁰ The consultation provisions of the FTA are designed as consultation processes “upon request”, whereby relevant competition law matters are discussed subsequently.¹⁰⁵¹ This process may be

¹⁰⁴³ EC, *Factsheet to the Opinion of the European Court of Justice on the EUSFTA and the Decision of Competences in Trade Policy* (2017) 1.

¹⁰⁴⁴ *Opinion 2/15* (ECJ, 2017) Ref. 1.

¹⁰⁴⁵ *Ibid.*

¹⁰⁴⁶ Cf. EC, *Press release – IP/18/3325* (2018); see Website of the two agreements: EC, ‘EU-Singapore trade and investment agreements (authentic texts as of April 2018)’ (2018) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>> accessed 6.9.2018.

¹⁰⁴⁷ Cf. EC, *Press release – IP/18/3325*.

¹⁰⁴⁸ Cf. Ch. 11 EU-Singapore, *Free Trade Agreement (negotiated and not ratified version)* (2018).

¹⁰⁴⁹ Cf. European Parliament Directorate-General for External Policies, *Free Trade Agreement between the EU and the Republic of Singapore – Analysis EP/EXPO/B/INTA/2017/07* (2018) 73.

¹⁰⁵⁰ Art. 11.11 EC, ‘EU-Singapore trade and investment agreements (authentic texts as of April 2018)’.

¹⁰⁵¹ Art. 11.13 *ibid.*

considered as a positive comity procedure. Yet the cooperation process between the contracting states is limited, as the authorities are bound to fairly strict confidentiality measures and can only exchange non-confidential information.¹⁰⁵² Indirect references to existing competition law agreements between the EU and Singapore have not been made.¹⁰⁵³ Overall, the negotiated provisions reflect basic MoU in competition law enforcement cooperation. The negotiated review clause of the competition chapter leaves backdoors open for further development in that sector, once the FTA is fully ratified.¹⁰⁵⁴

In December 2017, the EU concluded its negotiations of an FTA with Japan and the agreement was signed in July 2018 in Tokyo and endorsed for ratification by the European Council and the European Parliament.¹⁰⁵⁵ The European Commission noted that it was its aim to fully ratify the FTA before the expiration of the mandate in 2019.¹⁰⁵⁶ Indeed, it was signed and ratified on 1 February 2019. The competition chapter of the FTA provides for the parties cooperation “within the framework” the EU-Japan Competition Law Agreement of 2003 and reaffirms this cooperation by references to coordination and consultation.¹⁰⁵⁷ As no further provisions on cooperation in competition law enforcement may be found, and the direct and reaffirmed link to the agreement of 2003 has been made, the Competition Law Agreement of 2003 may be considered as fully integrated within the FTA. Measuring the direct provisions of the FTA they appear as rather weak and basic MoU, especially due to the reaffirmation of full operational independence of the parties enforcing their competition law, highlighting the soft law character of the negotiations.¹⁰⁵⁸ The Competition Agreement of 2003 goes far beyond the rudimental competition enforcement provisions in the FTA. Similar to previous Japanese Competition Enforcement Agreements, the Competition Agreement of 2003 appears to have a well-developed competition enforcement structure. The parties agreed to enable their competition authorities to directly¹⁰⁵⁹ cooperate via notification,¹⁰⁶⁰ techni-

¹⁰⁵² Art. 11.12 and Art. 11.13.3 *ibid.*

¹⁰⁵³ Due to the fairly new competition law system of Singapore, there is not such thing as a grown competition law cooperation structure.

¹⁰⁵⁴ Art. 11.10 EC, ‘EU-Singapore trade and investment agreements (authentic texts as of April 2018)’.

¹⁰⁵⁵ EC, *Factsheet – Key Elements of the EU-Japan Economic Partnership Agreement MEMO/18/3326* (2018); EC, *Press release – IP/18/4526* (2018); EC, *Press release – IP/18/3325* (2018); This FTA is not included within DESTA.

¹⁰⁵⁶ EC, *Press release – IP/18/3325*.

¹⁰⁵⁷ Ch. 11 EU-Japan, *Economic Partnership Agreement (negotiated and not ratified version)* (2018).

¹⁰⁵⁸ Art. 11.4 *ibid.*

¹⁰⁵⁹ Art. 11 EU-Japan, *Agreement concerning cooperation on anticompetitive activities* (2003).

¹⁰⁶⁰ Art. 2 *ibid.*

cal assistance,¹⁰⁶¹ positive- and negative comity,¹⁰⁶² coordination,¹⁰⁶³ consultation¹⁰⁶⁴ and exchange of information¹⁰⁶⁵ – all within the limits of confidentiality.¹⁰⁶⁶ The elaboration of the different provisions and the fact that the competition authorities are directly enabled to communicate, very much reminds one of MLATs. Yet due to the lack of a clear level of obligation, the Agreement of 2003 has to be considered as a “soft” MLAT. The fact that the EU and Japan have had such a comparably highly developed cooperation structure in place since 2003 but did not directly incorporate this structure into their negotiations of the FTA leaves the FTA to appear fairly weak cooperation-wise.

(16.) FTAs of 2018 and 2019

In January of 2016, the EU was able to finalize its negotiations with Vietnam regarding a Free Trade Agreement,¹⁰⁶⁷ but the FTA was put on hold after the ECJ opinion regarding the EUSFTA. The EU had to decide whether they wanted the FTA to be ratified by the European Council and all 28 Member States or if the FTA should be split into two agreements as in the EUSFTA process.¹⁰⁶⁸ Though not yet ratified by the contracting parties, the EU-Vietnam FTA was signed on 30 June 2019. Within the FTA, the contracting parties agreed to enhance an effective competition enforcement by cooperation. This cooperation is to be achieved by common competition policy development, especially in the area of state aid.¹⁰⁶⁹ The different cooperation measures are rather basic; including notification and consultation in a manner of positive comity within the limits of confidentiality and a specific reference to state aid.¹⁰⁷⁰ Due to a lack of obligation, the cooperation mechanisms are to be considered basic MoU, even if the importance of state aid measures is highlighted by the contracting parties. One will have to wait to see if the parties present new and further designed cooperation measures in the awaited FTA, although it is quite unlikely that they will agree on any higher levels of competition enforcement cooperation.

¹⁰⁶¹ Art. 3.1 *ibid.*

¹⁰⁶² Art. 4 and Art. 5 *ibid.*

¹⁰⁶³ Art. 6 *ibid.*

¹⁰⁶⁴ Art. 7 *ibid.*

¹⁰⁶⁵ Art. 8 *ibid.*

¹⁰⁶⁶ Art. 9 *ibid.*

¹⁰⁶⁷ EC, ‘Website of the EU-Vietnam Free Trade Agreement: Agreed text as of 24.09.2018’ (2018) accessed 7.9.2018.

¹⁰⁶⁸ EC, ‘Press release: EU and Vietnam finalise trade and investment discussions’ (2018) accessed 7.9.2018.

¹⁰⁶⁹ Ch. 11 Art. XX.3 EC, ‘Website of the EU-Vietnam Free Trade Agreement: Agreed text as of 24.09.2018’.

¹⁰⁷⁰ Ch. 11 Art. X.4 and X.5 *ibid.*

In 2012, the Trans Pacific Partnership Agreement (TPP) was concluded between 12 pacific rim-countries: the US, New Zealand, Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, Singapore, and Vietnam.¹⁰⁷¹ This FTA formed the biggest free trade area yet. However, with the political change in the US administration and under the presidency of Donald Trump, the US decided that it would not enter the TPP agreement. For that reason, the TPP failed. Thereafter the remaining 11 contracting states still held on to the TPP agreement and incorporated its text within the newly designed Comprehensive and Progressive for Trans-Pacific Partnership (CPTPP) in January 2018.¹⁰⁷² In the Competition Chapter of the TPP incorporated into CPTPP the parties highlighted their will to cooperate in competition law enforcement by exchanging information, notification and consultation, as well as by the development of competition policy.¹⁰⁷³ To that end, the parties agreed that singular contracting states may consider individual cooperation agreements on competition enforcement fostering such cooperation in the free trade area.¹⁰⁷⁴ Most notably, within the specifications of the cooperation mechanisms, the contracting states agreed that they would develop a competition culture within the free trade area by supplying one another with technical assistance in competition law enforcement: e.g. by sharing their diverse experience on competition advocacy; providing another with advice or training on relevant issues etc.¹⁰⁷⁵ Again, it is clear that the states tend to develop a competition culture and follow a bottom-up establishment of competition law enforcement, rather than establishing top-down rules thereon. The notification and consultation mechanisms show reasonably high development, yet they do not have the capacity to further modernize the cooperation mechanisms.¹⁰⁷⁶

Apart from that the United States, Mexico and Canada established a new arrangement based on NAFTA, seeing as shortly after President Trump's inauguration, the US left the NAFTA Agreement. This new agreement is now called USMC Agreement (USMCA).¹⁰⁷⁷ The competition chapter of this NAFTA-following agreement includes provisions which are quite different from the NAFTA competition provisions of 1992.¹⁰⁷⁸ To what extent modifications led to developments and to possible innovations, shall be outlined below.

Similar to NAFTA, the parties to the USMCA reaffirmed the importance of interstate cooperation to the benefit of more effective competition enforcement within their free trade area so that the parties shall “endeavor to cooperate in relation to their enforcement laws and policies, including through investigative assis-

¹⁰⁷¹ Cf. *Trans Pacific Partnership Agreement (TPP)* (2012).

¹⁰⁷² Art.1 *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)* (2018).

¹⁰⁷³ Art. 16.4.1 *Trans Pacific Partnership Agreement (TPP)*.

¹⁰⁷⁴ Art. 16.4.2 *ibid.*

¹⁰⁷⁵ Art. 16.5 *ibid.*

¹⁰⁷⁶ Art. 16.7 and 16.8 *ibid.*

¹⁰⁷⁷ Canada-Mexico-USA, *USMCA* (2018).

¹⁰⁷⁸ Ch. 21 *ibid.*

tance, notification, consultation and exchange of information”.¹⁰⁷⁹ More specifically, USMCA seeks to strengthen cooperation in competition law enforcement to terminate commercial conduct hindering market efficiency and consumer welfare of the free trade area.¹⁰⁸⁰ The parties urged themselves to “adopt or maintain measures sufficient to permit negotiations of cooperation instruments that may address, among other matters, enhanced information sharing and mutual legal assistance.”¹⁰⁸¹ Similarly to NAFTA, the parties made reference to mutual legal assistance without naming the specific treaties, although the provision does not incorporate such MLATs into the FTA.

More specifically and as a new feature, the parties to USMCA sought to enable cooperation, which “may include coordination of investigations that raise common law enforcement concerns” although within the boundaries “with respect to their competition policies and in the enforcement of their respective national competition law”.¹⁰⁸² The parties enable and reaffirm that the enforcement authorities may cooperate but also clearly reaffirm that such cooperation has its limits. Therefore, the parties even more specifically state that this cooperation:

shall be compatible with each Party’s law and important interests, in accordance with their law governing legal privilege and disclosure of business secrets and other confidential information, and within reasonably available resources.¹⁰⁸³

This passage underlines the strict optionality of the confirmed cooperation mechanisms. Yet the parties leave the backdoor open for more binding cooperation as they declare that they may cooperate on the basis of mechanisms which exist “or may be developed”.¹⁰⁸⁴ Moreover, the USMCA reaffirms that it is the aim of the parties to share their experiences with one another, especially by technical assistance.¹⁰⁸⁵ In that regard, the USMCA acknowledges and reaffirms the importance of the works of the OECD and ICN regarding cooperation in competition law enforcement.¹⁰⁸⁶ This is a clear positioning of the parties to the bottom-up approaches of the named fora which is not overwhelmingly surprising, as the US was the main state pushing the ICN as a counter pole to the EU’s aspirations. To specify the stages of cooperation, the parties further agreed to transparency- and consultation procedures. Upon request of either party, they shall consult and supply one another with information concerning their respective competition enforcement policies and practices.¹⁰⁸⁷ Both

¹⁰⁷⁹ Art. 21.3.1 *ibid.*

¹⁰⁸⁰ Art. 21.3.2 *ibid.*

¹⁰⁸¹ Art. 21.3.3 *ibid.*

¹⁰⁸² Art. 21.3.4 *ibid.*

¹⁰⁸³ *Ibid.*

¹⁰⁸⁴ *Ibid.*

¹⁰⁸⁵ Art. 21.3.5 *ibid.*

¹⁰⁸⁶ Art. 21.3.6 *ibid.*

¹⁰⁸⁷ Art. 21.5 and 21.6 *ibid.*

specifications are new compared to NAFTA of 1992, but it needs to be remembered that they merely reflect the more current cooperation mechanisms rather than design new, innovative ones. Other than that, the USMCA competition chapter includes widespread and detailed provisions concerning procedural core matters, which is further discussed below. Overall, the USMCA is more advanced than NAFTA with regard to competition enforcement cooperation. Yet it does not have the capacity to either innovate cooperation nor to set binding regulations.

It has to be noted that the US Trade policy might change back to its former state under President Joe Biden, however this cannot yet be predicted.

d.) Evaluation and Findings

After the evaluation of the 89 trade agreements through the three levels of integration, a few findings have to be made:

Few development agreements and few PTAs include a competition chapter and conferring stages of competition law enforcement cooperation, although the included levels of cooperation reflect the set of cooperation stages with the exchange of information, notification, consultation, technical assistance, and comity principles. All provisions are Memoranda of Understandings. Some refer to existing MLATs without incorporating these structures into the respective trade agreements.

Regarding the FTAs, it is remarkable how many of them contain a competition chapter, especially notable is the dramatic increase of such provisions after the failure of the WTO aspirations in 2003. However, the FTAs do not really have the capacity to develop cooperation in competition law enforcement. The levels of cooperation that are included are sometimes more detailed, sometimes rather basic, yet no drastically new or innovative strategies have been proposed or incorporated as the years went on. The only exceptions are the few newer FTAs which seek to develop a competition culture, as for example the EU-Colombia-Peru FTA of 2012 or the TPP/CPTPP of 2018. This ambit is innovative and corresponds to the developments and ambit of the ICN and the OECD recommendations. When states work together altruistically and try to push a common ground of understanding in competition law enforcement, rather than egocentrically enforcing their respective national competition laws extraterritorially, the basis for increasingly more binding competition enforcement is built. This bottom-up approach is the only way to inhibit diplomatic conflicts between the contracting states.

Furthermore, indirect references to well established competition agreements like the MLAT's have weaknesses. The fact that states make reference to their cooperation structures in their FTAs is a positive development. This settled competition culture paves the way towards an ever closer and interconnected competition law enforcement. It would be highly positive if states would directly link their existing competition structures within their FTAs or even go beyond that and find binding provisions in the name of their common growing competition cultures.

Even if it cannot be directly detected that anticompetitive conduct is considered as non-tariff trade barrier by the states, the increase of antitrust regulations within FTAs might indicate such a development.

2.) *Institution-Building Provisions*

Few trade agreements through all levels of integration include provisions representing institutional understandings and have the capacity to build competition enforcement institutions fostering cooperation between the states. In the competition evaluation part of the DESTA, those stages are differentiated in provisions creating a national competition authority,¹⁰⁸⁸ provisions establishing working groups on competition law,¹⁰⁸⁹ provisions creating a common authority/institution responsible for competition,¹⁰⁹⁰ and provisions creating a joint committee as a general institution responsible for competition.¹⁰⁹¹ The extent to which different institutions actually foster cooperation shall be discussed subsequently.

e.) Provisions Creating National Competition Authorities

Some trade agreements include provisions which unilaterally require one state to establish a national competition authority. Evaluating trade agreements containing a competition chapter which include provisions establishing a national competition authority, 4 PTAs and 9 FTAs meet this criteria.¹⁰⁹² It has to be noted that the chosen criteria of trade agreements containing a competition chapter is designed to filter out the more elaborate trade agreements in terms of competition law. Establishing a national competition authority is the most basic way to enable a cooperation competition enforcement. For that reason, it is quite remarkable when states agree to establish a competition authority and directly include a competition chapter in its trade agreement, including different stages of cooperation. The sole occurrence of trade agreements establishing competition law cooperation directly addressing

¹⁰⁸⁸ Abbreviation “comp_nat_auth” is coded “1”, if such provisions exist, cf. for further definition of the abbreviation: Andreas Dür, Baccini and Elsig, *DESTA Codebook Competition 2*.

¹⁰⁸⁹ Abbreviation “comp_wg” is coded “1”, if such provisions exist, cf. for further definition of the abbreviation: *ibid*.

¹⁰⁹⁰ Abbreviation “comp_com_auth” is coded “1”, if such provisions exist, cf. for further definition of the abbreviation: *ibid*.

¹⁰⁹¹ Abbreviation “comp_joint_committee” is coded “1”, if such a provision exists, cf. for further definition of the abbreviation: *ibid*.

¹⁰⁹² Following Agreements include a national competition authority establishing provision: PTAs: Japan-Mexico, *Agreement for the Strengthening of the Economic Partnership*; Japan-Philippines, *Economic Partnership Agreement* (2006); Japan Thailand, *Economic Partnership Agreement* (2007); EC-CARIFORUM, *Economic Partnership Agreement* FTAs: Canada and Costa-Rica, *Free Trade Agreement*; Japan-Singapore, *Agreement for a New-Age Economic Partnership*; US-Singapore, *Free Trade Agreement*; Brunei, ‘Transpacific Strategic Economic Partnership Agreement (TPSEPA)’; US-Colombia, *Free Trade Agreement*; Panama-Singapore, *Free Trade Agreement*; Peru-Singapore, *Free Trade Agreement*; Peru, *Free Trade Agreement*; America, *Free Trade Agreement*.

the establishment is highly remarkable. It shows that in those cases the “trade-and” debate has faded, and states have an awareness of the impact competition law has on free and fair trade. The US-Singapore FTA of 2003 is a good example of how a high developed state competition such as the US managed to integrate competition enforcement provisions of more advanced stage, resulting in the Republic of Singapore enacting its own competition laws in 2004.¹⁰⁹³ Without interpreting every singular provision, such national authority-creating institutional provisions regarding competition law reflect a tool to develop competition enforcement cooperation bilaterally; as seen in the US-Singapore FTA, even to directly establish higher levels of cooperation. No great differences of national authority-creating provisions may be detected between FTAs and PTAs, yet it has to be noted that the number of provisions establishing national competition authorities predominantly exists in FTAs. Regarding the lowest integrated stage of trade agreements, Trade Development Agreements, they do not include direct provisions establishing a competition authority. However, the unilateral development character of the EuroMed Agreements has to be pointed out since the agreements all state that their provisions have to be read in line with the TFEU.

f.) Provisions Creating “Competition Working Groups”

From the FTA’s discussed above, only 5 trade agreements establish so-called Competition Working Groups.¹⁰⁹⁴ With those provisions the parties establish informal working groups which hold meetings in different period of times. Their aim is mostly to strengthen cooperation in competition matters and the implementation of the respective competition chapter, though no further specifications can be measured. It has to be noted that in the reformed NAFTA (now USMCA), the provision on the establishment of a competition working group was not included. Instead, the parties reaffirmed the competition working groups of the OECD and the ICN.¹⁰⁹⁵ In that regard the provisions appear to cater for informal round tables – which is certainly positive yet does not create competent competition authorities.

g.) Provisions Creating “Joint Authorities” Responsible for Competition Matters

There are 44 trade agreements in force in which the contracting states have created “joint authorities” or “general authorities” which are also responsible for competition law matters. For example, in the EU-Singapore FTA of 2016 the parties agreed to establish a “Trade Committee” which is also responsible for the settlement of

¹⁰⁹³ Cf. description of the US-Singapore FTA of 2003 at B II 2. c.) bb.) (1.) “FTAs of 2003”.

¹⁰⁹⁴ Art. 1504 Canada-Mexico-USA, *North American Free Trade Agreement*; Art. 14.2.4 US-Australia, *Free Trade Agreement*; Art. 13.4 US-Colombia, *Free Trade Agreement*; Art. 13.4 US-Peru, *Free Trade Agreement*; Art. 16.02 Taiwan-Nicaragua, *Free Trade Agreement*.

¹⁰⁹⁵ Art. 21.3.6 Canada-Mexico-USA, *USMCA*.

competition issues.¹⁰⁹⁶ To that end the committee is supposed to be the forum where the parties make critical decisions, e.g. regarding the development of new subsidy rules.¹⁰⁹⁷ However, as this trade committee is not enabled to find binding solutions on its own it is not to be considered a competent trade and competition authority. Compared with the working groups on competition displayed, there is no real difference to be detected between the two categories. No other trade agreements have the capacity to create a common competent authority for competition, which is directly entitled to enforce competition law. The named Joint Authorities are similar to the working groups rather than to informal fora of interstate communications regarding competition law.

h.) Provisions Creating “Common Competition Authorities”

Another form of institutional cooperation is a “common competition authority”. The difference between a sole competition committee or working group and a joint competition authority is that states shift their sovereignty to the established authority, to the extent that it has the capacity to make binding legal decisions. A common competition authority is therefore not an informal but a formal binding authority.

Within the set of FTAs studied, only 2 of them still in force meet the criteria, the Chile-Mexico FTA of 1998 and the EFTA-Mexico FTA of 2000. Other trade agreements meeting the set criteria are from a higher trade integration level: the EU and CARICOM.¹⁰⁹⁸

The question is whether or not the two FTAs really created a common competition authority which have the capacity to jointly decide upon competition matters affecting the free trade area of the agreements.

In Art. 14.05 of the Chile-Mexico FTA the parties agreed to the following:

The Commission shall establish a Committee on Trade and Competition comprising representatives of each Party, which shall convene a least once a year. The Committee shall report and make recommendations to the Commission on matters regarding the relation between competition laws and policies and trade in the free trade zone.

With this phrase the parties did not establish a common competition authority or institution of a more binding character. But the established committee has the capacity to give recommendations to the established FTA Commission, even if no state has to follow these recommendations. For that reason, the FTA Commission may be the competent authority. In Art. 17.2 of the Chile-Mexico FTA, the powers of the commission are defined. The Commission shall supervise the implementation

¹⁰⁹⁶ Art. 2.15, Art. 12.8.2 and 12.10 EU-Singapore, *Free Trade Agreement (negotiated and not ratified version)*.

¹⁰⁹⁷ Art. 12.8.2 *ibid*.

¹⁰⁹⁸ Those higher phases of integration are to be displayed separately in the following. Examples of common competition authority, will be examined.

of the FTA, settle disputes arising regarding its application or interpretation, and supervise the work of established committees, sub-committees, or working groups.¹⁰⁹⁹ To that end, the commission shall take measures “establish[ing] and delegate[ing] responsibilities to, ad hoc or standing committees or expert groups” to modifying the rules of origin, or “take such other action in the exercise of its functions as the Parties may agree”.¹¹⁰⁰ Therefore, the FTA Commission has a distinct position in the steering of the FTA. Yet none of the duties set out for the commission leave it as a fully competent competition authority. It cannot set binding rules and may not enforce the FTA provisions as those powers are still left with the contracting states on which they have to consent respectively. The special position of the commission leaves it with some liberality in its decisions, yet in comparison to the joint competition authorities, the differences between the two institutional categories is not overwhelmingly big. One might even say that the only difference is structural.

In the EFTA-Mexico FTA of 2000 the commission has got similar rights and obligations. A sub-committee on competition was not established even though the parties agreed to the possibility of establishing such a sub-committee.¹¹⁰¹ The powers and rights of the FTA Commission are nearly identical to those of the FTA Commission in the Chile-Mexico FTA.¹¹⁰² The decisions of the FTA Commission are explicitly dependent on constitutional conformity with the contracting states and the fulfillment of the constitutional requirements of the contracting states.¹¹⁰³ Even though the parties agreed that the decisions of the FTA Commission may preliminarily come into force for the states which fulfilled their constitutional requirements. For that reason, the decisions of the FTA Commission have some degree of legal competence which makes it to appear to be a competent authority. Although as the rights and powers of the commission are not enshrined setting law and law enforcing competences – especially not in competition law matters – the FTA Commission is accordingly considered an informal steering commission fostering the implementation of the FTA.

For that reason, no trade agreements of the three different stages, Development Agreements, PTAs, and FTAs, have the capacity to bind legal competition law authorities.

3.) *Procedural Core Principles*

Throughout all integration phases, the vast majority of the reviewed trade agreements, include provisions in their competition chapters by which states subdue themselves to procedural core principles. These core principles may be considered as expressions of the rule of law. The rule of law encompasses different core principles

¹⁰⁹⁹ Art. 17.2 Chile-Mexico, *Free Trade Agreement*.

¹¹⁰⁰ Art. 17.3 *ibid*.

¹¹⁰¹ Art. 54 EFTA-Mexico, *Free Trade Agreement*.

¹¹⁰² *Ibid*.

¹¹⁰³ *Ibid*.

of law including transparency, predictability, stability, enforceability/accountability, and due process. These main principles shall uphold legal certainty within the established and most commonly accepted moral principles of law. Instead of displaying all the commonalities and differences of the procedural core principles within the discovered trade agreements, an example of a highly developed trade agreement regarding these core principles is the USMCA of 2018 competition chapter.

The procedural core principles of the USMCA competition law chapter may be found in its Art. 21.2 called “Procedural Fairness in Competition Law Enforcement”.¹¹⁰⁴ The heading itself is a declaration of submission to the rule of law. To specify which exact conduct shall be part of the declaration of submission the parties define that the term ““enforcement proceeding” means a judicial or administrative proceeding following an investigation into the alleged violation of the national competition laws and does not include matters occurring before a grand jury.”¹¹⁰⁵ The enforcement proceedings, regarding conduct subject to procedural fairness, address natural and legal persons. It does not address conduct of another state. Furthermore, the conduct of grand juries e.g. in judicial criminal hearings is excluded. The reason for this exclusion might be the differences in criminal law procedures of the contracting states. Following the definition of enforcement proceedings covered by the provision, the parties listed a number of rule of law matters, all subsumed under the headline: “Subject to Legal Review for Accuracy, Clarity, and Consistency Subject to Language Authentication”.¹¹⁰⁶ The first declaration concerns transparency measures to be obtained by the parties.¹¹⁰⁷ Before addressing the specific enforcement proceedings, the parties simply agreed to obtain a level of transparency “regarding the applicable competition laws, regulations, and procedural rules pursuant to which national competition law investigations and enforcement proceedings are conducted”.¹¹⁰⁸ To promulgate the legal principles upon which the administrative and judicial enforcement proceedings rely is the most basic way to provide transparency to the addressed natural and legal persons. To terminate disproportionate enforcement proceedings the parties further declared that their enforcement proceedings shall either have definite deadlines or reasonable time frames.¹¹⁰⁹ By incorporating specific deadlines or time frames regarding the enforcement proceedings, legal and natural persons addressed are not left in unpredictable unawareness of what is happening to them. Legal and economic predictability of the proceeding transparency is thus provided. Also, as the contracting states are obviously sticking to the principles of the rule of law as the parties want to allow the addressees, the right of individual legal representation within the enforcement

¹¹⁰⁴ Art. 21.2 Canada-Mexico-USA, *USMCA*.

¹¹⁰⁵ Art. 21.2.1 *ibid*.

¹¹⁰⁶ Art. 21.2.2 f. *Ibid*.

¹¹⁰⁷ Art. 21.2.2 *ibid*.

¹¹⁰⁸ Art. 21.2.2 lit. a *ibid*.

¹¹⁰⁹ Art. 21.2.2 lit. b *ibid*.

proceeding. This also applies to merger regulation and reviews.¹¹¹⁰ To that end, the USMCA allows legal counsels to take part in every hearing concerning the person and the national competition authority. Furthermore it grants the addressee the privilege of confidential communication with its legal counsel, when the “communications concern the soliciting or rendering of legal advice”.¹¹¹¹ Regarding merger review, the USMCA permits early consultation between the affected persons and the national competition authority, to allow them to present their case concerning the merger in question.¹¹¹² With these provisions, it assures that the affected persons have the opportunity to take part in the enforcement proceedings and have the opportunity to present their views and objections to the enforcement proceedings, all as a reflection of the core values of transparency, predictability, and due process of the rule of law. Regarding confidentiality, no information obtained in enforcement proceedings is to be disclosed and shall be handled with strict confidentiality;¹¹¹³ in addition, national competition authorities “do not state or imply in any public notice confirming or revealing the existence of a pending or ongoing investigation against a particular person that such person has in fact violated the Party’s national competition laws.”¹¹¹⁴ The reason for this explicit declaration is that the information obtained by enforcement proceedings is of high economic value for the affected party and disclosure may lead to severe economic disadvantages with effects equal to (or even worse) than prejudice. Hence, as stated before, confidentiality is of a very high value within competition law enforcement proceedings which the parties reaffirm accordingly. To assure that the enforcement proceedings and possible sanctions rely upon a clear actual legal basis the parties are required to assure that its national competition authorities have an “ultimate burden establishing the legal and factual basis for an alleged violation in an enforcement proceeding”;¹¹¹⁵ furthermore, the final decisions of the respective national competition authorities “are in writing and set out the findings of fact and conclusions of law on which they are based”.¹¹¹⁶ Both provisions set forth core values of the rule of law regarding due process, transparency, predictability/accountability etc. Before the national competition authorities find sanctions or remedies against persons, the parties agreed that it is their aim to offer the persons a fair proceeding, including the following:

- (a) obtain information regarding the national competition authority’s concerns, including identification of the specific competition laws alleged to have been violated;

¹¹¹⁰ Art. 21.2.2. lit. c and d *ibid.*

¹¹¹¹ Art. 21.2.2 lit. c *ibid.*

¹¹¹² Art. 21.2.2 lit d *ibid.*

¹¹¹³ Art. 21.2.3 *ibid.*

¹¹¹⁴ Art. 21.2.4 *ibid.*

¹¹¹⁵ Art. 21.2.5 *ibid.*

¹¹¹⁶ Art. 21.2.6 *ibid.*

- (b) engage with the relevant national competition authority at key points on significant legal, factual, and procedural issues;
- (c) have access to information that is necessary to prepare an adequate defense if the person contests the allegations in an enforcement proceeding; however, a national competition authority is not obliged to produce information that is not already in its possession. If a Party's national competition authority introduces or will introduce confidential information in an enforcement proceeding, the Party shall, as permissible under its law, allow the person under investigation or its legal counsel timely access to that information;
- (d) be heard and present evidence in its defense, including rebuttal evidence, and, where relevant, the analysis of a properly qualified expert;
- (e) cross-examine any witness testifying in an enforcement proceeding; and
- (f) contest an allegation that the person has violated national competition laws before an impartial judicial or administrative authority, provided that in the case of an administrative authority, the decision-making body must be independent of the unit offering evidence in support of the allegation.¹¹¹⁷

Those provisions shall underline that the affected person is offered a fair and transparent competition enforcement proceeding within the boundaries of the rule of law. Any arbitrary behavior of the national competition authorities shall be prohibited. To that end the affected persons shall have the opportunity to either “seek judicial review by a court or independent tribunal, including review of alleged substantive or procedural errors” or to “voluntarily agree to the imposition of the fine, sanction, or remedy.”¹¹¹⁸ This declaration reflects a clear reaffirmation of due process. Finally, the parties are urged to ensure that the calculation of their fines be transparently comprehensible and that the evidence obtained (including exculpatory evidence) is stored until the proceedings are exhausted.¹¹¹⁹

Overall, one has to note that the provisions regarding core procedural principles of the rule of law are very extensively reflected by the parties. Compared to NAFTA, certain provisions of the agreement are new for the contracting parties, especially those being incorporated into the competition chapter. The provisions strengthen the rights of the potentially affected parties which is a very positive development. Besides the positive effects for the competition enforcement cooperation, the reaffirmation of procedural core principles is very much the most basic way for parties to find convergence in their enforcement proceedings. The USMCA, as the NAFTA-following agreement, looks back to one of the oldest cooperation agreements regarding competition enforcement. The fact that the parties could agree upon such convergent core principles of their enforcement procedures gives an optimistic hope for the other trade agreements. The longer a competition enforcement culture lasts,

¹¹¹⁷ Art. 21.2.7 lit. a-f *ibid.*

¹¹¹⁸ Art. 21.2.8 *ibid.*

¹¹¹⁹ Art. 21.2.9 and 21.2.10 *ibid.*

the further advanced will be their convergent enforcement proceedings. In the end, advanced procedural core principles establish a high degree of legal certainty for affected persons and that subsequent sanctions in competition law enforcement will find greater acceptance within the respective societies accordingly.

4.) Intermediate Result

Competition law enforcement in trade agreements competition law chapters is based upon the displayed provisions of cooperation-fostering provisions, institution-building provisions, and procedural core principles. Overall, the cooperation-fostering provisions on the exchange of information, notification etc., form the more elaborate provisions within trade agreements as they show the highest degree of diversity and development. Yet the boundaries of institution-building provisions and declarations of procedural core principles represent the foundation for competition enforcement cooperation. Whilst the vast majority of trade agreements include declarations of procedural core principles within their competition chapter, the institution-building provisions show potentials for further development. It would be highly recommendable for states to establish common, free, and unanimous competition law institutions. Even if the states are not yet prepared or willing to shift sovereignty in competition law matters to a common competition institution which guards fair and undistorted free trade, in the fulfillment of their trade agreements, the states could find commonly accepted institutions which still may not have the last word in enforcing the respective competition laws, yet can issue clear recommendations for enforcement. The more such fora of diplomatic discourse are established, the lesser the risk of severe diplomatic feuds – both regarding other trade agreement related matters and especially regarding trade itself.

IV) Provisions Relating to Competition Law

In addition to classic competition law provisions, trade agreements also include provisions which concern competition-related areas, namely state trading enterprise (investment law) and state aid (subsidy law). Those legal areas are inherent in competition law because a state either decides to invest in its domestic economy, or to engage with private economy – both of which are most commonly used to strengthen the domestic economy. This behavior may certainly be considered as a non-tariff trade barrier. In many cases such involvement creates national trade advantages that might discriminate against fair trading with other markets and economies. Hence, it is not surprising that trade agreements regulate such conduct in their respective competition chapters. To what extent these provisions overlap with (the establishment of) substantive competition law and conferring procedural competition law measures shall be discussed below.

1.) *State Trading Enterprises*

When states are financially invested in their economy and take control of an economic entity, one may speak of a state trading enterprise. Within the competition data set ‘DESTA’, out of 138 trade agreements concluded since 1945 and containing a competition chapter, 105 also include provisions on state trading enterprise. Of these 105, 75 are in force which also meet the set of criteria (i.e. that they are either Development, Preferential Trade, or Free Trade Agreements).¹¹²⁰ After the analysis of those 75 trade agreements, it became clear that only 45 trade agreements included the state trading enterprise provisions within their competition chapters.¹¹²¹ To give an overview of state trading enterprise provisions and their legal character, examples of the different integration stages of trade agreements are demonstrated. For example, within the EU-Morocco EuroMed Agreement of 1996 the parties agreed that they would:

progressively adjust any State monopolies of a commercial character so as to ensure that, by the end of the fifth year following the entry into force of this Agreement, no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of the Member States and of Morocco.¹¹²²

With that declaration, the parties asserted that they wanted to eliminate discriminating state trading enterprise in areas which affect the interstate market within a set time period of five years. This certainly does not mean that the EU Member States and Morocco are not allowed to get publicly involved with the private sector – but that they must refrain from unfair governmental involvement. Even if the declaration reflects the understanding of the contracting parties regarding state trading enterprise and its effects on competition, the declaration remains a soft law provision. This may be observed by the wording “shall progressively adjust” which is not mandatory, as the discretionary margin is wide. Hence, the parties established a MoU on the adjustment of state trading enterprise.

Similar, though more detailed are the declarations on state trading enterprise of the 2008 EC-CARIFORUM PTA. Its Art. 129 entitled “Public enterprises and enterprises entrusted with special or exclusive rights, including designated monopolies” stipulates that the parties shall “ensure” that within their respective domestic legal systems, “measures distorting trade in goods or services between the Parties to an extent contrary to the Parties interest shall be neither enacted nor maintained.”¹¹²³ This declaration reflects the understanding of the contracting parties on the ability

¹¹²⁰ State-trading enterprise provisions are coded “1” as “comp_ste” Andreas Dür, Baccini and Elsig, *DESTA Codebook Competition 3*; Cf. Competition data set of Andreas Dür, Baccini and Elsig, *The Design of International Trade Agreements: Introducing a New Dataset*.

¹¹²¹ For an overview of the analysis cf. Annex.

¹¹²² Art. 37 EC-Morocco, *Euro Mediterranean Agreement*.

¹¹²³ Art. 129.2 EC-CARIFORUM, *Economic Partnership Agreement*.

of state trading enterprises to distort competition. To prevent such interest-affecting conduct the parties furthermore declared that “such enterprises shall be subject to the rules of competition in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.”¹¹²⁴ This declaration is the manifestation of the will of the parties not to exclude state trading enterprise from their respective competition laws simply because the state got invested in the private sector. Evidently, there is no desire for a separation of the economies into private and state enterprises. To this end, the parties (using wording nearly identically in their wording to the EuroMed example) agreed that they similarly adjust their state designated monopolies within five years to the extent compatible with the agreement, stating “no discrimination regarding the conditions under which goods and services are sold or purchased exists between goods and services originating [from the respective contracting territory]”.¹¹²⁵ The parties further specified that some derogations may exist in sectional rules mandated by respective national regulatory frameworks and that such state trading enterprise may not form part of the provisions of the PTA.¹¹²⁶ Additionally, the parties agreed that the PTA-built trade and development committee shall be informed about all measures shown, but no specific enforcing capacity was granted.¹¹²⁷ The soft law character of the state trading enterprise article of the PTA is expressed at the beginning of the article, as the parties agreed that nothing in the whole agreement shall prevent parties from designating or maintaining public or private monopolies in accordance with their domestic law.¹¹²⁸ Thus, the state trading enterprise provisions are to be considered basic MoU.

Similar provisions may also be found in FTAs. Surprisingly, the China-Korea FTA of 2015 the parties made reference to state trading enterprise. The parties agreed that they are not bound by the agreement to designate or to main public enterprises. Yet they agreed that such conduct has to be in line with basic considerations of competition law and in line with their respective completion laws.¹¹²⁹ With respect to the specificities of Chinese politics and laws, the veracity of the declaration is highly doubtful. Almost every economic entity within China is controlled by the state, therefore the state can only act in line with basic competition law considerations and in line with its declaration of the FTA when it liberalizes trade. This has only partly happened in the Shenzhen Special Economic Zone – a legislative experiment of a sectional liberal economy in China.¹¹³⁰

¹¹²⁴ Ibid. <https://www.youtube.com/watch?v=2nM-Xx4faZI>.

¹¹²⁵ Art. 129.4 *ibid.*

¹¹²⁶ Art. 129.3 *ibid.*

¹¹²⁷ Art. 129.5 *ibid.*

¹¹²⁸ Art. 129.1 *ibid.*

¹¹²⁹ Art. 14.5.2 and 14.5.3 China-Korea, *Free Trade Agreement*.

¹¹³⁰ See generally: Madeleine Martinek, *Experimental Legislation in China between Efficiency and Legality – The Delegated Legislative Power of the Shenzhen Special Economic Zone* (Springer 2018).

In the EU-Canada CETA, the parties explicitly agreed that the measures against anticompetitive conduct may be applied to entities including state enterprises.¹¹³¹ Yet they agreed that the application of their respective competition law ends where they may obstruct the performance of the particular tasks assigned to them.¹¹³² The contracting parties affirm that state-trading enterprise should be regulated by competition law (basic MoU), yet they do not find binding consistent and reciprocal measures within CETA.

Overall, it has to be concluded that state-trading enterprise seems to play a role in trade measures. Yet in no trade agreement can one find standardized mandatory agreements.

2.) *State Aid*

Besides state-trading enterprise provisions, trade agreements also deal with state aid provisions. Within the competition data set of DESTA, a fairly low number of trade agreement with a competition chapter also includes state aid provisions. In addition, while there are 97 trade agreements with competition chapter making reference to state aid (of which 64 are still in force),¹¹³³ only 23 of those trade agreements include references to state aid within their competition chapter.¹¹³⁴ Again, all three stages of integration of trade agreements are represented: The EuroMed Agreements (except for the EC-Jordan EuroMed Agreement) provide nearly identical references to state aid across their competition chapters. For example, the EU and Israel agreed in this EuroMed Agreement that :

Each Party shall ensure transparency in the area of public aid, inter alia, by reporting annually to the other Party on the total amount and the distribution of the aid given and by providing, upon request, information on aid schemes. Upon request by one Party, the other Party shall provide information on particular individual cases of public aid.¹¹³⁵

Rather than addressing or defining state aid, the parties established non-mandatory procedural obligations to communicate with each other in a transparent way.

As already shown in the EC-CARIFORUM PTAs, the parties agreed to ensure that “[p]ublic enterprises and enterprises entrusted with special or exclusive rights [...] shall be subject to the rules of competition”.¹¹³⁶ These provisions certainly do not include only state enterprise but are implicitly extended to enterprises entrusted with special or exclusive rights, also including enterprises who gather state aid and

¹¹³¹ Art. 17.3.1 EU-Canada, *Comprehensive Economic and Trade Agreement (CETA)*.

¹¹³² Art. 17.3.2 *ibid.*

¹¹³³ Within the competition data set, the filter “comp_state_aid” is coded “1”, if a provision on state aid or subsidy, could be detected, cf. Andreas Dür, Baccini and Elsig, *DESTA Codebook Competition 3*.

¹¹³⁴ Cf. Annex.

¹¹³⁵ Art. 36.3 EC-Israel, *Euro-Mediterranean Agreement*.

¹¹³⁶ Art. 129 EC-CARIFORUM, *Economic Partnership Agreement*.

subsidies. Therefore, the parties implicitly agreed to apply competition rules to state aid in a non-discriminatory manner. Other trade agreements implicitly apply competition rules to state aid too.¹¹³⁷ Yet none of the agreements go beyond the soft law barrier and towards mandatory provisions.

The trade agreements involving the engagement of Turkey, namely the Turkey-Egypt, Turkey-Jordan, and Turkey-Tunisia FTAs, all include references to state aid and subsidies in their competition chapters. The agreements all declare that the rules regarding state aid and subsidies shall be governed by Arts VI and XVI of the GATT agreement.¹¹³⁸ This recourse to well-developed binding international law in a bilateral trade agreement shows that the states still aim to keep up with the established multilateral structures of international trade law of the WTO.

More specific provisions on state aid and subsidies may be found in the recent free trade agreements of the EU, namely the EU-Vietnam, EU-Korea, and EU-Singapore FTAs. All of which also make references to the mentioned GATT provisions.¹¹³⁹ Furthermore, the parties agreed to principles of the application of state aid and subsidies, including the non-discriminatory application of such conduct as underlined by a presentation of specific examples where subsidies are non-discriminatory to the other party as in the event of nature catastrophes, promoting culture, and heritage conservation etc.¹¹⁴⁰ Moreover, the parties list exemptions to the application of the subsidy provisions of their competition chapter for to agriculture and fisheries.¹¹⁴¹ To accomplish a reciprocal non-discriminatory application of state aid and subsidies, the parties agreed to procedurally assist one another by meeting principles of transparency. They agreed that they shall notify one another “every four years [about] the legal basis, form, amount or budget, and if possible, the recipient of a specific subsidy”.¹¹⁴² Apart from the notification provisions the parties agreed that they shall, upon request of another, consult with one another and that the requested party shall supply the requesting party with all the designated information about subsidies and state aid – all within 90 days.¹¹⁴³ Almost identical are the provisions in the EU-Korea and EU-Singapore FTAs.¹¹⁴⁴ By not only defining subsidies and state aid and taking recourse to the GATT principles, but also by including procedural provisions of cooperation in state aid and subsidies, these may now be

¹¹³⁷ Cf. competition chapters of the following: Chile-EFTA, *Free Trade Agreement*; Chile-Korea, *Free Trade Agreement*; Korea-EFTA, *Free Trade Agreement*; Brunei, ‘Transpacific Strategic Economic Partnership Agreement (TPSEPA)’.

¹¹³⁸ Cf. Art. 26 Turkey-Tunisia, *Free Trade Agreement*; Art. 23 Egypt-Turkey, *Free Trade Agreement*; Art. 26 Turkey-Jordan, *Association Agreement establishing a Free Trade Area*.

¹¹³⁹ Art. 10.6 EU-Vietnam FTA cf. EC, ‘Website of the EU-Vietnam Free Trade Agreement: Agreed text as of 24.09.2018’.

¹¹⁴⁰ Art. 10.4 *ibid.*

¹¹⁴¹ Art. 10.5 *ibid.*

¹¹⁴² Art. 10.7 *ibid.*

¹¹⁴³ Art. 10.8 *ibid.*

¹¹⁴⁴ Art. 10.9 ff. EU-Korea, *Free Trade Agreement* ; Art. 10.5 ff. EU-Singapore, *Free Trade Agreement (negotiated and not ratified version)*.

considered as the “new” FTAs of the EU and as fairly strong agreements regarding state aid and subsidy law. Yet apart from the reaffirmation of binding WTO law, the agreements are not binding.

Overall, one may conclude that the higher the level of the integration of the trade agreement, the more specific the provisions on state aid and subsidy law. With regard to FTAs, subsidies may be considered as non-tariff barriers and there are a number of states entering into FTAs intending to lower non-tariff trade barriers – a positive development.

V) Dispute Resolution

During the evaluation of trade agreements with a competition chapter through the different integrations, it became clear that no trade agreement contained a binding dispute resolution mechanism. Instead, the majority of trade agreements explicitly state that no competition matters shall have recourse to dispute settlement mechanisms even if some trade agreements such as FTAs established dispute resolution bodies for other matters, such as trade and investment. As no trade agreements established binding international competition law, dispute resolution would not really make sense; even as an objective judicial review according to international legally binding competition standards would be highly preferable. Subjective discontents of states would be minimized, and barriers for truly fair competition law application would vanish. Apart from binding judicial review, the Competition Working Groups, Joint Competition Authorities and Common Competition Authorities would explicitly take over the duties to arbitrate disputes between the contracting states.

VI) Intermediate Result

The examination of layers of the trade agreement’s competition chapters show that trade agreements are subject to constant developments regarding the cooperation of competition law enforcement. Whilst all trade agreements meeting the set criteria involve general provisions compared to “provisions for undertakings not to distort competition”, underlining the bad influence of such conduct to the benefits of a liberal or free market, the cooperation-fostering and institution building provisions very much depend on the contracting state’s conviction about competition law. With regard to competition enforcement cooperation, the lower developed trade agreements leave it to basic declarations regarding competition law, whilst highly developed trade agreements include cooperation stages like notification, exchange of information etc., in a more detailed manner. Whilst underdeveloped trade agreements make no comment on common or joint committees or working groups, higher developed trade agreements do include such provisions. The majority of trade agreements include provisions by which the states subdue themselves to procedural core principles, no trade agreements include binding dispute settlement provisions.

Those different development stages wind their way through the three different layers of integration although not only the quantity of the FTAs itself, but also the amount of more elaborate development stages of FTAs leave one to assume that they reflect the highest developed stage concerning the competition law. For that reason, the assumption that cooperation in competition law enforcement increases with the stage of integration of a trade agreement, is indeed correct.

C) Customs Union

The highest integrated form of trade agreements are those creating customs union are for example CARICOM, MERCOSUR or the EU.¹¹⁴⁵ Trade within the territory of the customs union is free within its “domestic market”. The domestic market is jointly regulated by the Member States. The unions are marked by geographic vicinity and corresponding cultural commonality. To get an insight into the high level of cooperation, especially regarding competition law cooperation, the EU competition law system will be provided as an example, as the remarkable cooperation measures in EU competition law mark a very high standard of international cooperation.

I) EU Competition Law

Since 1957 “Competition Law” is a centralized legal competence within the EU (and its predecessors) on account of the treaty establishing the European Economic Community (EEC treaty).¹¹⁴⁶ The established European Economic Community was instructed by its Member States to build a “Common Market” as well as “a system ensuring that competition shall not be distorted in the Common Market”.¹¹⁴⁷ Referring to EU competition law, the EEC treaty established two general competition provisions, a cartel prohibition provision and a provision prohibiting the abuse of a dominant market position.¹¹⁴⁸ Through the evolvement of the EEC into the EU, the position of the competition provisions has changed. The EU Member States agreed to build a Common Market and held up the general competition provisions correspondingly.¹¹⁴⁹ These provisions created direct binding and material competition law provisions.¹¹⁵⁰ To assure the functioning of the market, in line with Arts 101, 102 TFEU, the Council is entitled to enact appropriate directives and regula-

¹¹⁴⁵ Cf. Art. 3.4 EU, *Treaty of the European Union – C 202/1 (TEU)* (2016).

¹¹⁴⁶ Dreher and Kulka, *Wettbewerbs- und Kartellrecht: eine systematische Darstellung des deutschen und europäischen Rechts* 219.

¹¹⁴⁷ Art. 2 and Art. 3 lit. f. EEC, *Treaty establishing the European Economic Community* (1957).

¹¹⁴⁸ Art. 81 and Art. 82 *ibid.*

¹¹⁴⁹ Art. 3 EU, *Treaty of the European Union – C 202/1 (TEU)*; Art. 101, 102 EU, *Treaty of the Functioning of the European Union – C 202/1 (TFEU)* (2016).

¹¹⁵⁰ *Europemballage and Continental Can Company Inc. vs. EC – C 6/72* (ECJ 1973); *BAT and Reynolds vs. EC – C 142 and 156/ 84* (ECJ, 1987).

tions as secondary EU competition law.¹¹⁵¹ The competent authority concerning the regulation of the EU market affecting competition matters is the European Commission.¹¹⁵² Aside from that, the national competition authorities are subordinately entitled to enforce European competition law accordingly.¹¹⁵³ The Council regulation 1/2003 was the key regulation procedurally harmonizing national competition laws of the EU Member States with binding EU competition law measures.¹¹⁵⁴ Furthermore, to regulate economically vital exemptions from the cartel prohibition the European Council enacted the so-called block exemption regulations in line with Art. 101.3 TFEU.¹¹⁵⁵ Moreover, the Council enacted a regulation on the control of concentrations between undertakings – the so-called Merger Regulation – to prohibit monopolies within the EU common market.¹¹⁵⁶

All regulations represent directly binding EU competition law which means that they have to be applied by the Member States when the EU common market is affected.¹¹⁵⁷ For that reason, apart from the detailed elaboration of the different competition regulations, the material aspects of EU competition law are binding and of a uniquely highly developed standard due to 61 years of common competition law development. This represents the elaborate cooperation of the respective 27 EU Member States. A search for another similarly highly-developed common ground on competition law, shared by such a multilateral community, will bear no fruits.

Additionally, the mutual cooperation of competition law enforcement is unique, as the cooperation proceedings of the Member States on the one hand and the competition enforcement proceedings of the European Commission on the other hand have a strained relationship of responsibility, as shall be outlined below.

Although the EU competition law provisions and the applicable case law is very detailed and already neatly described in several books and commentaries, a brief overview of the different provisions shall underline the development of EU competition enforcement cooperation and highlight the differences in previous stages of competition law within trade agreements.

1.) *The Basis of EU Competition Law*

The term competition law may be considered to be the general term for regulation of behavior infringing Arts 101, 102 TFEU. The EU Member States agreed to place their sovereignty in the EU and its bodies in matters of competition. The EU Competition Law may be divided into different categories of EU regulation: EU

¹¹⁵¹ Art. 103 EU, *Treaty of the Functioning of the European Union – C 202/1 (TFEU)*.

¹¹⁵² Art. 4 EU, *Council Regulation 1/2003* (2003).

¹¹⁵³ Cf. Art. 16 *ibid*; ; *France Télécom SA vs EC – C 202/07 P* (ECJ, 2009).

¹¹⁵⁴ Cf. Rec. 8 of EU, *Council Regulation 1/2003*.

¹¹⁵⁵ E.g. cf. EC, *Regulation 330/2010 on the application of Art. 101.3 TFEU to categories of vertical agreements and concerted practices – L 102* (2010).

¹¹⁵⁶ EC, *Regulation 139/2004 on the control of concentrations between undertakings (EC Merger Regulation) – L 24/1* (2004).

¹¹⁵⁷ Art. 288 EU, *Treaty of the Functioning of the European Union – C 202/1 (TFEU)*.

antitrust and cartel regulation which covers conduct considered as “anticompetitive agreement” – so-called “Art. 101 TFEU cases”; EU merger regulation cases; EU government procurement cases; EU state aid cases; and international competition law cases of the EU. Without making reference to the direct consequences of EU competition law on private persons (legal or natural), the material and legal procedures of the EU’s authority enforcement in competition law shall be outlined below.

a.) EU Antitrust Regulation Procedures

As noted, the Council Regulation 1/2003 provided the main momentum creating convergence in EU competition law. It is directly linked to Art. 101 and Art. 102 TFEU and has enabled a growing competition culture within the EU. In light of this experience, under these provisions, the regulation 1/2003 was enacted as legislation “designed to meet the challenges of an integrated market and a future enlargement of the Community”.¹¹⁵⁸ This regulation requires the European Commission’s authorities to investigate and decide antitrust cases as well as procedures and provisions which may be used by private addressees.¹¹⁵⁹ It includes provisions decentralizing EU competition law (due to the principle of legal exception) in such a detailed way that one may call the Council Regulation 1/2003 the basis of procedural cooperation in EU competition law.¹¹⁶⁰

aa.) The Power to Regulate Antitrust Law

To perform the powers of antitrust regulation (acc. to Art. 105, 103 TFEU regarding Art. 101, 102 TFEU) efficiently, the European Commission must first acquire information about infringements.¹¹⁶¹ This gathering of information has to be distinguished between formal and informal information processes. A formal information collection has to take place within the scope of the listed powers to investigate cartel infringements (Art. 17 ff. Reg. 1/2003).

Informal antitrust information may be gathered as long as this effort by the European Commission rests on a legal basis.¹¹⁶² The European Commission may attain such informal information via competitor complaints, the exchange of pertinent information with international competition authorities, or via the media.¹¹⁶³

Formal antitrust cases begin with notification to the EU antitrust authority, so after the authority has gained knowledge of an Art. 101 TFEU infringement. This notification of information can be either performed after the investigation is initiated by the European Commission or via a leniency application from one

¹¹⁵⁸ Rec. 1 EU, *Council Regulation 1/2003*.

¹¹⁵⁹ Bechtold, Bosch and Brinker, *EU-Kartellrecht Kommentar Einf. VO 1/2003* Rec. 2.

¹¹⁶⁰ *Ibid* Rec. 4.

¹¹⁶¹ Burrichter/Hennig in Jörg Biermann, Ulrich Immenga and Ernst-Joachim Mestmäcker, *Wettbewerbsrecht – EU; Teil 1* (5. Aufl. edn, 2012) Vorbemerkungen zu Art. 17–22 VO 1/2003 Rec. 1.

¹¹⁶² *Ibid* Rec. 2.

¹¹⁶³ *Ibid*.

of the cartel participants under the leniency provisions in line with the leniency program of the European Commission.¹¹⁶⁴ After the European Commission, as the competent EU antitrust authority, gains knowledge of a potential antitrust infringement, the investigation phase of the European Commission begins (cf. Art. 17 Reg. 1/2003). Its investigative tools are enumerated in chapter five of the Council Regulation 1/2003 and are quite wide ranging.¹¹⁶⁵ First, the European Commission has the power to attain information from potential antitrust infringing entities and from Member States and their competition authorities (Art. 18 Reg. 1/2003). They may interrogate to obtain voluntary testimony (Art. 19 Reg. 1/2003) and are entitled to perform search and seizure on the grounds of the EU Member states as long as they inform the EU Member State's competition authority (Art. 20,21 Reg. 1/2003). Furthermore, the European Commission may ask the Member State's competition authority to perform the search and seizure on the potentially infringing entities soil (Art. 22 Reg. 1/2003). The Commission is entitled to freely choose among the methods of investigation and is not limited by a specific hierarchy order.¹¹⁶⁶

After the investigation, the European Commission may enact sanctions under EU antitrust law consisting of provisional and ultimate penalties (Art. 23, 24 Reg. 1/2003). Though the legality of a penalty requires that the scope of the investigative measures has to be given and no limiting factors are present.

(1.) Scope of Antitrust Investigations

The functional, temporal, geographical and personal scopes of applicability have to be fulfilled for lawful investigations of the European Commission.

(a.) Functional Scope of Applicability

The European Commission may only take advantage of the investigative powers granted by the Council Regulation 1/2003, if it seeks to investigate infringements of Arts 101, 102 TFEU.¹¹⁶⁷ Besides information gathering, the European Commis-

¹¹⁶⁴ Acc. to the European Commissions leniency program, the first firm to submit evidence that is sufficient for the Commission to either launch an inspection or enable it to find an infringement receives full exemption from its fine (total immunity), under the provision that it immediately ends its participation in the infringement. Cf. European Commission, *Factsheet Competition: Antitrust procedures in anticompetitive agreements* (2013) 1.

¹¹⁶⁵ With represents the Art. 337 TFEU granted capacities of the European Commission to attain information and investigate them, cf. Burrichter/Hennig in Biermann, Immenga and Mestmäcker, *Wettbewerbsrecht – EU; Teil 1 Vorbemerkungen zu Art. 17–22 VO 1/2003* Rec. 1.

¹¹⁶⁶ Ibid Rec. 21.

¹¹⁶⁷ Cf. Rec. 23 and 24 and Art. 4 of EU, *Council Regulation 1/2003*.

sion may strive to attain antitrust evidence.¹¹⁶⁸ It is a precondition that the European Commission must have a concrete suspicion of entities infringing EU competition law.¹¹⁶⁹ Other incentives to investigate are not lawful.¹¹⁷⁰

(b.) Temporal Scope of Applicability

The European Commission may begin antitrust investigations after it formally starts an investigation procedure against the infringing entity.¹¹⁷¹ The European Commission may also re-open investigation when it has a concrete suspicion that something went wrong in the first procedure.¹¹⁷²

(c.) Geographical Scope of Applicability

The geographical scope enables the Commission to undertake investigations throughout the Community¹¹⁷³ which means within the territory of the EU. Hence the European Commission may investigate natural or legal persons having their undertakings within the EU. Also they may investigate foreign undertakings if the EU has a cooperation agreement with a third state and the investigation is part of the agreement.¹¹⁷⁴ The term undertaking refers to the economic entity as a whole which means that it is sufficient for the investigation that the concerned investigated entity is a subsidiary of the economic entity.¹¹⁷⁵ In the case of foreign investigations, where the European Commission is not legally entitled to perform investigations, the European Commission performs “informal” investigations upon request and with the consent of the respective state’s competition authority, where those investigations may not lead to legally binding sanctions within the EU.¹¹⁷⁶ Exceptions to this rule are certainly the special rules regarding the European Economic Agreement (EEA) of the EU with the EFTA states as discussed below.

(d.) Personal Scope of Applicability

Besides the described concerned economic entities, the European Commission has the capacity to investigate and interrogate natural persons concerned or associated with the investigated antitrust claim (Art. 19 Reg. 1/2003). Also, and quite notably, the European Commission may inspect private premises in order to obtain relevant antitrust information (Art. 21 Reg. 1/2003). However, investigations of adminis-

¹¹⁶⁸ Burrichter/Hennig in Biermann, Immenga and Mestmäcker, *Wettbewerbsrecht – EU; Teil 1 Vorbemerkungen zu Art. 17–22 VO 1/2003* Rec. 13.

¹¹⁶⁹ Ibid Rec. 14.

¹¹⁷⁰ Ibid.

¹¹⁷¹ Ibid Rec. 15.

¹¹⁷² Ibid; *Société Generale v Commission – T 34/93* (ECI, 1995) Rec. 77.

¹¹⁷³ Rec. 23 of EU, *Council Regulation 1/2003*.

¹¹⁷⁴ Burrichter/Hennig in Biermann, Immenga and Mestmäcker, *Wettbewerbsrecht – EU; Teil 1 Vorbemerkungen zu Art. 17–22 VO 1/2003* Rec. 16.

¹¹⁷⁵ Ibid.

¹¹⁷⁶ Ibid Rec. 19.

trative state premises cannot be conducted. Although, the European Commission may ask the Member State to supply them with specific information (Art. 18.6 Reg. 1/2003).¹¹⁷⁷

(2.) Limitations

The European Commission is bound by the principle of proportionality.¹¹⁷⁸ Additionally, the antitrust investigations of the Commission are limited by the principles of EU law, hence such investigations are not limitless. Generally, the European Commission has to take an ex ante view towards the measures. It has to take the gravity of a potential infringement into account and find the mildest yet most efficient investigation measure.¹¹⁷⁹ As other authorities described before, the European Commission is obliged to comply with a reasonable timetable for the whole investigation procedure.¹¹⁸⁰

bb.) Measurement

The binding investigative powers of the European Commission show that it possible for states to find a single competent competition authority which may proportionally enforce antitrust law in more than one state within the boundaries of the agreement, here: the EU market. The capacities of the European Commission may certainly be compared to the capacities of a single state, apart from the fact that the Commission cannot enact sanctions of criminal law.

b.) EU Merger Regulation Procedures

Based on the described principle that “competition shall not be distorted in the Common Market”¹¹⁸¹ the ECJ developed the principle that fair competition has to transpire in the EU market.¹¹⁸² This principle of effective protection of competition may be seen as the underlying basis for an EU-wide merger regulation,¹¹⁸³ the legal basis for which is the EU Council Regulation 139/2004 (EU Merger Regulation). The EU Merger Regulation is based upon central principles of merger regulation which is why a brief overview of the principles is vital, before turning to an overview of the procedures accompanying it.

¹¹⁷⁷ Ibid.

¹¹⁷⁸ Ibid; *SEP v Commission – T 39/90* (ECI, 1991) Rec. 44.

¹¹⁷⁹ Burrichter/Hennig Biermann, Immenga and Mestmäcker, *Wettbewerbsrecht – EU; Teil 1 Vorbemerkungen zu Art. 17–22 VO 1/2003* Rec. 22.

¹¹⁸⁰ Ibid Rec. 23.

¹¹⁸¹ See under § 5 C I.

¹¹⁸² Körber in Biermann, Immenga and Mestmäcker, *Wettbewerbsrecht – EU; Teil 1 Einleitung Fusionskontrollverordnung (FKVO)* Rec. 1; *Metro v Commission – C 26/76* (ECJ, 1977) Rec. 1875, 1905.

¹¹⁸³ Körber in Biermann, Immenga and Mestmäcker, *Wettbewerbsrecht – EU; Teil 1 Einleitung Fusionskontrollverordnung (FKVO)* Rec. 2.

aa.) Principles for EU Merger Regulation

As in the EU antitrust regulation, the EU Merger Regulation is guided by core principles which developed over time. One may notice the impact of the rule of law on the development of the general principles.

(1.) EU Competition Law's Scope of Measurement

The first principle is the scope of the EU competition law measurement which needs to be applied by the European Commission as the competent merger regulation authority. First the EU Council Regulation 139/2004 is tied to a substantive merger regulation framework. A general assumption developed over time, is that mergers building a market share of up to 25%, are in line with EU competition law, especially mergers not negatively affecting the Common Market.¹¹⁸⁴ Mergers exceeding this threshold or attracting the interest of the authorities for their effect on the common market need to pass the significant impediment to effective competition test (so-called SIEC-test) according to Art. 2 of the Merger Regulation 139/2004. This test was originally developed in the US.¹¹⁸⁵ A more dynamic and more individualized merger regulation is allowed regarding the scope of EU merger regulation.

Furthermore, the substantive scope of merger regulation shall stick to a more economic approach taking efficiency advantages of mergers into account.¹¹⁸⁶ Hence, the European Commission is asked to apply their merger regulations more flexibly, taking into account and interpreting the mergers and their effects on the EU market. This is certainly comparable to the US regulations under the former Hartford fire test.

(2.) Quantitative Scope

The quantitative scope of EU merger control is limited to mergers having a “community dimension” for the sake of greater legal certainty.¹¹⁸⁷ This dimension is measured by objectively determinates thresholds which are applied to each merger case (Art. 1 Reg. 139/2004).¹¹⁸⁸ These thresholds not only indicate whether a merger is to be regulated by the European Commission, they also indicate which authority (including Member State's authorities) is the right authority to take on the particu-

¹¹⁸⁴ Cf. Rec. 32 of EC, *Regulation 139/2004 on the control of concentrations between undertakings (EC Merger Regulation) – L 24/1*; Körber in Biermann, Immenga and Mestmäcker, *Wettbewerbsrecht – EU; Teil 1 Einleitung Fusionskontrollverordnung (FKVO)* Rec. 28.

¹¹⁸⁵ Körber in Biermann, Immenga and Mestmäcker, *Wettbewerbsrecht – EU; Teil 1 Einleitung. Fusionskontrollverordnung (FKVO)* Rec. 29; Stoll in Münchener Kommentar für Wettbewerbsrecht Rec. 1674.

¹¹⁸⁶ Ibid Rec. 32; Rec. 29 and Art. 2.1 lit. b of EC, *Regulation 139/2004 on the control of concentrations between undertakings (EC Merger Regulation) – L 24/1*.

¹¹⁸⁷ Körber in Biermann, Immenga and Mestmäcker, *Wettbewerbsrecht – EU; Teil 1 Einleitung. Fusionskontrollverordnung (FKVO)* Rec. 34.

¹¹⁸⁸ Ibid.

lar merger case.¹¹⁸⁹ Hence, the thresholds are not only substantive indications to the application of EU merger control, but also procedural thresholds of competence for the EUs competition authorities (cf. Art. 4, 9, 22 of Reg. 139/2004).

(3.) Precautionary Merger Control

Moreover, rather than only applying a repressive and sanction-driven merger control system, the Reg. 139/2004 implements a precautionary merger control system. All cases which fall within the scope of the Reg. 139/2004 are to be reported to the European Commission by the merging parties (Art. 4 Reg. 139/2004). If a merger is not reported to the Commission, the contracts are void (Art. 7 Reg. 139/2004).

(4.) Competences and One-Stop-Shop

Clashes of competences between the European Commission and the Member State's competition authorities have led to greater decentralization as can be seen within the more detailed initiatives of the EU Merger Working Group – still provided, however, that under the Reg. 139/2004 the European Commission shall have the general competence to control mergers within the EU and community dimensional impact (so-called one-stop-shop).¹¹⁹⁰ This general one-stop shop rule regarding the European Commission's general competence is accompanied by the initial right of the European Commission to freely take over specific merger cases (Art. 22.4 Reg. 139/2004), as well as an application right of the Member States (Art. 22.1 Reg. 139/2004) and the right of the partaking economic entities (Art. 4.5 Reg. 139/2004) to initiate proceedings of the European Commission under the EU merger regulations. Though, the European Commission has the right to refer merger cases within their competence to a national EU Member State's competition authority (Art. 9 Reg. 139/2004). Overall, one reason for the concentration of competencies within the European Commission which will be mainly motivated by the will of the Member States, is the wish for a more efficient EU-wide merger control. Also, as will be demonstrated, within the EU Merger Working Group it is the aim of the Member States to find a balance between concentration and decentralization.

(5.) Time Limitation by the European Commission

As previously described, within many of the trade agreements competition chapters, the EU merger control system is also limited by a due process clause and proportionality. This means the European Commission must hold its investigations within a proportional amount of time, taking the interest of the addressee into account. It would not be proportional to the merging parties to uphold a merger process indefinitely – the EC has to notice that merger efficiencies may diminish in a market

¹¹⁸⁹ Ibid.

¹¹⁹⁰ Art. 22 of EC, *Regulation 139/2004 on the control of concentrations between undertakings (EC Merger Regulation)* – L 24/1 ; Körber in Biermann, Immenga and Mestmäcker, *Wettbewerbsrecht – EU; Teil 1 Einleitung Fusionskontrollverordnung (FKVO)* Rec. 37.

(as discussed before in the case of GE Honeywell). When the European Commission is not capable of finalizing its investigations within the time frame of Art. 10 Reg. 139/2004, the economic entities may impute the Commission's consent to the merger (Art. 10.6 Reg. 139/2004). This time limitation is a great advantage for economic entities to gain legal certainty within a fixed and proportionate time frame.

(6.) Judicial Review

All decisions of the European Commission in line with the EU Merger Regulation are open to judicial review by the ECJ and ECJ (Art. 2 Reg. 139/2004) which reflects the separation of powers within the EU. No other international trade agreement of such a highly developed integrated stage as the EU, has ever implemented such a binding way of dispute settlement and legal review to issues concerning transnational decisions in competition law.

bb.) EU Merger Regulation Procedure

Having outlined the basic principles of EU merger regulation, the procedure accompanying the regulation needs to be afforded further scrutiny.

(1.) Allocation of Rights and Duties

As already stated, the allocation of competencies is performed by merger thresholds and a general merger regulation one-stop shop of the European Commission.¹¹⁹¹ Within the European Commission there exists is the Directorate General for Competition (DG Comp) under the former lead of Johannes Laitenberger and now Director-General Olivier Guersent. The DG Comp has its own budget to perform merger regulation. The DG Comp establishes case teams for every merger composed of experts such as economists and lawyers.¹¹⁹² Those DG Comp merger case teams deliver recommendations to the Commission itself, namely to the Commissioner of Competition Magarethe Vestager. The Commissioner normally announces the decisions of the European Commission regarding the merger case by publication in Administrative Commission Decisions which are open to judicial review.

(2.) Pre-Notification Phase

The pre-notification stage showcases the aim of the European Commission and its DG Comp to establish round table discussions with the affected entities. In this non-binding phase, the procedurally involved parties have the opportunity to discuss any legal matter relating to the particular merger project.¹¹⁹³ In this phase the

¹¹⁹¹ See above at § 5 C I. 1. b. aa. (4.) "Competences and one-stop-shop".

¹¹⁹² Körber in Biermann, Immenga and Mestmäcker, *Wettbewerbsrecht – EU; Teil 1 Einleitung. Fusionskontrollverordnung (FKVO) Rec. 83.*

¹¹⁹³ Körber in Biermann, Immenga and Mestmäcker, *Wettbewerbsrecht – EU; Teil 1 Einleitung. Fusionskontrollverordnung (FKVO) Rec. 85 f.*

European Commission makes reference to its best practice cases which gives the merging entities a measurable degree of legal certainty.¹¹⁹⁴ Also, the affected entities may apply to take part in this phase, so that the European Commission may or may not take on the case (Art. 4 Reg. 1/2004).

(3.) Notification Phase

The obligation to notify the European Competition (Art. 4.1 Reg. 139/2004) is binding and severe sanctions will follow if the obligation is disobeyed (Art. 7 Reg. 139/2004). The notification has to be performed via a notification form of the European Commission (Art. 3.1-3.5 Implementation Council Regulation 802/2004). If the merger includes confidential information, such information has to be especially highlighted and justified (Art. 18 Implementation Council Regulation 802/2004).¹¹⁹⁵ From the notification onwards, the merger is on hold until the European Commission consents to it (Art. 7.1 Reg. 139/2004). The exceptions to this rule are applied correspondingly (Art. 10.6 Reg. 139/2004).

(4.) Phase I

Following the notification to the European Commission, Phase I of the merger regulation process commences in the form of a pre-decision evaluation. The European Commission is evaluating whether the merger falls within the scope of the EU Council Regulation 139/2004 and if so, whether the Commission has severe doubts whether the merger is in line with the merger provisions.¹¹⁹⁶ The respective decisions are issued prospectively, such as the allowance because of merger clearance etc. A majority of merger cases will come to an end in this phase.

(5.) Phase II

The rather critical phase is the decision phase – the Phase II of the European Commission's merger regulations. The evaluation within this phase allows the European Commission to enact sanctions (demerger orders, appropriate interim measures etc.). Mainly Phase II ends with the Commission's decision, whether or not the merger passed the SIEC test, hence an allowance to merger or a decision that a merger is illegal (Art. 8 Reg. 193/2004).¹¹⁹⁷ The European Commission applies its discretion regarding allowances under certain defined circumstances (as in Boeing McDonnell Douglas) according to Art. 82 Reg. 139/2004.¹¹⁹⁸

¹¹⁹⁴ Ibid Rec. 86.

¹¹⁹⁵ Ibid Rec. 90 ff.

¹¹⁹⁶ Ibid Rec. 96.

¹¹⁹⁷ Ibid Rec. 104.

¹¹⁹⁸ Ibid; cf. above regarding Boeing Mc Donnell Douglas case of the European Commission.

(6.) Measurement

The fact that the whole merger review process follows binding EU law is already unique in comparison to the trade agreements. The fact that the European Commission's decisions are also publicly published (Art. 8, 20 Reg. 139/2004) and open to judicial review really shows the strength of EU merger control especially with respect to efficiency and legal certainty as to aspects of the rule of law.

c.) EU Government Procurement Regulation

In government procurement, the relationship between Member States and their economic entities may severely affect the Common Market which is why the EU competition law also tries to limit misconduct. Government procurement is bound by the fundamental freedoms of primary EU law, especially the principles of transparency, equal treatment, proportionality, and mutual recognition.¹¹⁹⁹ The Member States have a wide margin of discretion regarding government procurement.¹²⁰⁰ The secondary law is detailed and accordingly binding.

d.) EU State Aid Regulation

State aid within the EU is regulated by Art. 107-109 TFEU. Hence, state aid agreements negatively affecting the EU market are unlawful (Art. 107.1 TFEU). The system has two exemptions: state aid which is generally allowed as for example to impede the damages of i.e. natural disasters (Art. 107.2 TFEU), and state aid which is considered to be advantageous for the EU market (so-called block exempted state aid in line with Art. 17.3 TFEU, as for example state aid regarding agriculture within the EU market). The European Commission is the competent authority to supervise the provisions of state aid (Art. 108 TFEU) and may propose regulations to the European Council (Art. 109 TFEU) which, in turn, regulates state aid in a more detailed way.

e.) International Competition Law

The previously discussed need for international cooperation in competition law matters was duly noted by the EU Member States, which is why the EU Member States enabled the EU bodies to enter into treaties of international law.¹²⁰¹ In line with the principle of conferral under Art. 5.2 TEU, the EU is only able to take action at EU and international levels in accordance with the described EU powers and objectives of the TEU and the TFEU.¹²⁰² The EU's power to conclude treaties of international law

¹¹⁹⁹ Körber in *ibid* Überblick über die Rechtsquellen des Wettbewerbsrechts Rec. 57; European Commission, *Commission interpretative communication on concessions under community law – C 121/02* (2000) 5.

¹²⁰⁰ Körber in Biermann, Immenga and Mestmäcker, *Wettbewerbsrecht – EU; Teil 1 Überblick über die Rechtsquellen des Wettbewerbsrechts* Rec. 58.

¹²⁰¹ Stoll in *Münchener Kommentar für Wettbewerbsrecht* Rec. 1762ff.

¹²⁰² *Ibid* Rec. 1762.

with non-EU Member States is described in Art. 218 TFEU, whilst the scope of this external competence is described in the established jurisprudence of the EU.¹²⁰³ The procedure requires the existence of an institutional power of the EU. If such an institutional power may be affirmed, it is to be decided whether the EU has the sole competence to conclude the deal or whether the EU bodies need an explicit affirmation of all Member States. Once this is determined, the competent EU authority mandated to establish the international understanding must be identified.

aa.) EU Competences for External Affairs

The range of legal enabling statutes specifies the institutional competence of EU external affairs. Art. 217 TFEU enables the EU bodies to conclude association agreements; the power to conclude other species of international agreements derives from the explicit allocation of competencies of existing and legally recognized rules. Distinction must be made between three kinds of EU enabling competencies, those being: institutional competence of the EU; the sole or mixed competence of the EU and its Member States; and the institutional competence of an EU authority.

(1.) Institutional Competence of the EU for External Affairs

Institutional competence of the EU for external affairs derives from Art. 217 TFEU as well as the principle of the common EU trade policy and the legal principles of the AETR decision of the ECJ of 1971.¹²⁰⁴

(a.) Common Trade/Competition Policy

The competence of common trade and competition policy derives from Art. 207.1 TFEU, as the “common commercial policy shall be based on uniform principles”. The meaning and scope of such common commercial policy was further defined by the systematic and teleological interpretation of Art. 207.1 TFEU.¹²⁰⁵ The functioning of the EU Common Market includes trade in goods from non-Member States (Art. 29 TFEU), hence a central EU competence steering these external relations is vital.¹²⁰⁶ Therefore, sole national competencies to steer third-country trade relations are excluded for the sake of the functioning of the EU market.¹²⁰⁷

Whilst the scope of EU competencies for foreign trade policy was highly disputed, the three main theories of final theory and instrumental theory, as well as mediatory solution, all come to the conclusion that an EU competence for common competition policy is vital and given.¹²⁰⁸

¹²⁰³ Ibid Rec. 1762.

¹²⁰⁴ Ibid Rec. 1763.

¹²⁰⁵ Ibid Rec.1763.

¹²⁰⁶ Ibid Rec. 1764.

¹²⁰⁷ Ibid Rec. 1763; *Donckerwolcke v Procureur de la République, C-41/76* (ECJ, 1976).

¹²⁰⁸ Ibid. Rec. 1765; cf. for *final theory : Instrumental theory: WTO-opinion, Opinion 1/94* (ECJ, 1994) Rec. 4; Meinhard Hilf, ‘The ECJ’s Opinion 1/94 on the WTO – No Surprise, but wise’

(b.) Implicit External Competences of the EU

For other treaties of international law not enshrined by Art. 207.1 TFEU, such as sole competition law agreements, a EU competence to agree upon such agreements derives from unwritten law and case law such as the ECJ AETR case of 1971 which developed the so-called implicit external competence of the EU.¹²⁰⁹ Following the AETR case of the ECJ, the EU has the competence to agree to international treaties in cases where its competencies for EU internal regulation are conceded.¹²¹⁰ Therefore, the EU is enabled to conclude treaties of international law in cases where an EU internal competence to regulate a specific topic was already demonstrated¹²¹¹ as well as in cases where the EU would have EU internal regulation competencies but did not yet perform such competencies.¹²¹² The area of competition policy is explicitly conceded by the EU in antitrust law (Art. 101 TFEU), state aid (Art. 107 TFEU), and merger regulation (Art. 352 TFEU) so that the authority of the EU to regulate corresponding treaties of international law is deliberately provided for by Art. 207.1 TFEU. Hence the competence of the EU to conclude sole international competition law agreements is within the scope of the implicit external competence of the EU.¹²¹³

(c.) Intermediate Result

The margin of EU competencies for international competition law treaties is very wide. Hence, no considerable EU internal problems arise with regard to competence clashes.

(2.) Sole- and Mixed Competences of the EU for External Affairs

The next question is whether the EU has to share its external competencies in competition policy with the consent of its Member States. This question is significant for the political efficiency of treaties of international law, as the consent of every single Member State opens the door for further national political discussion and the risk of a veto by any single Member State of the whole political project. On one hand, such mixed EU competence for the conclusion of a treaty of international law is the more democratic solutions; on the other hand the duration of such a political process is very long and therefore inefficient. In that regard ways to efficiently take part in

Eur J Int'l L 1995 245 ff.; Pierre Pescatore, 'Opinion 1/94 on Conclusion of the WTO Agreement: Is There an Escape from a Programmed Disaster' *Common Market L Rev* 1999 387; for *mediatory solution* cf. Ehlermann et.al., *Études de droit des Communautés Européennes mélanges offerts à Pierre-Henri Teitgen* (1984) 152.

¹²⁰⁹ Ibid. Rec. 1767; Cf. Oliver Dörr, 'Die Entwicklung der ungeschriebenen Außenkompetenzen der EG' *EuZW* 1996.

¹²¹⁰ *AETR Case, C-22-70* (ECJ, 1971) 264 para. 1.

¹²¹¹ Cf. e.g. *WTO-opinion, Opinion 1/94 I-5264* Rec. 77.

¹²¹² Cf. "*Open Skies*", *Commission v United Kingdom, C-466/98* (ECJ, 2002) I -9427 Rec. 41-54.

¹²¹³ Ibid. Rec. 1767.

the accelerating process of international economic interdependence might be inhibited. That is the reason the described EU FTAs with Vietnam, Singapore etc. were split into free trade agreements on the one hand (EU-only treaties), and investment partnership agreements on the other (EU mixed treaties).¹²¹⁴ This division inhibits competence clashes (and consequently *ultra vires* claims of the Member States).¹²¹⁵

The more the centralization of political issues in the direction of the EU progresses, the stronger the assumption becomes that the EU will eventually be able to regulate more issues on its own behalf (EU only). Though it needs to be noted that at the moment, the populist wave and anti-globalization movements form national political movements trying to inhibit such centralization.

(3.) Institutional Competence of an EU Authority for External Affairs

Once the competence of the EU is clarified, the competent EU body has to be identified. Under Art. 218 TFEU the EU Council is generally the competent EU body to conclude treaties of international law, although the European Commission may also take up this role in exceptional cases.¹²¹⁶ Upon claim of France against the competence of the European Commission to ratify the EU/US competition treaty of 1991, the ECJ ruled that there is no room for an implicit competence of the European Commission to conclude international treaties.¹²¹⁷ Hence, the ECJ declared the EU/US Competition Law Agreement of 1991 void. Nonetheless with respect to the measures of the Vienna Convention on the Law of Treaties, the EU internal disproportionalities were not directly relevant to the determination of the validity of the EU/US Competition Law Agreement. Hence, the competent EU body, the EU Council, was able to approve the Competition Law Agreement retrospectively.¹²¹⁸

The European Commission may exercise its administrative enforcement cooperation with third states freely as long as it makes clear that this administrative enforcement cooperation is non-binding.¹²¹⁹ Therefore, the described best practices of the EU with the US were lawfully agreed upon. Similarly, the input of the Commission within the ICN etc., are lawful.

¹²¹⁴ Regarding the split-up and especially regarding the ECJ opinion 2/15 of 2017 cf. the explanations made above under FTAs from 2002-2018.

¹²¹⁵ Regarding *ultra vires* claims cf. the explanations regarding CETA above under FTAs from 2002-2018.

¹²¹⁶ Stoll Münchener Kommentar für Wettbewerbsrecht Rec. 1769.

¹²¹⁷ *France v Commission*, C-327/91 (ECJ, 1994) Rec. 27.; For the details of the treaty cf. explanations cf. above under “*Bilateral Positive Comity Competition Agreements*”.

¹²¹⁸ European Council and Commission, *Corrigendum to Decision 95/145/EC – L. 131 / 38* (1995); Stoll Münchener Kommentar für Wettbewerbsrecht Rec. 1770.

¹²¹⁹ “*Transatlantic Economic Partnership*”, *France v Commission – C-233/02* (ECJ, 2004) Rec. 45 ; Stoll in Münchener Kommentar für Wettbewerbsrecht Ibid.

(4.) Measurement

The process of Art. 218 TFEU to find the right competencies depends on the nature of the international treaty to be concluded, since sometimes the decisions concerning competences may be a matter of interpretation, as the authorization rules have the capacity to constantly develop. Regarding the competencies of the European Commission, one may note that they have widespread authority to conclude non-binding agreements (MoU etc.) on trade and competition policy. This procedure can be a strong political tool paving the way for global political initiatives to be concluded by the European Commission.

bb.) Direct Applicability of International Law

After the EU was able to enter into international trade and competition law treaties, one may ask the question upon whom and to what extent the provisions of these treaties are binding. The TFEU refers to the obligation act forth in such treaties in its Art. 216.2, yet further provisions describing the level of obligation do not exist.¹²²⁰ Rather, the interpretation of and rules on the level of obligation of international treaties for the EU and its Member States were developed by the ECJ.

First of all, the ECJ interprets the EU treaties of international law as integral components of the legal area of the EU.¹²²¹ Through consistent case law, the ECJ has held that the agreements of treaties of international law the EU agreed upon have a limited but direct applicability to EU law.¹²²² In the end, this direct applicability depends on a case by case individual interpretation of the agreements. The ECJ examines the agreements of international law in three steps. First, it examines the intent of the contracting parties, as the parties themselves are entitled to agree upon the level of obligation nationally (EU-wide).¹²²³ Second, the wording of the agreement is to be interpreted in the light of the obligations of the EU and its Member States.¹²²⁴ Last, if the previous steps do not lead to a clear conclusion, the ECJ takes

¹²²⁰ Stoll in Münchener Kommentar für Wettbewerbsrecht Rec. 1771; Astrid Epiney, 'Zur Stellung des Völkerrechts in der EU' EuZW 1999,5.

¹²²¹ *Hageman v Belgium – C 181/73* (ECJ, 1974) Rec. 3-5; Stoll Ibid.

¹²²² For the extensive literature on the interpretation of the ECJ cf. Stoll in Münchener Kommentar für Wettbewerbsrecht Rec. 1773.

¹²²³ *Hauptzollamt Mainz v Kupferberg – C 104/81* (ECJ, 1982) Rec. 17: "...Community institutions which have power to negotiate and conclude an agreement with a non-member country are free to agree with that country what effect the provisions of the agreement are to have in the internal legal order of the contracting parties..."; cf. regarding review and ambit of the *Kupferberg* case instead of others: Armin v. Bogdandy and Tillmann Makatsch, 'Kollision, Koexistenz oder Kooperation? – Zum Verhältnis von WTO-Recht und europäischem Außenwirtschaftsrecht in neueren Entscheidungen' EuZW 2000 261.

¹²²⁴ *Anastasiou et al. – C 432/92* (ECJ, 1994) Rec. 23; *Wählergruppe Gemeinsam – C 171/01* (ECJ, 2003) Rec. 54; *Pêcheurs de l'étang de Berre – C 213/03* (ECJ, 2004) Rec. 39; Stoll Rec. 1775.

into account the nature and ambit of the treaty within its interpretational sphere, as to whether it increases the legal and political positions of the EU, promotes the accession process of the EU, etc.

Therefore, the question of whether or not an international treaty is directly binding, very much depends on the individual interpretation of the ECJ. For that reason the European Commission and the EU Council design treaties of international law in a convergent way making the purposes of the treaties as well as the different wordings very similar to each other. Hence, the “EU patterns” of international commercial law may be observed, and in that way the mentioned idea of the export of EU law to third countries may be fostered.

cc.) General Principles of EU Law for International Competition Agreements

Over time some general principles developed deriving from the existing international competition law agreements of the EU. Those principles are the essence of the EU’s international competition law convergence, hence the content of the international competition law treaties very much differs in structure, legal content, ambit, etc. Therefore, they set forth the legal core values to be obeyed within future international competition law treaties of the EU. Furthermore, in comparison to other treaties of international law concerning such matters, they represent the level of possible convergence in procedural and substantive international competition law enforcement over the period of 60 years.

(1.) Scope of EU Body Competencies as Competition Law Authority Regulating External Competition Law Matters

The treaties of international law in competition law of the EU usually do not make references to the territorial competence of the EU Member State’s competition authorities. Yet this does not mean that the EU bodies are always the competent authority to regulate competition law. It is the other way around, as the EU bodies are only competent authorities to regulate competition law territorially, when their competence is directly granted within the individual treaty. This is usually the case within the sole competition law treaties with their references to Arts 101, 102 TFEU, where the EU Commission is the competent authority, if EU trade is affected, and Art. 1 EU Merger Regulation for EU market-relevant mergers.¹²²⁵ In other cases, the EU bodies are only competent authorities when the external regulative competence is granted by the principles previously described, common trade, implicit competence, etc. Though in competition law regulation this will be the always the case when more than one EU Member State is involved.¹²²⁶

¹²²⁵ Stoll in Münchener Kommentar für Wettbewerbsrecht Rec. 1781.

¹²²⁶ Ibid Rec. 1782.

(2.) Enforceability of international competition law

The EU's competition law related treaties of international law do not generally include mechanisms of implementation which is why the EU Member State's authorities generally have the competence to execute the agreed upon rules.¹²²⁷ If dispute arise, the EU treaties do not grant adjudicative competence to courts. Political arbitration mechanisms, such as the DSB of the WTO, are normally accessible which was only the case with the Eurostar investment law dispute within the former EU-Austria FTA (which was finally resolved with the accession of Austria to the EU in 1995).¹²²⁸ Regarding international competition law, no FTA includes references to dispute settlement issues, as already observed before

(3.) Confidentiality and competition law enforcement

As pointed out before, the exchange of confidential competition law information with other than EU states has not been allowed yet. In all competition law treaties this prohibition is justified with the high levels of EU internal protection of confidential information. This is the reason the EU and the US are not entitled to conclude a MLAT, where the exchange of confidential information is vital.

The reasons for this prohibition on the exchange of confidential information derived from the principle of the prohibition of exploitation (Art. 28.1 EU Regulation 1/2003, Art. 17.1 EU Merger Regulation), especially due to the EU principle of professional secrecy (Art. 339 TFEU, Art. 28.2 EU Regulation 1/2003, Art. 17.2 EU Merger Regulation).¹²²⁹ The principle of professional secrecy extends to business secrecy and other confidential information.¹²³⁰ Business secrecy covers information which has the capacity to severely harm an affected individual entity or person on account of exchange.¹²³¹ Therefore a very strict level of business secrecy is required.¹²³² Whether or not confidential information may be subsumed as information falling under the principle of business secrecy has to be determined individually – on a case by case basis.

The limits of international competition law treaties and the exchange of (non-) confidential information are debatable and still not entirely clear.¹²³³ Whilst some commentators argue that the principle of business secrecy limits every exchange of information between competition authorities, others want to allow exchange of

¹²²⁷ Ibid Rec. 1783.

¹²²⁸ Ibid; Cf. *Opel Austria v Commission – T-115/94* (CFI, 1997).

¹²²⁹ Ibid Rn. 1786.

¹²³⁰ Ibid.

¹²³¹ Ibid.

¹²³² Ibid; *Hoffmann-La Roche – C 85/76* (ECJ, 1979) Rec. 13-14; *AKZO Chemie v Commission – C 53/85* (ECJ, 1986) Rec. 28.

¹²³³ Stoll Münchener Kommentar für Wettbewerbsrecht Rec. 1787.

information between competition authorities, as long as the information only includes basic information like the name and the general components of the business practices of a tortfeasor.¹²³⁴

The differences may be reconciled by following the way the European Commission obtained confidential information by formal investigation, or by another informal method of its own.¹²³⁵ Formally obtained information will fall under the principle of business secrecy, whilst internal authority information will not be part of the strict principles governing authority internal exchange of such information.¹²³⁶ Since otherwise informal investigation would be hindered severely which would lead to a paralysis of the competition authority. The authorities may discuss competition enforcement measures against tortfeasors, accordingly, including discussing effects on market etc., though they are not entitled to publish the obtained information.¹²³⁷

With reference to the described ambit of the ICN and the OECD for states to work with waivers of confidentiality, the practical relevance of this debate may decrease dramatically in the future since tortfeasors have a great interest in cooperating with the investigating competition authority for several reasons. To name two: it is an efficient way to legal certainty and the corresponding affirmation of the tortfeasors will to cooperate by the authority (which will lead to lower fines in the best case).

Since the principle of confidentiality in business matters is of a fairly high value within the EU, the EU bodies have to respect it during cooperation in international competition matters.

dd.) Consequences for International Competition Law Treaties of the EU

The core principles of international competition law show that the EU competencies regulating competition law internationally are not limitless. Even if the EU has wide competencies to cooperate in such matters, core legal rules are still upheld.

f.) Facets of EU Competition Law

The facets of EU competition law are widespread and detailed. The foundations of EU competition law are the result of a well-working Common EU Market which grew over a long period of time. The fact that 28 states share such a detailed legal regime, especially in the light of previously described levels of integration of trade agreements, is unique.

¹²³⁴ For both cf. Stoll in Münchener Kommentar für Wettbewerbsrecht Rec. 1789.

¹²³⁵ Ibid.

¹²³⁶ Ibid.

¹²³⁷ Ibid; cf. also Zanettin, *Cooperation between Antitrust Agencies at the International Level* 127.

2.) *EU Internal Enforcement Cooperation in Competition Law*

Still, such a convergent working system faces typical inefficiencies. Even if the described competition law regime of the EU is generally binding on the Member States, there might still be resistance to enforcing the EU competition law in the way it is supposed to be. Therefore, it is the aim of the EU Member States to ease the cooperation process between them and their EU bodies for the sake of a smoother and better working EU competition law system. The main fora to achieve this may be the European Competition Network and the EU Merger Working Group.

a.) The European Competition Network

Having regard for the effective and convergent enforcement of European Competition law and to create a European “competition culture” as an EU level playing field, the EU Ministerial Council initiated the European Competition Network (ECN).¹²³⁸ The main purpose of the ECN is for the European Commission and the Member State’s authorities to closely cooperate in competition enforcement matters.¹²³⁹ To reach this goal the European Commission and the Member States are obligated by the ECN to follow certain codes of conduct which are comparable with described stages of cooperation. The European Commission is obligated to provide the Member State’s national authorities “copies of the most important documents it has collected” for the application of an enforcement action.¹²⁴⁰ Upon request of a national competition authority, the European Commission is further obligated to provide the national authority with further “existing documents necessary for the case”.¹²⁴¹ Moreover the Member State’s competition authorities have the opportunity to consult with the European Commission upon any European competition law matter if the European Commission is initiating enforcement activities under Arts 101, 102 TFEU.¹²⁴² On the other hand, no less than 30 days before enacting a competition law enforcing decision the national competition authorities are obligated to inform the European Commission about the decision concerned and provide the Commission with a short summary of the case.¹²⁴³ This notification is designed to assure the deterrence of the European Commission towards the national competition authorities in the enactment of competition enforcement activities in EU trans-border cases. If the European Commission initiates competition enforce-

¹²³⁸ Cf. Rec. 15 ff. and Art. 11-13 EU, *Council Regulation 1/2003*; Overview to the ambit of the ECN cf. http://ec.europa.eu/competition/ecn/index_en.html (visited on: 22.03.20); Jörg Schütz in Jan Busche and Andreas Röhling, *Kölner Kommentar zum Kartellrecht Band 4* (2013) 124 Ref. 1; Giorgio Monti, *EC Competition Law* (2007) 418; EC, Report on Competition Policy (2005) 69 para. 204.

¹²³⁹ Art. 11.1 EU, *Council Regulation 1/2003*.

¹²⁴⁰ Art. 11.2 *ibid.*

¹²⁴¹ *Ibid.*

¹²⁴² Art. 11.5 *ibid.*; also cf. Dreher and Kulka, *Wettbewerbs- und Kartellrecht: eine systematische Darstellung des deutschen und europäischen Rechts* 656.

¹²⁴³ Art. 11.3 and 11.4 EU, *Council Regulation 1/2003*.

ment proceedings, the competence of the national authority lapses.¹²⁴⁴ The summarized information may be forwarded to other Member States if they and their competition authorities are affected.¹²⁴⁵ Regarding the exchange of information, the European Commission and the Member States are entitled to exchange confidential information and use this as evidence in their competition enforcement proceedings regarding Arts 101, 102 TFEU respectively.¹²⁴⁶ If this information concerns natural persons rather than economic entities, the requirements of confidentiality are supplemented by further restrictions including on information regarding criminal custody or making no reference to evidence of shared information.¹²⁴⁷ For the sake of further deeper cooperation and greater efficiency in competition enforcement matters, and avoidance of parallel proceedings, the ECN provides the Member States with an opportunity to safeguard competition enforcement proceedings upon request of either the European Commission or another Member State in line with EU law.¹²⁴⁸ For that reason, the Member State's authorities under the ECN are fully entitled and endowed with the same rights deriving from the endorsement of the European Commission – as the “long arm” of the Commission.¹²⁴⁹ The European Commission is entitled to request a national authority within the ECN to assist the Commission in its competition enforcement activities, namely in cases where it considers assistance to be essential.¹²⁵⁰ Also the EC is entitled to formally order Member States authorities to assist.¹²⁵¹ Additionally, upon request of either the European Commission or the Member State's authorities, commission officials may support the enforcement activities.¹²⁵² The assistance activities are mandatory. Other than that, national law applies to the enforcement of the assistance activities.¹²⁵³ The goal of greater enforcement efficiency is furthermore highlighted by the provisions enabling the European Commission and the Member State's authorities to suspend or reject antitrust claims if another authority is already dealing with the case.¹²⁵⁴

To pay attention to the interests of the national Member States, the European Commission has to consult with the national competition authorities regarding proceedings intended to give them the opportunity to initiate a consultation upon this

¹²⁴⁴ Art. 11.6 *ibid.*

¹²⁴⁵ *Ibid.*

¹²⁴⁶ Art. 11.4 *ibid.*

¹²⁴⁷ Art. 12.3 *ibid.*

¹²⁴⁸ Art. 22.1 and Art. 20.5 *ibid.*

¹²⁴⁹ This mechanism is also described as a “system of parallel competences” cf. Monti, *EC Competition Law*; EC, Commission Notice on cooperation within the Network of Competition Authorities (2004) para. 1.

¹²⁵⁰ Art. 22.2 with reference to Art. 20.1 and 20.4 EU, *Council Regulation 1/2003*.

¹²⁵¹ *Ibid.*

¹²⁵² Art. 22.2 *ibid.*

¹²⁵³ *Ibid.*

¹²⁵⁴ Art. 13.1 and 13.2 *ibid.*

proceeding within the Advisory Committee of the ECN.¹²⁵⁵ If the European Commission fails to consult the Advisory Committee, the European Commission's notable decisions are void which underlines the level of obligation of the provision.¹²⁵⁶

The Advisory Committee aims to support and consult the European Commission in its competition enforcement proceedings.¹²⁵⁷ In that regard, the Advisory Committee wants to foster the contact of the European Commission with the Member State's competition authorities by coordinating the European competition enforcement activities.¹²⁵⁸ The Advisory Committee consists of the Member State's competition authority representatives led by the European Commission. Apart from the obligation to hear the Advisory Committee before enacting decisions, the European Commission "must take the utmost account of the opinion of the Advisory Committee" in its enforcement decisions.¹²⁵⁹ However, the Advisory Committee is not entitled to make official statements. Its ambit is rather to advise the European Commission and the parties involved.¹²⁶⁰

In 2006, the ECN endorsed a Model Leniency Program intended to promote convergence in leniency activities for the EU Member States.¹²⁶¹ Leniency systems were considered an essential catalyst for the detection of anticompetitive conduct within the EU market.¹²⁶² As such, after the establishment of the Model Program, in 2012 the ECN was able to reform it and introduce a model for a "state-of-the-art" leniency program to the EU Member States, including the utilization of digital information.¹²⁶³ Convergence in leniency programs intended to prohibit the Member States from making different sanction threats against individuals considering taking part in corporate leniency. The differences in sanction applications might lead to negative incentives to cooperate with competition authorities EU-wide, inhibiting an efficient detection of anticompetitive conduct.¹²⁶⁴ The majority of the EU Member States either adopted or developed leniency programs in line with the Model Program creating more convergent competition enforcement within the EU.¹²⁶⁵ For that reason, one may rightly notice the ECN's capacity to enact effective policy tools.¹²⁶⁶ The fact that the enacted policy concerns the convergent develop-

¹²⁵⁵ Art. 14.7 *ibid.*

¹²⁵⁶ Art. 14.5 *ibid.*; cf. e.g. *Cimenteries CBR vs. Commission – T-25/95* (ECI 2000).

¹²⁵⁷ ; Dreher and Kulka, *Wettbewerbs- und Kartellrecht: eine systematische Darstellung des deutschen und europäischen Rechts* 658 Ref. 1615.

¹²⁵⁸ *Ibid.*

¹²⁵⁹ EC, Commission Notice on cooperation within the Network of Competition Authorities (2004) para. 4.1.1 Ref. 59.

¹²⁶⁰ Art. 14.7 EU, *Council Regulation 1/2003*.

¹²⁶¹ ECN, *Model Leniency Programme* (2006).

¹²⁶² EC, *Communication from the Commission to the European Parliament and the Council: Ten Years of Antitrust Enforcement under Regulation 1/2003 – COM (2014) 453 final* (2014) Ref. 11 and 39 f.

¹²⁶³ *Ibid.* Ref. 11 and 39.

¹²⁶⁴ *Ibid.* Ref. 40.

¹²⁶⁵ *Ibid.* Ref. 39.

¹²⁶⁶ Cf. finding of the EC *ibid.* Ref. 39.

ment of investigation procedures, reflects that the EU cooperation in competition enforcement matters is on higher levels compared to the previously discussed stages of cooperation of exchange of information, notification, etc.

The cooperation and coordination measures of EU competition law, especially with regard to the rules concerning the ECN, represent a well-developed mandatory competition enforcement cooperation system. Theoretically, the powers of competition enforcement are balanced between the European Commission as a competent authority and the national government's authorities as *primus inter pares*.¹²⁶⁷ Yet in reality, the possibility of the national authorities intervening with the Commission's decisions is rather low. The criticism that the ECN plays a small role in developing and enforcing substantive competition law as the European Commission is playing the monitoring role, is correct.¹²⁶⁸ Measuring the benefits of the ECN, e.g. by standards of mutual trust and cooperation; professionalism; and a common regulatory philosophy, it seems that the ECN is limited by the European Commission in various ways.¹²⁶⁹ Formal cooperation, such as the exchange of information, works more efficiently, while the European Commission seems to have little confidence in the national authorities. It can, therefore, take the opportunity to veto the decisions of the national authorities and to adopt the case as its own.¹²⁷⁰ The design of national independence in competition enforcement matters rather seems to be an expression of political will, whilst the European Commission has a *de facto* competence to take care of competition enforcement matters within the EU. The number of cases with the ECN involved (either by Art. 11.4 or 11.5 Council Reg. 1/2003) has decreased over the years. Whilst in 2004 301 competition cases involved the ECN, in 2017 only 151 competition cases did so.¹²⁷¹ Out of 348 competition enforcement cases the European Commission was covering in 2017, 104 cases (less than a third) were "reported" to the ECN Member States.¹²⁷² The fact that the European Commission must consider the recommendations of the ECN but is not bound by them further shows the rather limited relevance of the ECN.

A certain limitation of the ECN was not new to the European Commission. In its 2014 summary for the European Parliament and the European Council, regarding the 10th anniversary of the application of the Council Regulation 1/2003, the European Commission found that the ECN has to be strengthened.¹²⁷³ The

¹²⁶⁷ Christina Oelke, *Das europäische Wettbewerbsnetz: die Zusammenarbeit von Kommission und nationalen Wettbewerbsbehörden nach der Reform des Europäischen Kartellverfahrensrechts* (Nomos 2006) 184.

¹²⁶⁸ Monti, *EC Competition Law* 418.

¹²⁶⁹ *Ibid.*

¹²⁷⁰ *Ibid.*

¹²⁷¹ See under "Aggregate figures on antitrust cases" at EC, 'European Competition Network' (2018) <<http://ec.europa.eu/competition/ecn/statistics.html#1>>.

¹²⁷² See under "More detailed figures on antitrust cases" at "Cases per Member State" at *ibid.*

¹²⁷³ EC, *Communication from the Commission to the European Parliament and the Council: Ten Years of Antitrust Enforcement under Regulation 1/2003 – COM (2014) 453 final* 12 Ref. 46.

European Commission believed that a centralized competition enforcement system within the EU overextended the capacity of the European Commission.¹²⁷⁴ The European Commission also believed that a decentralized competition enforcement system would be the only way to create a real free EU market.¹²⁷⁵ To reach this goal, the European Commission recommended equipping the EU legal system with provisions ensuring the independence of national competition authorities; that the NCAs have a decision-making capacity at their disposal that was free from politics; further that effective and proportionate fines and corresponding leniency programs within the Member States be available.¹²⁷⁶ Yet the European Commission believed that the ECN had developed to be a “key pillar of the application of EU competition rules and have considerably boosted enforcement”.¹²⁷⁷ As described, over the years cooperation drastically diminished. Subsequent to the 2014 recommendation of the European Commission, in 2017 the Commission enacted a proposal to the EU Parliament and Council in which the European Commission highlighted that the imperfection of competition law enforcement between the NCAs and the European Commission within the ECN occurred due to inequalities in competition law application. This was due to the non-existent harmonization of investigative powers and other procedural rules within the EU’s legal basis of the Council Regulation 1/2003 regarding Art. 101 and 102 TFEU.¹²⁷⁸ For that reason, the European Commission proposed to complement the Regulation 1/2003 in line with the EU legislative criteria of a legal basis, subsidiarity and proportionality¹²⁷⁹ with a minimum harmonizing EU directive.¹²⁸⁰ In this proposed directive which was justified by EU law setting provisions Arts 103 and 114 TFEU, the European Commission encouraged the complementing of 1/2003 with competition law enforcement provisions in areas the national competition authorities refused to harmonize voluntarily and without legal measures.¹²⁸¹ The key elements of the so-called “ECN+” directive mainly follow the recommendations made in 2004.

The directive tries to safeguard the political independence of the NCAs in their decision-making process by ensuring that the NCAs can perform their duties independently from political and other external influence, explicitly excluding instructions from any government or other public or private entity.¹²⁸² Furthermore, the

¹²⁷⁴ Ibid 11 Ref. 43.

¹²⁷⁵ Ibid 12 Ref. 44.

¹²⁷⁶ Ibid 12 Ref. 46.

¹²⁷⁷ Ibid 11 Ref. 43.

¹²⁷⁸ EC, *Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market – COM (2017) 142 final* (2017) 2.

¹²⁷⁹ Ibid 5 ff.

¹²⁸⁰ Ibid 20.

¹²⁸¹ Ibid 8.

¹²⁸² Art 4 *ibid* 33; Ailsa Sinclair, ‘Proposal for a Directive to Empower National Competition Authorities to be More Effective Enforcers (ECN+)’ *Journal of European Competition Law and Practice* 2017 631.

European Commission proposed provisions safeguarding the financial support of and sufficient human resources for the NCAs by the EU Member States.¹²⁸³ Still the European Commission opened the door for itself to intervene in investigation procedures, if it believes that the investigative capacities of a NCA are not sufficient.¹²⁸⁴ Apart from that, the proposal aims to ensure that the NCAs are provided with an effective toolbox for their investigations.¹²⁸⁵ To satisfy the struggles of the digital age, the proposal wants to equip the NCAs with the right to investigate information irrespective of the medium on which they are stored including mobile phones, laptops, and tablets.¹²⁸⁶ Regarding the sanctioning system in EU competition matters, the directive proposes to shift the sanctioning capacity to the NCAs so that they may enforce sanctions with a maximum of at least 10% of the total turnover of the preceding business year.¹²⁸⁷ This, of course, opens the door for the NCAs to enforce sanctions higher than 10% of the total turnover of the previous year of an economic entity. To assure a level playing field of fines relating to EU competition rules the proposal further wants to assure that economic entities may not be able to escape those imposed fines by restructuring.¹²⁸⁸ Most notably, the European Commission proposed that the NCAs be able to enforce their sanctions to undertakings infringing Arts 101, 102 TFEU.¹²⁸⁹ As the term undertakings is not further detailed, it is likely that the European Commission wants to align the NCAs to have the same capacity of worldwide extraterritorial application of antitrust measures as the European Commission when it enforces its measures in line with the effects doctrine.¹²⁹⁰ Also notable is that the European Commission wants to assure that the NCAs impose fines on an administrative or non-criminal level, as Member States partly enforce sanctions relating to competition matters on a criminal basis.¹²⁹¹ In that regard the proposal also wants to transpose the ECNs Model Leniency Program

¹²⁸³ Art. 5 EC, *Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market – COM (2017) 142 final* 33; Sinclair, 'Proposal for a Directive to Empower National Competition Authorities to be More Effective Enforcers (ECN+)' 631.

¹²⁸⁴ Art. 4 f. EC, *Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market – COM (2017) 142 final* 33; Sinclair, 'Proposal for a Directive to Empower National Competition Authorities to be More Effective Enforcers (ECN+)' 631.

¹²⁸⁵ Cf. preface page 3 and Art. 6 EC, *Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market – COM (2017) 142 final*.

¹²⁸⁶ *Ibid.*

¹²⁸⁷ Art. 14 *ibid.*

¹²⁸⁸ Art. 12 *ibid.*

¹²⁸⁹ *Ibid.*

¹²⁹⁰ Cf. Sinclair, 'Proposal for a Directive to Empower National Competition Authorities to be More Effective Enforcers (ECN+)' 632.

¹²⁹¹ Art. 12.1 EC, *Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market – COM (2017) 142 final*.

into EU law by minimum harmonizing leniency aspects with the directive.¹²⁹² It wants to assure that every Member State imposes a leniency system where Member States grant immunity and fines on the same basis.¹²⁹³ Furthermore, the proposal aims to assure a clear decentralization of competition law enforcement within the EU by granting the NCAs effective rules on mutual assistance.¹²⁹⁴ Mutual assistance refers to notification procedures between ECN Member States which they may either request or have to supply in the fining or enforcement process.¹²⁹⁵ To assure that the NCAs have the right to fine and enforce EU competition law within their capacity, the European Commission proposes that the notification procedures be carried out under the laws of the respective NCA; that the decisions of the NCAs only be enforced once they are final that there are no appeals; and that limitation periods within the fining and enforcement process belong to the respective national laws of the NCAs, so that NCAs do not have to enforce decisions which are contrary to their national law and disputes regarding their fines and the enforcement processes of EU competition law will also fall within their national jurisdiction.¹²⁹⁶

Overall, the proposal of the European Commission for an EU directive to empower the NCAs to be more effective enforcers and to assure the proper functioning of the internal market would fill gaps vital to a real decentralized competition enforcement system. The displayed provisions represent mandatory harmonization of competition enforcement within the EU and fix competencies of NCAs representing a balance of competencies on a level playing field of EU competition law enforcement. This proposal went through the ordinary legislative process and was adopted on 11 December 2018.¹²⁹⁷

In conclusion, the competition enforcement cooperation provisions concerning the ECN mandating the Member State's authorities and the European Commission to work together is unique. No lower integrated category of a trade agreement is able to establish binding measures like the Council Regulation 1/2003. The different stages of cooperation, such as exchange of information, notification, consultation etc., are also included correspondingly.

¹²⁹² Ibid.

¹²⁹³ Sinclair, 'Proposal for a Directive to Empower National Competition Authorities to be More Effective Enforcers (ECN+)' 632.

¹²⁹⁴ Ibid 633.

¹²⁹⁵ Art. 24 and 25 EC, *Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market – COM (2017) 142 final*.

¹²⁹⁶ Sinclair, 'Proposal for a Directive to Empower National Competition Authorities to be More Effective Enforcers (ECN+)' 633.

¹²⁹⁷ EC, *Directive 1/2019 – L 11/3* (2019).

b.) EU Merger Working Group

The EU Merger Working Group was established in 2010 to foster increased consistency, convergence, and cooperation among EU merger jurisdictions.¹²⁹⁸ It consists of the representatives of the European Commission of the representatives of the EU Member State's competition authorities.¹²⁹⁹ Additionally, the NCA's of the Member States of the EEA are also part of the EU Merger Working Group making the institution of an international character. The group is mandated to

identify areas of possible improvements regarding issues arising in relation to mergers with cross-border impact, and to explore possible solutions, focusing on what is feasible within the existing legal frameworks, and drawing from agency practices and experience.¹³⁰⁰

Those parts of its mandated work scheme reflect the soft law character of the EU Merger Working Group. Its aim is the development of merger cooperation and therefore the providing of recommendations to the competent legislative bodies of the EU. Hence, the legal character is similar to the ECN and the ICN or (more specifically) the EU-US Merger Working Group, a round table discussion and development forum. For that reason, one may say that the EU Merger Working Group tries to establish a common merger regulation culture within the EU and the EEA, whilst the competence to regulate mergers stays with the respective authorities, the NCAs and the European Commission.

In 2011, the EU Merger Working Group agreed upon best practices in merger review.¹³⁰¹ Within those best practices the working group members agreed to non-binding standards of cooperation in merger regulation, especially regarding notification in multi-jurisdiction merger cases to be regulated.¹³⁰² They declared the importance of cooperation in merger regulation to reduce the burdens for the merging parties by aligning timing of the regulation process to increase the efficiency of the process and to foster its transparency or more generally to prevent of political discord as merger regulation is just on the edge of the political balance between centralization and protectionism – even in the EU.¹³⁰³ The best practices recommends that the regulating authorities simply exchange information on multi-jurisdictional merger cases – yet the specific cooperation stage (spe-

¹²⁹⁸ Cf. Cooperation in merger control, The EU Merger Working Group at EC, 'European Competition Network'.

¹²⁹⁹ Ibid.

¹³⁰⁰ Ibid.

¹³⁰¹ EU-Merger-Working-Group, *Best Practices on Cooperation between EU National Competition Authorities in Merger Review* (2011).

¹³⁰² Para. 1.1 and 1.3 EU-US, *Best Practices on Cooperation in Merger Investigations*.

¹³⁰³ Para. 2.1 and 2.3 EU-Merger-Working-Group, *Best Practices on Cooperation between EU National Competition Authorities in Merger Review*; Regarding balancing act within EU cf. Monti, *EC Competition Law* 300 ff.

cific notification and so on), depends on the particular case being reviewed.¹³⁰⁴ The recommendations try to smoothen the binding cooperation in merger cases by Art. 4.5 and 20 of the European Council Regulation 139/2004 (EU Merger regulation) – particularly the referral requests of the EU merger regulation.¹³⁰⁵ To that end the EU Merger Working Group best practices address the NCAs and the merging parties respectively.

The NCAs are recommended to cooperate by exchanging of non-confidential information and to that end the best practices refer to the European Competition Authorities (ECA) guidelines on the exchange of information.¹³⁰⁶ The ECA guidelines include a model notice for the request of the exchange of non-confidential information and notification.¹³⁰⁷ In more complex cases of merger regulation, where the NCAs are in need of antitrust evidence and confidential information, the best practices recommend that the NCAs consult with one another upon their procedural status and discuss “market definition, assessment of competitive effects, efficiencies, theories of competitive harm, and the empirical evidence needed to test those theories”, as well as remedial issues.¹³⁰⁸ More specifically the best practices highlight the importance of the cooperation of NCAs with the respective merging parties, as the merging parties play an important role for an effective alignment of the merger review process. To that end the merging parties are recommended to contact the respective NCAs and provide them with specific information on their intended mergers. This includes:

- i. The name of each jurisdiction in which they intend to make a filing;
- ii. The date of the proposed filing in each jurisdiction;
- iii. The names and activities of the merging parties;
- iv. The geographic areas in which they carry on business;
- v. The sector or sectors involved [...].¹³⁰⁹

The best practices recommend that the merging parties assist the NCAs at early stages to reduce the risk of a multiple filing and to lessen the overall burdens of a merger review process in a multi-jurisdictional merger.¹³¹⁰ Furthermore, the merging parties are advised to coordinate the timing and substance of remedy proposals

¹³⁰⁴ Para. 3.1 and 3.2 EU-Merger-Working-Group, *Best Practices on Cooperation between EU National Competition Authorities in Merger Review*.

¹³⁰⁵ Ibid.

¹³⁰⁶ Para. 4.1 *ibid*; European-Competition-Authorities, ‘The Exchange of Information between Members on Multijurisdictional Mergers – Procedures Guide’ (http://ec.europa.eu/competition/ecn/eca_information_exchange_procedures_en.pdf).

¹³⁰⁷ Annex A of European-Competition-Authorities, ‘The Exchange of Information between Members on Multijurisdictional Mergers – Procedures Guide’.

¹³⁰⁸ Para. 4.3 lit. (i.) and (ii.) EU-Merger-Working-Group, *Best Practices on Cooperation between EU National Competition Authorities in Merger Review*.

¹³⁰⁹ Para. 5.3 *ibid*.

¹³¹⁰ Para. 5.5 *ibid*.

to the concerned NCAs, so as to ensure coherent remedies and to avoid having inconsistent remedies enacted against them.¹³¹¹ Regarding confidential information the best practices make reference to the described ICN Model Waiver Form of Confidentiality which is also annexed to the best practices.¹³¹² With that reference the merging parties are encouraged to make use of the waiver regarding the exchange of confidential information.¹³¹³

Overall, the best practices address multi-jurisdictional merger cases not just within the EU. The fact that the best practices not only address the NCAs but also the merging parties reflects that they are not one sided. It is very positive that the best practices implement the ICN Model Waiver regarding confidentiality. By doing so the EU Merger Regulation Group shows that they take part in the development of international competition law enforcement convergence.

Moreover, for the sake of greater transparency, the EU Merger Regulation Group listed requirements of its Member States for merger notification.¹³¹⁴ Also, the EU Merger Working Group monitored the role of the public interest towards merger regulation and came to the conclusion that the public interest does not explicitly play a role in merger regulation. All EU Merger Working Group Members agreed that they should apply their merger review in a non-discriminatory manner.¹³¹⁵

Overall, the EU Merger Working Group was able to develop merger review cooperation on a soft law basis and to assist the existing binding legal provisions of EU Merger Review.

3.) *Intermediate Result*

Together the different aspects and competencies within European Competition law enable a unique, working trans-border competition law enforcement system. That the hard and soft cooperation mechanisms go hand-in-hand, shows the strength in terms of legal acceptance and its constant development. The close and deep relations of competition law enforcement over 60 years of European history and the structure of the European market cannot be compared to a trade agreement. Still, it shows the potential for trade agreements to develop into a customs union.

¹³¹¹ Para. 5.6 *ibid.*

¹³¹² Para. 6 and Appenix A *ibid.*

¹³¹³ Art. 6.2 *ibid.*

¹³¹⁴ "Overview of the state of play of information requirements for merger notifications in each EU Member State" at "Document" of the "EU Merger Working Group" under "Cooperation on Merger Control" at EC, 'European Competition Network' <http://ec.europa.eu/competition/ecn/mergers.html>.

¹³¹⁵ Para. 20 f. EU-Merger-Working-Group, *Public Interest Regimes in the European Union – differences and similarities in approach* (2016).

II) Other Examples

Besides the strong competition rules of the EU, other highly integrated trade agreements now existing as customs or currency unions have similar, though possibly less developed, competition rules.

1.) EEA: EU-EFTA Competition Rules

The European Economic Agreement of the EU and the EFTA states (EEA) have unique competition rules.¹³¹⁶

a.) Common EEA Authorities

The EEA Agreement implemented four common authorities, the EEA Council composed of the EU Council, Members of the European Commission and respective representatives of the EFTA states which supervise the general principles of cooperation and the guidelines of the EEA Agreement.¹³¹⁷ The EEA Joint Committee triggers the information exchange between the contracting parties and is mandated to supervise the proper enforcement of the EEA Agreement.¹³¹⁸ The EEA Parliamentary Joint Committee is supposed to support the communication between the contracting parties and the EEA Consultative Committee is to strengthen the cooperation of the EEA states with economic and social entities.¹³¹⁹ The EEA Agreement implemented an EFTA authority, the mandated EEA Surveillance Authority, which is entitled to oversee the implementation of the EFTA and is equipped with rights and duties very similar to the European Commission.¹³²⁰ This shows that the EEA agreement developed the cooperation of the EFTA states (even if Switzerland was leaving the EEA afterwards) and was able to establish an equality of arms be-

¹³¹⁶ Switzerland left the EEA Agreement in 1992 on which is why Switzerland has an own FTA with the EU and is not included in the following. EFTA states within the EEA are Iceland, Norway and Liechtenstein.

¹³¹⁷ Immenga/Mestmäcker in Biermann, Immenga and Mestmäcker, *Wettbewerbsrecht – EU; Teil 1 Das EU-Wettbewerbsrecht im EWR Rec. 6*; Art. 89 ff. EU-EFTA, *Agreement on the European Economic Area* (1993).

¹³¹⁸ Immenga/Mestmäcker in Biermann, Immenga and Mestmäcker, *Wettbewerbsrecht – EU; Teil 1 Das EU-Wettbewerbsrecht im EWR Rec. 7*; Art. 92 ff. EU-EFTA, *Agreement on the European Economic Area*.

¹³¹⁹ Immenga/Mestmäcker in Biermann, Immenga and Mestmäcker, *Wettbewerbsrecht – EU; Teil 1 Das EU-Wettbewerbsrecht im EWR Rec. 8*; Art. 95 and 96 EU-EFTA, *Agreement on the European Economic Area*.

¹³²⁰ Immenga/Mestmäcker in Biermann, Immenga and Mestmäcker, *Wettbewerbsrecht – EU; Teil 1 Das EU-Wettbewerbsrecht im EWR Rec. 9*; Art. 108 EU-EFTA, *Agreement on the European Economic Area*.

tween the EU and EFTA regarding the wide competencies of the European Commission.¹³²¹ Additionally, the EEA Agreement established the dispute settlement body of the EFTA states, the EFTA Court.¹³²²

b.) Substantive Competition Rules and Convergent Interpretation

The competition measures of the EU and the EFTA states are mainly harmonized with the EEA Agreement: the Art. 53 ff. of the EEA Agreement, together with the Protocols 21-25 to the EEA Agreement and the Annex XIV to the EEA Agreement adopt a wording nearly identical to the Arts 101, 102, 106, 107 TFEU including secondary EU competition law measures (e.g. Re. 1/2003) establishing similar common competition rules for the EFTA states.¹³²³ Those common competition rules are interpreted together in line with the constant jurisdiction of the ECJ (Art. 6 EEA Agreement) – however, the EFTA states only have to obey but not strictly enforce the ECJ jurisdiction in their competition enforcement procedures.¹³²⁴ The procedure of clearing a homogenous interpretation of competition rules which the ECJ and the EFTA court apply is covered by the procedural rules of the EEA Council (Art. 105 ff. EEA Agreement) and the parties may settle their disputes concerning this interpretation in line with Art. 111 EEA Agreement.¹³²⁵ In the end, a conformity of competition law interpretation is reached between the EU and the EFTA states.

c.) Two Pillars Principle and “One Stop Shop”

The common competition rules are applied according to the principle of two pillars conferring to the competence of either the European Commission or the EFTA Surveillance Authority. This two-pillar principle (Arts 56, 57 EEA Agreement) decides, in line with the one-stop shop principle, which authority is the right and competent competition authority. Hence, conflicts of competencies are obviated.

d.) Measurement

The commonalities of the EU and EFTA competition principles show that cooperation in competition matters via a cooperation agreement such as the EEA is possible. However, it has to be noted that the contracting states are not only all comparatively highly developed economically but are also directly linked to each other geographi-

¹³²¹ Immenga/Mestmäcker in Biermann, Immenga and Mestmäcker, *Wettbewerbsrecht – EU; Teil 1 Das EU-Wettbewerbsrecht im EWR Rec. 9*; Art. 1 EU-EFTA, *Protocol 21 of the EEA Agreement on the implementation of competition rules applicable to undertakings* (2018).

¹³²² Art. 108.2 EU-EFTA, *Agreement on the European Economic Area*.

¹³²³ Immenga/Mestmäcker in Biermann, Immenga and Mestmäcker, *Wettbewerbsrecht – EU; Teil 1 Das EU-Wettbewerbsrecht im EWR Rec. 11*.

¹³²⁴ *Ibid* Rec. 15.

¹³²⁵ *Ibid*.

cally. Not only their close geographical and economic relationship but also the cultural identities of the states enable such cooperation practice, this is an example of what states may achieve when they insist on international cooperation.

2.) CARICOM Competition Rules

The CARICOM (Caribbean Community Single Market and Economy) in its revised CARICOM Treaty of 2001, Art. 171, established a CARICOM Competition Commission which is designed to apply the rules of competition for trans-border anticompetitive conduct, especially conduct having effects on the CARICOM market.¹³²⁶ Besides the CARICOM Competition Commission which may be seen as a fully entitled and competent competition authority, CARICOM established a Council for Trade and Economic Development (COTED) consisting of ministers delegated by the Member States.¹³²⁷ The COTED is supposed to implement effective competition rules, hence the two commissions are collaborating on the same matter: establishing a fair and free market within CARICOM. The difference is that with the CARICOM Competition Commission's investigations of anticompetitive conduct, the Commission first has to ask the respective Member States to investigate such conduct themselves.¹³²⁸ Only after the Commission unanimously finds that initiatives to terminate the identified anticompetitive conduct have to be taken, it may take its own investigations.¹³²⁹ Compared to the European Commission the CARICOM Competition Commission is inversely entitled to investigate anticompetitive conduct. One may, therefore, subsume the CARICOM investigation system in competition matters as decentralized rather than one-stop shop Commission competence.

Since the COTED is the last instance for disputes regarding competition law investigations¹³³⁰ this shows that the Commission itself is not the highest competition authority. The COTED is influenced by political ambiguity as it consists of ministers of the CARICOM Member States. In comparison, the European Commission has wide competencies mandated freely from the direct influence of the European Parliament and Council. Hence the competencies within CARICOM and the EU differ.

The penalizing system of anticompetitive conduct shall be supervised by the CARICOM competition commission,¹³³¹ though the CARICOM Member States retain their competence to perform a penalizing system terminating anticompetitive behavior (e.g. sanctions).¹³³²

¹³²⁶ Art. 169 CARICOM, *Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy* (2001).

¹³²⁷ Art. 15 *ibid.*

¹³²⁸ Art. 176.1 and 2 *ibid.*

¹³²⁹ Art. 176.3 *ibid.*

¹³³⁰ Art. 176.5 lit. b *ibid.*

¹³³¹ Art. 174 *ibid.*

¹³³² Art. 177 *ibid.*

Within the CARICOM, treaty one may note the definition of examples of the determination of and the abuse of dominant positions.¹³³³ However, the substantive competition measures affecting definitions do not appear as binding common competition law, but rather as interpretation guidance.

Regarding procedural competition enforcement cooperation the CARICOM implemented a well-defined cooperation scheme.¹³³⁴ One has to note that the stages of development of the CARICOM Member States are at a significantly lower integration stage economically than those of the EU Member States. In that light, the fact that lower developed states have the political will for a joint competition review in their common market, lets the CARICOM appear in a very innovative and positive light.

3.) Other Examples

Apart from the shown examples, there are other customs unions which either have a common competition policy in place or aim to develop one in the future.

The common market of South America (MERCOSUR) established a MERCOSUR Trade Commission.¹³³⁵ This Trade Commission is responsible for the regulation of common trade matters, including issues related to competition. The “Technical Committee No 5 on Competition Defense” was created to take on competition matters as an authority of experts.¹³³⁶ The MERCOSUR Competition Defense Protocol was revoked in 2016 by the Agreement of Competition Defense of Mercosur.¹³³⁷ New legislation was not enacted. Hence, after this short overview one may say that the MERCOSUR Member States have the awareness of a more convergent competition law enforcement, yet a binding single competition law within MERCOSUR is not in place.

The Common Market for Eastern and Southern Africa (COMESA) set up principles for common competition law in Art. 55 of the COMESA Treaty.¹³³⁸ Those basic principles, by which the contracting parties agree that anticompetitive conduct is incompatible with the common market is supported and strengthened by the COMESA Competition Regulation of 2004.¹³³⁹ Within the Competition Regulations the COMESA Member States agreed to establish a Competition Committee (Art. 6 of the COMESA Competition Regulation) with a wide-ranging capacity to: “monitor, investigate, detect, make determinations or take action to prevent, inhibit

¹³³³ Art. 178 and 179 *ibid.*

¹³³⁴ Art. 175 *ibid.*

¹³³⁵ For the following cf. CADE Administrative Council for Economic Defense, ‘The Common Market of the South MERCOSUR’ (2016) <http://en.cade.gov.br/topics/multilateral_cooperation_/multilateral-cooperation/mercado-comum-do-sul> accessed 18.01.19.

¹³³⁶ *Ibid.*

¹³³⁷ *Ibid.*

¹³³⁸ COMESA, ‘Treaty establishing the Common Market of Eastern and Southern Africa’ 1994.

¹³³⁹ COMESA, *Competition Regulations* (2004).

and/or penalize undertakings”.¹³⁴⁰ Besides that concentration of competence in the COMESA Competition Committee, the parties agreed upon substantive competition law measures such as restrictive business practices, dominant positions, abuse of dominant positions, as well as procedural measures (determination of anticompetitive conduct, procedure of commission upon request etc.).¹³⁴¹ Furthermore, cooperation provisions regarding M&A review are included by the COMESA Competition Regulation.¹³⁴² The competition provisions reflect a well working awareness towards common competition law regulation, though it has to be noted that the biggest hurdle of this ambition is the fragile economic situation of the contracting states and the problems with corruption.

The Eurasian Economic Union (EEU) in its establishing treaty enabled an EEU Competition Authority which has the competence to recommend that the EEU Member States enforce competition law (Art. 9.4 EEU Agreement). In Section XVIII of the EEU treaty the parties agreed upon basic principles regarding competition. The parties outlined procedures concerning the enforcement of competition policy but left the competence to actually do so with the Member States. Furthermore, the competition policy of the EEU includes exceptions to competition rules regarding the energy sector such as oil and gas. Overall, one has to take into account the immense influence of the Russian Federation on the EEU. The political structure of the Russian Federation is quite destructive for the whole EEU, especially with regard to monopolies and the understanding of Russian competition law enforcement.

The Association of Southeast Asian Nations (ASEAN) does not thus far provide for a common competition regulation, but the ASEAN Member States are aware of the advantages of competition enforcement. Hence in 2016 they initiated a “Blueprint Initiative 2025” which is a political thesis paper setting a political agenda to develop convergence of national competition regimes in order to implement a well working cooperation system within the ASEAN.¹³⁴³

The Gulf Cooperation Council (GCC) does not include competition law provisions to cooperate jointly. This shows that even in highly integrated stages of trade agreements there is still a lack of common competition rules and respective cooperation.¹³⁴⁴

III) Intermediate Result

The evaluation of customs and currency unions and their common competition law provisions has shown that this stage of integration mostly includes common competition rules. However, by comparing highly developed customs unions such

¹³⁴⁰ Art. 8.1 *ibid.*

¹³⁴¹ Art. 16 ff. and 20 f. *Ibid.*

¹³⁴² Part 4 Art. 23 ff. *Ibid.*

¹³⁴³ ASEAN, *Competition Action Plan 2016-2025* (2016).

¹³⁴⁴ Maria Casoria, ‘Competition Law in the GCC Countries: The Tale of a Blurry Enforcement’ *Chinese Business Review* 2017 141.

as the EU with less developed customs unions one will see the differences in obligation regarding common competition cooperation. These differences are most likely because the timely cooperation of the states within the respective customs unions differs a lot. The EU, for example, has existed for more than 60 years, while the EEU was founded only in 2016.

D) Comparison and Conclusion

Comparing the phases of trade agreement integration, with Development Agreements, PTAs and FTAs on the one hand and customs unions on the other, some notable commonalities and differences appear in regard to competition law:

1. Customs unions or higher integrated “trade agreements” are more likely to include substantive competition law provisions.
2. Customs unions have been seen to centralize competition law enforcement and its procedural rules by establishing common competent competition authorities, whilst the majority of the less integrated stages do not establish common competent competition authorities.
3. In the least integrated stage, a trend towards MLAT cooperation in competition matters was detected, which diminished over time. However, this mutual legal assistance cooperation (which was originally supported by the US DoJ) may not be observed in the highest integrated trade agreements, especially within the EU with its ECN and the EU Merger Working Group. Though it is striking that the provisions on mutual cooperation are enacted within the wider EU law. It supports the EU competition law enforcement, making it more efficient.
4. The cooperation stages and procedures namely exchange of information, consultation, etc., are in all integration phases of trade agreements which contain a competition chapter.
5. The more integrated a trade agreement is, the more detailed (and more binding) the enforcement procedures of competition law cooperation. Though the transition from one integration phase to the next is sometimes fluent, meaning that one may not find clear patterns of international competition law enforcement cooperation.
6. It appears that trade agreements where at least one party is highly developed economically, with a well working national competition law system in place, adapt the convictions of such higher-developed party regarding competition law and its enforcement cooperation. This idea of exportation is found in e.g. Canada FTAs, EU trade agreements, or US trade agreements.

§ 6 Final Conclusion

Taking into account the different stages of cooperation in competition matters within trade agreements including customs and currency unions and putting them into the context of previous internationalization aspirations, some findings have to be noted:

1. Trade agreements have the capacity to serve as the right for a for the regulation of competition matters.

2. To foster cooperation in competition law matters globally it is advisable that the boundaries of the existing will of states (or lack thereof) to cooperate is taken into account. It makes little sense to formulate well-meaning political objectives which are then perceived as nothing more than instructions with moral impetus and are thus rejected in the end. In this regard, to further foster competition enforcement cooperation in trade agreements, it is highly recommended that prospective trade agreements incorporate the established developments, not only within bilateral but also the previous multilateral agreements. It is especially advisable to recognize the development of common competition as a culture. Because cultures of cooperation might have the capacity to develop a common dogma of competition cooperation. This might be a way to arrive at substantive competition law measures internationally in the long run.

3. Especially in times when trade policy is characterized by trade-blocking statutes and protectionism, soft law dialogues pave the way back to constructive cooperation and the arbitration of deadlocked convictions. For that reason the soft law fora of the ICN and the OECD play a central role in the development of cooperation in competition law matters. Therefore, the involved states should constantly review their competition law chapters and refer to the latest developments of those dialogues. Therefore, multi- and bilateral fora should be perceived jointly rather than as isolated from one another.

4. Inclusion of competition law provisions within trade agreements (especially FTAs and higher integrated phases) is positive and encouraging. The fact remains that these provisions still have great development potentials, even in times when states are reluctant to relinquish some of their sovereignty in competition enforcement matters. A binding common competition law enforcement in a transnational free market is the key element to guarantee that free trade takes place in a fair manner. In the end, it is a question of an effective *ordo-political* trade regulation. Taking other legal areas regulated in trade agreements into account, it becomes clear that competition law is covered rather half-heartedly and is seen as expendable.

The fact that trade agreements incorporate competition law matters, was and remains innovative in itself. However, it is true that included stages of cooperation in competition law matters are (mainly) rather conservative and unimaginative. After all, various contracting states have mostly chosen to incorporate existing ideas regarding competition law and its enforcement cooperation. It is time for states to include innovative cooperation mechanisms in new and existing trade agreements. Only innovative and global cooperation measures may have the ability to confront and counter the drawbacks of the ever-accelerating global economy. In this context, it should be noted that the few and sparse references to the use of new digital methods could be the starting point for future innovations in the enforcement of competition within trade agreements. In the age of Amazon and Google, competition authorities are confronted with hybrid and sometimes unknown competition cultures, shrouded in digital veils.¹³⁴⁵

Also, even though anti-dumping measures are not currently replaced by anti-trust law, this method could still be a viable way of creating binding cooperation mechanisms under competition law.

5. Taking the example of the EU, one can see how common competition regulation is a key element for the cohesion in the common market. The uniform sanctioning of anticompetitive behavior within the market (and even extraterritorially) leads to fair market conditions. Such fair market conditions in the end lead to a greater acceptance of the common market. This fair working market is one of the reasons the 27 EU Member States upheld peace for nearly 70 years. Taking the historic developments of the UN, OECD and WTO into account, one may say that even if it is a microcosm and only a small wheel within the great machinery of peace,

¹³⁴⁵ E.g. cf. Lina M. Khan, 'Amazon's Antitrust Paradox' *The Yale Law Journal* 2017.

cooperation in competition law is indeed an arbitrating regulatory tool within the dilemma of liberalizing and further accelerating international economic interconnection. Therefore, it is worth improving its efficiency for the greater sake of peace, cultural diversity, and freedom. This certainly gains traction when confronted with the current and recurring protectionist politics all over the world. The leaders of the free world should realize that economic cooperation, of which cooperation in competition law matters is a small (yet effective and not insignificant) part, is a key element in solving bigger global problems.

Literature

Agreements

Trans Pacific Partnership Agreement (TPP) (2012)

Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)
(2018)

Africa E-S, *Agreement on Trade, Development and Cooperation* (1999)

America E-C, *Free Trade Agreement* (2013)

ASEAN, *Competition Action Plan 2016-2025* (2016)

Australia-Chile, *Free Trade Agreement* (2008)

Australia-Japan, *Free Trade Agreement* (2014)

Australia-Korea, *Cooperation Arrangement regarding the application of their
Competition and Consumer Protection Laws* (2002)

—, *Free Trade Agreement* (2014)

Australia-Malaysia, *Free Trade Agreement* (2012)

Australia-Singapore, *Free Trade Agreement* (2003)

Australia-Thailand, *Free Trade Agreement* (2004)

Australia-US, *Agreement on Mutual Antitrust Enforcement Assistance* (1999)

Canada and Costa-Rica, *Free Trade Agreement* (2002)

Canada-Chile, *Free Trade Agreement* (1996)

Canada-Colombia, *Free Trade Agreement* (2008)

Canada-EFTA, *Free Trade Agreement* (2008)

- Canada-Honduras, *Free Trade Agreement* (2013)
- Canada-Israel, *Free Trade Agreement* (1996)
- Canada-Korea, *Free Trade Agreement* (2014)
- Canada-Mexico-USA, *North American Free Trade Agreement* (1992)
- , *USMCA* (2018)
- Canada-Panama, *Free Trade Agreement* (2009)
- Canada-Peru, *Free Trade Agreement* (2008)
- CARICOM, *Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy* (2001)
- Chile-EFTA, *Free Trade Agreement* (2003)
- Chile-Korea, *Free Trade Agreement* (2003)
- Chile-Mexico, *Free Trade Agreement* (1998)
- China E-HK, *Free Trade Agreement* (2011)
- China-Chile HK, *Free Trade Agreement* (2012)
- China-Iceland, *Free Trade Agreement* (2013)
- China-Korea, *Free Trade Agreement* (2015)
- China-Switzerland, *Free Trade Agreement* (2013)
- Colombia-Korea, *Free Trade Agreement* (2013)
- COMESA, *Competition Regulations* (2004)
- COMESA, 'Treaty establishing the Common Market of Eastern and Southern Africa' 1994
- EC-CARIFORUM, *Economic Partnership Agreement* (2008)
- EC-Chile, *Free Trade Agreement* (2002)
- EC-Egypt, *Euro Mediterranean Agreement* (2001)
- EC-Israel, *Euro-Mediterranean Agreement* (1995)
- EC-Jordan, *Euro Mediterranean Agreement* (1997)
- EC-Korea, *Agreement concerning cooperation on anti-competitive activities – L 202/36* (2009)
- EC-Lebanon, *Euro-Mediterranean Agreement* (2002)
- EC-Morocco, *Euro Mediterranean Agreement* (1996)
- EC-Tunisia, *Euro Mediterranean Agreement* (1995)
- EEC, *Treaty establishing the European Economic Community* (1957)
- EFTA-Colombia, *Free Trade Agreement* (2008)
- EFTA-Egypt, *Free Trade Agreement* (2007)
- EFTA-GCC, *Free Trade Agreement* (2009)
- EFTA-Mexico, *Free Trade Agreement* (2000)

- EFTA-Peru, *Free Trade Agreement* (2010)
- EFTA-Singapore, *Free Trade Agreement* (2002)
- EFTA-Ukraine, *Free Trade Agreement* (2010)
- Egypt-Turkey, *Free Trade Agreement* (2005)
- EU, *Treaty of the European Union – C 202/1 (TEU)* (2016)
- , *Treaty of the Functioning of the European Union – C 202/1 (TFEU)* (2016)
- EU-Canada, *Agreement between the European Communities and the Government of Canada regarding the application of their competition laws* (1999)
- , *Comprehensive Economic and Trade Agreement (CETA)* (2017)
- EU-EFTA, *Agreement on the European Economic Area* (1993)
- , *Protocol 21 of the EEA Agreement on the implementation of competition rules applicable to undertakings* (2018)
- EU-Georgia, *Association Agreement – L 261/84* (2014)
- EU-Japan, *Agreement concerninig cooperation on anticompetitive activities* (2003)
- , *Economic Partnership Agreement (negotiated and not ratified version)* (2018)
- EU-Korea, *Free Trade Agreement* (2010)
- EU-Moldova, *Association Agreement – L 260/4* (2014)
- EU-Singapore, *Free Trade Agreement (negotiated and not ratified version)* (2018)
- EU-Ukraine, *Association Agreement – L 161/3* (2014)
- EU-US, *Agreement regarding the application of their competition laws – L 95/47* (1991)
- , *Agreement on the Application of Positive Comity Principles in the Enforcement of their Competition Laws – L 173/28* (1998)
- , *Best Practices on Cooperation in Merger Investigations* (2002)
- , *Best Practices on Cooperation in Merger Investigations* (2011)
- Georgia-Turkey, *Free Trade Agreement* (2007)
- Japan-Chile, *Economic Partnership Agreement* (2007)
- Japan-India, *Comprehensive Economic Partnership Agreement* (2011)
- Japan-Indonesia, *Economic Partnership Agreement* (2007)
- , *Implementing Agreement regarding the Operational Procedures referred to in Chapter 2 and Chapter 3 of the Economic Partnership Agreement* (2008)
- Japan-Mexico, *Agreement for the Strengthening of the Economic Partnership* (2004)
- , *Implementing Agreement pursuant to 132 of the Agreement between Japan and the United Mexican States for the strengthening of the Economic Partnership* (2004)
- Japan-Philippines, *Economic Partnership Agreement* (2006)

- , *Implementing Agreement pursuant to Article 12 of the Agreement for an Economic Partnership* (2006)
- Japan-Singapore, *Agreement for a New-Age Economic Partnership* (2002)
- , *Implementing Agreement pursuant to Article 7 of the Agreement for a New-Age Economic Partnership* (2002)
- , *Joint Statement of the Japanese and Singapore Ministers at the Ministerial Review Meeting on the Agreement between Japan and the Republic of Singapore for a New-Age Economic Partnership* (2003)
- Japan-Switzerland, *Free Trade Agreement* (2009)
- , *Implementing Agreement pursuant to Art. 10 of the Agreement on Free Trade and Economic Partnership* (2009)
- Japan-Thailand, *Implementing Agreement pursuant to Article 12 of the Agreement for an Economic Partnership* (2007)
- Japan-Vietnam, *Economic Partnership Agreement* (2008)
- Korea-EFTA, *Free Trade Agreement* (2005)
- Korea-India, *Free Trade Agreement* (2009)
- Korea-Peru, *Free Trade Agreement* (2011)
- Korea-Singapore, *Free Trade Agreement* (2005)
- Korea-Turkey, *Free Trade Agreement* (2012)
- Mexico-Israel, *Free Trade Agreement* (2000)
- Panama-Singapore, *Free Trade Agreement* (2006)
- Panama-Taiwan, *Free Trade Agreement* (2003)
- Peru E-C, *Free Trade Agreement* (2012)
- Peru-Singapore, *Free Trade Agreement* (2008)
- Rica CC, *Free Trade Agreement* (2004)
- Rica-Singapore C, *Free Trade Agreement* (2010)
- Taiwan-Nicaragua, *Free Trade Agreement* (2006)
- Thailand J, *Economic Partnership Agreement* (2007)
- Turkey-Jordan, *Association Agreement establishing a Free Trade Area* (2009)
- Turkey-Tunisia, *Free Trade Agreement* (2004)
- US-Australia, *Agreement relating to Cooperation on Antitrust Matters* (1982)
- , *Free Trade Agreement* (2004)
- US-Canada, *Treaty on Mutual Legal Assistance in Criminal Matters – E101638* (1990)
- US-Colombia, *Free Trade Agreement* (2006)
- US-Germany, *Agreement relating to Mutual Cooperation regarding Restrictive Business Practices* (1976)

- US-Korea, *Free Trade Agreement* (2007)
 US-Peru, *Free Trade Agreement* (2006)
 US-Singapore, *Free Trade Agreement* (2003)
 New Zealand HKN, *Closer Economic Partnership Agreement* (2010)
 New Zealand M-N, *Free Trade Agreement* (2009)
 New Zealand-Thailand, *Closer Economic Partnership Agreement* (2005)
 New Zealand" A-A-N, *Free Trade Agreement (AANZFTA)* (2009)

Data

- Andreas Dür, Baccini L and Elsig M, *The Design of International Trade Agreements: Introducing a New Dataset* (2014)
 —, *DESTA Codebook Competition* (2017)

(Journal) Articles

- Protocol of Provisional application of the General Agreement of Tariffs and Trade* (1955)
 'Building a new Boeing' *The Economist* 2000
 'Große Demonstrationen in Deutschland' *DIE ZEIT* (17.09.2016) <<http://www.sueddeutsche.de/news/wirtschaft/handel-grosse-demonstrationen-in-deutschland-dpa.urn-newsml-dpa-com-20090101-160917-99-487217>>
 'Deutsche Ökonomen warnen vor Trumps Kurs' *FAS* 2017
 Areeda PE and Hovenkamp H, 'Fundamentals of antitrust law' 2002
 Baetge D, 'Competition Law and Perspectives for Harmonization' *Uniform Law Review* 2004
 Baker DI, 'US International Cooperation on Competition Law Policy' *International Business Lawyer* 1997
 Baker DI and Rushkoff B, 'The 1988 Justice Department International Guidelines: Searching for Legal Standards and Reassurance' 23 *Cornell Int'l LJ* 1990 405
 Basedow J, 'International Antitrust: From Extraterritorial Application to Harmonization' 60 *La L Rev* 1999 1037
 Bhala R, 'Clarifying the Trade-Labor Link' 37 *Colum J Transnat'l L* 1998 11
 Blumenthal W, 'The Challenge of Sovereignty and the Mechanisms of Convergence' 72 *Antitrust LJ* 2004 267
 Böge U, 'Die Herausforderungen einer internationalen Wettbewerbspolitik in Zeiten globalisierter Märkte' 55 *Wirtschaft und Wettbewerb* 2005 590

- Boscheck R, 'The Governance of Global Market Relations: The Case of Substituting Antitrust for Antidumping' 24 *World Competition* 2001 41
- Broude T, 'Antidumping to Be or Not to Be in Five Acts: A New Agenda for Research and Reform' 37 *J World Trade* 2003 305
- Brunei C, New Zealand, Singapore 'Transpacific Strategic Economic Partnership Agreement (TPSEPA)' 2005
- Bürger C, 'Unternehmensinterne Aufteilung einer Geldbuße der Kommission' *WuW* 2015 348
- Casoria M, 'Competition Law in the GCC Countries: The Tale of a Blurry Enforcement' *Chinese Business Review* 2017 141
- Clarke JL and Evenett SJ, 'The deterrent effects of national anticartel laws: evidence from the international vitamins cartel' *The Antitrust Bulletin* 2003 689
- Daniels Lv, 'Rumschrauben am Welthandel – US Regierung will WTO verändern' *Die Zeit Online* <<https://www.zeit.de/wirtschaft/2018-02/donald-trump-usa-handelsmassnahmen-china/seite-2>>
- Davidow J, 'The UNCTAD Restrictive Business Practices Code' *The International Lawyer* 1979 587
- Davidow J and Shapiro H, 'The Feasibility and Worth of a World Trade Organization Competition Agreement' 2003 49
- Dörr O, 'Die Entwicklung der ungeschriebenen Außenkompetenzen der EG' *EuZW* 1996
- Egan M, 'Facebook and Amazon hit \$500 billion milestone' *CNN* 2017
- Elliott M, 'The Anatomy of the GE-Honeywell Disaster' *TIME Magazine* 2001
- Epiney A, 'Zur Stellung des Völkerrechts in der EU' *EuZW* 1999
- European-Competition-Authorities, 'The Exchange of Information between Members on Multijurisdictional Mergers – Procedures Guide'
- Farlow JC, 'Ego or Equity--Examining United States Extension of the Sherman Act' 11 *Transnat'l Law* 1998 175
- Fikentscher W and Heinemann A, 'Der "Draft International Antitrust Code" – Initiative für ein Weltkartellrecht im Rahmen des GATT' *WuW* 1994
- Fox EM, 'International antitrust and the Doha Dome' 43 *Va J Int'l L* 2002 911
- Gary Horlick and Meyer M, 'The International Convergence of Competition Policy' 29 *Int'l L* 1995 65
- Godt C, 'Der Bericht des Appellate Body der WTO zum EG-Einfuhrverbot von Hormonfleisch' 9 *Risikoregulierung im Weltmarkt, Europäisches Wirtschafts- und Steuerrecht* 1998 202
- Griffin JP, 'A Critique of the Justice Department's Antitrust Guide for International Operations' 11 *Cornell Int'l LJ* 1978 215

- Gupta V, 'After Hartford Fire: Antitrust and Comity' 84 Geo LJ 1995 2287
- Guzman AT, 'Global Governance and the WTO' 45 Harvard Int'l LJ 2004 303
- Habermas J, 'Der europäische Nationalstaat unter dem Druck der Globalisierung' Blätter für deutsche und internationale Politik 1999 425
- Hilf M, 'The ECJ's Opinion 1/94 on the WTO – No Surprise, but wise' Eur J Int'l L 1995
- Hoekman B and Mavroidis P, 'Dumping, antidumping and antitrust' 30 J World Trade 1996 27
- Holterhus TP, 'Eilanträge in Sachen CETA – Europäische Außenhandelspolitik im Mehrebenengeflecht von Verfassungs-, Unions- und Völkerrecht' Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 2016
- , *Schriftliche Stellungnahme zur öffentlichen Anhörung des Ausschusses für Wirtschaft und Energie am 5. September 2016 – Verfassungs- und europarechtliche Fragestellungen im Kontext des Ratifikationsprozesses des Umfassenden Wirtschafts- und Handelsabkommens (CETA); insb. zu den Einwirkungsmöglichkeiten des Deutschen Bundestages, 2016, Ausschuss-Drks. 18(9)927 (2016)*
- Jennings JP, 'Comparing the US and EU Microsoft Antitrust Prosecutions: How Level is the Playing Field?' Erasmus Law and Economics Review 2006
- Jennings RY, 'Extraterritorial Jurisdiction and the United States Antitrust Laws' 33 Brit YB Int'l L 1957 146
- Khan LM, 'Amazon's Antitrust Paradox' The Yale Law Journal 2017
- Kiss A, 'The Abuse of rights' 1 Encyclopedia of Public International Law 1992 4
- Klein J, *Time for a Global Competition Initiative – Speech of the Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice at the EC Merger Control 10th Anniversary Conference Brussels, Belgium (2000)*
- Klein J and Bansal P, 'International Antitrust Enforcement in the Computer Industry' Villanova Law Review 1997
- Kolasky WJ, 'GE/Honeywell: Continuing the transatlantic dialog' 23 U Pa J Int'l Econ L 2002 513
- Lambsdorff OG, 'Wettbewerbsrecht als Ordnungsfaktor einer globalisierten Marktwirtschaft Vortrag auf der XI. Internationalen Kartellkonferenz des Bundeskartellamtes am 19. 5. 2003 in Bonn.' Wirtschaft und Wettbewerb 2003
- Martinek M, 'Das uneingestandene Auswirkungsprinzip des EuGH zur extraterritorialen Anwendbarkeit der EG-Wettbewerbsregeln' 1989 IPRax 1989 347
- McKinnon MG, 'Federal Judicial and Legislative Jurisdiction Over Entities Abroad: The Long-Arm of US Antitrust Law and Viable Solutions Beyond the Timberlane/Restatement Comity Approach' 21 Pepp L Rev 1993 1219

- Meessen KM, 'Competition of Competition Law' 1989
- Meessen KM, 'Das Für und Wider eines Weltkartellrechts' 50 *Wirtschaft und Wettbewerb* 2000 5
- Meiklejohn R, 'An international competition policy: Do we need it? Is it feasible?' 22 *The World Economy* 1999 1233
- Monti M, 'Review of the EC Merger Regulation – Roadmap for the reform project, Speech/02/252' 2002
- Pescatore P, 'Opinion 1/94 on Conclusion of the WTO Agreement: Is There an Escape from a Programmed Disaster' *Common Market L Rev* 1999 387
- Potrafke N, 'Das Zerrbild der Globalisierung' *FAZ* 2014 18
- Robert D Anderson and Holmes P, 'Competition policy and the future of the multilateral trading system' *Journal of International Economic Law* 2002 531
- Rodik D, 'Has globalization gone too far' Washington, DC: Institute for International Economics 1997
- Schödermeier M, 'Die Vermiedene Auswirkung' *WuW* 1989 21
- Schoenbaum TJ, 'International trade and protection of the environment: the continuing search for reconciliation' 91 *American Journal of International Law* 1997 268
- Shimp RG, 'A Critical Review of the Justice Department's 1988 Antitrust Guidelines for International Operations' 14 *NCJ Int'l L & Com Reg* 1989 287
- Sinclair A, 'Proposal for a Directive to Empower National Competition Authorities to be More Effective Enforcers (ECN+)' *Journal of European Competition Law and Practice* 2017
- Sinn H-W, 'Lob der Globalisierung' *Handelsblatt* 2016 20f.
- Sprich C, 'Globalisierung und Nachhaltigkeit sind kein Widerspruch' *BDI* 2016
- Stancke F, 'TTIP, CETA und die Rolle des Wettbewerbsrechts in internationalen Freihandelsabkommen' *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)* 2016
- Stoll P-T, 'Die WTO: Neue Welthandelsorganisation, neue Welthandelsordnung: Ergebnisse der Uruguay-Runde des GATT' 54 *ZaöRV* 1994 241
- Sulcove E, 'Extraterritorial Reach of the Criminal Provisions of US Antitrust Laws: The Impact of United States v. Nippon Paper Industries, The' 19 *U Pa J Int'l Econ L* 1998 1067
- Sweeney B, 'International competition law and policy: a work in progress' *Melbourne Journal of International Law* 2009 58
- Tarullo DK, 'Norms and institutions in global competition policy' *American Journal of International Law* 2000
- Tomuschat C, 'Die Neue Weltwirtschaftsordnung' *VN* 1994

- , ‘The International Law Commission-An Outdated Institution’ 49 German YB Int’l L 2006 77
- Uken M, ‘Importzölle – Welche Rolle spielt die WTO?’ *Die Zeit Online* <<https://www.zeit.de/wirtschaft/2018-03/importzoelle-usa-europa-donald-trump-wto-perspektiven/seite-2>>
- UN, ‘Model Law on Competition Chapter VI – TD/RBP/CONF.7/L.6’ 2010
- v.Bogdandy A and Makatsch T, ‘Kollision, Koexistenz oder Kooperation? – Zum Verhältnis von WTO-Recht und europäischem Außenwirtschaftsrecht in neueren Entscheidungen’ *EuZW* 2000 261
- Verdier P-H, ‘Transnational Regulatory Networks and Their Limits’ *Yale J Intl L* 2009 113
- Von Finckenstein K, ‘International Antitrust Policy and the International Competition Network’ 2003 37
- Waller SW, ‘The internationalization of antitrust enforcement’ 77 *Boston University Law Review* 1997 343
- Wu EY, ‘Evolutionary Trends in the United States Application of Extraterritorial Jurisdiction’ 10 *Transnat’l Law* 1997 1
- Würdinger H, ‘Konferenzen der Linienenschiffart und GWB’ *Wirtschaft und Wettbewerb (WuW)* 1969 655

Judgements

- American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909)
- Certain German Interests in Polish Upper Silesia*, Series A, Nr. 7, 30 (PCIJ, 1925)
- S.S. “*Lotus*”, *France v Turkey*, Judgment, (1927) PCIJ Series A no 10, ICGJ 248 (PCIJ 1927), 7th September 1927, Permanent Court of International Justice (historical) [PCIJ] 1927)
- US v. Aluminium Co. of America et. al.* (148 F. 2d 416) (Circuit Court of Appeals, Second Circuit, 1945)
- Corfu Channel case*, Judgment of April 9th 1949, ICJ Reports 1949 1949)
- United States vs Imperial Chem. Industr. Ltd.*, 100 F. Supp. 78 (S.D.N.Y., 1951)
- Nottebohm Second Phase*, ICJ Reports 1955, 26 (ICJ, 1955)
- Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690 (1962) 1962)
- Consten and Grundig – C 56 and 58/64* (ECJ, 1966)
- North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark and Netherlands)*, ICJ Judgment of 20.2.1969, ICJ Report 1969, 3 1969)
- AETR Case*, C-22-70 (ECJ, 1971)
- Geigy v EC*, C- 52/69 (ECJ, 1972)

- Europemballage and Continental Can Company Inc. vs. EC* – C 6/72 (ECJ 1973)
- Hageman v Belgium* – C 181/73 (ECJ, 1974)
- Donckerwolcke v Procureur de la République*, C-41/76 (ECJ, 1976)
- Timberlane Lumber Co., et. al. vs. Bank of America National Trust and Savings Association, et. al.*, (United States Court of Appeals Ninth Circuit, 1976)
- Metro v Commission* – C 26/76 (ECJ, 1977)
- Hoffmann-La Roche* – C 85/76 (ECJ, 1979)
- Mannington Mills, Inc., vs. Congoleum Corporation* (United States Court of Appeals, Third Circuit, 1979)
- Hauptzollamt Mainz v Kupferberg* – C 104/81 (ECJ, 1982)
- AKZO Chemie v Commission* – C 53/85 (ECJ, 1986)
- Frontier Dispute Burkina Faso v. Republic of Mali*, ICJ Reports 1986 (ICJ, 1986)
- BAT and Reynolds vs. EC* – C 142 and 156/ 84 (ECJ, 1987)
- Woodpulp, joint Decision 89/95* (ECJ, 1988)
- Höfer v Macrotron*, C-41/90, ECLI:EU:C:1991:161 (ECJ, 1991)
- SEP v Commission* – T 39/90 (ECI, 1991)
- Hartford Fire Insurance Co. et. al. v. California et. al.*, 509 U.S. 764 (1993) (US Supreme Court, 1992)
- Anastasiou et al.* – C 432/92 (ECJ, 1994)
- France v Commission*, C-327/91 (ECJ, 1994)
- WTO-opinion, Opinion 1/94* (ECJ, 1994)
- United States v. Microsoft Corp., No. 94-1564* (United States District Court, Dist. Columbia, 1994)
- Société Generale v Commission* – T 34/93 (ECI, 1995)
- United States vs. Nippon Paper Industries Co., Ltd.; Jujo Paper Co., Inc.; and Hirinori Ichida* (United States District Court, D. Massachusetts, 1996)
- Opel Austria v Commission* – T-115/94 (CFI, 1997)
- United States vs. Nippon Paper Industries Co., Ltd., et. al.* (United States Court of Appeals, First Circuit, 1997)
- Japan – Film, Panel WT/DS44/R* (WTO DSB 1998)
- Cimenteries CBR vs. Commission* – T-25/95 (ECI 2000)
- Masterfoods and HB* – C-344/98 (ECJ, 2000)
- Den Norske Stats Oljeselskap AS v. HeereMac VOF* – 241 F. 3rd 420 (5th Cir. 2001), cert. denied, 534 U. S. 1127 (2002) (Court of Appeals for the 5th Circuit, 2001)
- US – Cotton Yarn* – WT/DS192/7 (WTO DSB, 2001)
- “Open Skies”, *Commission v United Kingdom*, C-466/98 (ECJ, 2002)

- Empagran SA v. F. Hoffmann-LaRoche Ltd.* – 315 F.3d 338 (United States Court of Appeals, District of Columbia Circuit, 2003)
- Wählergruppe Gemeinsam* – C 171/01 (ECJ, 2003)
- F. Hoffman-La Roche Ltd. v. Empagran S. A.*, 542 U.S. 155 (USSC, 2004)
- Pêcheurs de l'étang de Berre* – C 213/03 (ECJ, 2004)
- “*Transatlantic Economic Partnership*”, *France v Commission* – C-233/02 (ECJ, 2004)
- Dansk Rørindustri et. al. /EC, joint case C-189/02 P, C 202/02 P, C-205/02 P until C-208/02 P and C-213/02 P* (ECJ, 2005)
- Phonak/Resound, VI-Kart 8/07 (V)* (OLG Düsseldorf, 2008)
- France Télécom SA vs EC* – C 202/07 P (ECJ, 2009)
- EC – Bananas* (WTO DSB 2012)
- R. v. Gul* 2013, UKSC 64 2013)
- Areva et. al. v. EC, joint case C-247/11 P and C-253/11 P* (ECJ, 2014)
- Google Inc.*, C-131/12 (ECJ 2014)
- Motorola v. AU Optronics et. al.* (United States Court of Appeals Seventh Circuit, 2014)
- InnoLux Corp v. EC*, C-231/14 P (ECJ 2015)
- United States v. General Elec. Co. et al.*, No. 15-cv-1460 (U.S. District Court for the District of Columbia 2015)
- Opinion 2/15* (ECJ, 2017)
- EC, *Boeing/Mc Donnell Douglas – Case No IV/M.877* (1997)
- , *GE Honeywell, Case COMP/M.2220* (2001)

Monographs

- Atwood JR, Brewster K and Waller SW, *Antitrust and American business abroad*, vol 2 (JSTOR 1981)
- Baetge D, ‘Globalisierung des Wettbewerbsrechts: eine internationale Wettbewerbsordnung zwischen Kartell- und Welthandelsrecht’ (Zugl. Hamburg, Univ., Habil.-Schr., 2006 2007, Mohr Siebeck 2009)
- Basedow J, *Weltkartellrecht: Ausgangslage und Ziele, Methoden und Grenzen der internationalen Vereinheitlichung des Rechts der Wettbewerbsbeschränkungen* (Mohr Siebeck 1998)
- Bechtold R, Bosch W and Brinker I, *EU-Kartellrecht Kommentar* (3rd rmd edn, 2014)
- Benedek W, *Die Rechtsordnung des GATT aus völkerrechtlicher Sicht* (Springer 1990)

- Berber F, *Lehrbuch des Völkerrechts. Erster Band: Allgemeines Friedensrecht* (JSTOR 1959)
- Bhagwati J, *In defense of globalization: How the new world economy is helping rich and poor alike* (Oxford University Press 2004)
- Biermann J, Immenga U and Mestmäcker E-J, *Wettbewerbsrecht – EU; Teil 1* (5. Aufl. edn, 2012)
- Bornkamm J, Montag F and Säcker FJ, *Münchener Kommentar für Europäisches und Deutsches Wettbewerbsrecht*, Vol 3 (2020)
- Bronckers M and Quick R, *New directions in international economic law: essays in honour of John H. Jackson* (Kluwer Law International 2000)
- Busche J and Röbling A, *Kölner Kommentar zum Kartellrecht Band 4* (2013)
- , *Kölner Kommentar zum Kartellrecht Band 2* (Carl-Heymanns Verlag 2014)
- Caspar U, *Wettbewerbliche Gesamtwürdigung von Vereinbarungen im Rahmen von Art. 81 Abs. 1 EGV: Ein Beitrag zur Auslegung des Tatbestandsmerkmals der Wettbewerbsbeschränkung im europäischen Kartellverbotsrecht* (Heymann 2001)
- Caspers R, 'Globalisierung der Wirtschaft und Anpassungsdruck in Deutschland' in Apolte T, Caspers R and Welfens P (eds), *Standortwettbewerb, wirtschaftliche Rationalität und internationale Ordnungspolitik* (1999)
- Chomsky N and Barsamian D, *The prosperous few and the restless many* (Odonian Press Berkeley 1993)
- Dlouhy A, 'Extraterritoriale Anwendung des Kartellrechts im europäischen und US-amerikanischen Recht' (Julius-Maximilians-Universität Würzburg 2002)
- Dreher M and Kulka M, *Wettbewerbs- und Kartellrecht: eine systematische Darstellung des deutschen und europäischen Rechts* (9., rmd edn, Müller 2016)
- et al. E, *Études de droit des Communautés Européennes mélanges offerts à Pierre-Henri Teitgen* (1984)
- Evans MD, *International law* (4. rmd edn, Oxford Univ. Press 2014)
- Fikentscher W and Immenga U, *Draft International Antitrust Code* (1995)
- Friedrichs R, *Die Bindung der Gemeinschaft an die Wettbewerbsordnung des EGV bei der Anwendung des Antidumpingrechts* (1998)
- Graf Vitzthum W and Proelß A, *Völkerrecht* (De Gruyter 2016)
- Herdegen M, *Völkerrecht* (15., rmd and extended edn, 2016)
- , *Internationales Wirtschaftsrecht* vol 11 (C.H. Beck 2017)
- Hilf M and Oeter S, *WTO Recht – Rechtsordnung des Welthandels*, vol 2 (2010)
- Ipsen J, *Staatsorganisationsrecht. Staatsrecht* (28. edn, 2016)
- Ipsen K, Epping V and Menzel E, *Völkerrecht: ein Studienbuch* (6.rmd edn, Beck 2014)
- Jackson JH, *World Trade and the Law of GATT* (Lexis 1969)

- Jackson JH, *The world trading system: law and policy of international economic relations* (MIT press 1997)
- Jennings RY and Oppenheim L, *Peace. Parts 2 – 4. Oppenheim's international law* (9. rev. edn, 1996)
- Jessen H, *WTO-Recht und "Entwicklungsländer": "special and differential treatment for developing countries" im multidimensionalen Wandel des Wirtschaftsvölkerrechts*, vol 5 (BWV Verlag 2006)
- Kühling J, Sivridis A and Seidel C, *Datenschutzrecht* (CF Müller GmbH 2015)
- Langen E, Bunte H-J and Bahr C, *Kartellrecht, Deutsches Kartellrecht, Band 1* (12. Aufl. edn, 2014)
- Lipstein K u.a., *International Encyclopedia of Comparative Law: Private international law. Restrictions on competition* (J. C. B. Mohr (Paul Siebeck) 1995)
- Loewenheim u.a., *Kartellrecht: Kommentar* (3. Auflage edn, 2016)
- Martinek M, *Experimental Legislation in China between Efficiency and Legality – The Delegated Legislative Power of the Shenzhen Special Economic Zone* (Springer 2018)
- Meng W, 'Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht' (Zugl. Mainz, Univ., Habil.-Schr., 1993, Springer 1994)
- Monti G, *EC Competition Law* (2007)
- Mozet P, 'Internationale Zusammenarbeit der Kartellbehörden' (Müller, Jur. Verl. 1991)
- Nettesheim M, *Ziele des Antidumping- und Antisubventionsrechts: eine Darstellung am Beispiel des Rechts der USA mit Bezügen zum Recht der Europäischen Gemeinschaften* (C.H. Beck 1994)
- Oelke C, *Das europäische Wettbewerbsnetz: die Zusammenarbeit von Kommission und nationalen Wettbewerbsbehörden nach der Reform des Europäischen Kartellverfahrensrechts* (Nomos 2006)
- Petersen A, *Die Internationale Zusammenarbeit der Wettbewerbsbehörden* (LIT Münster 2005)
- Ricardo D, *On the principles of political economy, and taxation* (Dover Publications 1817)
- Roxin C, *Strafrecht, Allgemeiner Teil, Band I, Grundlagen, Der Aufbau der Verbrechenslehre*, vol 4 (C.H. Beck 2006)
- Shaw MN, *International law* (Seventh edn, Cambridge University Press 2014)
- Smith A, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Methuen and Co Ltd. London 1776)
- Stoll P-T and Schorkopf F, *WTO-Welthandelsordnung und Welthandelsrecht* (Heymanns 2002)

- Sullivan LA, *Handbook of the law of antitrust*, vol 7 (West Publ. 1977)
- Terhechte JP, *International Competition Enforcement Law – Between Cooperation and Convergence* (2011)
- Thomas JS and Meyer MA, *The New Rules of Global Trade – A Guide to the World Trade Organization* (Carswell 1997)
- v. Bar C and Mankowski P, *Internationales Privatrecht, Band I*, vol 2 (C.H. Beck 2003)
- v. Arnould A, *Völkerrecht* (3rd, rmd. edn, Müller 2016)
- Vautier KM, ‘Trans-Tasman trade and competition law’ in Vautier KM, Farmer J and Baxt R (eds), *CER and Business Competition—Australia and New Zealand in a Global Economy* (1990)
- Ver Eecke W, *Ethical reflections on the financial crisis 2007/2008: making use of Smith, Musgrave and Rajan* (Springer Science & Business Media 2013)
- Zanettin B, *Cooperation between Antitrust Agencies at the International Level* (2002)

Official Notifications

- UK Restrictive Trade Practices Act (1979)
- EU Data protection directive, 95/46/EC (1995)
- EU General Data Protection Regulation, 2016/679 (2016)
- Association IL, *Tokyo Conference Committee Report on the extraterritorial application of restrictive trade legislation* (1964)
- Brittan SL, *The need for a multilateral framework of competition rules – address of the Vice-President of the EC before the OECD Conference on Trade and Competition, Speech 99/102* (1999)
- Commission, *Commission interpretative communication on concessions under community law – C 121/02* (2000)
- , *Factsheet Competition: Antitrust procedures in anticompetitive agreements* (2013)
- Commission EC, *Corrigendum to Decision 95/145/EC – L 131 / 38* (1995)
- Commission UIL, *Identification of customary international law Text of the draft conclusions provisionally adopted by the Drafting Committee (A/CN.4/L.872)* (2016)
- EC, *First Report on Competition* (1971)
- , *Aluminium imports from eastern Europe, IV/26.870* (1984)

- , *Competition policy in the new trade order: strengthening international cooperation and rules – Report of the Group of Experts COM (59) 359 final* (1995)
- , *Towards an International Framework of Competition Rules – Communication to the Council COM(96) 284 final* (1996)
- , *Press release: EU Competition Commissioner outlines ideas for an international forum to discuss competition policy issues – IP/00/1230* (2000)
- , *Report from the Commission to the Council and the European Parliament on the application of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition – COM 618 final* (2000)
- , *Commission Notice on cooperation within the Network of Competition Authorities* (2004)
- , *Regulation 139/2004 on the control of concentrations between undertakings (EC Merger Regulation) – L 24/1* (2004)
- , *Report on Competition Policy* (2005)
- , *Regulation 330/2010 on the application of Art. 101.3 TFEU to categories of vertical agreements and concerted practices – L 102* (2010)
- , *Communication from the Commission to the European Parliament and the Council: Ten Years of Antitrust Enforcement under Regulation 1/2003 – COM (2014) 453 final* (2014)
- , *Press release – IP/16/3615* (2016)
- , *Proposal for a Council Decision on the signing, on behalf of the European Union, of the Agreement between the European Union and the Government of Canada regarding the application of their competition laws – COM(2016) 421 final* (2016)
- , *Factsheet to the Opinion of the European Court of Justice on the EUSFTA and the Decision of Competences in Trade Policy* (2017)
- , *Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market – COM (2017) 142 final* (2017)
- , *Factsheet – Key Elements of the EU-Japan Economic Partnership Agreement MEMO/18/3326* (2018)
- , *Press release – IP/18/3325* (2018)
- , *Press release – IP/18/3325* (2018)
- , *Press release – IP/18/4526* (2018)
- , *Directive 1/2019 – L 11/3* (2019)
- ECN, *Model Leniency Programme* (2006)

- EU, *Council Regulation 1/2003* (2003)
- , *Regulation on protection against dumped imports from countries not members of the European Union – L 176/21* (2016)
- , *Press release STATEMENT/17/1959* (2017)
- EU-Merger-Working-Group, *Best Practices on Cooperation between EU National Competition Authorities in Merger Review* (2011)
- , *Public Interest Regimes in the European Union – differences and similarities in approach* (2016)
- FTC, *Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger, Roscoe B. Starek III and Christine A. Varney in the Matter of The Boeing Company/McDonnell Douglas Corporation – 971 0051* (1997)
- Hirsch J, 'National and International Monopolies from the point of view of labour, the consuming public, and rationalization' (League of Nations International Economic Conference)
- ICN, *Annual Conference Programme Book* (2017)
- , *Summary of ICN Work Product 2016-2017* (2017)
- ICPAC, *Final Report* (2000)
- Martos LP, Hildalgo JLG and Solán CC, 'The Controversy over International Cartels in the League of Nations (1925-1927)' (European Society for the History of Economic Thought Conference 2015)
- Monti M, *Cooperation between Competition Authorities – a Vision for the Future, address of EC Commissioner for Competition before the Japan Foundation Conference, Washington DC – SPEECH/00/234* (2000)
- OECD, *Convention on the Organisation for Economic Co-operation and Development* (1960)
- , *Recommendation of the Council concerning Co-operation between Member countries in restrictive business practices affecting international trade – C(67) 53 (Final)* (1967)
- , *Report by the Committee of Experts on Restrictive Business Practices concerning Cooperation between member countries on restrictive business practices affecting international trade – C(67) 53* (1967)
- , *Recommendation of the Council concerning a consultation and conciliation procedure on restrictive business practices affecting international trade – C(73)99 (Final)* (1973)
- , *Recommendation of the Council concerning Co-operation between Member countries on restrictive business practices affecting international trade – C(79) 154 (Final)* (1979)
- , *C(82) 58(Final)* (1982)
- , *Competition Law Enforcement: International Cooperation in the Collection of Information* (1984)

- , *Recommendation of the Council for Co-operation between Member countries in areas of potential conflict between competition and trade policies – C(86) 65 (Final)* (1986)
- , *Revised Recommendation of the Council concerning Co-operation between Member countries on restrictive business practices affecting international trade – C (86) 44 (Final)* (1986)
- , *Merger Cases in the Real World – A Study of Merger Control Procedures* (1994)
- , *Revised Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade – C (95) 130 (Final)* (1995)
- , *Recommendation of the Council concerning Effective Action against Hard Core Cartels – C (98) 35 (Final)* (1998)
- , *Notification of Transnational Mergers – DAFFE/CLP 2 (Final)* (1999)
- , *Report on Positive Comity – DAFFE/CLP 19* (1999)
- , *Mergers in Financial Services – DAFFE/ CLP 17* (2000)
- , *Report on Hard Core Cartels* (2000)
- , *Global Forum on Competition – CCNM/GF/COMP (01) 2/REV 1* (2001)
- , *Restructuring Public Utilities for Competition –* (2001)
- , *Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programs* (2002)
- , *Report on the Nature and Impact of Hard Core Cartels and Sanctions against Cartels under National Competition Law – DAFFE/COMP 7* (2002)
- , *Hard Core Cartels: Recent Progress and Challenges ahead* (2003)
- , *Media Mergers – DAFFE/ COMP 16* (2003)
- , *Merger Remedies – DAF/COMP 21* (2003)
- , *Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations* (2005)
- , *Hard Core Cartels: Third report on the implementation of the 1998 Council Recommendation* (2005)
- , *Recommendation of the Council on Merger Review – C (05) 34* (2005)
- , *Policy Roundtable on Vertical Mergers – DAD/COMP (07) 21* (2007)
- , *Guidelines for Fighting Bid Rigging in Public Procurement* (2009)
- , *Recommendation on Competition Assessment – C (09) 130* (2009)
- , *Recommendation of the OECD Council on Fighting Bid Rigging in Public Procurement – C (15) 115* (2012)
- , *Challenges of International Co-operation in Competition Law Enforcement* (2014)
- , *Experiences with Competition Assessment* (2014)

- , *Recommendation concerning International Co-operation on Competition Investigations and Proceedings – C (14) 108* (2014)
- , *Competition co-operation and enforcement – Provisions on Negative Comity* (2015)
- , *Fighting Bid Rigging in Public Procurement: Report on implementing the OECD Recommendation* (2016)
- , *Summary of Discussion on the Hearing on Big Data – DAF/COMP/M (06) 2/ ANN2/Final* (2016)
- OECD and ICN, *Survey on International Competition Enforcement Co-operation cf. OECD Secretariat Report on the Survey* (2013)
- Policies EPD-GfE, *Free Trade Agreement between the EU and the Republic of Singapore – Analysis EP/EXPO/B/INTA/2017/07* (2018)
- U.S., *Antitrust Enforcement Guidelines for International Operations* (1977)
- , *Antitrust Enforcement Guidelines for International Operations* (1988)
- , *International Antitrust Enforcement Assistance Act – 15 USC Ch. 88* (1994)
- , *Antitrust Enforcement Guidelines for International Operations* (1995)
- , *International Competition Policy Advisory Committee – Final Report* (2000)
- , *Antitrust Division Submission for OECD Roundtable on Profolio Effects in Conglomerate Mergers* (2001)
- , *Model Waiver of Confidentiality* (2013)
- , *Antitrust Guidelines for International Enforcement and Cooperation* (2017)
- UN, *United Nations Conference on Trade and Employment, Resolution E/971* (1948)
- , *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations – A/RES/25/2625* (1970)
- , *United Nations Conference on Trade and Development, (IV) Resolution 96* (1976)
- , *Restrictive business practices, Resolution 35/63* (1980)
- , *UNCTAD, 3rd Report to Review all Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, TD/RBP/CONF.4/15* (1995)
- , *UNCTAD Review of all aspects of the set of multilaterally agreed equitable principles and rules for the control of restrictive business practices – TF/RBP/CONF.5/3* (2000)
- , *UNCTAD Review of Technical Assistance, Advisory and Training Programmes in Competition Law and Policy – TD/RBP/CONF.5/5* (2000)
- , *UNCTAD Recent importat Cases involving more than one Country – TD/RBP/CONF.6/5* (2005)

- , *UNCTAD Review of all aspects of the set of multilaterally agreed equitable principles and rules for the control of restrictive business practices – Resolution TD/RBP/CONF.6/14* (2005)
- , *UNCTAD Review of all Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices – Resolution TD/RBP/CONF.7/L.16* (2010)
- , *The use of leniency programmes as a tool for the enforcement of competition law against hardcore cartels in developing countries – TD/RBP/CONF.7/4* (2010)
- , *UNCTAD Report to Review all Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices – TD/RBP/CONF.8/11* (2015)
- , *UNCTAD Review to all Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices – Resolution TD/RBP/CONF.8/RES* (2015)
- UNCTAD, *Midrand Declaration – TD/L.360* (1996)
- WTO, *Singapore Ministerial Declaration – WT/MIN(96)/DEC* (1996)
- , *Communication from the European Community and its Member States – WT/WGTCP/W/115* (1999)
- , *Report of the Working Group on the Interaction between Trade and Competition Policy to the General Council – WT/WGTCP/4* (2000)
- , *Ministerial Declaration of Doha – Doc. WT/MIN(01)/DEC/W/1* (2001)
- , *Secretary Background Paper: Core Principles, Including Transparency, Non-Discrimination and Procedural Fairness – Doc. WT/WGTCP/W/209* (2002)
- , *Doha Work Programme, Decision Adopted by the General Council on 1 August 2004 – WT/L/579* (2004)

Websites

- Max Planck encyclopedia of public international law: MPEPIL* (Oxford Univ. Press 2008)
- Defense CACFE, ‘The Common Market of the South MERCOSUR’ (2016) <http://en.cade.gov.br/topics/multilateral_cooperation_/multilateral-cooperation/mercado-comum-do-sul> accessed 18.01.19
- EC, ‘EU-Singapore trade and investment agreements (authentic texts as of April 2018)’ (2018) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>> accessed 6.9.2018
- , ‘European Competition Network’ (2018) <<http://ec.europa.eu/competition/ecn/statistics.html#1>>

- , ‘Press release: EU and Vietnam finalise trade and investment discussions’ (2018) accessed 7.9.2018
- , ‘Website of the EU-Vietnam Free Trade Agreement: Agreed text as of 24.09.2018’ (2018) accessed 7.9.2018
- Grau A, Haunhorst R and Würz M, ‘Marshall-Plan und Währungsreform’ (*Lebendiges Museum Online, Stiftung Haus der Geschichte der Bundesrepublik Deutschland*, 2014) accessed 22.09.17
- Network IC, ‘ICN’ (2017) <<http://www.internationalcompetitionnetwork.org/>>
- OECD, ‘Best Practice Roundtables on Competition Policy’ (2017) <<http://www.oecd.org/competition/roundtables.htm>> accessed 14.09.17
- , ‘Global Forum on Competition’ (2017) <<http://www.oecd.org/competition/globalforum/about/>> accessed 10.11.17
- , ‘Organisation for European Economic Co-operation’ (2017) accessed 22.08.17
- WTO, ‘WTO Legal Texts’ (2017) <https://www.wto.org/English/docs_e/legal_e/legal_e.htm>
- , ‘WTO organization chart’ (2017) <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org2_e.htm> accessed 08.11.17

The study outlines the status quo of international cooperation in competition law matters. This is done by examining, in chronological order, the various approaches of the many multi- and bi-lateral international agreements that have attempted to solve the problems of competition law (WTO, GATT, etc.). Subsequently, the focus of this thesis is on the analysis of bilateral trade agreements. Within the framework of this analysis, the potential of trade agreements for competition law cooperation is to be shown. For this reason, only those bilateral trade agreements are analyzed that deal with the topic of regulatory cooperation in competition law in specially provided competition chapters. In doing so, the different stages of cooperation will be analyzed along the different integration phases of any trade agreements. The highest form of trade agreement integration – customs unions – will be dealt with separately, using the EU as an example.