

Harmonization of Competition Laws in a Global Economy : A Japanese Perspective *

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I. INTRODUCTION

Competition policy enjoys a more prominent role today than it ever has before.

This reflects the trend in which acceptance of the market system has expanded to developing countries and former socialist countries. In pace with this, the basic law for competition policy, namely competition (or antitrust) law, has spread to a large number of countries. At the same time, globalization of the economy has increased the internationalization of business activities, and has brought about an increase in antitrust violations occurring in multiple jurisdictions. This situation has caused the business community to call for harmonization of domestic competition laws.

Adding to the business need, harmonization of competition laws has also been discussed at the WTO (World Trade Organization) for market access consideration. The WTO has achieved substantial elimination of governmental barriers to trade, and therefore is now envisaged to tackle trade barriers emanating from anti-competitive corporate conduct. This need caused the WTO to establish a Working Group on "Trade and Competition" in 1996, and in November 2001 the WTO Ministerial Conference held in Doha (*Qatar*) agreed that negotiations regarding "interaction between trade and competition policy" will take place after the next session of the Ministerial Conference.¹

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1 Doha WTO Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001, available at

In these contexts, this article examines how and to what extent domestic competition laws should be harmonized. In this examination, harmonization in the substantive content of competition laws is distinguished from procedural harmonization, since these two have a different impact on national sovereignty and also have different attainability.

Part II examines reasons for business requests for substantive harmonization of competition laws, and considers attainability and desirability of substantive harmonization. Part III looks into market access considerations in competition law harmonization, and criticizes the proposal to establish international competition rules based on market access consideration. Part IV analyzes procedural aspects of competition law harmonization, and proposes to expand the “positive comity” concept through establishing a rule for primary jurisdiction for merger control. Part V, which serves as the conclusion, summarizes the major proposals of this article.

II. REQUEST FROM BUSINESS FOR SUBSTANTIVE HARMONIZATION OF COMPETITION LAWS

For a long time, the harmonization of competition laws meant international co-operation and adjustment of law enforcement (“procedural harmonization”). However, since near the end of the 1990s, harmonization regarding substantive contents of national competition laws (“substantive harmonization”) has surfaced as an important international issue. Substantive harmonization poses much more serious problems to governments than procedural harmonization because it risks intervening into national sovereignty regarding law enactment.

Increasing globalization of national markets and a concomitant increase in the importance of competition law have induced the call for substantive harmonization. Yet we must inquire to what degree substantive harmonization is necessary, and in what area of competition law harmonization is called for. Furthermore, we need to ask to what degree such harmonization is practically attainable.

1. Basis of Business Request to Substantively Harmonize Competition Laws

Increasing globalization of markets has caused more and more companies to extend their business beyond national boundaries. However, the law governing business competition, namely competition law (or antitrust law), remains national.

At the same time, the number of countries adopting competition laws has greatly increased.² Almost all developed countries now have competition laws, and a large number of developing countries have established their own competition laws. Furthermore,

<http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#interaction>.

2 UNCTAD document (TD/B/COM.2/CLP/16, 14 January 2000) lists 82 countries as having competition authorities, available at *<<http://www.unctad.org/en/docs/c2clp99d16.en.pdf>>.*

globalization, by increasing the number of competing companies, has intensified business rivalry and therefore augmented business conflicts that have caused monopolization (or exclusionary) cases. The most prominent example is the *Microsoft* case.³ Moreover, intensified global competition has prompted companies to restructure their corporate structure for augmenting their efficiencies, and thus brought about a marked increase in mergers and acquisitions (M & As), many of which are international.⁴ Prominent examples include the *General Electric (GE) /Honeywell* merger proposal (2001), and the *Boeing / McDonnell Douglas* merger (1999).

These phenomena have induced calls from the business community for harmonization of domestic competition laws, since coping with different competition laws has caused considerable increases in both business costs and risks for multinational companies.

Typically, companies involved in international mergers are obligated to prepare voluminous documents of different formats corresponding to demands from multiple countries. And, when faced with conflicting decisions, they may have to give up mergers. Another example is companies that are indicted for monopolization (or abuse of dominance), and then are inflicted with incompatible remedies from multiple countries.

2. *Evolving Nature of Competition Laws*

Business' demand for competition law harmonization has a reasonable basis. However, we have to recognize that no country has yet come up with an ideal model for competition law. Illegality standards in U.S., EU and Japanese competition laws have experienced constant improvements. These improvements have been accomplished mainly through changes in the interpretation of law clauses. In the case of U.S. antitrust law, law clauses prohibiting "restraint of trade" (Sherman Act: Section 1) and "monopolization" (Section 2) have remained unchanged, but their interpretation has gone through cumulative improvements. This situation is the same in the case of EU (EC) competition law – the "abuse of dominant position" clause (Art. 82 EC Treaty) – and in Japanese Antimonopoly Law⁵ – the "Unfair Business Practices" clause (Artt. 19 and 2 (9)).⁶

3 *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

4 During the second half of the 1990s, the U.S. witnessed a remarkable surge (a more than 100% increase) in merger activity, and in 2001, 29% of the announced M&As were cross-border mergers. COUNCIL OF ECONOMIC ADVISERS, the Executive Office of the President, the Economic Report of the President (February 2002) 103-104, at <<http://w3.access.gpo.gov/eop>>.

5 *Shiteki dokusen no kinshi oyobi kōsei torihiki no kakuho ni kansuru hōritsu (Dokkin-hō)*, Law No. 54/1947, as amended by Law No. 80/2001.

6 For detailed analyses, see T. TAKIGAWA, *Nichi-Bei-EU no dokkin-hō to kyōsō seisaku* [Competition Laws and Policies of Japan, the U.S., and the EU] (Tokyo 1996).

Therefore, unified adoption by countries of the same clause – for instance, a clause prohibiting “abuse of dominant position” – does not realize harmonization of competition laws. Importance does not lie in the wording of law clauses, but in interpretation standards. More importantly, unified adoption and fixation of one interpretation of an illegality concept such as “abuse”, “unfair business practice”, or “restraint of trade” ceases the process of constant improvement, and thus is harmful for competition law development.

The only antitrust area where universal consensus has been formed is condemnation of “hard-core cartels”, namely horizontal restraints whose sole purpose is restraint of competition, such as price cartels or bid rigging. In 1998, OECD, made a recommendation to prohibit hard-core cartels.⁷ Illegality standards regarding horizontal restraints other than “hard-core cartels” differ considerably among the U.S., EU, and Japan. Moreover, each country or region has historically considerably transformed its antitrust standards.⁸

Illegality standards for mergers, whose harmonization companies apparently consider most desirable, differ substantially between the EU and the U.S. as exemplified by conflicting decisions for mergers between *GE/Honeywell* (2001) and *Boeing/McDonnell Douglas* (1999). This divergence reflects substantive difference between the U.S. and EU agencies on the proper scope of antitrust enforcement.⁹ Specifically, the difference emanates from different treatment of business efficiency in merger regulation. The EU considers arresting market power (in EU terminology “dominant position”) absolutely important. In contrast, U.S. antitrust agencies have come to give more and more favorable treatment to efficiency defenses posed by merging companies.¹⁰ The difference between the EU and the U.S. emanates from philosophical differences on the objective of competition law, and therefore no objective preference can be made regarding divergent EU and U.S. approaches.

Vertical restraints, the remaining major area of competition law, have remained as the most ambiguous area in the U.S., the EU, and Japan, where no concrete illegality standards have been achieved. In the U.S., the Antitrust Division (in the Department of Justice) abolished its Vertical Restraint Guideline in 1993 in the face of opposing court

7 Recommendation of the Council Concerning Effective Action against Hard-core Cartels, C (98) 35/FINAL.

8 The most recent development occurred in 2000 in the U.S. adoption of the FTC (Federal Trade Commission) and the DOJ (Department of Justice) joint guideline; the Antitrust Guidelines for Collaboration Among Competitors are available at <<http://www.ftc.gov/bc/guidelin.htm>>.

9 Remark of the Head of Antitrust Division, U.S. Department of Justice; C. A. JAMES, International Antitrust in the Bush Administration, Address at the Canadian Bar Association Annual Fall Conference on Competition Law Ottawa, Canada, September 21, 2001, available at <<http://www.usdoj.gov/atr/public/speeches/9100.htm>>.

10 For detailed analyses, see E. GRAHAM, Economic Considerations in Merger Review, in: EVERNETT / LEHMAN / STEIL (eds.), *Antitrust Goes Global* (2001) 57-78.

decisions, and has not yet come up with a new guideline. The EU has been endeavoring to rationalize its vertical restraint standard.¹¹ In Japan, the JFTC (Fair Trade Commission of Japan, *Kôsei Torihiki I'inkai*) standard regarding “unfair business practices” has remained so vague that it has allowed the JFTC much discretion in condemning vertical restraints.¹²

In summary, broad-ranged harmonization in substantive contents of competition law is neither attainable nor desirable. This, however, does not mean that countries cannot learn from law enforcements in other countries. The EU, the U.S., Japan, and other developed countries should each constantly evaluate their law standard, comparing their own with other countries' standards. Japanese competition law – Antimonopoly Law – has the most room for improvement. In particular, ambiguous standards in the Antimonopoly Law for “unfair business practices” should be clarified further. Developing countries envisaging the adoption of competition laws should study the competition laws of the U.S., Europe, and Japan in order to design a logical competition law suited for each country's economic needs.

III. ROLE OF THE WTO IN GLOBAL COMPETITION LAW AND POLICY

Besides business' call for harmonization, market access consideration has been another impetus for tackling competition law at an international forum, particularly at the World Trade Organization (WTO).

1. *Expanding the WTO's Mandate beyond Market Access toward Market Efficiency*

Competition law and policy has been discussed at a working group of the WTO in the framework of “Trade and Competition”. As exemplified by U.S.-Japan trade cases, private-sector conduct as well as governmental regulations form trade barriers. In the context of WTO rules, GATT (General Agreement on Tariffs and Trade) and GATS (General Agreement on Trade in Services) rules may be undermined by private anti-competitive conducts. The European Commission has most earnestly stated this point.¹³

11 The European Commission's new vertical restraint guideline (Commission Notice, Guidelines on Vertical Restraints, 13 October 2000, Official Journal of the European Communities, 2000/C 291/01) improved transparency of the standard. Nevertheless, the Commission needs to re-evaluate the roles of block exemptions.

12 See T. TAKIGAWA, Prospect of Antitrust Law and Policy in 21st Century: In Reference to Japanese Antimonopoly Law and Fair Trade Commission, paper presented at a conference held by the Korean Competition Law Association: Prospect of Antitrust Law and Policy in the 21st Century (April 26, 2001, Seoul, Korea), whose revision is to be published in (forthcoming): *Global Studies Law Review* 1 (2002).

13 The EC initiative at the WTO is explained by I.G. BERCERO / S.D. AMARASINHA, Moving the Trade and Competition Debate Forward, in: *Journal of International Economic Law* 4 (2001) 481-506.

From this viewpoint, the WTO Ministerial Declaration (in Singapore, December 1996) established the WTO Working Group on the Interaction between Trade and Competition Policy.¹⁴

In order to prevent competition law from forming trade barriers, “national treatment (NT)”, namely non-discrimination between national and foreign entities, is first called for. The NT rule has already been largely achieved at the WTO, since the GATT, in Article 3, obligates member countries to adhere to NT in laws and regulations regarding merchandise sales. Nevertheless, GATT applies only to merchandise trade. For service trade, national treatment has not yet been made mandatory, since GATS did not adopt a universal NT obligation.¹⁵ Therefore, as an initial step for the “Trade and Competition” endeavor, the WTO should obligate member countries to adhere to NT in the enforcement of their competition laws.

National treatment in competition law enforcement, in spite of its necessity, is inadequate for preventing business conducts from forming trade barriers. Weak competition laws, even if they are applied in a non-discriminatory manner, fail to condemn trade-restricting business conducts. The EU, therefore, has called for adopting global minimum rules as WTO competition law.¹⁶

In contrast with the EU, the U.S. administration has been opposed to discussing competition law at the WTO. The U.S. administration has laid as a basis for its opposition the fact that the fundamental objective of competition law is not market access. Typically, conflict in U.S. and EU merger regulations on the *GE/Honeywell* merger and *Boeing/McDonnell Douglas* merger did not concern market access. Conflicts in merger regulation exemplify business’ concern for costs in dealing with multiple regulatory authorities.

U.S. authorities, therefore, proposed establishing another forum, focused specifically on the substantive and procedural issues surrounding international antitrust enforcement.¹⁷ The idea for this forum – originally called “Global Competition Initiative (GCI)” – came from the report of the Department of Justice (DOJ) Advisory Committee.¹⁸ This forum is now named “International Competition Network (ICN)”.¹⁹ The ICN is foremost a network of antitrust authorities (national or multinational competition

14 WT/MIN (96)/DEC, Ministerial Declaration.

15 Art. 17 of GATS obligates member countries to adhere to NT only in the fields listed by member countries.

16 See BERCERO / AMARASINHA (*supra* note 13).

17 JAMES (*supra* note 9).

18 INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE (ICPAC) to the Attorney General and Assistant Attorney General for Antitrust, FINAL REPORT (2000) 272; at <<http://www.usdoj.gov/atr/icpac/finalreport.htm>>. 272.

19 See W.J. KOLASKY, U.S. and EU Competition Policy: Cartels, Mergers, and Beyond; Before the council for the United States and Italy Bi-Annual Conference (2002), at <<http://www.usdoj.gov:80/atr/public/speeches/9848.htm>>, and ICN’s web site: <<http://www.internationalcompetitionnetwork.org/>>.

agencies). Antitrust officials from 14 countries launched ICN in October 2001, and held their first annual conference in September 2002 in Italy.

In spite of the U.S.'s concern, the WTO still seems to be the most important international forum for discussing competition law (and policy). Three reasons may be pointed out in support of this remark. First, the WTO, with its dispute settlement mechanism, is the most effective international organization for dissolving trade conflicts. Second, the WTO, in contrast to the OECD, has the merit of including as its members many developing countries. In discussions of "trade and competition", it is imperative to include developing countries, since competition law has much importance for economic development.²⁰

Third, the WTO has already expanded its activity beyond narrowly defined trade issues. Namely, in 1995 the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) established minimum rules for the protection of intellectual property rights (IPR). The main objective of the IPR is not trade liberalization. The IPR protection, through enhancing incentives for innovation, promotes countries' economic development. Therefore, the WTO member countries, through formation of common rules on competition law, may expand the WTO mandate *beyond narrowly defined market access toward the efficient functioning of markets*.

A WTO ministerial level meeting at Doha in November 2001 agreed that negotiations regarding "Interaction between trade and competition policy" would take place after the next Session of the Ministerial Conference. The WTO, in the long run, should include in its mandate competition principles. For this objective, not only competition law but competition policy issues should be discussed. The most urgent and vital issue in this regard is the anti-dumping (AD) measures of the WTO. AD measures have widely spread among WTO member countries including developing countries, and now have become a major obstacle to trade liberalization.²¹ The WTO should fundamentally re-evaluate its AD rules and, in the long run, replace AD rules with the predatory pricing rule of competition law.

2. *Need to Deny Trade-Specific Competition Rules*

The WTO, in discussing competition law, should forsake narrow market-access consideration and adopt a pro-competitive efficiency objective. This shift in focus is necess-

20 In addition, according to GUZMAN (A.T. GUZMAN, *Antitrust and International Regulatory Federalism*, New York University Law Review 76 (2001) 1142 *et seq.*, at 1157), the primary advantage of the WTO is its potential to overcome the divergent national incentives created by international trade and local regulatory objectives. Unlike many other fora, the WTO provides a setting in which a wide range of topics can be discussed and which, therefore, allows for concessions in one area in exchange for agreement in another.

21 For the most convincing analysis, see B. LINDSEY, *The U.S. Antidumping Law: Rhetoric versus Reality*, Trade Policy Analysis (Cato Institute) No. 7 August 16, 1999, at <<http://www.freetrade.org>>.

ary because blindly pursued market access often contravenes a pro-competitive objective based on efficiency. This point is best illustrated in the so-called *Kodak-Fuji* case in the latter half of the 1990s. This conflict concerned *Kodak's* access to the Japanese market, and was first taken up by the U.S. administration as U.S. Trade Law's Section 301 case. Subsequently, the U.S. administration transferred this case to the WTO dissolution settlement mechanism. In 1998, the WTO panel came up with a report exonerating the Japanese government.²²

The 1998 panel report found the Japanese government had not contravened WTO obligations on the following grounds. First, Japanese regulations and competition law (Antimonopoly Law) enforcement conformed to NT obligations. Second, measures adopted by Japanese governmental agencies (the Ministry of Trade and Industry [*Tsûshô Sangyô-shô*] and the JFTC) were neutral and did not disadvantage imports.

The *Kodak-Fuji* case basically concerned private business practices, and current WTO rules cannot effectively deal with private conducts. Therefore, trade policy personnel who wish to enhance market access may be tempted to adopt, at the WTO, competition rules that widely condemn business practices with entry restricting effects. If the WTO followed this course, exclusionary business practices including exclusive dealing and tying would be widely prohibited. Actually, *Philip Marsden* reported that the WTO Secretariat envisioned establishing a special antitrust rule for market access.²³ According to the secretariat paper, the envisioned special rules regarding trade-related restraints on competition at the WTO would aim at easing entries into foreign markets.

This idea of establishing special trade-related antitrust rules is contrary to world welfare, since special antitrust rules favoring new entrants disrupt the market mechanism. The same competition principle should apply to both domestic and foreign companies. The traditional trade policy (or market access) approach, therefore, is inappropriate for antitrust (competition) rules. Competition laws should prohibit anti-competitive conduct, but should not indiscriminately condemn market barriers. In other words, competition laws should not allow new entrants to free-ride on the efforts of incumbents. This spirit of competition laws should not be changed for trade policy purposes.

3. *Division of Roles between the WTO, the ICN, and the OECD*

The competition laws of countries are not unified, and although convergence has been achieved to some degree, substantial differences still exist. Obviously, the WTO or any other multilateral institution cannot at this stage establish a unified international competition law. This point is underlined by the constantly evolving nature of competition law, which is best exemplified in the rules for vertical restraints in the U.S., the EU, and

22 WT/DS44/R, 31 March 1998, Japan – measures affecting consumer photographic film and paper, at <<http://www.wto.org/wto/dispute/distab.htm>>.

23 P. MARSDEN, The Impropriety of WTO “Market Access” Rules on Vertical Restraints, in: *World Competition* vol. 20 no. 6 (1998).

Japan. The only competition law area where they have reached consensus is in condemnation of “hard-core cartels”. Notable antitrust experts believe that it is impossible to agree on international antitrust rules outside narrow hard-core cartels.²⁴

Therefore, at the current stage, the WTO competition rule should limit itself to a national treatment obligation together with the prohibition of hard-core cartels. The WTO should refrain from establishing any concrete illegality standards for vertical restraints, unilateral conducts, and mergers. The European Commission, which formerly envisaged harmonization in other areas such as vertical restraints and abuse of dominant positions, now admits this limitation.²⁵

The WTO rule prohibiting hard-core cartels should include the prohibition of export cartels. It is necessary to explicitly prohibit member governments from tolerating domestic companies’ export cartels because, in many countries, competition law authorities have left export cartels intact that do not have a direct anti-competitive impact on domestic markets. Nevertheless, export associations or co-operations whose objective is the attainment of efficiency should not be condemned as hard-core cartels.

Unanimous prohibition of hard-core cartels (including export cartels) at the WTO is a substantial achievement both from the viewpoint of trade liberalization and economic efficiency. Nonetheless, wider-ranging harmonization efforts are worthwhile. Competition-related provisions are already contained in a number of WTO rules such as TRIPs and GATS, which obligate member countries to adopt measures against “anti-competitive practices”.²⁶ The TRIPs and GATS, however, do not define the meaning of “anti-competitive practices”. Abstract prohibition of “anti-competitive practices” does not serve to condemn concrete business practices. The WTO should, in the long-run, endeavor to determine what specific behaviors, other than hard-core cartels, should be prohibited.

The U.S. administration has been opposed to contemplating competition law issues at the WTO. The U.S. considers that the WTO, as a trade liberalizing organization, is not apt to take up competition law issues. Hard-core cartels for export and import inhibit trade liberalization. Other anti-competitive conduct, however, does not exert direct trade effects. Nevertheless, the WTO has gradually extended its activity and has already taken up the role of a market-integrating organization. The TRIPs agreement is the most representative achievement in this regard, since intellectual property protection is important not for market liberalization but for efficient functioning of the market. Global protection of intellectual property rights enhances the market efficiencies of adopting countries.²⁷

24 Among others, see ROBERT PITOFISKY (former Chairman of the U.S. Federal Trade Commission); R. PITOFISKY, *Competition Policy in Global Economy – today and tomorrow*, in: *Journal of International Economic Law* 2 (1999) 410.

25 See BERCERO / AMARASINHA (*supra* note 13) 495.

26 For instance, TRIPs Agreement Artt. 8 and 40.

27 Nevertheless, we have to take care not to give too much rights to IPR holders, since excess-

The WTO, as a well-established and resourceful international organization with member countries all over the world, is naturally the most appropriate institution to deal with competition issues. The U.S. administration's opposition, however, should be taken into account. Discussion of competition law without participation of the U.S. is of little significance, since the U.S. has the most developed competition (antitrust) law system and has among its citizens a predominantly large number of antitrust experts.

As already mentioned, the U.S. administration has come up with the idea of establishing a new international forum to discuss competition law issues, namely the International Competition Network (ICN). It is costly to establish a new international forum outside the WTO. However, if the U.S. administration is prepared to dispense the money and personnel resources along with the cooperation of other countries, this new international forum will become a useful international institution. Competition law and policy have become so vital to world economy that devoting money and personnel resources to a new forum is a cost-effective investment. As *Frederic Jenny* (Chairman of the WTO Working Group on Trade and Competition) sensibly observed, different fora might best be used to respond to different international competition-policy problems.²⁸

The European Commission has already agreed to cooperate with the U.S. administration in establishing the ICN. This venue will provide a forum "where government officials, as well as private firms, non-governmental organizations, and others can exchange ideas and work toward common solutions of competition law and policy problems".²⁹

In order to develop effective cooperation among different fora, a division of roles must be established between the WTO, the ICN, and the OECD. This division may be made as follows:

- (i) The WTO, in the next round, will establish a rule mandating national treatment (NT) in competition law enforcement together with the rule prohibiting, with penalty, hard-core cartels (including export cartels).
- (ii) The ICN will perform studies regarding harmonization of competition law contents and procedures, particularly for merger control and vertical restraints.
- (iii) The OECD may engage in more in-depth studies of competition law harmonization. Results of the ICN and OECD studies should be transferred to the WTO for possible international rules at future WTO rounds.

ively wide protection of IPR retards technology improvements.

28 Cited by D.K. TARULLO, Norms and Institutions in Global Competition Policy, in: *American Journal of International Law* 94 (2000) 500.

29 M. MONTI [European Commissioner for Competition Policy], "The EU Views on Global Competition Forum", speech at ABA meetings: Competition Policy and Globalisation, Washington D.C., 29 March 2001; available at <<http://europa.eu.int/comm/competition/speeches>>.

IV. PROCEDURAL HARMONIZATION: POSITIVE COMITY AND BEYOND

Substantive harmonization of competition law, other than common prohibition of hard-core cartels, is a long-run endeavor to be studied at the WTO and at other fora. In contrast, procedural harmonization of competition law enforcement is achievable in a relatively short time. Furthermore, complaints from business regarding international anti-trust emanate mostly from the procedural overlapping of law enforcements (multi-jurisdictional enforcements) rather than from substantive law discrepancies. Procedural harmonization, therefore, is a more pressing need than substantive harmonization.

1. Positive Comity and International Co-operation

Major countries (or regions) no longer pose fundamental opposition to “extra-territorial” application of competition laws. The U.S., the EU, and Japan now each consider it necessary to apply their competition law to foreign companies that have caused illegal anti-competitive effects in domestic markets. The U.S. has long adhered to the “effects doctrine”.³⁰ The EU applies its competition law when “the place where [the illegal conduct] is implemented”³¹ is within the EU. Still, its result is the extraterritorial application of EU competition law to protect EU consumers. Japan has gradually adopted the effects doctrine. An amendment in 1998 of the Antimonopoly Law (Art. 15) clarified that the law is applicable to overseas mergers by foreign companies.³²

International debate currently is not concerned with extraterritoriality, but rather with “comity”, namely the degree to which a nation should refrain from applying its antitrust law to activities abroad. Exercise of comity has been called for particularly toward the U.S., since the exertion of U.S. antitrust law criminal sanctions has had grave consequences for individuals. Comity is an important concept for mitigating conflicts in extraterritorial application. The comity principle, however, does not eliminate all international antitrust conflicts.

Nations should go beyond comity and engage themselves in active international cooperation in dealing with international anti-competitive conduct. International cooperation in tackling international cartels has become particularly important, since the incidence of large-scale international cartels (*e.g.*, vitamins cartels) has greatly increased.

30 See (Third) Restatement of the Foreign Relations Law of the United States §§ 402 (1) (c), 403 (2) (a) (1986).

31 Joined Cases 89, 104, 114, 116, 117 & 125 to 129/85, *A. Ahlstrom Osakeyhtio v. Commission*, 1988, E.C.R. 5193, 5243 [Wood Pulp Case].

32 Nevertheless, Antimonopoly Law’s article regarding document delivery (Art. 69-2) has been lacking in provision for delivery overseas. This deficiency has hindered JFTC from pursuing extra-territorial application of the Antimonopoly Law. This situation is going to be amended as the Government has scheduled to put to Parliament a bill amending the Antimonopoly Law within 2002, thus enabling JFTC to officially send documents overseas (News release, JFTC, 4 March 2002, at <<http://www.jftc.go.jp>>).

The U.S. DOJ reported in 2001 that it has obtained over \$ 1.7 billion in criminal fines since the beginning of fiscal year 1997, of which over 90 percent were imposed in connection with the prosecution of international cartel activities.³³

OECD member countries have long cooperated on competition law enforcement based on the OECD 1967 Recommendation, which was most recently modified, in 1995.³⁴ Bilateral cooperation agreements between major countries (and regions) have multiplied in recent years. In 1999 Japan established an antitrust cooperation agreement with the U.S.³⁵

The 1991 EC / U.S. Agreement³⁶ is the most noteworthy bilateral antitrust agreement, and its 1998 Amendment³⁷ incorporated for the first time the so-called “positive comity”. Positive comity is a provision whereby each antitrust agency would give careful consideration to a request by the other one when it takes antitrust enforcement action against any illegal behavior in its jurisdiction that injures the other party’s interests. Positive comity, in contrast to traditional comity, is the forward-looking principle whereby nations actively cooperate in tackling international anti-competitive conducts.

2. *Need to Establish Priority Rule for Jurisdiction on Mergers*

Positive comity is an important concept by which nations will develop active antitrust cooperation. Nevertheless, it cannot eliminate international conflicts emanating from overlapping jurisdiction of competition law. The U.S.-EU conflict in the *GE / Honeywell* merger occurred after the conclusion of the U.S.-EC Positive Comity Agreement in 1998.

In resolving conflicts of overlapping jurisdiction, we have to distinguish hard-core cartel cases from other antitrust cases, in particular, mergers. For hard-core cartels, cooperation is necessary among countries concerned. In this case, overlapping jurisdiction

33 J.M. GRIFFIN (Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice), “Status Report: Criminal Fines”, Speech delivered at the American Bar Association, Section of Antitrust Law, 28 March 2001, at <http://www.usdoj.gov/atr/public/speeches/8063.htm> (visited on Nov. 24, 2001).

34 The 1995 Recommendation of the OECD Council Concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade, OECD Doc. C(95)130/FINAL (hereinafter “OECD Recommendation”), available at <http://www.oecd.fr/daf/clp/rec8com.htm>.

35 Agreement between the Government of the United States of America and the Government of Japan Concerning Cooperation on Anti-competitive Activities, 7 October 1999, available at <http://www.usdoj.gov/atr/public/international/docs/3740.htm>.

36 Agreement between the Government of the United States of America and the European Communities Regarding the Application of Their Competition Laws, 23 September 1991, available at http://www.usdoj.gov/atr/public/international/int_arrangements.htm.

37 Agreement between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, 4 June 1998, available at http://www.usdoj.gov/atr/public/international/int_arrangements.htm.

is not a problem to be avoided. International cartels cause economic harm to consumers in multiple countries. Therefore, multiple countries' antitrust agencies may condemn the same companies and impose multiple penalties.

In contrast, for mergers and most business conduct other than hard-core cartels, penalties or sanctions should not be levied on companies. What is required is a single order to cease and desist from the anti-competitive conduct. Therefore, the U.S., the EU, and other countries' antitrust agencies need not demand same merging companies to file pre-notifications and go into multiple investigations. It is a waste of human resources for multiple countries' agencies to engage in concurrent investigations. Furthermore, such multiple investigations and legal procedures have imposed huge administrative and legal costs on multinational companies.

Therefore, for mergers, vertical restraints, and conduct other than hard-core cartels, the positive comity concept should be pushed forward. Namely, *principal jurisdiction may be given to a country that has the closest connection to the companies concerned*. In most cases, the country where the companies' headquarters is located will have the closest connection to the companies' conduct. Professor *Eleanor Fox* proposed this idea concerning merger jurisdiction.³⁸ Other business conduct excluding hard-core cartels needs to be treated in the same way.

For example, in the case of the 2001 *GE / Honeywell* merger, the U.S. rather than the EU may have principal jurisdiction, since the merging companies' activities are dominantly within the U.S. Nevertheless, U.S. antitrust agencies should take into consideration the EU's concern based on positive comity. Although the U.S., the EU, and Japan have different standards on the illegality of mergers or vertical restraints, the differences are not fundamental ones. The U.S., the EU, Japan, and other developed countries where most multinational companies are located all have well-developed competition law regimes. Therefore, a country where the activities of the companies concerned are centered may safely have principal jurisdiction without causing substantial dissatisfaction to other countries.

Principal jurisdiction given to the country that has the closest connection with the violating companies need not amount to sole jurisdiction. In many antitrust cases, different countries have to order different remedies against the same companies responding to different anti-competitive effects. For instance, in the case of the *Time-Warner / AOL* merger in 2000, both the U.S. and the EU had jurisdiction, and the EU ordered a remedy to the merging company different from the one ordered by the U.S. Federal

38 E. FOX, "Separate Statement of Advisory Committee Member Eleanor M. Fox", in: ICPAC (*supra* note 18), Annex 1-A: "In the absence of international rules and dispute resolution, we may eventually find it necessary to give the nation at the center of gravity a trumping right to enjoin or allow the merger (while other interested nations might retain the right to implement more modest, tightly tailored relief). But if any nation is, legitimately, to wear the mantle of *parens patriae* for the world, it would be obliged to count all costs of the merger, even those outside of its borders, as if they fell within its borders."

Trade Commission.³⁹ These kind of multiple remedies should not be considered as an unnecessary duplication of enforcements. Multiple countries need to order different remedies corresponding to different anti-competitive effects. Nevertheless, principal jurisdiction should be given to one country in order to avoid unnecessary duplication of investigation and enforcements.

V. CONCLUSION

Increasing globalization has induced the business community to request harmonization of competition laws both in substance and procedure. However, regarding substantive harmonization, we have to take into account the evolving nature of competition law. Currently the only area where harmonization is attainable is the prohibition (with penalty) of hard-core cartels. In other areas, such as mergers and vertical restraints, countries should learn from other countries' experiences in order to improve their legal standards. Moreover, international fora including the OECD and the newly launched ICN (International Competition Network) are encouraged to study ways for harmonizing competition laws.

Another impetus for competition law harmonization has emanated from market access consideration. Market access, however, should be subject to the more fundamental objective of market efficiencies, which forms the basis for competition law. Blindly pursued market access often contravenes the objective of competition laws based on efficiency. Therefore, the WTO should not aim at establishing special competition rules that prioritize market access. The WTO should aim at establishing minimum common competition rules, which currently are limited to national treatment in law enforcement and common prohibition of hard-core cartels, including export cartels.

Procedural harmonization, in contrast with substantive harmonization, is more the pressing need from the viewpoint of international business activities. Overlapping jurisdiction in merger control has come to inflict a heavy burden on multinational companies. By pushing forward the "positive comity" concept, principal jurisdiction may be given to one country that has the closest link to merging companies. Principal jurisdiction need not amount to sole jurisdiction, since in some cases, multiple countries have to impose different remedies on the same merging companies corresponding to different anti-competitive effects in each country.

For competition law (and policy) harmonization, the WTO, with its vast membership and its dispute dissolution mechanism, should be treated as the most important forum. The newly established ICN and the existing OECD should be positioned as fora supporting the WTO. The WTO, then, should *transform its market-access orientation to a pro-competition orientation* based on efficiency.

39 See R. WHISH, Competition Law (4th ed., 2001) 776.

ZUSAMMENFASSUNG

Angesichts der zunehmenden Vernetzung der nationalen Märkte und der großen Bedeutung global aktiver Großunternehmen in der heutigen Zeit erscheint die Harmonisierung der verschiedenen Rechtssysteme in Fragen des Kartell- und Wettbewerbsrechts als eine wichtige Aufgabe. Der Autor sieht vor allem die Welthandelsorganisation (WTO) als wichtiges Forum an, um derartige Entwicklungen voranzutreiben und die bestehenden unterschiedlichen Interessen und Konzepte, insbesondere diejenigen der USA, der EU und Japans miteinander in Einklang zu bringen. Wichtiger noch als die Harmonisierung des materiellen Rechts sei aber zunächst die Einigung in Verfahrensfragen, insbesondere über die Frage, welches Land mit seinen Behörden primär für die Prüfung von Fällen zuständig sei, die verschiedene Märkte gleichzeitig betreffen. Der Verfasser schlägt vor, daß dies das Land sein solle, das mit den betreffenden Unternehmen die engsten Verbindungen unterhält. Gleichwohl ist er aber der Auffassung, daß es sich dabei um keine ausschließliche Zuständigkeit handeln dürfe, da die Auswirkungen auf verschiedene Märkte gegebenenfalls unterschiedliche Maßnahmen erfordere. Bei der Harmonisierung des materiellen Rechts unter dem Dach der WTO sei das wichtigste Ziel nicht länger (nur) die Sicherung eines freien Marktzugangs, sondern vor allem eine klare Ausrichtung auf den Wettbewerb auf der Grundlage des Effizienzgedankens.

(Die Redaktion)