INTERNATIONALIZATION OF COMPETITION LAW AND POLICY

A Master's Thesis

by
NUR SEDA KÖKTÜRK

Department of
International Relations
Bilkent University
Ankara
September 2010

INTERNATIONALIZATION OF COMPETITION LAW AND POLICY

The Institute of Economics and Social Sciences
of
Bilkent University

by

NUR SEDA KÖKTÜRK

In Partial Fulfillment of the Requirements for the Degree of
MASTER OF ARTS

in

THE DEPARTMENT OF
INTERNATIONAL RELATIONS
BİLKENT UNIVERSITY
ANKARA

September 2010

I certify that I have read this thesis and have found that it is fully adequate, in scope and in quality, as a thesis for the degree of Master of Arts in International Relations.

Asst. Prof. Dr. Pınar İpek
Supervisor

I certify that I have read this thesis and have found that it is fully adequate, in scope and in quality, as a thesis for the degree of Master of Arts in International Relations.

Asst. Prof. Dr. Dimitris Tsarouhas
Examining Committee Member

I certify that I have read this thesis and have found that it is fully adequate, in scope and in quality, as a thesis for the degree of Master of Arts in International Relations.

Asst. Prof. Dr. Zeki Sarıgil
Examining Committee Member

Approval of the Institute of Economics and Social Sciences

Prof. Dr. Erdal Erel
Director

ABSTRACT

INTERNATIONALIZATION OF COMPETITION LAW AND POLICY

Köktürk, Nur Seda

M.A., Department of International Relations

Supervisor: Asst. Prof. Dr. Pınar İpek

September 2010

With the internationalization of anticompetitive business activity, national competition laws and policies proved to be insufficient to protect competition in free markets. To cope with the problems created by international anticompetitive conduct, states and/or national regulators started to take part in various arrangements concerning the issue. Today, there are different forms of internationalization of competition law and policy such as extraterritorial application of domestic laws and policies and certain cooperation and convergence mechanisms. Moreover, various actors take part in the process: states, regulators, international organizations, firms etc.

This thesis aims to analyze the important factors of internationalization of competition law and policy so that the reasons behind the current state of the internationalization process can be understood. Furthermore, four main International Political Economy theoretical perspectives are utilized to provide a new insight for and a further understanding of internationalization of competition law and policy.

Keywords: Competition Law and Policy, Internationalization, European Union, International Organizations, International Political Economy, Realism, Liberalism, Historical Structuralism, Constructivism

ÖZET

REKABET HUKUKU VE POLİTİKASININ ULUSLARARARASILAŞMASI

Köktürk, Nur Seda

Yüksek Lisans, Uluslararası İlişkiler Bölümü

Tez Yöneticisi: Yrd. Doç. Dr. Pınar İpek

Eylül 2010

Rekabete aykırı firma eylemlerinin uluslararasılaşması ile, ulusal rekabet hukuku ve politikalarının serbest piyasa rekabetini korumak için yetersiz kaldığı anlaşılmıştır. Uluslararası rekabet karşıtı davranışların yarattığı problemler ile başa çıkabilmek amacıyla, ülkeler ve/veya ulusal düzenleyiciler konu ile ilgili çeşitli düzenlemeler içerisinde yer almaya başlamışlardır. Günümüzde rekabet hukuku ve politikası, ulusal rekabet hukuku ve politikalarının ülke dışı uygulanması ve bazı işbirliği ve yakınsama mekanizmaları gibi farklı formlarda uluslararasılaşmaktadır. Ayrıca bu süreçte ülkeler, düzenleyiciler, uluslararası organizasyonlar, firmalar vb. gibi muhtelif oyuncular da yer almaktadır.

Bu çalışma, rekabet hukuku ve politikasının uluslararasılaşmasında etkili olan faktörleri analiz etmeyi ve böylece uluslararasılaşma sürecinin şu anki durumuna gelmesinin sebeplerini anlamayı amaçlamaktadır. Bunun yanında, çalışmada, dört temel Uluslararası Politik Ekonomi teorik perspektifi kullanılarak, rekabet hukuku ve politikasının uluslararasılaşması konusuna yeni bir bakış açısı getirilmesi ve sürecin daha iyi bir şekilde anlaşılması amaçlanmaktadır.

Anahtar Kelimeler: Rekabet hukuku ve politikası, Uluslararasılaşma, Avrupa Birliği, Uluslararası Organizasyonlar, Uluslararası Politik Ekonomi, Realizm, Liberalizm, Tarihsel Yapısalcılık, Konstrüktivizm

ACKNOWLEDGEMENTS

First of all, I wish to express my gratitude to Asst. Prof. Dr. Pınar İpek, who supervised me throughout the preparation of this thesis and also encouraged me during my graduate study at Bilkent University. I would like thank Asst. Prof Dr. Dimitris Tsarouhas and Asst. Prof. Dr. Zeki Sarıgil for spending their valuable time to read my thesis and kindly participating in my thesis committee. I am also grateful to Scientific and Technological Research Council of Turkey (TUBITAK) for funding me through my graduate education.

I would like to thank my colleagues in Turkish Competition Authority, especially Neyzar Menteşoğlu, Özgür Can Özbek and Sinan Çörüş, for their valuable friendship and support during the preparation of my thesis. I am grateful to the head of my department, Ali Demiröz, for his understanding and tolerance throughout my graduate studies.

Finally, I owe special thanks to my dear family for their endless love. My husband, Tolga Köktürk, deserves more than a general acknowledgement. Without his infinite patience, understanding and support, I would not have been able finish this thesis.

TABLE OF CONTENTS

LIST OF FIGURES

LIST OF TABLES

CHAPTER 1

INTRODUCTION

According to neoclassical economic theory/neoliberal ideology, effective competition in the market delivers efficiency, lowers prices, increases innovation and thus, brings considerable benefits to the society. There is a belief in free market economy because; competition in the market is thought to allocate resources between competing parties and hence, provide economic efficiency by this way. Therefore, in neoclassical thinking, there is a presumption that "the more competitive a market, the more efficient that market will be" (Taylor, 2006: 15).

Nevertheless, markets do not operate perfectly; and there exists so-called "market failures" or "market imperfections" preventing effective and/or perfect competition in market. Government intervention in free markets to regulate imperfect competition is seen as a solution to the problem so that economic efficiency and welfare can increase. Thus, competition law and policy (CLP or antitrust law and policy) is the tool of governments to regulate market failures. Objective of CLP is to promote and maintain competition in the market to increase efficiency and economic

welfare. To achieve this objective, governments/regulators intervene in markets when market players engage in anticompetitive practices.

CLP, traditionally, has been an instrument for governments to intervene in markets to regulate imperfections in their territorial markets. In other words, nation states owe the competence for regulating anticompetitive activities inside national boundaries. However, with the increase in cross-border anticompetitive business activities and proliferation of national CLP regimes around the world, nation states and national regulators have been facing challenges to apply domestic policies to address international conducts and conflicts arising from colliding antitrust regimes.

Accordingly, internationalization of CLP is a concept that includes those attempts of governments/regulators and also alternative ways of dealing with cross-jurisdictional anticompetitive conduct. There are different modes of internationalization of CLP, from unilateralism to cooperation, from convergence to supranationalization. Moreover, internationalization also occurs in different forms such as bilateral or multilateral arrangements, binding or non-binding agreements etc.

Within this framework, it is seen that there have been various initiations for creating an international CLP system under different institutional settings and at different levels/modes. Currently, internationalization process of CLP draws an uneven, scattered and complex picture. Therefore, my aim in this thesis is to analyze the important factors in internationalization of CLP so that I can shed a light on the current state of the process and make implications about the future of international antitrust.

Although antitrust is regarded as a field of law, it is interdisciplinary in nature; having elements of law, economics and politics. Since it is a form of market regulation and applicable to certain conduct of firms, CLP is "about economics and economic behavior" (Whish, 2005: 1). Furthermore, despite prominent roles of lawyers and economists, politicians are also present in the field because enforcement of CLP is "dependent on political choices" (Dabbah, 2003: 57). Hence, as Dabbah (2003: 57) argues, an adequate understanding of CLP requires involvement of various disciplines: law, economics, political science and public administration.

Thus it is argued in this thesis that an insight from another field of study is needed to examine internationalization of CLP: international political economy[1] (IPE). First, CLP itself is about regulating the markets. relationships between state and market and between state and firms are of primary importance in this policy area. Second, internationalization of CLP has become a phenomenon with the increase in cross-border business activities. Because IPE "studies life in global economy", the situation of antitrust policy in global markets should be an area of interest for IPE (Oatley, 2006: 1). Third, it is thought that actors in the process of internationalization of CLP i.e. firms, MNCs, states, governments, markets, international organizations etc. and relationships between these actors can also be explained from the IPE perspective. Accordingly, internationalization of CLP is analyzed by utilizing IPE theoretical perspectives for a full understanding of the process. Moreover, there are

[1] IPE can be defined as a field that "bridges the disciplines of economics and politics" and it is concerned with market-state relations as well as interactions between state and firms (especially multinational corporations (MNCs)), role of international organizations, international-domestic linkages etc (Cohn, 2005: 6-8).

not any studies conducted under the IPE field of study on international antitrust law and policy, yet.

The aim of this thesis is to find an answer to the question what factors are important in the internationalization of CLP. Factors that lead to different modes and forms of internationalization of CLP should be analyzed in order to understand the reasons behind the current state of the process and future implications for a system of international antitrust. While doing that, I will utilize four main theoretical perspectives of IPE, i.e. realism, liberalism, historical structuralism and constructivism, to gain a new insight for internationalization of CLP and to understand which of these theories best explain the process.

The thesis contains six chapters. After the introduction, in the second chapter I give a brief summary of IPE theories so that they can be utilized after examining the factors of internationalization of CLP. These theories are: realism, liberalism, historical structuralism and constructivism.

The third chapter first explains what competition (antitrust) law and competition (antitrust) policy are, and the relationship between these two terms. The core provisions of competition law are discussed in this section to understand what kind of business practices are prohibited by law. In the second section, the conceptualization of "internationalization of CLP" is made. I divide this concept into sub-categories as unilateralism, cooperation and coordination, convergence, harmonization, binding international antitrust code and supranationalization, so that different forms of internationalization are covered. In the last section, attempts to

internationalization of CLP are summarized to discuss the modes and levels together with the actors in the process.

In the fourth chapter, the literature on internationalization of CLP is given. Then, five important factors of internationalization of CLP are analyzed: globalization, sovereignty and conflicting national interests, differences between countries, role of EU-U.S. relationship and non-state actors.

Chapter five discusses the EU's process of supranationalization of CLP as a successful example and a role model for internationalization of CLP in the world. Because competition policy is one of the chapters in the *acquis* and Turkey is a country in the accession process, Turkish CLP is explained in the second section of this chapter. Furthermore, Turkey's close trade relations with the EU (as a member of the Customs Union) and its place in the global economy as a developing country makes it a case worth analyzing.

In the concluding chapter, four main IPE theoretical perspectives are utilized to understand the process of internationalization of CLP. Explanations of ground IPE theories on the factors of internationalization are discussed. It is argued that neoliberal institutionalism gives the most plausible explanation for the *process* of internationalization of CLP. Finally, second section of chapter six concludes the thesis.

CHAPTER 2

CLP AND INTERNATIONAL POLITICAL ECONOMY

As it was argued before, concerning the internationalization of CLP, I argue that an insight from another field of study is needed: international political economy (IPE) can be/should be utilized .to introduce a new insight to the internationalization of CLP studies and to understand the process better. Since CLP is about regulating the markets, relationships between state and market and between state and firms are of primary importance and since IPE "studies life in global economy", the situation of antitrust policy in global markets should be an area of interest for IPE (Oatley, 2006: 1). Therefore, in this section, a brief summary of the four IPE theories are given, so that discussions can be made by utilizing them in subsequent chapters. These theories are realism, liberalism, historical structuralism and constructivism.

2.1. Realism

Named also as mercantilism or economic nationalism in IPE, realism is one of the oldest approaches to state-market relationship. “The emphasis of mercantalists on the linkages between power and wealth was critical to the establishment of a realist perspective” (Cohn, 2005: 66).

Realists believe that nation-state is the main actor in IPE and in an international environment where there is no central authority, states have to pursue their own interests and power. Because of the importance they give to national sovereignty, rational states should be powerful in order to defend their interests in an anarchical international system. Realists assume that politics/political economy is a zero-sum game and usually confliction (Frieden and Lake, 2000: 12).

According to realists, there is a “hierarchy of issues in world politics” and “high politics” on military issues dominate the “low politics” in economic issues (Keohane and Nye, 1977: 24). Furthermore it is argued that powerful states shape the structure of “economic relation at the international level” (Cohn, 2005: 68).

2.2. Liberalism

In the liberal IPE, the state is not seen as a unitary actor: there are various actors and ‘multiple channels’ that are interrelated to each other: interstate, transgovernmental and transnational actors/relations (Keohane and Nye, 1977: 24-

25). In fact, "the liberal argument emphasizes how both the market and politics are environments in which all parties can benefit by entering into voluntary exchanges with other" (Firieden and Lake, 2000: 10). Moreover, the world system is not one of anarchy but of interdependence among actors. Since it is a positive-sum game, everyone gains from cooperation and "market relations … lead to positive outcomes for all" (O'Brien and Williams, 2007. 19).

Consequently, in neoliberal institutionalism, institutions are defined as "related complexes of norms and rules [formal or informal], identifiable in space and time" (Keohane, 1988: 383). Within this framework, international institutions are thought to have the potential to maintain and increase cooperation. For neoliberal institutionalists, states are main actors in the anarchical international system and they follow their own interests. Yet, states' interests are not limited to security and power; they have multiple interests. Furthermore, they focus on their actual or potential gains rather than relative gains. It is argued that, other than states, there are actors in the international system such as international organizations/agencies, supranational bureaucracies, firms etc.

Regimes and institutions facilitate cooperation to secure national interests. Keohane (1984 :7) argues that cooperation is "essential in a world of economic interdependence, and … shared economic interests create demand for international institutions and rules". Although it is difficult to achieve international cooperation especially in certain issue areas, it is argued by neoliberal institutionalists that "rule-guided and norm-governed arrangements are far more common" than realist notions of anarchy suggests (Lipson, 1993: 80). Moreover they claim that "the ability of

states to communicate and cooperate depends on human constructed institutions" (Kayıhan, 2003: 11).

2.3. Historical Structuralism

Having the varieties such as Marxism, world-system theory, dependency theory, Gramscianism and neo-Gramscianism, the historical structuralism is hard to explain under one general title. Yet the basic feature of it is that historical structuralism "focus[es] on exploitative nature of capitalism" (Cohn, 2005: 117). Although liberals and realists take the capitalist mode of production as given, historical structuralists see capitalism (and market structure) as a problematic system that increases inequality and exploitation (Cohn, 2005: 127). Under capitalism, fair distribution of power and wealth is not possible; there is always an uneven development process between states, which increases the possibility for conflict (O'Brien and Williams, 2007. 22).

Furthermore, Gramsci focused on the role of "culture, ideas and institutions" on legitimization of dominant parties' values, norms and interests (Cohn, 2005: 130). His argument is that the hegemon does not only rule by coercion, but by negotiating and creating common shared values and ideas, it gains the consent of subordinate groups and legitimizes its power.

Writers such as Robert Cox and Stephan Gill, by following the ideas of Gramsci, "focused on the role of social forces and ideology in liberalizing and

globalizing economic relations" (O'Brien and Williams, 2007: 23). These neo-Gramscians applied Gramsci's ideas internationally and mentioned the emergence of a transnational historical bloc that included big MNCs, internationalist elements inside the state and international organizations (Cox, 1987). Accordingly, neoliberal economic policies were introduced as efficiency enhancing and good for everyone. Thus, to the extent that the neoliberal ideas in the process of globalization claimed to serve peoples' best interests has diffused and been accepted with the consent of subordinate groups and then, the powerful could legitimize its power without any conflict and coercion.

2.4. Constructivism

Constructivists argue that since object, events and actors gain meaning only through "intersubjective knowledge and structure", ideas are of primary importance (O'Brien and Williams, 2007: 366). It is norms and values that shape actors'/agents' interests and identities at the same time constituting those identities and interests (O'Brien and Williams, 2007: 35).

Abdelal *et al*. (2005: 23) claim that in the economic arena, agents' ideas and beliefs about the effect of themselves and others' actions shape the outcomes. Thus, ideas, beliefs and/or norms determine the actors' preferences about economy, which shape the state of economy accordingly. The following sentence explains the main argument of the constructivist IPE very clearly:

A constructivist IPE argues that agents' expectations and intersubjective beliefs constitute causal relationships in the economy by altering the agents' own beliefs about the interests of others, upon which the realization of their own intersubjectively constructed interests depend (Abdelal *et al*., 2005: 24).

CHAPTER 3

COMPETITION LAW AND POLICY (CLP)

In this chapter, competition law and competition policy and the relationship between them are explained. Then, the conceptualization of "internationalization of CLP" is made and attempts to internationalization of CLP are summarized in the last section.

3.1 What is Competition Law and Policy?

Competition law[2] is one form of government regulation that aims to protect and promote competition in free market economy by regulating anticompetitive conduct (Taylor, 2006: 8, Jones and Sufrin, 2008: 1). It is considered that by protecting competition in markets, economic efficiency and increase in social welfare is achieved. As it is seen, competition law presumes the presence of free markets and/or market economy. This is an indication of the fact that the intellectual roots of competition law lie in neoclassical economic theory, which assumes that competition in the market increases efficiency, lowers prices and enhances innovation. In neoliberal thinking, competition law is seen as an instrument utilized by governments to intervene in the economy to correct market imperfections/failures (Taylor, 2006: 15).

Although the primary objective of competition law is to achieve economic efficiency and maximize social or consumer welfare[3], it is observed that it is also utilized for other purposes such as protection of competitors and/or small firms, achieving fair competition, market integration (as in the case of the EU) or for socio-

---

[2] In this study, the terms "antitrust law/policy" and "competition law/policy" will be used interchangeably since antitrust is the American name of competition. On the other hand, the European Commission uses the term "antitrust" to donate the areas of competition law other than mergers and state aid. Yet, throughout the thesis, "antitrust law/policy" will be taken as the synonym of "competition law/policy".

[3] Whether the goal of competition law should be increasing consumer welfare or social welfare is a debatable issue. Social welfare is accepted to be the sum of consumer surplus and producer surplus in the economy. Hence, when competition law is concerned with consumer welfare rather than social welfare, redistribution of welfare between consumers and producers will be a concern of competition law (Sufrin and Jones, 2008: 13). Otherwise, redistributive effects will be ignored, bearing in mind that producers and consumers are not always separate entities. In the U.S. system, maximization goal of consumer welfare is clearly emphasized while in the EU this objective has recently started to be emphasized.

political purposes such as employment, environmental issues etc (Sufrin and Jones, 2008). Furthermore, competition law is claimed to provide long-term welfare accumulation and sustainable economic growth (Taylor, 2006: 21). Yet, in this study, the primary goal of competition law is emphasized: enhancing economic efficiency and increasing social/consumer welfare.

Although there are different competition law systems in the world, they share certain core provisions: prohibition on anticompetitive collusion of market players, prohibition on abusive use of market power and prohibition of competition-reducing merger activities. These are briefly explained below:

Anticompetitive Collusion/Arrangements: Any kind of collusive activity that two or more firms engage in and has an anticompetitive effect on the market is prohibited under this provision. Such arrangements could be between competitors (horizontal) or between for example suppliers and distributors (vertical). It is accepted that horizontal arrangements have more adverse effects on the competition process than vertical arrangements. Furthermore, cartels are regarded as the most anticompetitive of horizontal arrangements. A cartel is defined by the European Commission as

> Arrangement(s) between competing firms designed to limit or eliminate competition between them, with the objective of increasing prices and profits of the participating companies and without producing any objective countervailing benefits" (European Commission, 2002).

In general, anticompetitive cartel activities range from price fixing, market sharing, limiting supply/output, allocation of consumers or territories etc. Cartels are harmful to society because when competitor firms/rivals become a member of a

cartel, they charge higher prices and gain higher profits than they would in competitive markets. Besides cartels, other forms of horizontal agreements and vertical agreements are prohibited by CLP as long as they are regarded as eliminating and distorting competition in the market.

Abusive Use of Market Power: Not only anticompetitive arrangements between firms are prohibited under competition law but also unilateral or single conduct of firms may fall within the scope of it. Firms with a certain degree of market power are prohibited from using this power (or so-called dominant position) to eliminate or distort competition in the market. The reason for this prohibition is because such behavior deteriorates competition between firms, exploits consumers, excludes competitors from the market etc. Actions of a dominant firm (or a firm with market/monopoly power) such as predatory pricing, exclusive dealing, tying/bundling of products, refusal to deal/supply are prohibited when they distort competition in the market.

Anticompetitive Mergers[4]*:* Mergers are prohibited under competition laws if they have a damaging effect on the competitive structure of the market. If a merger causes the creation or increase of merging parties' monopoly power/dominant position,

[4] " Merger" is used in this study as comprehending both mergers and acquisitions. In fact, the terms "merger" and "acquisition" differ in the sense that as a result of a merger, merging parties disappear and a new entity is created, whereas, in an acquisition, one of the parties take over the other one and buyer firm survives. Furthermore, the term "concentration" is used by the EU authorities instead of "merger", "acquisition" and "joint venture".

competition in the market lessens because of such a transaction and hence, merger is prohibited under competition law.

Horizontal mergers are more likely to cause competition concerns than vertical or conglomerate mergers because the number of competitors in the market decreases and the new merging entity starts to have a higher market share.

As it was explained above, competition law is a form of market regulation by governments. Competition policy, on the other hand, is a broader concept that includes a competition law system in it. At its broadest level, competition policy includes all kinds of government policy that "address the extent, nature and scope for competition in the economy" (Taylor, 2006: 28). Yet, competition law is *the* principal instrument of competition policy, which is used to implement competition policy by ensuring the competitive structure of markets (Taylor, 2006: 28, Jones and Sufrin, 2008: 2).

Generally, the terms "competition law" and "competition policy" are used interchangeably in the literature. Yet, they are distinguishable as it was explained above. In this study, I will use the term "competition law and policy" instead of using one of them or using them separately. By doing this, I refer to a system of market regulation by government, whose objective is to "promote the efficient operation of markets in order to maximize economic welfare" (Taylor, 2006: 29).

3.2. The Concept of Internationalization of Competition Law and Policy

As it is the main theme of this study, it is thought that the conceptualization of "internationalization of CLP" is of significant importance. Although CLP had been seen as a domestic issue for several decades, this situation changed increasingly in the last half century because of internationalization of anticompetitive business practices and proliferation of national competition polices around the world. Countries reacted to this situation in many various ways such as application of domestic laws extraterritorially or engaging in different interactions with other countries.

Consequently, the term "internationalization" is utilized in this study to cover all the alternative arrangements that have been or may be made between states/jurisdictions/competition agencies so that almost all forms, modes and/or levels of international political governance of CLP are analyzed.

For practical purposes, I divide the modes of internationalization of CLP into five main categories, which are (i) unilateralism, (ii) cooperation and coordination, (iii) convergence, (iv) harmonization, (v) agreement on a binding international antitrust code and (vi) supranationalization.

(i) Unilateralism: States may react to the increasing level of international anticompetitive activity by applying their law and policy to intervene and regulate foreigners' behavior. Hence, unilateralism is a "one-sided political action without any form of international

cooperation, partly even risking international conflicts because of negative cross-border spillovers" (Mitschke, 2008: 12).

(ii) *Cooperation and Coordination:* Keohane (1984: 51) argues that international cooperation occurs "when actors adjust their behavior to the actual or anticipated preferences of others, through a process of policy coordination". Accordingly, in CLP context, cooperation and coordination mean those kinds of arrangements between states that include exchange of information and/or knowledge, technical assistance, consultation, notification of action, exchange of staff etc. Cooperation and coordination can be based on formal or informal as well as bilateral, regional or multilateral arrangements. Furthermore, these arrangements can be binding or non-binding (voluntary) in nature. Usually the aim is to assist each other through cooperation and coordination arrangements but it is also assumed that cooperation and coordination will "lead toward convergence" (Gerber, 1999: 127).

(iii) *Convergence:* In its general terms, convergence refers to a "movement from a state of difference to a state of similarity" (Gerber, 1999: 131). Concerning the international CLP, it means increasing shared characteristics (procedures, rules and understandings) between national CLP regimes. In this study, a bottom-up movement should be understood by convergence since it occurs because of states' own choices rather than a binding top-down arrangement. Thus, convergence may increase as a result of formal or informal contacts of

states/agencies, cooperation arrangements in place, efforts of international organizations etc. Damro (2005: 5) claims that "convergence covers changes to institutions, while cooperation covers changes in behavior".

(iv) *Harmonization:* According to Boodman (1991: 702), "harmonization is a process in which diverse elements are combined or adopted to each other so as to form a coherent whole while retaining their individuality". Throughout this study, similar to Mitschke's definition, I use the term as "bringing national laws in line with each other" (Mitschke, 2008: 12). For example, process of harmonization may include creation of identical CLP regimes. Although the results of process of convergence and harmonization could be similar (i.e. similar CLP systems), the difference between convergence and harmonization is harmonization's relative top-down nature. Furthermore, according to Crane (2009: 151), one of the preconditions for meaningful harmonization of antitrust regimes is not only convergence of rules and procedures, but also the creation of international antitrust institutions.

(v) *Agreement on a binding international antirust code:* This kind of arrangement refers to a situation in which countries agree on certain provisions under an international law system but without an autonomous institution that takes the power of national competition authorities away.

(vi) *Supranationalization:* Supranationalization means transfer of rights and powers from state-level to supranational level. Supranationalization of CLP is the transfer of law, policy and decision-making rights in the antitrust field to a supranational institution so that there is a unitary system of CLP applicable and prior over national regimes. For example, although EU member states have national CLP regimes, competition provisions in the Treaty of Rome and the decisions of the European Commission have dominance over national laws when anticompetitive practices have 'Community dimension'.

To sum up, internationalization of CLP covers all the above-mentioned modes and throughout this study, analysis and discussion will be on specific modes of internationalization of CLP as well as on the internationalization of CLP as a whole. Previous attempts to internationalization of CLP are explained in the next section by emphasizing different forms, levels and actors in the process.

3.3. Attempts to Internationalization Competition Law and Policy

In this section, a summary of previous attempts to internationalization of CLP are given. Although first attempts to create an international CLP go back to 1920s; starting from 1940s, there were also attempts to unilaterally deal with the international competition problems. Therefore, in this chapter, I will first give the unilateral attempts of countries/regulators and then I will move on to cooperation,

convergence and harmonization efforts of different actors. I will explain the efforts under the General Agreement on Trade and Tariffs (GATT), the United Nations (UN), the Organization for Economic Cooperation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD), the World Trade Organization (WTO), works by the scholars and experts, the International Competition Network (ICN) together with the bilateral and regional arrangements between countries and/or competition agencies. By covering all these efforts of internationalization of CLP, it is possible to assess the conditions that led to current situation and to make implications about the future.

3.3.1. Unilateral Attempts (Extraterritorial Application of Domestic Laws)

CLP, historically designed for application to the business enterprises that locate in a state's own territory, started to become inadequate as anticompetitive business activities started to become international.

As the first jurisdiction that had a CLP and as the world's major economic power, the U.S. was the one of the first countries that had to deal with antitrust problems caused by increasing international economic activity. By increasing foreign business activities in the U.S., the anticompetitive practices of non-U.S. firms started to affect the U.S. economy adversely.

For example, Country A's textile exporters engage in a cartel activity and increase and fix prices of textile products they sell to Country B. Country B's

consumers who buy these textile products have a loss in consumer welfare, since they are charged higher prices. There exists a welfare transfer from B's consumers to A's producers. In such a case, Country B intervenes in the market to correct this kind of market failure.

The reaction of the U.S. to such a situation was applying its domestic antitrust law extraterritorially. Extraterritorial application of U.S. antitrust rules by the U.S. regulators to non-U.S. firms was based on 'effects doctrine'. According to this doctrine, as long as a conduct has an adverse effect on a country's own territory, its national laws can be applied irrespective of the firm's home country or of the place conduct has taken place.

The first antitrust case that the U.S. applied its law extraterritorially based on the effects doctrine was *Alcoa* case in 1945 in. Furthermore, in 1992 The Foreign Trade Antitrust Improvements Act, it was concluded that the U.S. antitrust law can be applied where there is a direct, substantial and reasonably foreseeable effects of the conduct on the U.S. territory (Sweeney, 2010: 241). Yet, extraterritorial application of the U.S. antitrust law has been criticized especially by its major trading partners for being disrespectful to their sovereignties[5].

Although criticized substantially, extraterritorial application of domestic competition laws have extended to other jurisdictions because of the increase in international cases. For instance, the EU applies its competition rules extraterritorially but its application is not as broad as the U.S.'s effects doctrine.

[5] The countries such as Australia, Canada, Denmark, Finland, France, Italy, Japan, Mexico, New Zealand, Norway, Sweden, Switzerland and the United Kingdom started to response by enacting "blocking statutes" to exclude their citizens and companies from the extraterritorial application of the U.S. law (Gayton, 1997: 5),

However, there is still a general traditional hostility of some countries to extraterritorialism, even the European ones such as the UK and France: “respect for sovereignty affects the utility of applying domestic competition laws extraterritorially” (Sweeney, 2010: 247). Other than that, lack of power and lack of private actions cause only few states to expand the reach of their national laws beyond their borders (Sweeney, 2010: 245).

3.3.2. Early Attempts

There have been earlier attempts for dealing with antitrust problems in a way other than extraterritorial application. In 1927, League of Nations arranged a forum named World Economic Forum and during this Forum, a paper called ‘The Social Effects of International Industrial Agreements’ was presented by a professor of economics called William Oulaid and he proposed “regulatory co-ordination at the international level” to be able to prevent the negative effects of international cartels (Taylor, 2006: 148). Nevertheless, such a proposal did not attract attention since very small number of nations had competition laws in 1920s and their attitudes in this policy area had differed considerably (Taylor, 2006: 148).

After the failed proposal of an international initiation for antitrust problems, years following the Great Depression and Second World War period witnessed the initiations for a stable international financial system and international trade openness, which were seen very important for the stability of international system (O’Brien and

Williams, 2007: 114). Hence post-war period is a period shaped mainly by the rise of "Western liberal economic order", "U.S.'s international power" and "international organizations" (O'Brien and Williams, 2007: 114). The internationalization efforts of the period were mainly a reflection of U.S. interests that relied on open trade system ruled under a multilateral trade regime. For this reason, a meeting was held in 1947 in Geneva and 23 nations agreed upon reduction of tariffs (General Agreement on Tariffs and Trade-GATT) under a setting of "a code of rules, a dispute settlement mechanism and a forum for trade negotiations" (O'Brien and Williams, 2007: 155). However, CLP was not one of the major priorities in the agenda since the main importance was given to liberalization of trade by reduced tariffs.

After the GATT, The Conference on Trade and Employment, held in Havana in 1948 (also called 'The Havana Charter), witnessed the attempts of creating International Trade Organization (ITO). Actually, ITO was a reflection of the Bretton-Woods setting, which led to the creation of international financial and monetary regimes after the Second World War in 1944, in the context of liberalization of international trade system. The plan designed at the Havana Charter was to regulate the international trade together with the regulation of cross-border competition (Taylor, 2006: 150). For this reason, Havana Charter's fifth chapter (Article 46-54) included obligations on states to prevent restrictive business practices. This was an indicator of seeing antitrust law and policy as a part of liberalization agenda. In Article 46[6], it is stated that:

---

[6] Havana Charter for an International Trade Organization, Final Act of the United Nations Conference on Trade and Employment, April 1948 available at http://www.wto.org/english/docs_e/legal_e/havana_e.pdf

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

As it can be seen from the text, rules about the restrictive business practices were arranged quite comprehensive and states were obliged to prevent restrictive practices of their domestic enterprises that had a negative effect on international production, trade and objectives of the ITO. According to Article 50, member states are obliged to take necessary measures (such as legislation) to ensure that public or private enterprises in their jurisdictions do not engage in such practices. Business practices that should be prevented were also given in the third paragraph of Article 46:

> (a) Fixing prices, terms or conditions to be observed in dealing with others in the purchase, sale or lease of any product:
> (b) Excluding enterprises from, or allocating or dividing, any territorial market or field of business activity, or allocating customers, or fixing sales quotas or purchase quotas;
> (c) Discriminating against particular enterprises;
> (d) Limiting production or fixing production quotas;
> (e) preventing by agreement the development or application of technology or invention whether patented or unpatented;
> (f) extending the use of rights under patents, trade marks or copyrights granted by any Member to matters which, according to its laws and regulations, are not within the scope of such grants, or to products or conditions of production, use or sale which are likewise not the subject of such grants;
> (g) Any similar practices which the Organization may declare, by a majority of two thirds of the Members present and voting, to be restrictive business practices.

Moreover, in subsequent articles; a complaint procedure, a consultation procedure, an investigation procedure and a dispute resolution procedure were foreseen as well. Detailed and binding competition regime under the Havana Charter was never realized since the Charter itself fell through. The objection of the U.S. Congress to the ITO was the main reason of the failure. "With the failure of the ITO, the GATT became the institutional focus of the world trading system" (O'Brien and Williams, 2007: 155). Havana Charter included a total of 106 articles and out of them, 38 articles constituted the GATT. Of the 68 articles of the Havana Charter that were removed, nine articles were the above-mentioned Articles 45 to 54 of the Chapter 5, which included provisions on restrictive business practices.

The failure of attempts to an international antitrust regime under the auspices of an international organization did not totally destroy the process for internationalization of CLP. In 1953, the United Nations Economic and Social Council prepared a Draft Convention on Restrictive Business Practices, which proposed an international cartel organization. This organization was structured in a manner that it would not "have any right of interference in the legislative practice of other nations" (Domke, 1955:135). The organization was only to make investigations, consultations and recommendations and its inability to require member states to pass competition laws was a weakness (Domke, 1955:135).

Yet, the strength of the organization lied in its publicity (Domke; 1955: 137). This meant that the organization was going to make the investigations and recommendations accessible by public, which was planned to increase the effectiveness of its actions. Since enterprises are always worried about their

reputation, they were against the policy of publicity. Moreover, International Chamber of Commerce was also worried on the feasibility of the project since there were no agreed standards, definitions and legislation on antitrust policy and government restraints were more harmful than the business restraints such as cartels and monopolization efforts (Domke, 1955: 139). This initiative was again futile that such a convention was not realized.

In the GATT Report of Experts on Restrictive Business Practices in 1960, it is concluded that there are many states that do not even have competition legislation and this makes creation of common standards and rules on restrictive business practices very difficult (GATT, 1960). Because of absence of domestic competition laws in many jurisdictions, no consensus was reached and therefore a multilateral agreement on the issue was seen as a premature development.

3.3.3 OECD

Despite the ineffective efforts for an international antitrust code under the GATT and at the UN level till the end of 1950s, The Organization for Economic Co-operation and Development (OECD) decided to deal with antitrust issues by creating the Competition Law and Policy Committee (CLPC) in 1961 (Its name was the Committee of Experts on Restrictive Business Practices up until 1987). "The CLPC's purpose was to serve as a talking shop for OECD member agencies to collect and discuss information on antitrust and to promote harmonization" (Sokol, 2007: 47).

The Committee issued OECD Council Recommendations in 1967, 1973, 1979, 1986, 1995, 1998, 2001, 2005 and 2009. Moreover, in 1996, Joint Group on Trade and Development (The Joint Group) was created to discuss the relationship between international trade and competition policy.

The Recommendations aimed at promoting cooperation and convergence between competition agencies. For example, 1967 Recommendation encouraged members to initiate bilateral agreements while in 1998, it was recommended to enact domestic laws against hard-core cartel activities. Hard-core cartels whose activities include price fixing, output level limitations and market division, were seen as illegal by all antitrust systems since there is no doubt that they increase prices in the market and hence reduce social/consumer welfare. Other than that, the Committee also engaged in publishing best practices and making peer reviews. Member countries' competition agencies prepare discussion papers that include their agencies' point of views and case law, which are assessed in several meetings and turn into best practices and recommendations.

Despite promoting convergence and creating an international sense of antitrust, the Recommendations of the OECD are non-binding in nature and this factor limits the capacity of them to succeed their implementation. Moreover, since OECD is a club of developed nations and developing country participation is rather limited, these Recommendations lack the ability of global adoption. The OECD, on the other hand, ended the works of the Joint Group in 2006 especially because of the U.S. concerns (Sokol, 2007: 51).

3.3.4. The UNCTAD

Another international institution that also undertook a role in international antitrust issues is the United Nations Conference on Trade and Development (UNCTAD). UNCTAD began studying on CLP in the 1970s when UNCTAD members started to engage in negotiations for a code on restrictive business practices (Sokol, 2007: 48). Since UNCTAD membership is open to all UN members and it is a setting that mostly developing countries have a role, UNCTAD's initiations targeted larger number of parties, even the ones that did not have any competition laws. In 1980, UNCTAD adopted the Set of Multilaterally Agreed Equitable, Principles and Rules for the Control of Restrictive Anticompetitive Practices (The Set).

The Set is a multilateral agreement on competition policy that recognizes the development dimension of CLP and provides:

- A set of equitable rules for the control of anti-competitive practices,
- A framework for international operation and exchange of best practices and
- Vital technical assistance and capacity-building for interested member states so that they are better equipped to use competition law and policy for development.

Moreover, in 1995, Model Competition Law was adopted to assist member states that do not have competition legislation.

The main obstacle of the Set to have an impact on global antitrust regulation is its non-binding nature. Voluntary adoption of the Set makes its implementation by

member states dependent on their own will. Moreover, developing countries' emphasis on trade and development issues also affected the content of the Set which caused "confusion and the failure to generate models of substantial usefulness" (Cluchey, 2007:84).

3.3.5. Efforts by Academics and Experts

Some group of scholars and experts also analyzed possible international institutional approaches to antitrust issues. They are worth mentioning since they have been influential for the future conduct between nation states/competition agencies on internationalization of CLP.

Max-Planck Institute for Foreign and International Patent, Copyright and Competition Law brought a number of academics and experts together for outlining the current state of international CLP and making proposals for the future. This group of experts and academics, called the *Munich Group*, prepared a Draft International Antitrust Code (Draft Code) in 1993. In the Draft Code, a plurilateral agreement under the GATT regime was proposed. It included "the minimum standards that would need to be obeyed by contracting parties" and suggested that "an international antitrust agency would be established to safeguard the consistent application of national antitrust provision" (Piilola, 2003: 228). It was designed in a manner that its provisions were going to be applied in international cases only. For this reason, a creation of an international antitrust authority, with a power of

requesting national agencies to take appropriate measures, was foreseen. Actually, these proposals of the Munich Group, which mostly included European scholars, also reflected the differing points of views of the Europe and the U.S. on internationalization of CLP.

A similar initiation by the European Commission in 1995 was the creation of an expert group for analyzing the current and the future situation of international antitrust. The 1995 Expert Group published a report called Competition Policy in the New Trade Order Strengthening International Cooperation and Rules (The Expert Group Report) ,which reflected the EU's views on development of a multilateral framework on CLP (Cluchey, 2007: 75). The Expert Group Report recommends a multilateral arrangement that would ensure states to incorporate minimum standards in their national legislations. (Piilola, 2003: 228).

The above-mentioned reports and the European Union's propositions for a multilateral competition regime created a suitable environment in 1990s for discussing an institutional setting for international CLP issues (Sokol, 2007: 49). The reflections of this situation can be seen in the efforts under the WTO starting from the middle of the 1990s.

3.3.6. WTO

With the increasing challenges of implementing national laws to international economic activities and transactions, their effects on international trade and with

detailed proposals for an international antitrust framework (especially those of the EU), the WTO decided in 1996 WTO Singapore Ministerial Conference to establish the Working Group on Interaction between Trade and Competition Policy (The Working Group). Singapore Ministerial Declaration paragraph 20 states that:

> Having regard to the existing WTO provisions on matters related to investment and competition policy and the built-in agenda in these areas, including under the TRIMs Agreement, and on the understanding that the work undertaken shall not prejudge whether negotiations will be initiated in the future, we also agree to:
> - establish a working group to examine the relationship between trade and investment; and
> - establish a working group to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework (...) (WTO, 1996).

Up until 2001 Doha Ministerial Conference, The Working Group published several reports that included the issue areas to be discussed, works done, meetings held, conclusions reached etc. Most of the issue areas in the Working Group's agenda were about the relationship between international trade and competition policy (Sokol, 2007: 50).

In paragraph 23-25 of the Doha Ministerial Declaration, the focus of the Working Group was shifted towards the clarification of core principles, including transparency, non-discrimination and procedural fairness, and provisions on hard core cartels; modalities for voluntary cooperation and support for progressive reinforcement of competition institutions in developing countries through capacity building (WTO, 2001).

Although meetings of the Working Group continued, member states could not reach a consensus on the content of an antitrust framework under the WTO despite its limited agenda. Objections came from both the U.S. and from the developing countries. “By 2003, the Working Group agreed that any binding standards for antitrust law were not feasible or desirable” and the WTO dropped the CLP form its agenda, also ending the Working Group (Sokol, 2007: 51).

3.3.7. ICPAC Report

Following the works of the WTO and some other international organizations, in 1997, the U.S. initiated the International Competition Policy Advisory Committee (ICPAC) headed by the members of the Antitrust Division of the Department of Justice (DOJ). The aim was to review the internationalization of antitrust to be able to clarify the U.S. situation in ongoing discussions. ICPAC published a report in 2000 (The ICPAC Report). The ICPAC Report, rather than a multilateral binding framework under the WTO, promoted fostering the dialogue among competition agencies, providing technical assistance, increasing consultation and cooperation between authorities and hence developing greater convergence and soft harmonization of antitrust systems (ICPAC, 2000: 35, 284). The institutional settings proposed were a global competition initiative and bilateral cooperation agreements. In 2001, the global competition initiative was realized as the International Competition Network (ICN).

3.3.8. ICN

In 2001, the ICN was established by fourteen jurisdictions, namely Australia, Canada, European Union, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, United Kingdom, United States, and Zambia. The ICN does not have a permanent secretariat, which is considered to be giving it flexibility. Instead, the ICN is guided by a 15-person Steering Group composed of representatives of ICN member competition agencies who serve in the Steering Group for two years. The work of the ICN is conducted by the working groups that "address competition issues on a project-by-project basis" (Blumenthal, 2004: 268). The works of these groups are discussed in workshops and annual meetings/conferences that member agencies and non-governmental bodies participate.

The ICN appears to be a soft law organization that issues non-binding recommendations and best practices on antitrust issues. According to Sokol (2007:109), the goal of the ICN is not to implement harmonized and standard rules on antitrust issues but to "create consensus and adopt antitrust norms".

On the Memorandum on the Establishment and Operation of the International Competition Network (ICN, 2001), mission and activities of the ICN are explained as;

- [p]roject-oriented, consensus-based, informal network of antitrust agencies from developed and developing countries that will address antitrust enforcement and policy issues of common interest and formulate proposals for procedural and substantive convergence through a results-oriented agenda and structure,
- [e]ncourag[ing] the dissemination of antitrust experience and best practices, promot[ing] the advocacy role of antitrust agencies and seek[ing] to facilitate international cooperation,

- [A]ctivities (...) on a voluntary basis (...) rely[ing] on the high level of goodwill and cooperation among those jurisdictions involved,
- [N]ot intended to replace or coordinate the work of other organizations, nor (...) [to] exercise any rule-making function,
- (...) [Leaving] to the individual antitrust agencies to decide whether and how to implement the recommendations, through unilateral, bilateral or multilateral arrangements, as appropriate.

Moreover the ICN is described as an organization that "seek[s] advice and contributions from the private sector and from non-governmental organizations that are concerned with the application of antitrust laws (non-governmental advisers) (...)" (ICN, 2001).

It is argued that despite ICN's founding concept of 'no power', it has a power that comes from soft-norm formation, which can turn into hard law by time. In fact, according to a survey, "96% of competition agencies surveyed make use of ICN work products and materials, and 94% distribute them inside the agency. 77% use ICN materials for reference purposes, 46% for staff training and 40% for outreach. 69% of all agencies say they are pro-actively working towards applying ICN Recommended Practices" (71% of emerging and 65% of established agencies) (Fox, 2009: 166).

3.3.9. Bilateral and Regional Agreements on CLP

Bilateral Competition Agreements

Taylor (2006: 108) argues that bilateral competition agreements (BCAs) can be seen as establishing "de facto international standard for cross border competition law

enforcement" when there is no multilaterally agreed rules on antitrust problems. There have been four phases of bilateral agreements on competition, which are:

1. First Generation BCAs from 1976 (as passive cooperation agreements),
2. Second Generation BCAs from 1988 (as negative comity agreements),
3. Third Generation BCAs from 1988 (as positive comity and international enforcement assistance agreements),
4. Fourth Generation BCAs (extension of jurisdiction agreements) (Taylor, 2004: 108).

First BCA was signed between the U.S. and Germany in 1976 as a response to the OECD Recommendations. Agreements between the U.S. and Australia (1982), between the U.S. and Canada (1982) and between Germany and France (1987) followed (Taylor, 2006: 109). These first generation BCAs mainly aimed at reducing the tensions between jurisdictions that had aroused from extraterritorial application of national laws. However, the U.S.-Germany agreement has a different character in the sense that its main motivation was increasing cooperation between agencies rather than reducing the conflicts that resulted from the U.S.'s extraterritorial enforcement (Zanettin, 2002: 61). As major "economic and political partners", the U.S. and Germany shared similar views on extraterritorial application of national CLP and they did not have any disputes concerning the issue (Zanettin, 2002: 62).

First generation BCAs mostly included notification, information exchange, cooperation and consultation requirements which were quite limited in nature (Taylor, 2006: 109). Second and third generation BCAs were negotiated after the weaknesses of the previous ones had been realized and the concept of 'comity' was

introduced in these agreements. Negative comity clause "refers to an obligation placed on an enforcing nation to consider the interests of an affected nation when enforcing its domestic laws and to refrain from taking enforcement action that adversely affects the interests of the affected nation" (Taylor, 2006: 110). Positive comity on the other hand, provide the affected nation to request the other party to examine the anticompetitive practices that are taking place within the other party's territory but causing harm in affected party's territory.

Fourth generation BCAs on the other hand, have occurred very rare. The BCA between the New Zealand and Australia signed in 1998 can be given as an example. This agreement allows parties to extend their legislative prohibitions to cover both jurisdictions. Taylor (2006: 120) argues that since New Zealand and Australia have similar legal systems and highly harmonized competition laws and since this agreement was part of a larger harmonization attempt of both parties' business laws, it has reached well beyond the boundaries of current BCAs. Yet, "it indicate[s] what may be achievable between nations with closely integrated economies, an existing extensive bilateral trade and economic relationship, similar competition laws, similar cultures and similar legal systems" (Taylor, 2006: 120).

As the major powers of the world economy, the U.S. and the E.U. signed a bilateral competition cooperation agreement in 1991[7]. The agreement includes negative and positive comity clauses together with reciprocal notification of cases

[7] Agreement between the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, 23 Sptember 1991 [1991] 5 CMLR 517. After an inter-EU challenge to the agreement (mainly form France), the ECJ concluded that the EC could not enter into agreements with other countries and therefore the agreement could be concluded in 1995 (Jones and Sufrin, 2008: 113).

under investigation when there is an interest of either party, exchange of non-confidential information, meetings between officials, assistance and coordination. Between the years 1991-1999, the U.S. and the EU cooperated in 689 cases, 358 of which were notified by the EU while the U.S. notified 331 of them (Yevust in Piilola, 2003: 241).

Since the 1991 Agreement was seen as a success by both parties, they agreed on clarification of application of the positive comity clause and hence concluded the Agreement between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of their Competition Laws (Positive Comity Agreement) in 1998.

CLP provisions in Regional Agreements

Regional free trade and/or cooperation agreements also contain certain provisions on CLP. The Asia Pacific Cooperation Organization (APEC) is an example for regional cooperation agreements. It is an institution that promotes "free trade and practical economic cooperation in the Asia-Pacific region" (Taylor, 2006: 71). APEC has 21 member countries that have substantial differences in their economic development levels[8]. Differences in levels of economic development are also reflected by the differences in their competition laws and policies. For instance, the U.S. has the Sherman Act since the 19th century while China has passed its competition law very recently.

[8] The APEC member countries are Australia, Brunei Darussalam, Canada, Chile, People's Republic of China, HongKong,China, Indonesia, Japan, Republic of Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, The Philippines, Russia, Singapore, Chinese Taipei, Thailand, The United States and VietNam. Available at www.apec.org.

In 1999, APEC members endorsed the "APEC Principles to Enhance Competition and Regulatory Reform". These principles are non-binding and voluntary in nature and it is emphasized in the text that they take into account the "diverse circumstances of economies in the region" (APEC, 1999). The APEC competition principles are non-discrimination, comprehensiveness, transparency, accountability and implementation (APEC, 1999). It is seen that the aim of endorsing these principles is not harmonizing the national competition policies of the member countries but to increase cooperation and convergence. Taylor (2006: 124) argues that the APEC example shows that when countries have different levels of economic development and of competition culture with "low to moderate degree of economic integration", promoting cooperation and convergence is a better strategy than harmonizing CLPs.

The North American Free Trade Agreement (NAFTA) is a regional trade agreement between Canada, Mexico and the U.S. to implement a free trade area. It entered into force on January 1, 1994. It includes only few provisions on competition policy. In Articles 1501 of the Agreement, it is stated that

> Each Party shall adopt or maintain measures to proscribe anticompetitive business conduct and take appropriate action with respect thereto; recognizing that such measures will enhance the fulfillment of the objectives of this Agreement (NAFTA, 1994).

Although the NAFTA has a dispute settlement mechanism for resolving trade disputes between national industries and/or governments, parties of the Agreement do not have recourse to dispute settlement for the competition related matters. This situation shows that members of the NAFTA do not prefer any limitation on their powers concerning the implication of CLP.

Attempts to internationalization of CLP are discussed in this chapter. Firstly, the unilateral responses to internationalization of anticompetitive business activity, i.e. extraterritorial application are explained. Although it is a way to deal with international antitrust problems, the sovereignty concerns and capabilities of countries seem to limit the use of extraterritoriality. Later on, cooperation/coordination, convergence and harmonization efforts starting from the 1920s are explained. It is seen that the attempts of states, competition agencies and international organizations are among the most effective ones. Yet, the role of international organizations in the internationalization of antitrust is mostly seen a result of state preferences because states usually draw the line for the initiations of international organizations.

Reflecting the state preferences does not mean these organizations are not effective in the process; most of them actively contribute to cooperation and convergence efforts taking place at the international level. The table produced by Damro (2005: 20) gives an excellent summary of the legal features that these organizations have:

Table 1: Legal Features of International Organizations

	UNCTAD	OECD		WTO	ICN
		Competition Committee	**Global Forum**		
International Coverage	Multilateral	Developed countries	Multilateral	Multilateral	Multilateral
Primary Target	Developing countries	All countries	Developing countries	All countries	All Countries
Issue Mandate	Trade-plus	Trade-plus	Competition only	Trade-plus	Competition only
Objective	Cooperation and Convergence	Cooperation and Convergence		N/A*	Cooperation and Convergence
Means to Objective	Primarily discretionary and non-binding	Primarily discretionary and non-binding		Binding with a Dispute Settlement Mechanism*	Primarily discretionary and non-binding

*****: Damro lists these categories as "N/A" since it was decided to remove competition policy from Doha Round. *Source:* Damro (2005: 20)

It is seen that the institutionalization of competition issues in the WTO had been a too ambitious project that had to be inactivated because of the diverging opinions among developed countries and between developed and developing countries. Therefore, now, the WTO does not have a role in the internationalization of CLP; discussions on competition policy had been suspended.

Although non-binding in nature, the OECD and the UNCTAD are seen as "useful instruments to support cooperation between competition authorities" (Mitschke, 2008: 40). Nevertheless since they have limited memberships (developed countries in the case of OECD and developing ones in the UNCTAD), these institutions are not seen as 'the' institutions for internationalization of CLP.

The ICN on the other hand has distinct approach to internationalization of CLP. According to ICN web site, the ICN is unique as it is the only international body devoted exclusively to competition law enforcement and its members represent

national and multinational competition authorities. Damro (2005: 21) argues that since governments are not involved in its processes, the ICN enables competition authorities to use their own discretionary authority in a less formal and bureaucratic setting. Moreover, due to ICN's non-binding voluntary nature, it does not touch upon the national interests and sovereignty concerns of countries and this makes it easier to enhance "bottom-up convergence" and cooperation between member agencies (Mitschke, 2008: 42).

Concerning the bilateral arrangements, they are generally between competition agencies and have non-binding provisions on cooperation and coordination. Similarly regional agreements on economic cooperation or free trade have non-binding clauses on competition issues.

To conclude, state preferences and concerns seem to shape the internationalization of CLP together with the efforts of competition authorities and international organizations. The reason for internationalization efforts seem to stem primarily from internationalization of economic (and hence anticompetitive) activity. Coordination and cooperation efforts show that national competition agencies no longer have the ability to cope with global antitrust problems alone. Yet, the inability to agree on binding international competition rules can be seen as a result of states' sovereignty concerns, differences on their objectives on application of CLP and on their economic development levels. For example, developed economies tend to sign bilateral agreements with the countries they trade, which have certain degree of development levels and competition rules.

In the light of these explanations, important factors of internationalization of CLP are discussed in the next chapter.

CHAPTER 4

FACTORS OF INTERNATIONALIZATION OF CLP

In the previous chapter, review of the attempts to internationalization of CLP is given. It is understood that state preferences and efforts of competition agencies and international organizations are important in the process. Moreover, increase in international anticompetitive activity, sovereignty concerns of countries, sharing similar antitrust concerns, being close trading partners, having similar development levels together with competition and institutional/policy-making cultures levels seem to be important factors shaping the process of internationalization of CLP.

In this chapter, factors of internationalization of CLP are discussed in detail. In 4.1., a brief summary of the literature on internationalization of CLP is given by focusing on the factors that scholars in international antitrust field see as important in internationalization of CLP. Then in Chapter 4.2., I will explain the important factors of internationalization of CLP based on the previous attempts and literature review sections of the study.

4.1 Literature Review

When we look at studies on international antitrust issue, it is seen that the main focus has been the level of international interaction and the type of institutions that regulate the relationship between states and/or their national competition agencies.

Andrew Guzman (2001; 2004), as one of the main contributors of international CLP literature, argues that there should be substantive international standards for antitrust and the WTO is the preferred institution for such a setting.

In his earlier article, Guzman (2001) suggests a new regime for international antitrust which should contain substantive standards and he proposes WTO as the governing body of the new system. Concerning the current state of cooperation, with the increase in international business activities, tools that the national competition authorities have in their hands became insufficient, which caused them to cooperate with each other in order to maintain their enforcement capability domestically (Guzman, 2001: 1144).

The most preferred form of cooperation has been bilateral agreements in which information sharing between states/authorities constitute the main part (Guzman, 2001: 1145). Guzman (2001: 1146) calls this type of cooperation as "procedural cooperation" and he claims that there are not any substantive cooperative chapters or minimum standards on these agreements as it can be expected from "self-interested states and administrative agencies seeking to preserve their own influence." In other words, the reason for cooperation in the form of bilateral

agreements between antitrust authorities is to gather information outside their own territory and, by this way, to continue enforcing their domestic laws without any troubles caused by increasing international business activities. Such form of cooperation shall not regulate the global economy but it shall only adopt domestic agencies to "international challenges" (Guzman, 2001: 1146).

In another article, Guzman (2004: 355) argues that noncooperation includes risks such as "transaction costs" especially for businesses since they have to deal with different antitrust regulation systems, "the risk of biased prosecutions" since all firms have their home countries and increased "international activity" due to the lack of an effective enforcement system for illegal international activities. In the present system, since multinational firms should deal with antitrust agencies in different countries, they have to bear multiple costs such as hiring many legal representatives, preparing lots of different documents, meeting requirement of all jurisdictions etc (Guzman, 2004:355). Moreover, this causes different regulators reviewing the same transaction and hence creating time costs (Guzman, 2004:355).

A domestic antitrust authority not only deals with domestic firms but also with international firms that have business activities in its country and/or whose activities have effect in its territory. Therefore, according to Guzman (2004: 356), it is possible that national regulators will apply national laws laxer to domestic firms and tougher to international ones. He gives export cartel exemptions as an example for such a situation.

The main argument of Guzman is that in the absence of cooperation between agencies, substantive antitrust policies are harmed by international trade and making

accurate policies becomes impossible due to diverging interests of countries (2004: 357-359)[9]. If a country is a net exporter, anticompetitive conducts held by domestic firms will adversely affect foreign markets while benefiting those domestic firms. On the other hand, a net importer country shall apply stricter competition policies since local consumers may be affected from the anticompetitive activities of foreign firms.

Guzman (2004: 363-365) claims that divergent interests, which are the result of countries' import-export balance, create divergent preferences for or expectations from negotiations on international antitrust regime. Moreover, as long as states have divergent preferences, it is impossible to reach a consensus unless concessions are made. Since there is such a need for compensation of losses and transfer payments, then a setting in which only competition issues are discussed will not suffice. Therefore, Guzman (2001: 1156; 2004: 365) proposes that antitrust negotiations should be carried in a "sufficiently broad institutional context" where transfers can be made so that a potential loser of the negotiated competition regime can be given compensations in other issue areas such as intellectual property or environment.

Guzman (2001: 1157; 2004: 372) claims that concluding an agreement on an international scale is "best from a global perspective" and national incentives of states cannot be dealt without an agreement on 'substantive' rules. Moreover, an agreement that makes the current regulatory system better off should be dealt under the auspices of the WTO. He gives two main reasons for his proposal as the ability to make transfer payments and ability to use the dispute solution system (DSS) in the WTO.

[9] In his argumentation, Guzman (2004: 357) assumes that "each state pursues its own interests without regard for the other states' interests" and "states do not consider foreign costs and benefits at all."

According to Guzman (2001), DSS is important because even there is an agreement on the international substantive antitrust standards, states may avoid obeying the rules, which makes the agreement meaningless. For states to honor their commitments and to make an agreement credible[10], DSS is so far the best setting (Guzman, 2001: 1158). In his earlier article (2001), Guzman proposes an international regulatory system that should include substantive antitrust rules and that should be under WTO. In the latter one (2004), he also explains how to achieve an agreement. He (Guzman, 2004: 373) argues that first of all nondiscrimination principle, especially containing national treatment clause, could be useful for preventing export cartel exemptions and a "slightly more ambitious WTO agenda[11]" is a good start for deeper cooperation in international antitrust.

Eleanor M. Fox, in her article *Antitrust and Regulatory Federalism: Race Up, Down and Sideways* (2000), examines the concepts of "regulatory competition" and "regulatory federalism" concerning the CLP. CLP has been national and the markets have been mostly global, while there has been an increase in the discussions for the internationalization of CLP (Fox, 2000:1781). The first point Fox mentions is the differences between goals of national CLPs and how such differences affect the internationalization process. She calls the conception of the U.S. antitrust system as "efficiency law" in which competition law is seen as a "tool to produce efficiency through markets" (Fox, 2000: 1782-1783). On the other hand, Fox (2000: 1782)

---

[10] Other than a dispute resolution procedure, Guzman (2001:1158) also mentions "reputational constraints".

[11] He quotes from the WTO Doha Ministerial Declaration: "core principles, including transparency, non-discrimination and procedural fairness, and provisions on hard core cartels; [and] modalities for voluntary cooperation…"

argues, some competition laws aim to protect small businesses, to make fair access possible ("fairness law").

Fox examines whether nations may make or modify their competition laws to compete with other states for foreign investment, new business etc (Fox, 2000: 1788). In other words, Fox analyzes if regulatory competition is a factor that lead to the internationalization of antitrust[12]. Fox (2000: 1793) argues that given the U.S. style less interventionist efficiency based antitrust law; the EU may see itself in a race with the U.S. to the bottom.

Fox also mentions the competition between the U.S and the EU to expand the number of nations that have antitrust regimes that are similar to theirs. She argues that the nation who can expand its own antitrust system will have a stronger place in the world economy.

Accordingly, Fox (2000: 1802) argues that in a global economy like the one today, "[t]here is a need for an international economic order in which at least some players are charged with responsibility to enhance the welfare of the entire community". Nevertheless, states' first concern is still their national problems rather than international or global problems and they do not want to lose their sovereignty on various policy areas (Fox, 2000: 1802). Hence domestic interests and fear of losing sovereignty are factors that determine the states' choice of international governance structure for antitrust.

---

[12] Regulatory competition is assumed to occur when states compete with each other to attract new investment into their own territories. The tools states use for this purpose include laxer law regimes in issues such as environment, lower taxation etc.

Keeping those main concerns of states in mind, Fox claims that some problems should be and can be solved at the international level. She proposes measures such as "transparency, national treatment, mutual respect, due process and a prophylactic principle in favor of openness", which are mainly GATT/WTO principles (Fox, 2000: 1806). Fox (2000: 1807) concludes that for CLP, regulatory competition is a "side track" and the main question is on "regulatory federalism": "How should we, how can we, reorder economic regulation so that it works for use as citizens of the world?"

In another article, Fox (2003) in a way tries to answer the above-mentioned question. She compares "horizontalists", who think that even global solutions of the day can be solved at the national level (extraterritorial application and/or nation-to-nation cooperation such as bilateral agreements and ICN) and "internationalists", who claim that "global-level solutions" are necessary for some problems of antitrust (Fox, 2003: 912).

Within this framework, she analyzes three different problems. The first one, inbound restraints, is regulated with the help of "effects doctrine" that allows states to apply their national laws for activities held outside but have effects inside their territories. U.S. antitrust law allows to use effects doctrine but Fox (2003: 917) argues that developing countries cannot use it effectively since some do not have antitrust laws and some others do not have enforcement capabilities/resources /power. Moreover, there is the possibility of conflicting policies of countries. Second problem is the evidence located abroad. Although bilateral arrangements are helpful, they have their own shortcomings. The third problem is about the

competition/industrial policy interface solved nationally, which is not a national-only problem.

Fox concludes that both national or nation-to-nation cooperation arrangement and higher-level solutions should be used together to solve global problems such as global mergers and world cartels.

Harmonization of competition policy is examined by Daniel Crane (2009) in three aspects: priority issues of harmonization, necessary conditions for harmonization and substance, procedure and institutions in harmonization process. By 'harmonization', he refers to the "increased international homogenization of antitrust norms" (Crane, 2009: 143). Crane (2009: 151-152) mentions three "preconditions for meaningful harmonization." The first of these is a general agreement on the legitimacy of market economies and governments' intervention on the market. Since antitrust law and policy regulates free markets by intervening in business practices, the "legitimacy of a regulated market economy" should exist for trusting international decision-making in CLP (Crane, 2009: 152).

Second, a consensus between harmonizing institutions on the goal of antitrust regulation is another condition for harmonization since agreement on "modes" will have no benefit without agreeing on "why and for whose benefit" the antitrust policy is (Crane, 2009: 152). Third, Crane (2009: 153) argues that for harmonization to occur effectively, international decision-makers should not have to cogitate on the distributional consequences of their polices, in other words an international competition agency should not deal with political matters.

Crane (2009: 155-156) claims that the realization of the first two criteria mentioned above is difficult; hence he proposes taking "a number of small, incremental steps" as a beginning for future harmonization. He argues that by starting with procedural arrangements that do not raise sovereignty and ideological concerns, formal antitrust norms could be set and reaching agreements on "substantive norms and international institutions" gets easier (Crane, 2009: 157). He gives a unified international premerger notification protocol, as an example of steps for antitrust homogeneity in the coming years (Crane, 2009: 158).

Frederic Jenny (2003) takes into account the international cooperation part of internationalization process. He defines cooperation between national regulatory agencies in a way that he includes case specific cooperation such as exchange of confidential/non-confidential information, joint investigations and non-case specific cooperation (technical assistance, positive and negative comities, recommendations, peer reviews etc.) (Jenny, 2003: 3-4). After reviewing the bilateral, regional and multilateral cooperation agreements on competition, Jenny (2003) claims that the younger agencies' need for the experience of older regimes, new challenges created by the technological advances starting from nineties, globalization of markets, increasing number of international merger activity and lobby of the business community together with skepticism of domestic institutions on the behavior of national antitrust agencies have been factors of international cooperation in antitrust.

Jenny (2003: 19) concludes that "there are two major reasons for the development of international cooperation on antitrust enforcement: the rapid globalization of a number of markets and the proliferation of countries adopting

antitrust law." Since globalization is here to stay and since the number of countries adopting competition laws is increasing, there is a growing need for a multilateral framework for international cooperation that includes "transparent, fair and effective" mechanisms of cooperation and at the same time respects the sovereignty concerns of states (Jenny, 2003: 20).

Paul Stephan (2005) accepts the globalization phenomena and increasing international transactions together with the limitations of nations states in such a system, but he argues that the development of international technocracy in antitrust has its own problems. First of all, Stephan (2005: 177-179) sees competition policy as an "undefined concept" and different meanings and implementations create "significant differences in national competition policies." He argues that competition policy and trade policy are much related. He accommodates international trade theory to show that applying competition law to externalize the costs of international trade and internalizing the benefits (for example by selectively applying it to foreign producers rather than domestic ones) creates a global welfare deteriorating trade barrier that is too hard to determine (Stephan, 2005: 185). Other than that, in the political economy side, public choice theory suggests that governments reflect the interests of powerful domestic interest groups rather than consumers. Hence this theory also shows that national competition policies will have protectionist goals that lower global welfare and these factors will create differing competition laws and policies (Stephan, 2005: 186).

Baring in mind the different conceptions and goals of national competition policies that are used as tools for trade protection, Stephan (2005: 186) hypotheses

that “in a world where international trade occurs, one and only one competition policy can maximize global welfare.” According to Stephan (2005: 187), disagreement on the consequences of policy choices between states (horizontal variation) and presence of interest groups that aim to externalize the costs of international trade in a state (vertical variation) are the reasons of variation in antitrust regulations. To support this argument, Stephan (2005: 187-194) analyzes the competition laws and enforcement practices of three major economic powers: U.S., EU, and Japan. He finds that;

- Institutional structures of them differ.
- Substantive goals of their antitrust laws, despite similar wordings, differ in practice.
- There is a motive and opportunity (such broad and nonspecific standards) to discriminate against foreigners in both of three jurisdictions.

By these finding, Stephan (2005: 193-194) concludes that competition policy can be affected from protectionist pressures as well and the reasons why states restrict international trade can be much related with their reasoning while implementing competition laws.

If the current situation creates a loss in global welfare and if only one (global) competition policy can increase global welfare, then internationalization of antitrust becomes the core issue. Here internationalization is used in the sense of convergent policies and harmonization standards.

Stephan analyzes different propositions and possibilities such as soft harmonization, international agreement under the WTO, and allocation of regulatory

jurisdictions among major powers such as bilateral agreements. Contrary to many states and scholars who see international institutions as a solution for international antitrust problem, he proposes to dispense with international institutions. Instead he argues that international anarchy rather than international cooperation can work in internationalization of antitrust. States that have protectionist competition policies protecting inefficient local businesses will have to alter their position for not to lose their international competitiveness and therefore there will not be a need for international institutions to regulate antitrust.

Daniel Tarullo (2000) argues that internationalization of antitrust is very much related with its institutional configuration. He analyzes different institutional settings in which international antitrust policy is dealt; the WTO, the OECD and bilateral cooperation agreements. Firstly he identifies the problems associated with the internationalization of antitrust as 1) anticompetitive activities that cannot be solved solely by national regulators (transnational cartels and oligopolies/monopolies), 2) conflicting antitrust enforcement between states (extraterritoriality and merger reviews), 3) burden on business due to duplication of enforcement and 4) market access issues (Tarullo, 2000: 479-481).

After giving the major problems, he explains whether they can be solved under different institutional contexts. He concludes that neither the WTO, nor the OECD, nor bilateral agreements can deal with the problems of international antitrust alone. Instead, different problems should be solved under different institutional settings and therefore he proposes a "multiforum response" to those problems (Tarullo, 2000: 500).

The EU and the U.S. have had different views on the institutional setting that the internationalization of antitrust should take place. Since these two are the major economic powers, such a conflict between them has attracted attention. Arguing that the "outcome of this conflict will shape the globalization of antitrust law", David Gerber (1999: 123-124), examines the factors that "shape the perspectives and positions of the parties." In this way, although indirectly, Gerber analyzes the conditions that shape internationalization of antitrust. He claims that there are several factors such as domestic politics, international politics and economic incentives, yet he focuses on 'legal experience' of the parties that shape their positions in the conflict (Gerber, 1999: 124). He gives three factors of legal experience that affect the conflict on internationalization of competition law. These are legal cultures affecting the way participants perceive recent and future situations, legal experience shaping the preferences and values of these perceptions and legal experience shaping expectations from legal systems (Gerber, 1999: 124).

Reviewing the two sides' point of views, Gerber (1999: 129-130) claims that while the European side insists on a comprehensive and systematic framework for competition law, i.e. an international agreement, under the auspices of the WTO, the U.S. is interested in soft policies of cooperation and convergence. Hence, the main reason of the conflict lies in the perception of a need for an international framework for competition law. Convergence, which is an "independent choice by states" and as "increase in shared characteristics" without any international agreement, is a result of socialization of the parties, efforts of international organizations together with the EU and the U.S. "and 'invisible hand' of rationality" (Gerber, 1999: 131-132).

Gerber (1999: 133) argues that although the U.S. side is experienced in these convergence mechanisms, the EU decision-makers think, in consistency with their experiment, that there should be "some agreement that requires decisional convergence." Again, legal experiences determine the way two sides assess the obstacles about the scope and efficiency of cooperation. Gerber (1999: 137) states that the "U.S. participants are less aware of and less concerned about those obstacles than their European counterparts" because of differing legal experiences. Projection and prediction about the creation of an international competition framework is also different between two parties.

While such an idea is familiar and doable for the Europeans due to their community building efforts and national experiences, the U.S. antitrust law is more case-centered rather than framework-based (Gerber, 1999: 137-139). Concerning the preferences, Gerber (1999: 139-140) claims that Europeans prefer a comprehensive, consistent and systemized framework similar to their integration process and national experiences; on the other hand U.S. side's preferences focus on fact and case-law based regime just like in their common law system. To sum up:

> Both sides tend to favor an international response that functions along lines with which they are familiar and corresponds to the values that support the decision-making process they use (Gerber, 1999: 140).

Concerning the lack of a support for a competition framework under the auspices of the WTO, Mervyn Martin (2008) argues that the reason was the difference in development levels between members of the WTO. Disparity in development leads to differences in needs of countries and thus the way they assess internationalization of CLP. Signing bilateral agreements as an example of practical

cooperation does not seem workable for developing countries since some of them still do not have competition laws and even for the ones who have antitrust laws, usually they can not get into bilateral cooperation with developed countries or they become the weaker part of the agreement (Martin, 2008: 300-302).

Technical cooperation on the other hand, will be successful as long as both developed and developing countries show effort for that. Martin (2008: 304-305) analyzes the viability of harmonization efforts and concludes that divergent approaches of major players and marginalization of developing countries are main concerns. In the article, although it is not likely to be realized in the near future, the WTO is seen as the most appropriate institution for competition negotiations to take place because of its existing mechanisms and membership (Martin, 2008: 314).

4.2. Determining the Factors of Internationalization of CLP

By using the findings of Chapter three and the previous section, five important factors of internationalization are analyzed in this section, which are globalization, sovereignty concerns and conflicting national interests, differences between countries, the role of the EU-U.S. relationship and the role of non-state actors.

The primary factor in the internationalization process is thought to be *globalization* (Fox, 2000; Jenny, 2003; Stephan, 2005). It is seen that the main drive for internationalization of CLP is the increasing number of international

(anticompetitive) firm conduct. With the business activities (trade, production, distribution etc) spreading to various markets, as Guzman (2001) argues, tools that the national regulators have became insufficient.

Although extraterritorial application of domestic laws and policies is a way to protect competition in a country's domestic market, it causes conflicts in the international arena because no country wants another law and policy to be applied in its own territory. Other than that, because states/regulators do not want to give up their powers on CLP issues, they do not agree on international antitrust rules or establishment of supranational antitrust institutions. Inability to agree on common standards under the auspices of the WTO and voluntary nature of other multilateral arrangements support the case. Hence, *sovereignty concerns and conflicting national interests* is also a factor of internationalization of CLP (Guzman, 2001 and 2004; Fox, 2000).

Differences between countries cause them to take part in different and various forms of internationalization arrangements. Differing conceptions on objectives of CLP affect the internationalization levels of countries (Fox, 2000; Stephan, 2005; Crane, 2009). Moreover, as it was shown in Chapter two, developed countries usually get involved in cooperation and convergence arrangements with other developed countries. Hence, as Martin (2008) argues, economic development levels are important.

The role of the EU-U.S. relationship is also important since they are the major economic powers and have two of the most developed antitrust regimes in the world. Therefore, cooperation, convergence arrangements and/or differences and

conflicts between these two countries affect the worldwide process of internationalization of CLP (Gerber, 1999). Moreover, the EU and the U.S. compete with each other to expand their own antitrust systems to other countries that do not have CLP (Fox, 2000).

Although there are not many findings and studies on *the role of non-state actors* (firms, business organizations etc.) on internationalization of CLP, since the antitrust law and policy mainly deals with business practices, I think that this factor should also be analyzed in this study. Below the above-mentioned factors are discussed in detail.

4.2.1. Globalization

Although it has been frequently used in daily life in different concepts, what people understand from globalization differ significantly from each other. Concerning the economic realm, globalization usually refers to "internationalization", which is an "increase in the volume of economic flows across borders" and/or liberalization in terms of removal of trade or investment barriers (O'Brien and Williams, 2007: 384). On the other hand, ideas, knowledge and culture that flow regardless of the territories and westernization are also regarded as globalization in some different concepts (O'Brien and Williams, 2007: 384). Hence, it is appropriate to say that globalization is "a multidimensional concept" and a process "whereby the barriers of time and space are reduced, new social relations

between distant people are fostered and new centers of authority are created" (O'Brien and Williams, 2007: 132-133).

O'Brien and Williams argue that globalization is a historical process (O'Brien and Williams, 2007: 9). After the 1850s, international economy was formed and economies have become "increasingly global" and from the last quarter of the twentieth century, the term global economy was started to be used extensively (O'Brien and Williams, 2007: 132). Following this argument, in this study, it is assumed that the globalization (in its 'modern' form) has been an ongoing process from the 1850s, but has become a real phenomenon in the last two or three decades.

Within this framework, the following paragraphs will explain the relevance of globalization with the internationalization of CLP. As described earlier, the CLP deals mainly with cartels, monopolization or abuse of dominance by firms and mergers. These three areas have been all affected by the internationalization of economic activity or economic globalization since all these antitrust matters started to transcend national boundaries.

With the internationalization of business activities, firms that only had national competitors faced many rivals from different nations. Thus, they had to increase their shares in international markets. For this reason, some firms started to engage in anti-competitive activities to resist globalization and competition.

Consequently, internationalization of anticompetitive activity led to the internationalization of CLP. Dabbah (2003: 14) argues that internationalization of antitrust law and policy is a "response to market globalization" because, with globalization, it became almost inevitable to make changes in antitrust policy. For

example, Commissioners for the Competition Directorate General at the European Commission, Sir Leon Brittan and Karel Van Miert (1996: 3) argued that:

> [Liberalization and globalization] call into question the domestic nature of competition rules and the absence of binding rules at the international level. Many countries or regions have implemented comprehensive policies, but lack appropriate instruments to apply domestic competition rules to anticompetitive practices with an international dimension, as well as to obtain relevant information outside the jurisdiction. A framework is necessary then to enhance effective enforcement of competition rules.

Similarly, although failed, the idea behind the inclusion of competition rules to the WTO regime was to eliminate private business constraints, which adversely affected the liberalized trade environment. Hence, international competition rules were seen as a response to the anticompetitive behavior of firms within the context of globalization process.

Furthermore, it is argued that one of the main factors that necessitated a network such as the International Competition Network was economic globalization:

> [E]conomic globalization has resulted in an increasing number of investigations of mergers, cartels, and abuses of dominance that transgress jurisdictional boundaries. This involves two risks, that of sub-optimal enforcement, if agencies which each have a partial picture of the situation do not cooperate with each other, and that of divergent outcomes, if different jurisdictions reach different conclusions about the same practice (ICN, 2005: 1-2).

To sum up, globalization process is a factor of internationalization of anticompetitive business conduct that has necessitated internationalization of CLP. The three different areas of antitrust, accordingly, (i) anticompetitive arrangements/cartels, (ii) abuse of dominance/monopolization and (iii) mergers, are analyzed below.

(i) Anticompetitive Arrangements/Cartels

Cartels are the oldest form of business activity that fall in the scope of antitrust regulation. According to Wells (2002: 5), cartels started to be seen in their modern format from the last quarter of the nineteenth century. There were national cartels in which firms from same country came together to resist foreign competition and also there were international cartels since businesses across borders usually "decided to cooperate rather than engage in costly and quite likely inconclusive economic wars" (Wells, 2002: 5).

Before the beginning of the WW1, there had been international cartels in important sectors such as steel rail, explosive and synthetic alkali (Wells, 2002: 5). During the protection years of 1920s and 1930s, exporting firms continued to engage in anticompetitive arrangements (with national and cross-national firms) to be able to decrease the costs of contracting foreign markets. Despite the protectionist measures of the years followed by the WW1 and the Great Depression, international cartel activity has continued. In the interwar period, there had been 179 detected international cartels (Connor, 2004: 242).

Thus, the expansion of markets and its relative speed in the second phase of industrial revolution and the emergence of international cartel activity in the last quarter of the 19th century closely follow each other. In fact, the earliest effort for the introduction of multilateral antitrust rules was the League of Nations' World Economic Forum in 1927, which was a failure.

In the late 1980s and in 1990s, as Simmons and Elkins (2003: 275) argue, there were three main policies that intensified globalization process: (i) liberalization

of the current account, (ii) liberalization of the capital account and (iii) the unification of exchange rate. Moreover, deregulation and/or privatization of national monopolies along with liberalization and technological advancement have also been drivers of the process.

Within this framework, Sweeney (2010: 79) claims that with the growth of economic globalization, it is likely that the level of harm caused by international cartels shall increase, "both in absolute terms and relative to harm caused by domestic cartels". According to a study by Connor (2004), it was found that between the years 1996-2001, there were 167 hardcore cartels prosecuted by the U.S., the EU and Canada. Between 1969 and 1995 (total of 26 years), 33 international cartels were discovered by the EU while this number is 24 between 1996 and 2001 (total of 5 years).

The harm of international cartels is hard to quantify but this is usually estimated by finding the percentage and/or amount of price increases caused by cartels. In a report by the OECD Competition Committee (2002: Annex A), it was concluded that:

> [R]ecent cases against large, international cartels suggest that the dimensions of the problem are even larger than previously thought. It remains difficult to place a monetary value on the harm, but it is surely significant, amounting to billions of dollars annually.

Similarly, Connor and Lande (2005) studied the price overcharges resulting from international cartels and demonstrated that the median overcharge for international cartels has been 30-33% between 1780 and 2004 and 25% between 1991 and 2004.

Moreover, the effect of international cartels on the trade levels of developing countries was estimated by Levenstein and Suslow (2004). For their cross-section analysis, they used a sample of 42 prosecuted hardcore cartel cases during the 1990s. It was found that "the *average* annual amount of trade affected during the 1990s (…) was $47.0 billion, representing 4.7 percent of imports and 0.9 percent of GDP of these countries (Levenstein and Suslow, 2004: 817-818).

Another study by Evenett et al. (2001) demonstrated that the average time periods that international cartels operated has been rather long: at least 6 years in 1990s. The reason behind the operability of international cartels could be their ability to escape from cartel prosecution more easily than domestic cartels since cartel members may be more loyal to the cartel activity to enjoy huge international profits and since the international nature of cartels enable members to find more sophisticated anti-detection and anti-cheating techniques (Sweeney, 2010: 86-87). Accordingly, Sweeney argues that it is the spreading of cartel culture all around the world and distortion of international trade that will make "everyone worse off" (Sweeney, 2010: 82).

(ii) Abuse of Dominance/Monopolization

The other area that competition policy deals with is the abuse of dominance or monopolization. The internationalization of national markets is claimed to increase the competition in markets by decreasing the market power of dominant firms. On the other hand, global markets offer dominant firms to extend the reach of their activities and hence, their market power internationally. This could occur in two

ways. First, although a dominant firm may conduct its anticompetitive activity in a domestic market, its negative effects can be felt in some other markets. Second, a firm may be dominant in more than one jurisdiction and engage in monopolization activity in all of those markets. Budzinski (2008: 18) argues that anticompetitive behaviors of dominant firms in international markets are more frequent in recent decades.

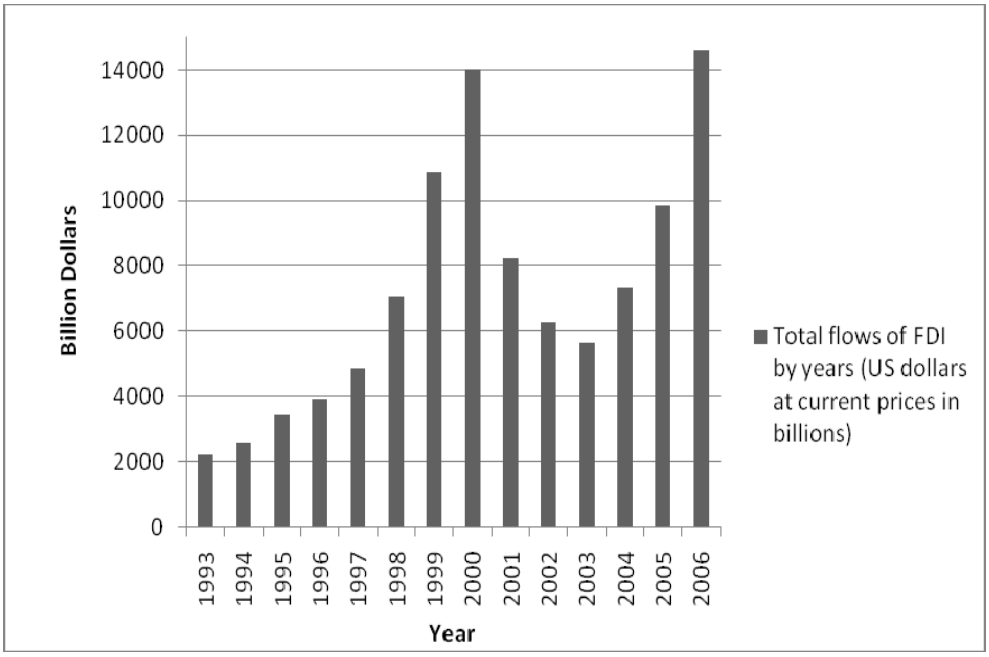
One of the striking examples of companies with global market power/dominance is Microsoft. Microsoft is often referred as a case for taking the advantage of market liberalization and technological advancement. With a world market share of over 90% and dominance in many national markets, Microsoft was investigated in various antitrust cases by the U.S, the EU and certain other jurisdictions.

When a multinational firm is investigated by more than one competition authority, it may not be possible to reach an efficient solution mainly because of diverging decisions. Moreover, when remedies of the most interventionist national regulator have to be applied by the dominant firm, the decision of this authority may have consequences in other countries whose competition authorities are less restrictive. The decision or remedy given by the most restrictive jurisdiction may not be the optimal solution for that specific firm's monopolization case. Furthermore, global dominant firms may try to use nationalistic elements to be able to decrease the intervention they are exposed in foreign countries, mainly by whipping up political support from their home countries (Sweeney, 2010: 139). This increases the possibility of conflict between those countries' regulators/governments.

Hence, the internationalization of economic activity may result in the extension of dominant firms' market powers and the possibility of abusive behavior worldwide. Moreover, investigations and decisions of different antitrust regulators may come up against each other, which creates an environment for conflict.

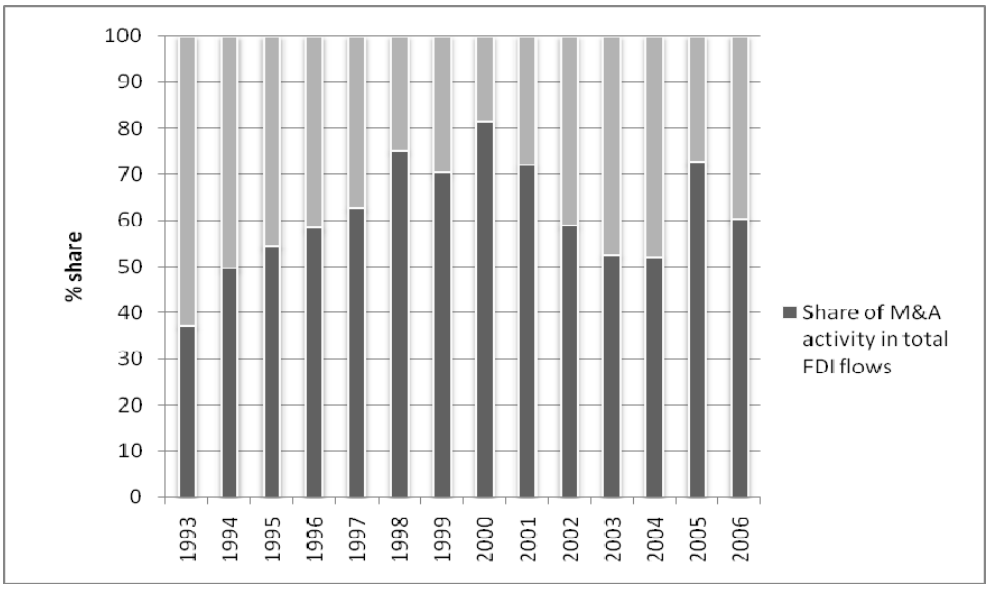
(iii)Mergers

The amount of foreign direct investment (FDI) has increased significantly in the last two decades. Moreover, the share of M&A activity in total FDI flows has also been considerable. Graph 1 below shows the amount of FDI flows by years. Graph 2, on the other hand, gives the share of M&A activities in total FDI flows.



Source: UNCTAD FDI statistics database (http://stats.unctad.org/fdi)

Figure 1 Total Flows of FDI by Year (US Dollars at Current Prices)



Source: UNCTAD FDI statistics database (http://stats.unctad.org/fdi)

Figure 2: Share of M&A Activity in Total FDI Flows (%)

International mergers can both have procompetitive and anticompetitive effects. They are procompetitive because national markets with powerful firms open up to competition from abroad when an international competitor buys a domestic business. Markets enlarge and people have more choices that are both cheaper and more qualified. On the other hand, by merging with different business from all over the world, a firm can also gain market dominance over time, which may restrain competition and decrease consumer welfare in a market. This situation in return, may cause powerful businesses to abuse their positions in international markets in the longer term. Merger activities that have a transnational nature create additional costs to merging parties since they have to apply various jurisdictions for pre-merger reviews.

To sum up, it is shown above that the globalization process is an important factor in internationalization of CLP because (i) anticompetitive

arrangements/cartels, (ii) abuse of dominance/monopolization and (iii) mergers have raised important governance issues within the context of globalization process.

However, despite a relationship between globalization and an increase in international anticompetitive activity, globalization process alone cannot explain the internationalization of CLP. There are reasons for arguing globalization is not the only factor in internationalization of CLP. First, despite globalization and internationalization of anticompetitive business activities, national competition authorities could unilaterally tackle with such problems, especially with their tool of *extraterritorial application*. Yet, there have also been cooperation and convergence mechanisms issued by states/regulators, which make one think that there are other important factors in internationalization of antitrust law and policy. Second, and more importantly, there are different levels and forms of internationalization in CLP. Bilateral, regional and multilateral efforts with differing cooperation and convergence structures have also emerged during the process. Hence, due to the scattered and complex structure of internationalization of CLP, it is thought that there are other factors of internationalization to be discussed.

4.2.2. Sovereignty and Conflicting National Interests

Today, most of the countries in the world (except the EU member countries) have the competence for applying their domestic antitrust laws and policies on conduct that take place in their own territories. Hence, domestic regulators have the

power of enforcement and decision-making in CLP issues. Consequently, states do not prefer losing this power, since it is seen as a limitation to their sovereignty.

Furthermore, the existing national/regional regulatory arrangements aim at increasing or at least protecting national welfare and therefore states are bound to focus on their citizens' welfare instead of global welfare (Budzinski, 2008: 32). This is actually in line with the argument that "governments and regulators favor their own constituents over foreigners" (Guzman, 2001: 1152). The export cartel exemption given by the U.S. to domestic export firms that are in a cartelistic behavior in foreign markets is an important example of this. Export cartels are exempted from national antitrust laws, despite their nature being national. This is because the U.S. citizens are not affected from export cartels, while these domestic firms gain considerable profits. However, citizens' of the countries who import the goods and/or services of the cartel members lose in this situation.

The argument that national welfare is preferred at the expense of world welfare is supported by decisions or statements of different regulators for the same transaction. For instance, the EU's opposition to the famous Boeing/McDonnell merger in 1997 is seen as a support for Airbus (a European firm and the Boeing's only competitor) against Boeing (the U.S. firm), while U.S.'s clearance of the transaction is regarded as a support for Boeing.

Countries' tendency to protect their own sovereignty and national interests affect the process of internationalization of CLP in two different ways. First, extraterritorial application of domestic laws and policies become problematic since this is seen as a threat to a nation's sovereignty and opposed to its national interests.

Second, harmonization, binding international codes and supranationalization of CLP create problems because states want to hold the power of implementation and decision-making on competition issues and see such attempts threatening their sovereignty. Below, these arguments are discussed in detail.

4.2.2.1. The Issue of Extraterritoriality and Sovereignty

Extraterritoriality is defined as a "state's claim of jurisdiction over individuals or activities beyond its borders" (Gayton: 1997:3) and it is an attempt to "unilaterally internalize the negative external effects" (Budzinski, 2008: 34). On the other hand, the principle of territoriality asserts that nations are not allowed to apply their laws to foreign jurisdictions. However, in the *Lotus* case in 1927, the Permanent Court of International Justice defined an exception to this principle and stated that:

> Far from laying a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of (…) their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules (Zanettin, 2002: 21).

After the *Lotus* decision, the U.S. became the first jurisdiction that applied this exception in an antitrust case, *Alcoa,* in 1945. According to Gayton (1997: 5), the U.S.'s extraterritorial application of its laws is an attempt that expands and as well as undermines the notion of territoriality.

The instrument used by the U.S. for extraterritorial application was the *effects doctrine*. According to the effects doctrine, domestic competition agencies apply

their domestic laws to anticompetitive practices, which occur in foreign markets and have a significant anticompetitive impact on domestic markets.

Extraterritorial application of domestic laws has its own shortcomings since unilateral enforcement of national rules is difficult in order to deal with international problems. The main problem with the extraterritoriality is the confliction of national interests due to sovereignty concerns.

Within this framework, the doctrine of sovereignty is one of the pillars on which the internationalization of antitrust policy stands. Because the extent of countries' wills to relinquish their sovereignty is an important question in the internationalization process (Dabbah: 2003: 139). Since national laws and policies apply inside national boundaries, states feel threatened when another country attempts to apply its rules in their own territories.

As the U.S. started to expand the application of the effects doctrine, the countries such as Australia, Canada, Denmark, Finland, France, Italy, Japan, Mexico, New Zealand, Norway, Sweden, Switzerland and the United Kingdom started to response by enacting "blocking statutes" to exclude their citizens and companies from the extraterritorial application of the U.S. law (Gayton, 1997: 5) because they regarded it "as tantamount to a legal invasion" (Slaughter and Zaring, 1997: 4).

The potential for conflict even increases when a country applies its domestic law against a conduct in a foreign market, in which such a conduct is not lawful or is even desirable (Mitschke, 2008: 23). For example, a case was brought against Swiss watch manufacturers by the U.S. since there was a claim that by an agreement they signed, watch manufacturers had stopped the exportation of watch spare parts to

prevent manufacture of watches in other parts of the world. However, the problem was that the agreement, which was interpreted as anticompetitive by the U.S., had been known and even supported by the Swiss government (Zanettin, 2002: 35).

Extraterritorial application has some other shortcomings. First, some states do not have national CLP systems and some do not have the capability to apply their laws and policies extraterritorially. Countries without economic and political power do not have the ability for extraterritorial application of their domestic laws and policies (Mitschke, 2008: 22). It is observed that regulators of only developed countries such as Germany, Japan and the EC, have applied extraterritoriality principle effectively. Hence these less powerful countries have difficulty in protecting their national interests concerning the international anticompetitive activity affecting their territories.

Another shortcoming of the extraterritorial enforcement is the inability to collect information to evaluate the potential anticompetitive activity if the information needed is in strict control of foreign country. Usually, national competition authorities have extensive investigation powers that are based on state power. However, when the evidence is abroad, it is not possible to apply those powers in foreign jurisdictions (Budzinski, 2008: 37). There are two main options in such a situation: to ask the foreign competition authority to send the information or to demand the firm to send the relevant documents on a voluntary basis. The first option is hard to realize, since national regulators are usually reluctant to send such information. The problem with the second option is the probability of insufficient evidence due to the fact that firms may not send the documents, which are against

their cases. Therefore, the existence of necessary information abroad has the potential to deteriorate the investigation process because of countries' and firms' protection of their own interests. (Budzinski, 2008: 37).

4.2.2.2. The Issue of Supranationalization and Sovereignty

While sovereignty is an important factor in extraterritorial application of domestic laws and policies, it is also limiting the efforts of harmonization, signing a binding code and/or supranationalization of CLP. Since harmonization means bringing national laws in line with each other, signing an international code means adhering to international rules and supranationalization means transfer of rights and powers from state-level to supranational level, states/regulators do not want to give up their sovereignty and power on implementation of antitrust policies.

The failed attempt of a binding international arrangement under the auspices of the WTO, especially the U.S.'s unwillingness and opposition, is a good example of countries' concerns on sovereignty. Moreover, increasing number of cooperation and convergence efforts instead of creating binding international rules on antitrust is also supportive of this argument. Even the EU, once a proponent of an international antitrust regime under the auspices of the WTO, started to support the form of internationalization, which included voluntary and non-binding provisions, such as the ICN.

Overall, sovereignty concerns and national interests appear to be important factors in internationalization of CLP

4.2.3. Differences between Countries

Differences among countries play a role in internationalization of antitrust law and policy. The main differences that are important in the process are the differences in (i) economic structures/development levels, (ii) differences in economic integration levels and (iii) differences in competition cultures/institutional capabilities. Throughout this section, these differences will be analyzed altogether because of their entangled structure: generally, similar economic structures also result in similar competition/institutional/policy-making culture or countries with similar development levels and competition/institutional cultures are the ones that are usually more integrated in economic sense.

Differences in market structures and economic environments between developing and developed countries can be a factor affecting the level of internationalization of CLP. Bradford (2007: 419) argues that optimal antitrust rules and therefore the preferred type of international antitrust arrangement for developing and developed countries may differ because of "differences in the composition of the domestic market, the degree of trade liberalization, the institutional ability to pursue antitrust violations as well as domestic interest group dynamics".

Despite major differences among developing or developed countries, there are “a set of interests specific to developing countries” in the world trading system (O’Brein and Williams, 2007: 160) and similar agendas concerning their economic development objectives. This is most clearly seen in the negotiation process for a competition code under the UNCTAD. Actually, the inspiration of the developing countries in dealing with CLP under the auspices of UNCTAD was the aim of economic development of the less developed countries (Lianos, 2007:4).

Negotiations for a code on restrictive business practices under the UNCTAD and the resulting Set reflect developing countries’ economic development goals while the developed nations insisted on the maintenance of market competition and promotion of antitrust rules (Oesterle, 1981: 20).

During the negotiations, developing countries argued that there should have been an emphasis on their ‘special situation’ and that a business practice that has an effect on trade and economic development’ should be defined as a restrictive practice. (Oesterle, 1980:17-19). On the other hand, developed countries insisted that ‘adverse effect on trade and development’ alone shall not mean that the business practice would be restrictive.

Other than the coverage of restrictive business practices, developing countries argued that there should be an exemption for firms of developing countries and the Set should concentrate on the conduct of multinational companies from developed countries. Nevertheless, given the opposition of developed countries to this argument, in Article B (7), the principles and rules of the Set was designed to be universally applicable to all countries and enterprises regardless of the parties

involved in the transactions, acts or behavior. On the other hand, Article C(7), which is about the preferential treatment to developing countries, states that the developed countries should take into account in their control of restrictive business practices the development, financial and trade needs of developing countries. Moreover along the text, there is an emphasis on principles to be applied in a *just* and *equitable* basis.

As a result, because of different economic structures and conflicting interests of developed and developing nations, the Set reflected neither the sole economic development goals of developing world nor the consumer welfare approach of the developed world.

The argument that the developed countries tend to cooperate with developed countries while they refrain signing agreements with the developing world is supported by current state of bilateral agreements between different competition authorities: "[T]here are few agreements between developed and developing countries or between large and small countries" (Jenny, 2003: 5).

In fact, the U.S. Department of Justice Antitrust Division (DOJ) has nine bilateral agreements with nine mostly developed and/or large economies. These are Australia (1982), Brazil (1999), Canada (1995), Germany (1976), European Communities (1991), Israel (1999), Japan (1999), Mexico (2000) and Russia (2009). Among these nine economies, in 2008, six of them had per capita incomes higher than $25.000 while four of them had incomes higher than $35.000[13].

[13] Australia: $37.250, Canada: $38.710, Germany: $35.950, The European Communities: $32.600, Israel: $27.450 and Japan: $35.190. Source: The World Bank and the CIA Factbook (for the data of the European Communities)

When the texts of these agreements are analyzed, it is seen that only the Memorandum of Understanding signed with Russia consists of technical cooperation issues such as training courses, comments on each others' proposed change of laws and assistance on promotion of sound competition policy.[14] On the other hand, the agreements with, for example, Australia and Canada include detailed provisions on exchange of evidence and on further elaboration of the principles of positive comity, respectively.

Zanettin (2002: 68-71) argues that the opening of web of bilateral agreements to developing countries such as Israel, Brazil and Mexico can be explained by these countries' 'special' relationships and their amount of trade with the U.S. Brazil is one of the most powerful economies of the Americas and an important trading partner, Israel has a free trade zone agreement with the U.S. and Mexico is a member of NAFTA (Zanettin, 2002: 69).

Despite the importance of similar economic structures for cooperation and convergence between countries, the degree of bilateral cooperation between competition agencies of developing countries with similar development level has been limited (Botta 2009). Botta (2009) analyzes the bilateral cooperation efforts between Brazil and Argentina and finds that even though there is a substantial degree of economic integration between these countries, as they are one of the leading trade partners of each other and signatories of Mercosur, a regional trade agreement, they have not been successful in cooperating with each other on antitrust matters (Botta,

[14] "Memorandum of Understanding on Antitrust Cooperation Between The United States Department oj Justice and The United States Federal Trade Commission, On the One Hand, and The Russian Federal Anti-Monoploy Service, On the Other Hand", November, 10,2009. Available at www.usdoj.gov

2009: 154-156). Based on interviews with the officers and commissioners from the Brazilian and Argentinean competition authorities, it is seen that one major reason is the "different stages of development of the competition law in two countries and the lack of personal contacts" (Botta, 2009:154-157).

On the other hand, Patricia Agra, an adviser of the President of the Brazilian competition authority, claims that a certain degree of confidence to each other's jurisdictions is necessary for bilateral cooperation to work and such a confidence is lacking between Brazil and Argentina (Botta, 2009: 172). Moreover, the reason for the lack of trust from the Brazilian perspective is because of the independence problem of the Argentinean competition authority that causes its decisions to be influenced from the political considerations. Thus, despite having similar development levels and some degree of economic integration, different levels of institutional ability and competition culture may result in limited internationalization of CLP.

The argument that the internationalization of CLP could be easier when countries have similar competition laws and institutional/policy-making cultures can be supported by the documents provided by the national agencies and by the existing convergence and cooperation mechanisms. For example Acting Assistant Attorney General of the U.S. Department of Justice, Klein (1996) presented the bilateral agreements of the U.S. with other jurisdictions as being "between and among countries that have well-established commitments to, and experience in, competition matters". Klein (1996) argued that international antitrust agenda can be successful as long as it is among key trading partners with common policies on antitrust.

Shared values and norms are important in this field, since CLP is not a "set of neutral principles" that all nations agree, but it is a policy area in which "dearly held public values" are important (Waller, 1997: 348). Waller argues that this is why national differences among competition cultures are the most important obstacle in harmonization efforts and the future of international antitrust (Waller, 1997: 348).

The most advanced bilateral agreement that includes provisions on cooperation and harmonization in antitrust today is between Australia and New Zealand. This agreement allows parties to extend their legislative prohibitions to cover both jurisdictions. Taylor (2006: 120) asserts that these two countries have similar legal systems, highly harmonized competition laws and this agreement was part of a larger harmonization attempt of both parties' business laws. Consequently, this case demonstrates that the similarity of rules and competition/institutional culture has been an important factor for extending the cooperation and convergence provisions in bilateral arrangements.

Similarly, Zanettin (2002: 229-230) argues that bilateral cooperation can be used efficiently only by limited number of countries since good knowledge of other party's legislation, its commitment to antitrust principles and trust between the parties are essential factors for an efficient cooperation. The U.S., the EU, Canada, Australia and Japan are among the countries that have the potential to develop such a relationship (Zanettin, 2002: 230).

4.2.4. Role of the Relationship between the EU and the U.S.

The EU and the U.S. constitute together more than %50 of the world's total GDP. Moreover according to World Investment Report (UNCTAD, 2008), 40 out of top 50 financial transnational corporations are from the U.S. or the EU, while again the same percentage holds for non-financial companies. Therefore, it is meaningful to say that competition policies of the two and relationship between them would have a substantial effect for the rest of the world. Similarly, Chairman of the U.S.' Federal Trade Commission (FTC), William Kovacic (2008: 8) claims that:

> More than any other single force, the interaction of the competition policy systems of the EU and United States deeply influences the convergence process within all of the multinational and regional networks.

The EU and the U.S. are determined to apply competition laws and see CLP as a part of their economic policies for growth and development. Baring in mind that the U.S. antitrust law influenced the founders of the EU, this is no surprising. Nevertheless, despite U.S. antitrust influence, the EU competition law has features that are uniquely European (Sweeney, 2010: 182). Moreover, there are also differences in enforcement of these policies: the EU seems to be more interventionist than the U.S.

As world's most powerful economies, it is very common that the U.S. and the EU deal with same competition cases such as transnational mergers, international cartels or abuse of dominance by large multinational firms. Thus, the probability of conflict caused by different decisions reached by these two jurisdictions and procedural differences also impose costs on firms under investigation.

The cooperation and convergence efforts between the EU and the U.S. have continued for several years. The bilateral cooperation agreement between the Commission on the one hand and the Department of Justice Antitrust Division (DOJ) and Federal Trade Commission (FTC) (two regulator antitrust institutions in the U.S.) on the other has positive comity and information sharing elements in it. Moreover, they also cooperate in other multilateral arrangements such as the OECD and the ICN. On the other hand, there had been a main divergence between two jurisdictions on the inclusion of competition policy issue on the agenda of the WTO: The EU was the main supporter of a multilateral binding competition regime under the auspices of the WTO, while the U.S. relied on non-binding bilateral cooperation arrangements[15].

Despite sharing similar views and cooperating in many ways, there have been cases that have raised questions about the ongoing differences and need to improve cooperation and convergence between the EU and the U.S. For example, the European Commission prohibited the merger of two American companies, GE and Honeywell, which were producers of jet engines and aerospace products. Respectively, this was a transaction that the U.S. authorities cleared by claiming that it would make the customers/consumers better off. Another example is the Microsoft cases on abuse of dominance/monopolization. The U.S. and the Microsoft agreed on settlement agreements (one in 1994 and other in 2001), after the investigations run by American regulators during the 1990s. However, the decision of the European

[15] Damro (2004 :7) argues that "the U.S. has the tools of unilateralism, they fear the compromise of bargaining, and they abjure the 'relinquishment' of sovereignty". On the other hand the power of the Commission would only grow due to its "own experience with binding, treaty-based harmonization of competition law in the Single Market" (Damro,2004: 8).

Commission after the similar investigation procedures was fining Microsoft $612 million in 2004. In brief, there are still conflicts between the two of world's major antitrust systems, which devalue the efforts on internationalization of CLP

Another point that should be emphasized concerning the EU and the U.S. competition laws is that in the face of proliferation of national competition laws all around the world, the EU and U.S.'s CLP regimes become models for new jurisdictions. While there were only 20 countries that had competition laws in the early 1980s (Sweeney, 2010: 2), today more than 100 jurisdictions apply antitrust laws and policies. Hence, the technical assistance and capacity-building efforts supported by these two jurisdictions are important factors shaping the antitrust systems of developing countries.

Kovacic (2009: 316) points that there is a competition between the EU and the U.S. competition agencies for "influence and recognition"; a competition to be "the global leader in competition policy". Furthermore, there are arguments about the EU winning this competition because more nations are finding the EU antitrust system more suitable to their economies and policies than the US system and adopt a model that resembles the EU CLP regime (Fox, 2000: 1798; Kovacic, 2008: 8-9).

Consequently, the nature of relations (differences, similarities, conflicts and cooperation) between the U.S. and the EU antitrust policies is an important factor for the internationalization of CLP. In fact, many people think that as long as the EU and the U.S. CLP have huge substantial differences and no agreement, further steps, such as a multilateral agreement, cannot be taken in the internationalization process (Damro, 2004: 3, Sweeney, 2010: 179).

4.2.5. Non-State Actors

Multinational corporations (MNCs), business interest groups and other non-governmental organizations such as consumer interest groups, bar associations, group of advisers etc. should also be considered in the process of internationalization of CLP. These non-state actors can affect the process of internationalization of CLP in two distinct ways: domestic and international. Concerning the domestic way, non-state actors may have a role in the shaping a country's position on internationalization antitrust and of related talks and negotiations with other countries. Moreover, non-state actors can also be members of international organizations that deal with international competition policy and they may affect the international agenda directly by participating in the meetings of such institutions.

Most of the institutions that deal with multilateral antitrust arrangements recognize non-state actors as participants (Blumenthal, 2004: 277). For instance, the OECD reserves a place for the private sector participants especially the Business Advisory Committee (BIAC) but holds the right to exclude them from the meetings (Blumenthal, 2004: 277). Concerning the WTO, participation is more limited to "advocacy and discussion with their respective governments" (Blumenthal, 2004: 277).

The ICN can be regarded as the most 'open' international organization to the non-state actor participation.

> ICN agency members work closely with non-governmental experts, including private practitioners, representatives of international organizations, industry and consumer groups, and academics ("non-governmental advisors" or "NGAs"). This structure

> promotes the interplay of public and private sector participation and expertise in the development of the ICN's projects, resulting in a work product that benefits from the input of a wide spectrum of stakeholders[16].

Non-state actors' participation to the ICN becomes in two ways: directly taking place in projects, alongside member agencies or working through their member agencies. They are especially helpful in identifying the problems of the business community, commenting on the work products or directly drafting a work product themselves. Yet, the "ultimate say (…) with respect to ICN principles, practices, recommendations, and other outputs is limited to member agencies" (Blumenthal, 2004: 277). Furthermore, only member agency representatives can be the members of the steering committee, leaders in working groups and designer of the projects (Blumenthal, 2004: 277). Actually, the fact that the non-governmental organizations should contact the member agency of its jurisdiction to be able to get involved in ICN working groups rather than applying directly to the ICN shows that non-state actors are not seen as the main stakeholders but as 'by-products' of their respective jurisdictions.

The role of MNCs deserves a special attention since globalized activities of firms are seen as the main drive for the internationalization of CLP and at the same time business community also participates in the process itself. There are people who argue that MNCs should be seen as part of the problem rather than the solution when considering the question of internationalization of competition law because it is the

---

[16] *Non-Governmental Advisors to the International Competition Network,*. ICN. Retrieved June 12, 2010 from www.internationalcompetitionnetwork.org. http://www.internationalcompetitionnetwork.org/uploads/non-governmental%20advisors%20to%20the%20international%20competition%20network.pdf.

anticompetitive or restrictive practices of business firms that the whole issue of internationalization actually arises (Dabbah, 2006).

There has been an increase in the international cartel and transnational merger activities throughout the globalization process. Yet the question arises how the business community responds to the internationalization of antitrust policy.

To answer the question, one should examine the behavioral motives of firms. It is generally assumed that the main aim of a rational firm is to maximize its profits. Therefore, it should seek ways to decrease its costs and/or increase its efficiency. Under this assumption, while responding to the internationalization of economic activity and internationalization of CLP, business world shall try to decrease the costs and keep the benefits that arise from using national competition laws while dealing with international antitrust problems.

According to Dabbah (2003b: 211-213), MNCs are assumed to be in support of internationalizing competition law because various jurisdictions handling the same activity could create inconsistencies among decisions, conflicts between states and also there may be a risk of using confidential information of firms for economic espionage. Despite making such an assumption, he states that "at the moment (…), it is not yet clear which particular industrial sector or key [MNCs] will support or resist the move towards greater internationalization of competition law".

Without internationalization of CLP, business community faces transaction costs that arise from transnational merger activities. Together with the increasing number of new competition laws throughout the world, an MNC may have to apply several jurisdictions for one merger transaction it plans. Some sources suggest that

there are more than 70 jurisdictions that have a pre-merger notification system in the world[17] (Galloway, 2009: 179).

In a study by the International Bar Association (IBA, 2003), it is revealed that a typical transnational merger is worth €3.9 billion and notified to six antitrust authorities in average, generating a cost of €3.3 million and taking seven months to be completed. Moreover, a study conducted by Richard Whish and Diane Wood for the OECD (Whish/Wood Report) (1994: 99) found that business people see the executive time and the lost productivity resulting from long, protracted investigations as the largest cost of multiple reviews. Similarly, Waller (1997: 387) claims that the strongest pressure for a EU-style "one-stop shopping" in merger reviews comes from the business interests' lobbying activities since they demand "unified filings and timing requirements, more uniform and less burdensome disclosure requirements and shorter waiting periods before transactions may close".

In sum, the increasing transaction costs is one of the reasons why the business community supports the internationalization of antitrust policy. In addition to money and time costs of multiple notifications, mergers reviewed by many different jurisdictions increase the risk of conflicting and inconsistent results. There may be inevitable differences between the results reached by distinct authorities, because the market structure and effects of transaction may differ among economies (Griffin, 1999: 40). Thus, cooperation and

[17] For instance, *Exxon-Mobile* merger had to be notified to more than twenty jurisdictions while *MCI/WorldCom* merger was reviewed by more than 30 competition authorities (Dabbah, 2003: *supranote* 23).

convergence up to some point have the potential to decrease these transaction costs burdened by the business.

Business interests in areas of antitrust other than mergers are more diverse (Waller, 1997: 387). Given that internationalization of CLP has actually been a result of internationalization of anti-competitive business practices, international cartels may take the advantage of national laws being implemented in national boundaries. Even when a jurisdiction applies its law extraterritorially, difficulties in gathering evidence outside it territory may provide cartels the opportunity to get rid of antitrust sanctions. Therefore, an anticompetitive company would not support the cooperation efforts at the international level.

Export firms, on the other hand, may find it useful to have harmonized antitrust rules because they would like to compete in fair grounds outside their jurisdictions. Yet, because of the exemptions given by national authorities to export cartels, those cartel members may not support internationalization of antitrust with the fear of losing this privilege.

Putnam (1988) argues that domestic interest groups, by pressuring their governments, can be effective in the politics of international negotiations accordingly, it could be argued that powerful business sector in a country affects the internationalization of CLP through shaping their governments and/or antitrust agencies' preferences. For example, the role of MNCs and their lobbying efforts in the WTO negotiations for a TRIPs agreement was important since they, as the main patent holders in the world, would clearly

benefit from such an arrangement (Bradford, 2007: 434). Nevertheless, as it was explained above, the costs and benefits of internationalization of CLP for the business world seems to be "diffuse, case-specific and difficult to forecast" (Bradford, 2007: 430). Thus there have not been any interest groups lobbying for an international antitrust agreement under the auspices of WTO (Bradford, 2007: 426).

Furthermore, internationalization is perceived to be carried by the governments/agencies for increasing the effective enforcement capabilities of the governments/agencies and to increase consumer or social welfare. In such a setting, private sector is only seen as a tool that can be used for understanding the situation and needs of the market, rather than a player in the process of internationalization. The role of non-governmental bodies in the OECD or ICN is an example of this situation since non-state/non-agency participants are excluded from the main decision-making processes. Therefore, it has been observed that despite their increasing participation, private sector is still not a powerful actor in internationalization of CLP.

In this chapter, the factors that influence the internationalization process of CLP were analyzed. It is concluded that globalization is a factor of internationalization of CLP because it led to an increase in international anticompetitive business conduct. Moreover, sovereignty concerns matter in terms of limiting both extraterritorial application of domestic laws and supranationalization of CLP/agreeing on a binding international agreement.

Difference in economic development levels, competition policies and institutional cultures together with degree economic integration is important in the sense that they affect the form of and actors in internationalization efforts. The EU-U.S. relationship affects the process of internationalization because they are the most influential countries in terms of CLP in the world. Non-state actors, on the other hand, are less influential than expected because there are no common objectives that they work for.

In the light of these factors, in the next chapter, I will analyze the EU's CLP since it is one of the major actors in internationalization of CLP and the most successful example of supranationalization. Moreover, the role of accession process in Turkish CLP together with Turkey's efforts in the internationalization process will be explained.

CHAPTER 5

THE EUROPEAN UNION AND TURKISH CLP

The EU case deserves a special attention because its CLP is seen as the most successful EU policy concerning the level of supranationalization and hence, it could provide an example for internationalization of CLP in the world.

In this chapter, the leading factors in supranationalization of EU CLP will be analyzed to assess the relative success of its antitrust regime. Furthermore, the factors that led the EU's CLP to harmonize and supranationalize will be compared with the findings of Chapter three. Then, the emphasis on competition rules in the *acqui* and the Turkish accession process to the EU together with its effects on Turkish CLP and Turkey's internationalization efforts will be discussed.

5.1. European Union CLP

The competition rules for the EU take place in the Treaty of Rome (the Treaty) that was signed in 1957[18]. Actually, by that time, European states had just adopted antitrust laws: France in 1953 and Germany in 1957. Moreover, antitrust law and policy field was seen as a highly limited and technical domain where some small number of insignificant decisions were made (Moravscik, 1998: 76). Hence, it was not seen as a threat to national identity and interests (Büthe and Swank, 2007: 18). Moreover, transferring national powers in CLP to supranational level was favored by Germany since a European-wide antitrust policy was seen in the interests of big German business, which had had fear of facing nationalistic behavior in other European countries (Büthe and Swank, 2007: 18). Since Germany promoted a competition policy "modeled on its own" and "succeeded imposing its views", provisions on the Treaty reflected more or less the German system of antitrust (Moravscik: 1998: 149, 204).

Consequently, the main articles that deal with competition in the Treaty are Article 85 (renumbered as Article 81 in Treaty on European Union (TEU) and as 101 in Treaty on the Functioning of the European Union (TFEU)) and Article 86 (renumbered as Article 82 in TEU and as 102 in TFEU). Article 85 prohibits agreements between undertakings that have the object or effect the prevention, restriction or distortion of competition and that may affect trade between Member

[18] Before that, with the encouragement of the U.S., there had been establishment of competition laws in certain European states such as the U.K., Germany and France.

States. Article 86, on the other hand, forbids an undertaking that holds a dominant position to abuse its dominance in so far as it may affect trade between Member States.

Regulation 4064/89, as the the first regulation of the EC that required pre-notification to the Commission of concentrations within its scope, states that mergers "which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market".

Within this framework, both in the objectives and activities of the EC and in the competition provisions of the Treaty as well as the Regulation, there is an emphasis on the competition in internal market/between member states. Therefore, the EU's CLP differs from other systems in the sense that it also serves as a tool to achieve the goal of market integration. Similarly, Waller (1997: 353) argues that the EU's CLP should be analyzed in terms goal of creating the European Common Market.

The institutional framework of the EU is an important factor for analyzing the EU antitrust policy. The Commission and the ECJ played a key role in "interpreting and enforcing EU antitrust law" (Dabbah, 2003: 91). Below, these institutions are analyzed separately.

(i) The European Commission

Although, a common competition policy for the EU was agreed in 1957, a 'truly' common policy came into force after the serious efforts of the Commission

(Damro, 2003: 211). In 1957, not all member states had similar competition laws; even some of them did not have any and it was the Commission that pushed for a common antitrust policy (Damro, 2003: 211). Moreover, the Commission had the idea that the centralized enforcement of competition rules was essential for the objectives of the EU (Dabbah, 2003: 92). The authority of the Commission on competition policy increased with the initiation of Regulation 17/62[19] (Regulation 17), which gave the Commission the discretion on implementation of Articles 85 and 86[20]. Yet, it is considered that the competition policy became "truly" European with the introduction of merger review process in 1990. Since then, the Commission acquired an actual supranational authority in the field (Damro, 2007: 210-212).

In the competition policy area, the Commission enjoys broad powers ranging from investigating (fact-finding) and punishing (legal evaluation), to infringement of competition rules on its own initiative or acting on complaints. Therefore, in competition cases the Commission is said to be the "law-maker, policeman, investigator, prosecutor, judge and jury" (Jones and Sufrin, 2008: 1146).

(ii) The European Court of Justice

Another EU institution that affected the development of the EU antitrust policy is the ECJ. Dabbah (2003: 93) argues that the ECJ has developed EC antitrust law by "advancing the propositions it created over the first two decades following 1957". Accordingly, while functioning as an institution which "ensure[s] that the

[19] Regulation 17/62, 1962 OJ204.
[20] It is argued that the politicians of the time were not aware of Regulation 17's potential on giving the European Commission ability to act independently (Wilks and Bartle, 2002: 164).

Commission keeps within the bounds of its powers and discretions and observes the law" (Jones and Sufrin, 2008: 1252), the ECJ tried to enhance the powers of the Commission (relative to the powers of the Member States and domestic courts) by expansive interpretations to strengthen the EC competition law (Dabbah, 2003: 93-94).

(iii)National Competition Authorities and National Courts

A supranational CLP enforced by a supranational institution does not mean that the national competition authorities (NCAs) do not have a function in the system. The competition chapter in the Treaty was included into the "national law of each EU member state and are, therefore, directly enforceable by each national court" (Taylor, 2006: 127). Moreover, with the modernization process of the EU competition policy, Regulation 1/2003 introduced a system of 'shared parallel competences between the Commission and the NCAs on the application of competition provisions in the Treaty.

European Competition Network (ECN) was established to increase the communication of NCAs with each other and NCAs with the Commission. The ECN facilitates consultation, cooperation, and exchange of confidential and non-confidential information and promotes the uniform application of the competition rules on the part of the Commission, NCAs and national courts (Whish, 2005: 258).

The basic principle in this system is that a case should be dealt by the authority best placed to deal with it. An NCA takes action if the conduct has substantial direct actual or foreseeable effects in its territory and it must be able to

bring the entire infringement to an end [21](Jones and Sufrin, 2008: 1271). If three or more member states are affected from a conduct, then it is Commission that takes action. Furthermore, NCAs and national courts may apply national laws for controlling mergers that do not fall inside the thresholds of the Community law (Korah, 2007: 246).

On the other hand, the Commission may decide on halting the proceedings of an NCA and take that case over itself and NCAs should relieve of their competence if the Commission initiates its own proceedings. Moreover, NCAs cannot take decisions that would encounter to a decision adopted by the Commission (Whish, 2005: 260).

Role of Non-State Actors

There are no findings and/or studies that demonstrate the direct role of non-state actors in the negotiation process of competition provisions in the Treaty. Nevertheless, non-state actors seem to have a role in *actual* supranationalization of CLP. Although the Treaty gave the Commission supranational power in antitrust, it could not use it properly until it realized the boundaries of this power. Together with the adoption of Regulation 17, there was another factor that pushed the Commission to expand its authority: European private sector.

By making complaints to the Commission about their competitors in the market and by bringing the cases to the ECJ, private firms provided the supranational

[21] National courts also have the power to apply Article 81 and Article 82. Moreover if a person is harmed by an infringement, then that person has a right to bring that action in a domestic court for injunction, for ending the action or for damages for his/her loss.

institutions to “move from nominal to actual antitrust enforcement authority” and to “develop an expansive competition law doctrine” (Büthe, 2009: 192). In other words, non-state actors, which were seeking their own economic interests, utilized the Commission’s powers to intervene in the market to prohibit the activities that harmed their businesses. Concerning the merger policy, firms were in favor of a one-stop shop and fast evaluation of their merger activities and hence supported the supranationalization of merger policy.

Moreover, it is also argued that “sub-national” non-state actors and supranational institutions, the Commission and the ECJ, formed a kind of “transnational coalition” for expanding the supranational governance structure of the EU (Büthe and Swank: 2007).

EU CLP as a Part of the Acqui

The EU competition policy was made a pre-condition for membership to the EU, by making it as a part of the acqui communitaire (Chapter 8), Therefore, it got easier to harmonize and supranationalize the CLP because any candidate country has to adopt EU competition rules before joining the EU.

To sum up, the EU has a system of supranational competition rules enforced by a supranational authority. Moreover, the national competition laws are harmonized with the EU law and there is a high degree of cooperation and information sharing between the national authorities and between the NCAs and the Commission.

Several reasons could be given for the development of the CLP system that the EU has. First, competition policy was introduced as a part of a broader agenda: the main objective was market integration and CLP was used as a tool for achieving common internal market. Second, CLP was not seen as a policy field that could threaten national identities and interests of states. Furthermore, Germany pushed for including antitrust provisions to the Treaty. Third, the Commission and the ECJ were the main supporters of the supranationalization of competition policy; hence they shaped the EU CLP accordingly. Moreover, with the level of market integration reached over the years, it became easier to harmonize national laws, to create a system of shared competences and to form a body like the ECN. Fourth, non-state actors were also supportive of supranationalization. Last, by making the EU competition rules as a part of the *acqui,* countries already adopt EU antitrust policy before membership and expansion of the EU CLP model is succeeded.

However, the extent to which this system is relevant to the internationalization of the CLP in the world is questionable. If the factors of internationalization of CLP in Chapter three are compared with the findings of this chapter, it is seen that despite some similarities, the main motive for European competition policy differs from the factors that leads internationalization of CLP worldwide. This is why the EU has succeeded a certain level of supranationalization and harmonization on its CLP while there is only limited level of cooperation and convergence among countries in the world.

First, in the EU process, CLP was seen as a *tool* for achieving a certain degree of integration among member economies. When the countries decided on

such an arrangement, they had already been ready to give up some of their sovereignty on some policy areas. Hence, accepting the Commission as the authority for EU-level anticompetitive practices was not very difficult. On the other hand, without such an objective and acceptance, states are more reluctant to give up their sovereignty in antitrust matters. Furthermore, they are keen on protecting their national interests and domestic firms. In such a setting, countries choose to cooperate and converge their antitrust systems up to a level without making considerable concessions such as harmonization and supranationalization.

Second, the differences among countries have been important in supranationalization and harmonization process of CLP in the EU. The founding members of the EU did not differ in their economic levels and new members generally had certain levels of economic development together with a degree of market integration with other member states. Moreover, economic criteria for membership provided the disparities between countries to decrease. Concerning the CLP, the presence of competition policy as a chapter in the *acquis* has been very important to create a common competition culture in the EU. Thus, it got easier to harmonize national policies of member countries. As market integration and competition policy harmonization increased, supranational structure of the EU's CLP strengthened. As it was argued before, differences in economic structures, market integration levels and competition cultures are important factors in internationalization of CLP and this can be observed in the EU example.

Third, the role of non-state actors/institutions in the supranationalization of the EU is important in the sense that the Commission and the ECJ supported the

process. Yet, such strong supranational/transnational actors are not present in internationalization of CLP in the world. Although there are international organizations, they do not have power, motivation and capability to play a leading role in the internationalization process. Moreover, MNCs could take the advantage of the existing supranational institutions to realize their own economic interests by making the Commission and the ECJ take action against possible anticompetitive conduct in the market. Consequently, these institutions realized the limits of their power and supranational authorities in CLP and hence, actual supranationalization of CLP was succeeded.

To sum up, there are different dynamics in supranationalization and harmonization process of the EU CLP. Thus, it is thought that the EU CLP is a good example for the internationalization of CLP since it shows the limitations and potentials in the process. Yet it would not be meaningful to take the EU's system as a model for the worldwide internationalization of CLP.

5.2. Turkish CLP

As it was mentioned before, the presence of competition policy in the *acquis* is important because it helps to create a European culture of competition. Furthermore, it is important in the sense that it acts like an anchor for the EU candidate countries. Turkey is a country in the accession process with the EU and is the only country that signed the Customs Union without EU membership. Its role as

an EU candidate, as a developing country and as an actor in international CLP system makes Turkey a case worth analyzing. Hence, Turkish CLP and internationalization efforts will be explained in the next chapter.

5.2.1. The Act on the Protection of Competition and the Turkish Competition Authority

Adoption of a competition law named The Act on the Protection of Competition No.4054 (TAPC) by the Turkish Parliament and establishment of Turkish Competition Authority (TCA) in 1994 was a condition for signing a customs union agreement with the EU. Agreement Creating an Association between Turkey and the EEC or Ankara Agreement that was signed on December 1, 1964 aimed at creation of a customs union between Turkey and the EU. Negotiations for a customs union could begin in 1994 and the Association Council adopted a decision[22] (Decision 1/95) on March 6, 1995.

Decision 1/95 includes provisions on competition law and policy under Chapter IV named "Approximation of Laws". Articles 32, 33 and 34 are replica of the Treaty's Articles 85, 86 and 92. In Articles 32 and 33, business activities are "prohibited as incompatible with the proper functioning of the Customs Union, in so far as they may affect trade between the Community and Turkey". Article 34, on the

[22] Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union (96/142/EC) available at http://www.mfa.gov.tr/data/AB/EUAssociationCouncilDecision195CustomsUnionDecision.pdf

other hand, prohibits "any aid granted by Member States of the Community or by Turkey through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between the Community and Turkey".

Article 39 of the Decision 1/95 requires Turkey to "ensure that its legislation in the field of competition rules is made compatible with that of the European Community, and is applied effectively". Moreover it was stated that "before the entry into force of the Customs Union, [Turkey shall] establish a competition authority which shall apply these rules and principles effectively".

After the adoption of TAPC and establishment of TCA, the TCA could only be operational after three years, in 1997. Important articles of the TAPC (Article 4, 6 and 7) are in accordance with the TFEU's 101st and 102nd articles and Regulation 4064/89.

5.2.2. The EU CLP as an Anchor for Turkish CLP

Turkey began negotiations with the EU to become a full member of the EU on October 3, 2005. Among the 35 chapters of the *acquis,* Chapter 8 is on competition policy. This chapter has two sub-heading as "Anti-trust and Mergers" and "State Aid". Screening Report of Chapter 8 was published on May 3, 2006 and according to this report, "*acquis* in this chapter is to a large extent linked to the

obligations arising from the Customs Union between the EU and Turkey presently in force" (European Commission, 2006).

In Progress Report 2009 (European Commission, 2009: 49), it is stated that:

> Overall, Turkey shows a high level of alignment in the field of anti-trust, including its merger control rules. Turkey continued to enforce the competition rules effectively. The Competition Authority has a satisfactory level of administrative and operational independence. No further legal alignment in the area of State aid can be reported and the long-awaited state aid law is still pending. There is still a need to implement the EU discipline on State aid in the steel sector, as part of Turkey's commitment under the ECSC Free Trade Agreement. Alignment in this chapter is not complete.

Consequently, Turkish CLP is in line with the *acquis* but Chapter on Competition Policy is not complete due to the problems on state aid issue.

5.2.3. Turkey and the TCA as an Actor in Internationalization of CLP

Customs Union between the EU and Turkey include provisions on information exchange and positive comity (Articles 36, 40 and 43). There have been two attempts of the TCA for requesting cooperation and consultation from the EU based on these provisions of the Decision 1/95. On May 2004, the TCA asked the DG Competition of the Commission for information about a possible cartel investigation by the Commission; a cartel that had effects on Turkish territory. It was

stated by the DG Competition that the information gathered by the Commission is confidential and cannot be given to the TCA[23].

On June 2004, an official request was made to the DG Competition (based on the Article 43 of the Decision 1/95) about another cartel that affected Turkish markets negatively. According to the positive comity provision in this Article, affected party requests the other party to take appropriate measures. Yet, whether the notified party shall initiate any proceedings depends on its own consideration. By referring to this provision of the Article, DG Competition stated that it does not consider running an investigation necessary. Hence, it can be concluded that despite having very similar laws and an agreement that includes exchange of information and positive comity provisions, the TCA efforts on case-specific cooperation with the EU has become unsuccessful so far.

TCA has also engaged in bilateral arrangements with jurisdictions other than the EU. These are mainly in the form of Memorandum of Understandings (MOUs):

- MOU on Cooperation between the Free Trade Commission of the Republic of Korea and the TCA (November 17, 2005)
- MOU for Enhancing Bilateral Cooperation between the Romanian Competition Council and the TCA (December 12, 2005)
- MOU on Cooperation Between the TCA and the Bulgarian Commission on Protection of Competition (December 1, 2007)
- MOU on Cooperation between the Portuguese Competition Authority and the TCA (July 28, 2009)

[23] This case will be explained in detail below.

- MOU on Cooperation between the Council of Competition of Bosnia and Herzegovina and the TCA (April 28, 2010)
- MOU on Cooperation the Authority for Fair Competition and Consumer Protection of Mongolia and the TCA (April 28, 2010)

When the texts are analyzed, it is seen that they include provisions on cooperation and exchange of information on general competition issues together with exchange of staff and technical assistance. There are no binding provisions and/or confidential information exchange. Moreover case-specific cooperation and consultation is not mentioned in detail[24].

Turkey also takes part in other CLP-related international settings such as the WTO, the OECD, the UNCTAD and the ICN. The TCA seems as an active participant in these organizations. For the Working Group of the WTO, the TCA prepared an opinion document and supported the inclusion of binding competition provisions to the WTO, which are on transparency, equal treatment and restriction of hard core international cartels in line with the needs of the developing countries.

The TCA hosted the 2005 United Nations Conference on the Review of the Set. In his opening statement, the TCA President of that time, Mustafa Parlak (2005), mentioned the importance of the meeting for increasing communication and cooperation between the competition authorities and he stated that "members of the international society have to meet on a common basis in some way for actually fighting international infringements of competition".

[24] MOU with the Mongolia is rather different form the other ones in the sense that it includes positive comity provision and the TCA seems as the provider of technical assistance to Mongolian authority. Yet the other MOU s are very much the same of each other

In the OECD, the TCA participates meetings on CLP since 1998. Moreover, the TCA submits its yearly reports to the OECD, shares Turkish experience on specific issues and gives opinions on OECD decisions and recommendations. Turkey was also reviewed by the OECD under its Peer Review Program and the Peer Review Report (OECD, 2005) was presented on February 18, 2005 in the OECD's Global Competition Forum. According to the Peer Review Report:

> The agency [TCA] has continued to make excellent progress in the years since [OECD's 2002 Report]. It has played a critically important role in moving the Turkish economy forward to greater reliance on competition-based and consumer-welfare oriented market mechanisms. As an agency, it can take justifiable pride in its reputation as one of Turkey's most effective and best administered agencies.

It is recommended in the Peer Review Report to "leverage and expand the Authority's reach through international co-operation" by "developing cooperation agreements with antitrust agencies in other countries that would permit sharing of investigative information".

The TCA is a member of the ICN since 2002. It actively participates in the activities of working groups to share its experience and contribute to outcomes of the work of working groups. In this respect, the TCA held the leadership of a project on 'state monopolies' under the Unilateral Conduct Working Group and also it was the co-chairman (with Brazil) of the Competition Policy Implementation Working Group. Moreover, the TCA actively contributes to and shares country experience for reports prepared by the Working Groups in the ICN. Other than these, the TCA hosted the 9th ICN Annual Meeting of 2010, which is the most important occasion of the ICN. For

this purpose, the TCA became the member of the Steering Committee for one period.

Other than the above-mentioned international efforts of the TCA, it should also be noted that TAPC includes a provision on extraterritoriality. This was emphasized in OECD Peer Review Report (2005) as:

> Article 2 of the Competition Act incorporates a basic "extraterritorial effects" test, so that anticompetitive conduct occurring outside Turkey that affects Turkish markets falls within the Act's prohibitions. In proceedings under the Act, foreign firms are treated no differently than domestic firms. The Authority recognizes the practical problems associated with obtaining information about conduct involving foreign firms and products.

As it was mentioned in the report, despite having the ability to apply its law extraterritorially, the TCA has difficulties in gathering evidence from foreign firms and sanctioning them. Finding evidence is easier if foreign firms have subsidiaries in Turkey but still certain problems on investigations prevail. An example of the TCA's cases on international cartel activity that had affected the Turkish territory is discussed below.

Sized Coal Market Case[25]

Upon the complaints about sharp price increases in the coal market, the TCA started an investigation and found that the sharp increase in domestic retail prices had resulted from the systematic increases in the prices of imported coal. Since the reason for high prices could have been a price fixing agreement/a cartel between foreign firms operating in the Turkish market, the

[25] Competition Board decision numbered 06-55/712-202, dated 25.7.2006.

TCA wanted to make spot inspections/down-raids to these firms. Nevertheless, since they were foreign firms, some of them did not even have an operational branch in Turkey. Therefore, inspection/evidence-gathering process could not be succeeded properly.

Other than that, the TCA had to contact those firms' headquarters in order to communicate its investigation decision and investigation report to the investigated parties, which is a procedural requisite to finalize an investigation. The whole notification process was executed via Ministry of Foreign Affairs (MFA) but many problems were faced since "the communication of official documents related to competition issues is not directly covered by any international convention either at multilateral or bilateral level" (OECD, 2007: 4).

Since the TCA could not gather evidence from some of the coal companies due to lack of their physical presence in Turkish territory, it tried to cooperate with the competition agencies of the firms' home countries on the basis of its international agreements. Within this framework, the "TCA asked the European Commission and Competition Authority of Austria to take the necessary measures against these undertakings within their jurisdiction" by carrying out inspections and sending the gathered information and documents concerning Turkish market to the TCA (OECD, 2007: 5). Similarly, the TCA

made the same requests to Switzerland, based on the relevant articles of the free trade agreement between Turkey and EFTA states[26].

The replies from the relevant parties were as follows:

- European Commission informed that they could not share any information and documents about the firms and their activities with any country that is out of the scope of the jurisdiction of the European Commission due to principle of professional secrecy,
- Austrian Federal Competition Authority officials replied that it would be better to handle the matter at Community level rather than at national level and
- Competition Authority of Switzerland replied that spot inspections could be carried out when there were signs that anti-monopoly rules in Switzerland were violated. Therefore, they could not initiate any process against the firms that violated anti-monopoly rules in Turkey and permission of the relevant parties was necessary to send information and documents belonging to Swiss firms (OECD, 2007).

As a result, the investigation on sized coal market could only be carried on with those firms which have a contact point in Turkey and thus, only they were fined, although the other firms were probably a part of the cartel.

---

[26] Article 17 of the EFTA agreement is about competition rules and prohibited activities restricting competition which affect trade between Turkey and Switzerland. Thus, it enables any party to take safeguard measures, if one party established any prohibited activities that were carried out in the jurisdiction of the other. Furthermore, first paragraph of Article 23 envisages consultation between the parties to solve the matter before applying any safeguard measures.

This case demonstrates, first of all, the limits of extraterritorial application of national laws: inability to hold inspections when the investigated firm does not have a contact point in Turkey. Moreover, even if the evidence is found by other ways, it may not be possible to satisfy the relevant procedural requests of the law: communication of official documents. Other than these, cooperation between the competition agencies on case-specific issues seems to be problematic, even though there are agreements and/or arrangements having cooperation, consultation and positive comity provisions between the parties.

To sum up, as a member of the Customs Union and a candidate country for EU membership, Turkey takes the EU CLP as a reference and an anchor for its CLP. Since competition policy is part of the *acquis*, Turkey is responsible to make its law and policy in line with the EU. The EU has approved Turkey's high level of alignment in competition policy. Therefore, besides the factors of internationalization analyzed in the previous chapter, another important factor affected the Turkish CLP: EU conditionality. EU accession conditionality implies that EU membership is dependent on complying with the requirements of the EU. Economic criteria and *acquis* are the relevant conditions concerning the CLP. Hence it is seen in the Turkish case that exogenous pressure from the EU determined the change in Turkish policy on competition. Consequently, it seems that Turkish CLP attended the process of 'Europeanization' of CLP before the process of internationalization of CLP.

In the international arena, Turkey has other initiations in international organizations and with other countries. Yet, the provisions in these arrangements are not binding and have previously-mentioned shortcomings. Bilateral arrangements up to now were signed mostly with developing countries. To sum up, internationalization of Turkish CLP includes mostly coordination, experience exchange and technical assistance provisions.

Concerning the factors of internationalization in Chapter 3, it is seen that globalization is an important factor in internationalization efforts of Turkey. Because with the internationalization of markets and liberalization of Turkish economy, foreign presence in Turkish markets increased and this created the problem of dealing with the anticompetitive activities conducted by foreign firms, which adversely affected the Turkish territory. Since extraterritorial application has its limits, TCA tried to cooperate with the EU and some other national agencies. Yet, no actual results were taken from those initiations.

Role of non-state actors is limited in Turkish CLP both nationally and internationally. Due to short history of CLP in Turkey and lack of competition culture in the economy, awareness of CLP among, especially, national firms and business associations is low. Within the framework of "competition advocacy", the TCA engages in several activities to increase awareness and to explain the competition rules to the private sector. For example, based on a protocol between the TCA and The Union of Chambers and Commodity Exchanges of Turkey (TUCCET), several conferences are held to introduce the general provisions of the TAPC to the members of the TUCCET. Yet,

heretofore, non-state actors have not been influential concerning the Turkish CLP.

In this chapter, as the most successful supranationalization example, the EU's CLP is analyzed. It is seen that the EU supranationalization process has considerable differences from the internationalization process of CLP in the world. Concerning the Turkish case, as Turkey being a candidate for the EU membership and a member of the Customs Union, Turkey's CLP is also explained and Turkey's place in the international antitrust field is discussed.

In the next chapter, attempts and the factors of internationalization of CLP will be discussed by using the IPE theories. IPE theories are utilized to analyze and discuss the factors of internationalization of CLP within a different perspective so that we can better understand the internationalization process and gain a new insight.

CHAPTER 6

CONCLUSION

6.1. Discussion on Theoretical Framework

The aim of this thesis is to examine the internationalization of CLP and find out the factors that are important in the process of internationalization. Four main IPE theories are utilized to better understand the mechanisms and gain a new insight concerning the international CLP studies.

6.1.1. Realism

Unilateral application of national CLP to international business activities by the U.S. shows that rather than cooperating with other countries, the U.S. primarily prefers acting on its own in the international system of antitrust. Moreover,

extraterritorial application of national laws also indicates that states care about their national interests instead of international ones.

When the U.S., as the first and most experienced enforcer of antitrust law in the world, started to apply national antitrust laws to foreign jurisdictions and firms whose activities affect its own national territory, some other states gave reactions by applying blocking statues or some other diplomatic measures against the U.S. It is argued, for example, that "the British reaction to … US extraterritorial enforcement illustrates that the issue does rise to the level of power politics" (Fidler, 1992: 574). According to the realist IPE, states feel a threat to their national sovereignty when other countries apply their policies in their territories and thus, they take action to pursue their own power and interests.

Exemptions given to export cartels can be given as an example of how states protect their own industries and, thus, pursue national interests against foreign rivals. "These export cartel provisions remind one of the realist tenets that economic power is political power in the international system" (Fidler, 1992: 572). Moreover, some decisions taken by domestic competition authorities are also seen as political rather than economic decisions, in which the state protects its own industry or firms against foreign ones. Such decisions are also regarded as attempts to control foreign firms' power in domestic economies.

In a study that analyzed the "government reaction to large corporate merger attempts" in the EU between 1997 and 2006, authors argue that the nationality of the acquiring company is an important factor in decision-making of the governments (Dinç and Erel, 2009). By using primary data for the merger attempts in the first

fifteen EU member countries during 1997-2006, they conclude that reactions of some governments to merger attempts are non-economic and do not have to do with competitive concerns. Instead, it is found in this econometric study that economic nationalism(Dinç and Erel, 2009).

Overall, realists argue that the "multitude of interests leads to conflicting views on the necessity of [an international] agreement" on CLP (Ezrachi, 2005: 6). In fact, realists would argue that "market relations are shaped by political power" and "economic policy should be used to build a more powerful [and wealthy] state" (O'Brien and Williams, 2007: 15).

Although unilateral enforcement of domestic competition laws to protect national interests and also confliction of national interests can be explained by realist IPE, the existence of cooperation and convergence efforts in CLP seem to be refuting the realist assumption that interactions in IPE is zero-sum game. Therefore, it is seen that the persistent influence and power of states in the process of internationalization of CLP seem to be valid with certain limitations.

On the other hand, the EU's support for a binding international antitrust regime under the auspices of the WTO in 1990s and supranationalization of EU CLP, which was analyzed in Chapter five, seems to be undermining certain realist arguments.

Although realist IPE can explain the supranationalization of CLP up to some level, it has certain limitations on explaining the role of non-state actors such as MNCs and supranational institutions. Moreover, it seems that the supranationalization of CLP is in accordance with the economic integration of the

EU. Yet, realism cannot provide sufficient explanations on such a 'spillover' effect between the issue areas.

6.1.2. Liberalism

The existence of national CLPs itself has to do with one of the core arguments of the liberal theory that the role of the state should be preventing restraints on competition and thereby creating an open environment where world's scarce resources can be used efficiently (Cohn, 2005: 91). Wilks and Bartle (2002: 157) argue that "[j]ust as independent courts symbolize the rule of law, so a competition agency symbolizes commitment to the free market".

In the same token, for liberals, state and non-state actors cooperate and domestic laws and policies converge in the field of CLP because by reducing potential frictions, states gain from interdependence and cooperation in this field. Moreover, it is argued by the liberals that "international agreements or regimes would maintain international economic order" (Keohane, 1984 in O'Brien and Williams, 2007: 20). For instance, although UNCTAD has non-binding rules and recommendations in competition policy area, it helps developing states gain assistance for implementing competition law. Developed states, on the other hand, have the possibility to broaden the area of their CLP systems by shaping the agenda and providing technical assistance to developing countries. Thus, liberals would

argue that UNCTAD serves as a platform to increase gains from interdependence and convergence.

Bilateral arrangements between countries that include negative and/or positive comity provisions, exchange of information or dual investigation processes are examples of increasing interdependence and resulting cooperation in the system. These states cooperate with each other in specific cases or situations in which, in the absence of bilateral arrangements, there could exist conflicts between them. Notification (to each other) as a "first step to cooperation" increased significantly in recent years: in the period 1976-1979 there were 37 notifications on average between the OECD countries (bilaterally), 106 in the period 1980-1985 and 220 in the period 1990-1991 (Zanettin, 2002: 78). Zanettin (2002:78) argues that "[s]uch an evolution may show a greater commitment to cooperation".

Although some major states apply their competition laws extraterritorially, it is seen that because of increasing conflicts among states there existed a 'more sensitive doctrine' on extraterritorial enforcement and countries started to cooperate in order to decrease the concerns over national sovereignty. Bilateral, regional and/or multilateral efforts for cooperation and convergence are indicators of the situation.

For instance, in the cooperation agreement between the U.S. and the EU, it is stated that the parties will notify each other if they realize that their enforcement activities may affect important interests of the other party. This process is in line with the liberal argumentation that states cooperate in order to handle the conflict situations or problems in the international competition law system and gain mutually from cooperation. "This diplomatic activity demonstrates that States that value

economic interdependence do not engage one another in the international system on strictly realist terms" (Fidler, 1992: 577).

Keohane and Nye (1977:33-35) argue that multiple channels of interaction between governments and societies in different territories is one of the factors that create complex interdependence, which "blurs the distinction between domestic and international". The interaction of non-state actors such as MNCs, business organizations, international organizations constitute transnational networks. It is argued that "contacts between governmental bureaucracies that have similar missions may not only alter their perspectives but lead to transgovernmental coalitions on particular policy questions" (Keohane and Nye, 1977: 34). Furthermore, such interactions and communications are thought to have the potential to cause change in the perceptions of a state's self-interest; transgovernmental politics may hinder states to pursue clearly specified goals. (Keohane and Nye, 1977: 35, 115).

Within this framework, Slaughter (2004:39) examines the networking of regulators around the world since she argues that "[b]usineses that cross borders must be regulated across borders" and hence there is a need for cooperation among regulators. Raustiala (2002), on the other hand, argues that transgovernmental cooperation increases liberal internationalism since they fill a gap between non-cooperation and cooperation based on treaties/agreements. According to this transgovernmentalist theory, there are other actors in the system than the state but this does not mean the state is disappearing; instead it disaggregates according to the purposes of cooperation (Raustiala, 2002: 10-11, Slaughter, 2004: 5).

In fact, international CLP is a policy field in which transgovernmental networks are actively functioning. Bilateral arrangements between jurisdictions, informal international interactions, efforts under the OECD, UNCTAD and the ICN are all examples of transgovernmental/transnational networking in which usually the bureaucrats and regulators from competition agencies interact with each other. According to liberalism, transgovernmentalism in particular, these networks both facilitate cooperation among regulators and shape domestic regulation of antitrust around the world (convergence) (Raustiala, 2002:91).

For example, the ICN was established as a 'network' of domestic competition agencies and also of non-state actors. The goals of the ICN clearly support the normative aspects of transgovernmental theory. The ICN is seen as a setting where cooperation and convergence between developed and developing countries shall mutually benefit both sides (Raustiala, 2002: 43).

Moreover, the development of the ICN is seen by the liberals as an example of how, as Nye (2004: 5) argues, soft power gets "others to want the outcomes that [one] wants" by "co-opt[ing] rather than coerc[ing] them". The soft power of the ICN lies in peer pressure among members, technical assistance, advocacy and support of the non-governmental bodies that cause members to adopt non-binding best practices and recommendations of the ICN. "The ICN is a soft-law formation, and soft law has a tendency to become hard law" (Fox, 2009:174).

Overall, cooperation and convergence that occur between governments and/or competition agencies that is described here show that states voluntarily cooperate to alleviate the problems caused by application of national laws on international

antitrust problems. Thus, these efforts to decrease conflicts in the international competition law system through such arrangements coincide with the liberal theoretical perspective that formal and informal communication and interaction among nation-states; international organizations, transnational and transgovernmental networks etc. have the ability to alleviate the potential for conflict between states and lead to cooperation.

6.1.3. Historical Structuralism

Incorporating CLP into the state policy-making is itself a part of the neoliberal agenda because regulating the failures of the free market economy has the aim of maintaining the capitalist system thoroughly. Hence, CLP seems to be inseparable with capitalism and liberal ideas. The aims and goals of competition law were drawn by major powers mainly by the U.S. and then spread to jurisdictions such as Canada, Japan, Germany and the EU. Although there are significant differences in competition law systems even across developed countries, the main goal and the basic tenets reflect the consent of subordinate groups. Thus, the 'general system of competition law' has been legitimized through transnational historical blocs across other countries including the developing, even the least developed ones. For example, of the 93 ICN member countries, only 30 of them are classified as

"advanced economy" according to the IMF's World Economic Outlook database[27]. Concerning the UNCTAD classification, 32 of the ICN member countries are "developed"[28]. Thus, it could be argued that nearly 60% of the ICN members are from the developing (or even least developed such as Zambia, Yemen, Tanzania and Senegal) world that have the consent to have CLP system.

For instance, the ICN and its official goals reflect how the major powers export and diffuse their CLP systems. In such a setting, developing countries give their consent to this liberal agenda although it may not be appropriate for their economic systems. The claim of Fox (2009: 171) that although developed countries have more say on the ICN than developing world, the leaders try to "include, involve and respond to all voices" is understood by historical structuralists as the existence of inequality and creation of a common competition culture by developed world to legitimize their power.

Similarly, in the case of Turkey, it accepted to introduce a competition law and an independent competition authority after the negotiations and then agreement on the Customs Union with the EU although it may undermine its domestic firms' profits or citizens' welfare.

Consequently, the argument of historical structuralism that the market relations in the capitalist system create injustice and inequality can be considered for the competition law system. For example, the inclusion of CLP to UNCTAD's agenda can be considered as an effort to change competition law system into a more egalitarian and non-liberal one. As a part of New International Economic Order

[27] Available at http://www.imf.org/external/pubs/ft/weo/2009/02/weodata/groups.htm#ae
[28] Available at http://www.unctad.org/en/docs/gdscsir20071_en.pdf

(NEIO) efforts, developing countries wanted to use CLP for their development purposes. The reason for the efforts was that developing countries perceived that "capitalist notions of 'competition' between private undertakings in reality worked as a mechanism of power politics used to weaken the abilities of some states to challenge the status quo" (Fidler, 1992: 581).

In historical structuralism, both CLP system itself and process internationalization of CLP are seen as ways to legitimize the power of developed world through creation of a common competition culture. Nevertheless, historical structuralist theory has limitations on explaining why and how there are different levels of internationalization of CLP.

6.1.4. Constructivism

Concerning the CLP and internationalization process of CLP, there are no sufficient studies and/or findings to be utilized by constructivist IPE perspective. Nevertheless, the explanations of constructivism on economic world and international economy can be applied to CLP. For example, constructivists claim that economic policies are socially constructed and there are norms legitimized by the interaction of markets, governments and societies (Abdelal *et al.*, 2005: 25-27).

Consequently, it could be argued that expectations and beliefs about antitrust law and policy shape this policy field and the norms and values constituted by antitrust law and policy shape the beliefs and interests of actors in the process.

Similarly, norms and values in internationalization process of CLP are socially constructed by the interactions of governments with each other and governments with markets. Furthermore, these norms, values and changes in them alter the interests and expectations of actors (states, regulators etc.) in the internationalization process.

Within this framework, the interactions between competition authorities and norms/rules of international organizations shape those actors' expectations and preferences on internationalization of CLP. Furthermore, actors' beliefs and expectations also shape the internationalization process and outcome of CLP. Therefore, internationalization of CLP is seen by constructivists as a social construction in both its causes and effects.

For example, interaction between competition authorities and expectations on international antitrust (increasing cooperation and expanding CLP throughout the world for major states, technical assistance for new jurisdictions) shaped the objectives of the ICN. The work of the ICN and intersubjective knowledge created by its members constituted the norms and values for internationalization of CLP: State sovereignties are of primary importance and an international agreement on antitrust has no relevance in the ICN context. Furthermore, these norms and values shape the internationalization process as well as the expectations and preferences of agents. Therefore, the decreasing emphasis on an international agreement and/or supranationalization (compared to 1990s) and increasing importance of the ICN can be seen as a result of the intersubjective knowledge created in the ICN context.

6.1.5. Conclusion on IPE Theoretical Perspectives

In the light of these findings, it should be noted that the process of internationalization of CLP is complex. There are various important factors shaping internationalization process. Therefore, different degrees, levels and forms of internationalization can be explained by different theories.

Yet, taking into account the current state of internationalization of CLP, it seems that neoliberal institutionalism gives the most plausible explanation. Although CLP is a field in which sovereignty concerns and domestic interests matter, there is cooperation and convergence at some level such as the initiations of international organizations like the OECD and the ICN together with bilateral arrangements between competition agencies. Countries take part in such institutions in which they think there is a potential for cooperation and hence they will have potential or actual gains from cooperation. In line with Guzman's argument (2001), it seems that states prefer cooperating with each other as long as it protects their interests and provide them struggle with the problems of international business conduct in domestic markets.

When the existing mechanisms of internationalization of CLP are analyzed, there are:

- International organizations (OECD, the UNCTAD and the ICN) that mostly prepare recommendations/best practices and provide technical assistance/advocacy to national competition agencies and hence, aim at increasing cooperation and convergence in CLP,

- Bilateral and regional cooperation arrangements that include notification, information exchange and consultation requirements, also negative and positive comity provisions, which are voluntary in nature,
- Regional trade agreements that include general competition provisions.

Thus, in the light of the neoliberal institutionalist arguments formal and informal rules/institutions also have a role in the international system. The existence of international institutions "facilitate self-interested cooperation by reducing uncertainty" (Kayıhan, 2003: 16) as demonstrated in the case of the internationalization of CLP process.

It is seen that most of the current modes of internationalization are non-binding and voluntary in nature and they aim at facilitating international cooperation and increasing convergence on CLP. On the other hand, previous attempts to create binding competition rules or propositions for harmonization and supranationalization were never realized. Rather, current regimes and institutions facilitate cooperation to secure national interests. Existence of different institutions and actors in the process is also in line with the neoliberal institutionalist argument that other than primary role of states, there are actors such as international organizations, bilateral/multilateral arrangements etc.

As the major economies of the world that have the ability to shape and manage the global economy, the EU and the U.S. also have the most sophisticated CLP systems. There have been conflicts between two countries on certain antitrust

cases. This is because of the differences in their jurisdictions and more importantly because they have a tendency to protect their domestic firms and economies. On the other hand, they also cooperate in various cases and under different settings. Bilateral agreement between these two countries include provisions on exchange of information, positive comity etc. Hence, various potential conflicts are resolved by formal and informal interactions between two jurisdictions.

Concerning the effect of international institutions on state policy, neobileral institutionalism argues that "they affect domestic policy by changing conceptions of interest, and thus the policies of the governments" (Kayıhan, 2003: 16). It is seen in the process of internationalization of CLP that existing institutions for cooperation and convergence aim at increasing communication and mutual understanding and create common rules and norms. Rather than threatening state interests through hard forms of internationalization, these institutions try to create a competition culture around the world, which will affect the state interests and perceptions in the future.

Consequently, it is argued that neoliberal institutionalism gives the most plausible explanation on the process of internationalization of CLP.

6.2. Conclusion of the Thesis

One of the major developments of the twentieth century (especially last two or three decades) has been the acceleration in the process of globalization, which increased the amount of international anticompetitive business activities. Hence,

CLP, which was once a national-only policy field, had to deal with business conduct having an international dimension. Antitrust regulators found themselves in a position dealing with cases that involve firms and evidence located in foreign jurisdictions. As a response, countries/regulators (especially the U.S.) started to apply their domestic laws and policies extraterritorially to protect competition in domestic markets.

Extraterritorial application of domestic laws and policies cause conflicts between jurisdictions because it deranges the legal, economic and political interests of other countries. It can be anticipated easily that no sovereign state prefers another states' law and policy to be applied to activities that take place on its own territory. Hence, different forms of internationalization of CLP appear to be the attempts to overcome the hurdles created by international anticompetitive business conduct and extraterritorial application of domestic policies. When previous and current efforts of internationalization are analyzed, it is seen that there have been various actors and modes in the process of internationalization of CLP, ranging from cooperation and coordination arrangements to initiations for a binding international antitrust code.

Today, international organizations such as the OECD, the UNCTAD and the ICN include international CLP issues on their agendas and mostly, they publish recommendations and best practices to increase cooperation and convergence. Moreover, they provide technical assistance especially to countries that recently introduced national CLPs. Bilateral arrangements, on the other hand, are the other most extensive form of internationalization of CLP. Introduced as a mechanism to alleviate the conflicts caused by extraterritoriality, today, bilateral agreements

contain certain cooperation provisions such as notification, information exchange, comity principles etc. These arrangements are also non-binding and voluntary most of the time. Moreover, parties to such arrangements are usually developed countries that have close trade relationships and share similar antitrust policies/objectives.

Although various cooperation and convergence mechanisms were introduced under different settings, no consensus could be reached on conclusion of a binding international antitrust agreement and/or on introduction of a supranational antitrust institution. The most known failed attempt for a binding antitrust regime was initiated under the auspices of the WTO. The aim of providing a ground for negotiations on internationally binding minimum standard for competition rules was dropped from the agenda since some countries (mainly from the U.S. and the developing world) opposed it.

Within this framework, it was demonstrated that differences between countries are important in the sense that they determine the form and level of internationalization of CLP. Countries do not prefer binding regimes, when there are differences especially between development and integration levels and competition policies/institutional cultures. Another factor that is important in the process is the relationship between the EU and the U.S. The differences between two countries CLP models, their differing views on internationalization of CLP and competition between these jurisdictions concerning the expansion of their CLP regimes to other countries affect the process of internationalization.

The EU CLP was analyzed in this thesis as an example of successful internationalization of CLP. It has been concluded that the EU has different

dynamics that led to the supranationalization of its CLP and it cannot be a model for the worldwide internationalization of CLP. Turkish CLP, on the other hand, was explained because Turkey is a candidate country for EU membership and also has close trade relationships with the EU. Moreover, as a developing country with a short period of CLP history, Turkey's place in the internationalization process was analyzed. It is seen that EU membership conditionality has been the primary factor affecting the Turkish CLP.

In the light of the findings, four main IPE theoretical perspectives are discussed to explain the process of internationalization of CLP. Because it is thought that an account of IPE provides a new insight and a further understanding for the internationalization mechanism and the role of various actors-states, regulators, international organizations, firms.

Within this framework, it is argued that neoliberal institutionalism provides the most plausible explanation for internationalization of CLP. It is shown that countries/regulators do not prefer being legally bound by certain agreements or supranational institutions because they do not favor surrendering their power. Yet, they engage in several cooperation and convergence arrangements under different institutional settings as long as their domestic interests are protected. Furthermore, the nation states can gain from these arrangements. Similarly, existing non-binding/voluntary cooperation and convergence mechanisms demonstrate that states prefer internationalization of CLP up to a level that does not interfere with their sovereignties and interests but at the same time help them to overcome the problems created by internationalization of CLP.

In the light of the above-mentioned findings, it is thought that rather than binding international arrangements and/or harmonization/supranationalization of CLP, existing cooperation and convergence mechanisms will prevail in the future. The role of the ICN deserves a special attention because; it is the only transnational network that has a competition-only agenda. Its emphasis on respect for national sovereignties and absence of a binding agreement in its agenda, positioning itself as a soft law organization that aims at increasing cooperation and convergence by issuing non-binding recommendations and best practices and also having governmental members (regulators) from all around the world (developed and developing) as well as non-governmental members; the ICN seems as a very important organization for the future international system of CLP. As Fox (2009: 174) mentions, the ICN "fills a real need in global antitrust", a field in which there are domestic laws and policies that apply to "conduct in global markets and yet resist internationalization".

In sum, there are various factors that affect internationalization of CLP and the current state of the process demonstrate that form and level of internationalization has been limited to certain cooperation and convergence mechanisms. It is thought that agreeing on a binding international antitrust code or supranationalization of CLP does not seem possible in the near future because states continue cooperating as long as it protects their domestic interests and enables them to have positive gains. While differences between countries are not likely to disappear,. It is perceived that existing mechanisms may provide convergence of national laws and policies, no matter the speed of convergence (soft/bottom-up convergence) has been a slow. Consequently, analysis of the important factors shows

that internationalization of CLP is likely to cover cooperation and convergence mechanisms under different bilateral and multilateral settings, at least in the short and medium term. These efforts are valuable in the sense that they increase communication and mutual understanding of CLP and, although slowly, facilitate convergence of antitrust rules towards a future international antitrust system.

SELECT BIBLIOGRAPHY

Abdelal, Rawi, Blyth, Mark and Parsons, Craig. 2005. *Constructivist Political Economy*. Manuscript in Preparation. Retrieved September 1, 2010 from http://ducis.jhfc.duke.edu/wp-content/uploads/archive/documents/ABP.pdf

Blumenthal, William. 2004. "The Challenge of Sovereignty and the Mechanisms of Convergence," *Antitrust Law Journal* 72(1): 267-282.

Boodman, Martin. 1991. "The Myth of Harmonization of Laws", *American Journal of Comparative Law* 39(4): 699-724.

Botta, Marco. 2009. "The Cooperation between the Competition Authorities of the Developing Countries: Why does it not Work? Case Study on Argentina and Brazil", *The Competition Law Review* 5(2): 153-178.

Bradford, Anu. 2007. "International Antitrust Negotiations and the False Hope of the WTO", *Harvard International Law Journal* 48(2): 383-439.

Brittan, Leon and Van Miert, Karel. 1996. "Towards an International Framework of Competition Rules", *Communication from the Commission to the Council* COM (96) 284.

Bode, Mariana and Budzinski, Oliver. 2005. "Competing Ways towards International Antitrust: the WTO versus the ICN", *Marburg Papers on Economics* 03-2005. Retrieved June 15 2010 from http://www.econstor.eu/dspace/bitstream/10419/29838/1/506459942.PDF.

Budzinski, Oliver. 2008. *The Governance of Global Competition: Competence Allocation in International Competition Policy*. Cheltenham and Northampton: Edward Elgar Publishing.

Büthe, Tim. 2009. "The Evolution of Supranational Antitrust Enforcement and Control of Government Subsidies in the EU". *New Global Law and Policy* 2(2): 181-206.

Büthe, Tim and Swank Gabriel T. 2007. "The Politics of Antitrust and Merger Review in the European Union: Institutional Change and Decision from Messina to 2004", Center *for European Studies Working Paper Series* 142.

Cluchey, David P. 2007. "Competition in Global Markets: Who Will Police the Giants?" *Temple International and Comparative Law Journal* 21(1): 59-101.

Cohn, Theodore H. 2005. *Global Political Economy: Theory and Practice*. Pearson Longman.

Connor, John M. 2004. "Global Antitrust Prosecutions of Modern International Cartels", *Journal of Industry, Competition, and Trade* 4(3): 239–67.

Connor, John M. and Lande, Robert. 2005. "How High do Cartels Raise Prices? Implications for Reform of the Antitrust Sentencing Guidelines", *Tulane Law Review* 80: 513-565.

Cox, Robert W. 1987. *Production, Power and World Order: Social Forces in the Making of History*. New York: Columbia University Press.

Crane, Daniel A. 2009. "Substance, Procedure and Institutions in the International Harmonization of Competition Policy," *Chicago Journal of International Law.* 10(1): 143-159.

Dabbah, Maher M. 2003. *The Internationalization of Antitrust Policy*. Cambridge: Cambridge University Press.

Dabbah, Maher M. 2003. "The Internationalization of Competition Law and Multinational Enterprises (MNEs) as Non-State Actors in the Process", *Non-State Actors and International Law* 3: 201-213.

Dabbah, Maher M. 2006. *International and Comparative Competition Law* [Class Hand-out]. London, United Kingdom: Queen Mary University of London. School of Law.

Damro, Chad. 2004. "To Multilateralize or Not: The EU's Role in International Competition Policy" *Paper presented at the ECPR Joint Sessions Workshop 7 13-18 April Uppsala, Sweden.*

Damro, Chad. 2005. "Discretionary Cooperation and the Regulation of Internationalizing Business Activity", Paper prepared for the Third ECPR General Conference, 8-11 September 2005, Budapest, Hungary.

Damro, Chad. 2007. "Institutions, Ideas and a Leadership Gap: The EU's Role in Multilateral Competition Policy", In Elgström, Ole and Smith, Michael (Eds.). *The European Union's Role in International Politics: Concepts and Politics:* 208-224.. Routledge

Department of Justice (DOJ). April 27, 1999. "*Attorney General Signs Antitrust Assistance Agreement With Australia*" [Press Release, TDD (202) 514-1888]. Retrieved June 24, 2010 from http://www.justice.gov/atr/public/press_releases/1999/2382.pdf.

Dinç, Serdar and Erel Işıl. "Economic Nationalism in Merger and Acquisitions", *Fisher College of Business Working Paper Series* 2009-03-024.

Domke, Martin. 1955. "The United Nations Draft Convention on Restrictive Business Practices," *The International and Comparative Law Quarterly* 4(1): 129-140.

European Commission. 2002. *Glossary of Terms Used in EU Competition Policy.*July 2002 Brussels. Retrieved August 21 from http://ec.europa.eu/competition/publications/glossary_en.pdf

European Commission. 2006. *Screening Report Turkey on Chapter 8: Competition Policy*. May 3, 2006. Retrieved August 7, 2010 from http://www.abgs.gov.tr/files/tarama/tarama_files/08/screening_report_08_tr_internet_en.pdf

European Commission. 2009. *Turkey 2009 Progress Report*. October 14, 2009. Retrieved August 7, 2010 from http://ec.europa.eu/enlargement/pdf/key_documents/2009/tr_rapport_2009_en.pdf

Evenett, Simon, Levenstein, Margaret and Suslow, Valerie. 2001. " *International Cartel Enforcement: Lessons from the 1990s*", *World Economy* 24(9): 1221-1245.

Evenett, Simon J., Alexander Lehmann and Benn Steil. 2000. "Antitrust Policy in an Evolving Global Marketplace". In *Antitrust Goes Global: What Future for Transatlantic Cooperation?* Evenett, Simon J., Alexander Lehmann and Benn Steil (Eds.). Washington: Brooking Institution Press.

Ezrachi, Ariel. 2005. "Merger Control and Cross-Border Transactions- A Pragmatic View on Cooperation, Convergence and What's in Between", *The University of Oxford Centre for Competition Law and Policy Working Paper* (L) 11/05.

Fidler, David P. 1992. "Competition Law and International Relations", *The International and Comparative Law Quarterly* 41(3): 563-589.

Frieden, Jeffry A. 2000. *International Political Economy: Perspectives on Global Power and Wealth* (4th edition). London and New York: Routledge.

Fox, Eleanor M. 2007. "GE/Honeywell: The U.S. Merger that Europe Stopped - A Story of the Politics of Convergence" in Fox, Eleanor M. and Crane, David. (Eds.). *Antitrust Stories.* Foundation Press.

Fox, Eleanor M. 2009. "Linked-In: Antitrust and Virtues of a Virtual Network", *NYU Law and Economics Research Paper Series Working Paper*. 09-27:151-174.

Galloway, Jonathan. 2009. "Convergence in International Merger Control", *The Competition Law Review* 5(2): 179-192.

General Agreement on Tariffs and Trade (GATT). 1960. *Restrıctıve Busıness Practıces: Arrangements For Consultatıons: Report of Experts*. Retrieved July 2, 2010 from http://www.worldtradelaw.net/misc/rbp2.pdf

Gayton, Jeffrey T. 1997. "From Here to Extraterritoriality: The United States Within and Beyond Borders", *Paper presented at the International Studies Association Conference 18-22 March 1997, Toronto, Canada.* Retrieved June 10, 2010 from http://minds.wisconsin.edu/bitstream/handle/1793/18289/From%20Here%20to%20Extraterritoriality.pdf.

Gerber, David J. 1999. "The U.S.-European Conflict Over the Globalization of Antitrust Law: A Legal Experience Perspective," *New England Law Review* 34: 123-143.

Grieco, Joseph M. 1998. "Anarchy and the Limits of Cooperation: A Realist Critique of the Newset Liberal Institutionalism". *International Organization* 42 (3):485-507.

Griffin, Joseph P. 1999. "What Business People Want from a World Antitrust Code", *New England School of Law* 34: 39-45.

Guzman, Andrew T. 2001. "Antitrust and International Regulatory Federalism," *New York University Law Review* 76(4): 1142-1163.

Guzman, Andrew T. 2004. "The Case for International Antitrust," *Berkeley Journal of International Law* 22: 355-374.

Haas, Ernst B. 2004 (1958). *The Uniting of Europe: Political, Social, and Economic Forces 1950-1957*. Notre Dame IN: University of Notre Dame Press.

Harsh Reaction in US to Microsoft EU Antitrust ruling. September 18, 2007. *AFP*. Retrieved from http://afp.google.com/article/ALeqM5jZjtOGKGoy-UxGzEN3us3OoPtFkA.

International Bar Association (IBA). June 23, 2003. *IBA/ABA Survey Identifies Costs to Business of Competition Referrals on Cross-Border M&A Deals* [Press Release]. Retrieved from http://www.globalcompetitionforum.org/Editors_Notes_Backgrounder.pdf.

International Competition Network (ICN). 2001. *Memorandum on the Establishment and Operation of the International Competition Network.* Retrieved June 6, 2010 from http://www.internationalcompetitionnetwork.org/uploads/library/doc579.pdf

ICN. 2005. *A Statement of Mission and Achievements Up Until May-2005*. Retrieved June 12, 2010 from http://www.icn-bonn.org/ICN_Mission_and_Achievements_Statement.pdf

ICN. April 2009. *Icn Factsheet And Key Messages.* Retrieved June 12, 2010 from http://www.internationalcompetitionnetwork.org/uploads/library/doc608.pdf.

ICN. *Non-Governmental Advisors to the International Competition Network.* Retrieved June 12, 2010 from http://www.internationalcompetitionnetwork.org/uploads/non-governmental%20advisors%20to%20the%20international%20competition%20network.pdf.

International Competition Advisory Committee (ICPAC). 2000. *Final Report to the to the Attorney General andAssistant Attorney General for Antitrus*. Retrieved April 10 from http://www.justice.gov/atr/icpac/finalreport.htm

Jennings, John P. 2006. " Comparing the US and EU Microsoft Antitrust Prosecutions: How Level is the Playing Field", *Erasmus Law and Economics Review* 2(1): 71-85.

Jenny, Frederic. 2003. "International Cooperation on Competition: Myth, Reality and Perspective," Paper presented at *The University of Minnesota Law School Conference on Global Antitrust Law and Policy* Minneapolis September 20-21 2002.

Jones, Alison and Sufrin, Brenda. 2008. *EC Competition Law: Text, Cases and Materials* (3rd Edition). Oxford: Oxford University Press.

Kayıhan, Lerzan. 2003. "The Role of International Institutions From a Security Concept Perspective in the Post-cold War Period: Realism versus Liberal Institutionalism" *Unpublished Paper for IR 601: Advanced Topics in Theory and Methodology in International Relations,* Middle East Technical University.

Keohane, Robert O. and Nye, Joseph S. 1977. *Power and Interdependence: World Politics in Transition, Little*. Boston and Toronto: Brown Company.

Keohane, Robert O. 1984. *After Hegemony*. Princeton: Princeton University Press.

Keohane, Robert O. 1988. "International Institutions: Two Approaches", *International Studies Quarterly*. 32(4): 379-396

Klein, Joel I. 1996. "A Note of Caution With Respect to a WTO Agenda on Competition Policy", *Speech at The Royal Institute of International Affairs.* Retrieved April 15, 2010 from http://www.justice.gov/atr/public/speeches/0998.pdf.

Korah, Valentine. 2007. *An Introductory Guide to EC Competition Law and Practice* (9thRev. Edition). Hart Publishing.

Kovacic, William E. 2008. "Competition policy in the European Union and the United States: convergence or divergence in the future treatment of dominant firms?", *Competition Law International* October 2008: 8-18.

Levenstein, Margaret and Suslow, Valerie Y. 2004. "Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy", *Antitrust Law Journal* 71(3): 801-852.

Lianos, Ioannis. 2007. "The Contribution of the United Nations to the Emergence of Global Antitrust Law", *Tulane Journal of International and Comparative Law* 15(2):1-52. Retrieved June 17, 2010 from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1398918

Lipson, Charles. 1993. "International Cooperation in Economic and Security Affairs" in Baldwin, David A. (Ed) *Neo-realism and Neo-liberalism: The Contemporary Debate.* New York: Columbia University Press.

Majoras, Deborah P. 2001. "GE-Honeywell: The U.S. Decision", Speech Made before the Antitrust Section of the State Bar of Georgia. Retrieved from http://www.justice.gov/atr/public/speeches/9893.pdf.

Martin, Mervyn. 2008. "The Creation of a Global Competition Regime. Where Exactly do the Obstacles Lie- Practical Co-operation or Ideological Differences?" *Richmond Journal of Global Law and Business* 7(1): 297-314.

Melamed, Douglas A. 1997. "International Antitrust in an Age of International Deregulation", *Speech at George Mason Law Review Symposium: Antitrust in the Global Economy.* Retrieved April 15, 2010 from http://www.justice.gov/atr/public/speeches/1234.pdf.

Mitschke, Andreas. 2008. *The Influence of National Competition Policy on the International Competitiveness of Nations: A Contribution to the Debate on International Competition Rules.* Heidelberg: Physica-Verlag (Springer).

Moravscik, Andrew. 1998. *The Choice for Europe: Social Purpose and State Power from Messina to Masstricht*, New York: Cornell University Press.

Oatley, Thomas.2006. *International Political Economy: Interests and Institutions in the Global Economy* (2nd Edition). International: Pearson Longman.

O'Brien, Robert and Marc Williams. 2007. *Global Political Economy: Evolution and Dynamics* (2nd ed.) New York: Palgrave Macmillan.

Oesterle, Dale A. 1981. "United Nations Conference on Restrictive Business Practices", *Cornell International Law Journal* 14(1).

Organization for Economic Co-operation and Development (OECD), Competition Committee. 2002. *Report on the Nature and Impact of Hard Core Cartels and Sanctions against Cartel under National Competition Laws.* DAFFE/COMP(2002)7. Retrieved 19 June, 2010 from http://www.oecd.org/dataoecd/16/20/2081831.pdf.

OECD. 2005. *Country Studies: Turkey- Peer Review of Competition Law and Policy.* Retrieved July 5, 2010 from www.oecd.org/dataoecd/26/7/34645128.pdf.

OECD. 2007. *Inventory On Effective Cooperation Practices: Turkey.* Working Party No. 3 on Co-operation and Enforcement. DAF/COMP/WP3/WD(2007)20

Parlak, Mustafa. 2005. "Opening Statement by the President of the Turkish Competition Authority", *Speech given at Fifth United Nations Conference to Review all Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, 14–18 November 2005, Antalya, Turkey.*

Piilola, Anu. 2003. "Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation," *Stanford Journal of International Law* 39: 207-251.

Putnam, Robert D. 1988. "Diplomacy and Domestic Politics: The Logic of Two-Level Games", International *Organization* 42: 427-434.

Raustiala, Kal. 2002. "The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law", *Virginia Journal of International Law* 43(1): 1-92.

Rowley, William and Wakil, Omar. "The ICN Five Years On", *Global Competition Review* May 2007: 29-33.

Rowley, William J. 2002. "The Internationalization of Merger Review: Towards Global Solutions (Perspectives of a Non-Governmental Advisor)" *Presented at the International Competition Network First Annual Conference 28-29 September 2002*.

Simmons, Beth A. and Elkins, Zachary. 2003. *Globalization and Policy Diffusion: Explaining Three Decades of Liberalization*. In Kahler, Miles and Lake, David A. (Eds.). *Governance in a Global Economy: Political Authority in Transition*: 275-304. Princeton and Oxford: Princeton University Press.

Slaughter, Anne-Marie. 2004. *A New World*. Princeton and Oxford: Princeton University Press.

Slaughter, Anne-Marie and Zaring, David T. 1997. "Extraterritoriality in a Globalized World", *Social Science Resource Network (SSRN).* Retrieved June 15, 2010 from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=39380.

Sokol, Daniel D. 2007. "Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age," *Berkeley Business Law Journal* 4(1): 37-122.

Stephan, Paul B. 2005. "Global Governance, Antitrust and the Limits of International Cooperation," *Cornell International Law Journal* 38: 173-218.

Sweeney, Brendan J. 2010. *The Internationalization of Competition Rules*. New York: Routledge.

Tarullo, Daniel K. 2000. "Norms and Institutions in Global Competition Policy," *American Journal of International Law* 94: 478-504.

Taylor, Martyn D. 2006. *International Competition Law: A New Dimension for WTO?*. Cambridge: Cambridge University Press.

The Asia-Pacific Economic Cooperation (APEC), 1999. *APEC Principles to Enhance Competition and Regulatory Reform.* Retrieved August 5, 2010 from http://www.international.gc.ca/apec/principles-principes.aspx?lang=eng

The North American Free Trade Agreement (NAFTA), 1994. *The North American Free Trade Agreement.* Retrieved August 5, 2010 from http://www.nafta-sec-alena.org/en/view.aspx?conID=590

The United Nations Conference on Trade and Development (UNCTAD). 2000. *The United Nations Set of Principles and Rules on Competition* (The Set). TD/RBP/CONF/10/Rev.2. Retrieved April 10, 2010 from http://www.unctad.org/en/docs/tdrbpconf10r2.en.pdf.

The UNCTAD. 2008. *World Investment Report: Transnational Corporations and Infrastructure Challenge.* Retrieved from http://www.unctad.org/en/docs/wir2008_en.pdf.

Yevust, Youri. 2001. "Transatlantic Competition Relations: A New World Order?". In *Transatlantic Governance in the Global Economy* edited by Pollack, Marc A. and Gregory C. Shaffer. In Piilola, Anu. 2003. "Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation," *Stanford Journal of International Law* 39: 207-251.

Waller, Spencer Weber. 1997. "The Internationalization of Antitrust Enforcement", *Boston University Law Review* 77: 343-404.

Waltz, Kenneth N. 1979. *Theory of International Politics*. Reading: Addison-Wesley.

Weinstein, Michael M. (Ed.). 2005. *Globalization: What's New*. New York: Columbia University Press.

Wells, Wyatt. 2002. *Antitrust and the Formation of the Postwar World.* New York: Columbia University Press.

Whish, Richard and Wood, Diane. 1994. *Merger Cases: The Real World, A Study of Merger Control Procedures.* OECD. Retrieved June 26, 2010 from http://www.oecd.org/dataoecd/4/40/31587583.pdf.

Whish, Richard. 2005. *Competition Law* (5th Edition). New York: Oxford University Press.

Wilks, Stephan and Bartle, Ian. 2002. "The Unanticipated Consequences of Creating Independent Agencies", *West European Politics* 25(1): 148-172

World Trade Organization (WTO). 1996. *Singapore Ministerial Declaeration*. WT/MIN(96)/DEC December 18, 1996. Retrieved April 10 from http://www.wto.org/english/thewto_e/minist_e/min96_e/singapore_declaration96_e.pdf

WTO. 2001. *Doha Ministerial Declaration*. WT/MIN(01)/DEC/1 November 21, 2001. Retrieved April 10 from http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.pdf

Zanettin, Bruno. 2002. *Cooperation between Antitrust Agencies at the International Level.* Oxford and Portland: Hart Publishing.