I. Introduction

Since the mid 1990s, the world economy is experiencing a merger wave which strongly exceeds previous ones. The transaction volume of world-wide mergers reached a level of 2400 bill. US-$ in 1998, which is five times higher than corresponding levels of the early 1990s. For 1999, the total transaction volume is estimated at 3000 bill. US-$. And the year 2000 has started with the mergers of America Online/Time Warner (180 bill. US-$) and of Vodafone Airtouch/ Mannesmann (190 bill. US-$) which pushed the transaction volume for individual merger cases up to unprecedent levels.

The current merger wave is mainly driven by the globalization of the world economy and the deregulation of national markets (Kleinert, Klodt 2000). In many areas, the expansion of relevant markets fairly exceeds the expansion of firm size, and competition intensifies in spite of merger activities. However, there may be certain areas where this general trend does not hold. Antitrust authorities would still be well-advised to cast a careful eye upon the formation of oligopolies on global and national markets and are still requested to call a halt to anticompetitive mergers. As merger activities increasingly reach beyond national borders, competition policy will surely have to follow.

It is the central question of this paper whether this purpose can reasonably be achieved by an extraterritorial application of national antitrust legislation or whether it requires the establishment of an international competition policy of its own. For this purpose, the following section briefly introduces the effects doctrine and the comity principle which are at the heart of international antitrust cooperation. There upon, the next section explores the scope for international cooperation on the base of 20 antitrust case studies. The final section concludes and touches upon the rising importance of antitrust issues for the sustainability of the international trading order.

II. The Effects Doctrine and the Comity Principles

The corner stone of each international application of national competition law is the so-called effects doctrine. It states that national authorities are entitled to prosecute any restrictive business practices which affect competition in their jurisdiction, irrespective of their regional origin. Some observers argue that this doctrine can be regarded as an adequate base for solving international antitrust issues (see, e.g., Hauser and Schoene 1994; Iacobucci 1997; Freytag and Zimmermann 1998; Möschel 1999). Others object that the effects doctrine may have been sufficient in the past, but the internationalization of anticompetitive actions would require to complement it by independent international competition rules (see, e.g., Immenga 1995; Basedow 1998; Wolf 1999). The validity of these positions will be evaluated in the following by a brief discussion of 20 antitrust cases where different jurisdictions were involved (Table 1). This paper concentrates on the desirability of international competition rules, not on their feasibility, which raises a completely different set of questions (see, e.g., Hoekman 1997; Langhammer 1999).

The effects doctrine was put forward for the first time by the U.S. Supreme Court in the *Alcoa* case of 1945: it applied the cartel ban of the Sherman Act, which had previously been enforced only domestically, to a quota agreement on aluminium imports to the U.S. which had been established by several non-U.S. firms in Switzerland (Scherer, Ross 1990, p. 453ff). The commission of the European Union followed this route in the *Dyestuffs* cases when it imposed a fine on a price-fixing agreement of ten leading producers of dyes, among them companies from Switzerland and the United Kingdom (which was no EU member in those days). This decision of 1969 was contested before the Court of Justice for lack of jurisdiction, but the Court finally confirmed the

Table 1 – Selected Cases of International Antitrust

No.	Year	Case	Authority	Decision
1	1945	Alcoa	U.S. Supreme Court	prohibition of a Swiss quota agreement on aluminium exports to the U.S.
2	1970	Ciba/Geigy	U.S. DoJ(e)	conditional permission of Swiss merger
3	1972	Dyestuffs	ECJ(a)	fine upon price fixing agreement of non-EU companies
4	1979	Organic Pigments	FHC(b)	notification of U.S. merger under German Cartel Law
5	1980	Bayer/ Firestone	KG Berlin(c)	prohibition of a merger between two French subsidiaries of U.S. parent companies by the German Cartel Office
6	1981	Uranium Cartel	FTC(d)	jurisdiction for U.S. authorities to investigate non-U.S. companies and individuals outside the U.S.
7	1983	Philip Morris/ Rothmans	KG Berlin(c)	prohibition of a merger between U.S. and British/South African companies by the German Cartel Office
8	1985	IBM	U.S. DoJ(e)	contestion of conditions on the disclosure of product standards imposed by the EU

Table 1 ctd.– Selected Cases of International Antitrust

No.	Year	Case	Authority	Decision
9	1985	Laker Airways	CFC(f)	British action against predatory pricing before the U.S. court
10	1988	Wood Pulp	ECJ(a)	prohibition of price fixing agreement of non-EU companies
11	1990	Mérieux/ Connaught	FTC(d)	conditional approval of third countries merger
12	1991	de Havilland/ ATR	EC-COM	prohibition of French/Canadian merger
13	1993	Hartford Fire Insurance	U.S. Supreme Court	U.S. competition rules dominate British ones even in contracts negotiated on British territory
14	1994	Fax Paper	Canadian Bureau of Competition Policy/ U.S. DoJ(e)	mutual jurisdiction for Canadian and U.S. authorities to investi-gate price fixing agreement
15	1994	Plastic Dishes	Canadian Bureau of Competition Policy/ U.S. DoJ(e)	mutual jurisdiction for Canadian and U.S. authorities to investi-gate price fixing agreement
16	1995	British Tele-com/MCI	EC-COM	prohibition of demarcation cartel of British and U.S. companies

Table 1 ctd.– Selected Cases of International Antitrust

No.	Year	Case	Authority	Decision
17	1996	Kimberley Clark/ Scott Paper	EC-COM	U.S. merger subject to EU merger control
18	1996	British Airways/American Airlines	U.S. Department of Transportation	open British skies for U.S. airlines as precondition for approval of British participation in strategic alliance
19	1997	Boeing/ Mc Donnell Douglas	EC-COM	conditional approval of U.S. merger which had already passed the FTC(d)
20	1998	World Com/ MCI	EC-COM/ U.S.DoJ(e)	conditional approval of U.S. merger

(a) European Court of Justice. – (b) Federal High Court (Germany). –(c) Court of Appeals (Kammergericht) Berlin. – (d) Federal Trade Commission (United States). – (e) U.S. Department of Justice. – (f) Columbia Federal Court.

Source: Own compilation from various sources.

application of EU law to non-EU companies in 1972. The Court hesitated, however, to base its decision explicitly on the effects doctrine. And even as late as 1988, when it prohibited the price fixing agreement of the *Wood Pulp* case, where exclusively non-EU companies were involved, the Court avoided to explicitly apply the effects doctrine. There seem no doubt, however, that the European Court of Justice at least implicitly acknowledges the effects doctrine, although official reasoning is expressly based upon the territoriality principle (Behrens 1993).

The effects doctrine is explicitly adopted by the German Cartel Office, which still plays a dominant role in the public debate on antitrust issues – not only in Germany, but also at the European and the international level. In the late 1970s, it successfully requested the notification of a merger between two U.S. firms under the German Cartel Law in the so-called *Organic Pigments* case. This decision was approved by the Federal High Court (Bundesgerichtshof) in 1979. In the *Bayer/ Firestone case*, the Federal Cartel office even accomplished to prevent the merger of two French affiliates of U.S. parent companies, which would otherwise have gained a dominant market position in the German market for synthetic rubber. The most famous case in this respect was the *Philip Morris/Rothmans* case, which was concerned with the merger of a U.S. and a British/South African company. The Federal Cartel Office inhibited the merger, but initially earned only mild surprise by the two firms in question and by the public as well. Eventually, however, the case was solved by the separation of a German subsidiary from Rothmans, which strongly mitigated the impact of the merger on competition in the German tobacco market.

These cases actually demonstrate that the effects doctrine is quite powerful in settling international antitrust issues. Its validity is increasingly accepted not only in North America and Europe, but also in those countries where no genuine national competition rules exist (Basedow 1998, p. 21)

Strict application of the effects doctrine might not only solve conflicts, however, but might also create international conflicts of its own. For instance, if a certain merger of two U.S. firms is appreciated by U.S. authorities, but viewed with concern by the European Union, U.S. and EU law may conflict with each other if the EU Commission is determined to apply EU law via the effects doctrine to this case.

This was precisely the situation which occurred in the merger case of Boeing and McDonnell Douglas, which passed the Federal Trade Commission without any obligation. This decision obviously ignored the fact that the merger would strengthen the dominant position of Boeing on the market for large commercial aircraft in the United States and in Europe as well. The generous approval by the Federal Trade Commission was probably motivated by industrial policy considerations. The EU Commission objected, but eventually only achieved some slight modifications with respect to the relations between aircraft producers and airlines (Stehn 1997). The Commission would surely have been able to prohibit the merger by European law and could have imposed a fine of up to 10 per cent of total sales upon Boeing/McDonnell Douglas, but such an attempt would have involved the risk of severe transatlantic trade conflicts.

Of course, it may be objected that also the European Commission may have had certain industrial policy considerations in mind when it tried to prevent the merger. But the mere fact that Airbus is the major competitor of Boeing does not imply that the U.S. merger was not anticompetitive (Fox 1998). The Boeing/Mc Donnell Douglas case thus illustrates that international conflicts about antitrust issues are most likely to emerge if national authorities are pursuing divergent industrial policy objectives.

It is quite difficult for external observers to picture the true nature of international conflicts between national antitrust authorities. In press releases and other public statements any indication of conflict will carefully be avoided in order to prevent escalation. Such a behavior may be well-advised in each individual case, but it can give rise to misleading policy conclusions if publicly displayed harmony is confused with congruity of actual policy objectives.

Harmony and concord are especially stressed in U.S.-EU antitrust relationships. A formal base for it was established by the "Agreement Regarding the Application of their Competition Laws", which was negotiated in 1991 and finally accepted by the Council of Ministers in 1995 (Commission 1995). It is based upon the principles of comity, where negative or traditional comity considers the effects of any enforcement action on the interests of the other party, whereas positive comity even entitles a country to refer a case to the authorities of the partner country if there are cross-border spillovers of anticompetitive business practices (Meiklejohn 1999). These two principles are both included in the U.S.-EU agreement (Art. V 3 and Art. V 2 respectively). Positive comity between the U.S. and the EU was further elaborated in a special agreement, which was signed in 1998 (Official Journal of the EU no. OJL 173 of 18. June 1998, Luxemburg).

In recent years, the principle of negative comity has repeatedly been applied in U.S.-EU antitrust relationships. Positive comity, by contrast, has up to now been applied only once, namely in the Sabre/Amadeus case of 1998, where the U.S. Department of Justice requested the Commission to investigate specific allegations of discrimination by the European computerized airline reservation system AMADEUS against the correspond system SABRE which is set up by a number of U.S. airlines (Commission, 1999a).

An unsolved issue of positive comity results from the fact that national authorities are typically not empowered to investigate against domestic agents if these agents are in conflict with foreign antitrust rules, but do not violate national law. U.S.-EU antitrust cooperation thus concentrates on mutual exchange of information and on informal consultations.

III. Case Studies

The previous section has illustrated that the effects doctrine and the comity principles are powerful instruments in the area of international antitrust. It is still an unsettled issue, however, if these instruments are sufficient for restricting international conflicts to a reasonable amount or if they should be complemented by international competition rules. In order to shed more light on this matter, the cases listed in Table 1 have been rearranged with respect to their potential for international conflicts and the prospects for solving them by international cooperation (Table 2).

The cases on top left of Table 2 represent several examples where the international cooperation of antitrust authorities worked quite well. In the Fax Paper and Plastic Dishes cases, close cooperation enabled the U.S. Department of Justice and the Canadian Bureau of Competition Policy to uncover price fixing agreements, which would hardly have been provable by each authority in its own (Bingaman 1995; Großmann et al. 1998). Further positive examples are provided by the joint U.S./EU investigations of the demarcation cartel of British Telecom and MCI and the merger of Kimberley Clark and Scott (Großmann et al. 1998). Each of these four cases represent successful international cooperation in antitrust which did not require common competition rules.

Table 2 – Potentials for Conflict Resolution in International Antitrust (a)

resolved by cooperation		resolvable by cooperation	
14	Fax Paper	4	Organic Pigments
15	Plastic Dishes	6	Uranium Cartel
16	Brit. Telecom/MCI		
17	Kimberley Clark/Scott		
20	World Com/MCI		
conflicting national legislation		**conflicting industrial policy**	
1	Alcoa	5	Bayer/Firestone
2	Ciba/Geigy	8	Philip Morris/Rothmans
3	Dyestuffs	8	IBM
9	Laker Airways	12	de Havillande/ATR
10	Wood Pulp	18	British Airways/American Airlines
11	Mérieux/Connaught	19	Boeing/Mc Donnell Douglas
13	Hartford Fire Insurance		

(a) The case numbers correspond to those in Table 1.

Source: Compiled from Table 1.

In addition, the WorldCom//MCI case was included in the upper left box of Table 2, because the Commission of the European Union has repeatedly stressed that this case would represent an example of extremely successful cooperation between EU and U.S. authorities (see, e.g., Commission 1999a, b). The crucial point of this case was the strong positions of both companies in the supply of integrated Internet access, the so-called universal connectivity. The merger would have increased the world market share in this are beyond 50 per cent. As the Internet does not know any national borders, this increase in market power would have been felt by consumers in the U.S. and in Europe as well. U.S. and

EU antitrust authorities thus had a common interest. The case was eventually resolved by a decision of the Commission which requested MCI to sell its Internet business. The U.S. Department of Justice followed this decision, and MCI sold its Internet business to its competitor Cable & Wireless. It may be doubted, however, whether the WorldCom/MCI case really constitutes a success story of conflict resolution via negative comity, because there was no true conflict between antitrust authorities from the outset.

The entries on top right of Table 2 represent two cases where certain transatlantic conflicts occurred, which could probably have been mitigated if the U.S.-EU agreements on comity had already been in force when these cases were negotiated. In the Organic Pigments case, which has already been mentioned above, the German Cartel Offices insisted upon the notification of a U.S. merger under the German cartel law. The U.S. Government resisted against such an application of the effects doctrine to its own jurisdiction, and it took extended negotiations to gain acceptance of the notification. A similar situation occurred in the Uranium Cartel case, where the investigations of U.S. authorities against a price fixing agreement of foreign suppliers to the U.S. uranium market was blocked by the governments of Canada, South Africa, France, and – above all – the United Kingdom, which felt it had to prevent a U.S. invasion on their territory (Behrens 1993; Rishikesh 1991). Even the present U.S.-EU agreements on the comity principle would not have entitled U.S. authorities to carry out own investigations on European territory (which was actually intended by the U.S. Government), but there would have been the opportunity to demand for respective investigations from European authorities.

Negative and positive comity would run dry, however, if national antitrust regulations are conflicting with each other. One of such cases (listed at bottom left of Table 2) is the Ciba Geigy case which was related to the market conduct of two

Swiss firms which was legal under Swiss legislation but illegal under U.S. legislation. The same applies to the above mentioned Dyestuffs case which dealt with the participation of U.S. firms in several export price fixing agreements. From the U.S. perspective, there was no reason for intervention, because such business practices are not in conflict with U.S. legislation. From the EU perspective, however, the export cartels violated the competition rules of the EEC treaty. In these cases, the U.S. authorities would not have been entitled to investigate on the behalf of EU authorities, even if the comity agreements had already been in force. The Wood Pulp case also belongs to this category, because it was also concerned with expert cartels which were legal by U.S. standards but illegal by EU standards (Campbell, Treblicock 1994; Rishikesh 1991).

A severe international conflict emerged in the Laker-Airways case. After the bankruptcy of this British airline, which had shaken up competition in transatlantic flight connections by extremely cheap fares, the liquidator maintained that Laker Airways had been exposed to predatory pricing by several competing airlines. The accusation was brought before a U.S. court, because British legislation did not outlaw predatory pricing in those days. The U.S. court declared its competence, because the price distortions were affecting many U.S. citizens who were traveling across the Atlantic. However, the British government strictly prohibited the provision of any pieces of evidence for the U.S. trial (Rishikesh 1991). This conflict, which lasted for several years and which temporarily even involved the British House of Lords, would not have been solvable by any kind of comity, because the true conflict arose from divergent legal treatment of predatory pricing.

An extreme piece of conflict was constituted by the Hartford Fire Insurance case. This British reinsurance company was obliged by the U.S. Supreme Court to dispense certain terms of contract with their customers, which were legal under

British law, but illegal under U.S. law. The Supreme Court argued that Hartford Fire Insurance could handily comply with the verdict, because the respective terms of contract were not explicitly required, although not illegal by British law. It denied that this case, which referred to actions which occurred entirely on British soil, would really establish a "true conflict", as it could smoothly be resolved by subjection of British contracts to U.S. law. As a matter of fact, however, the Hartford Fire Insurance case is interpreted by most observers as a rather questionable example of U.S. imperialism in international jurisdictional conflicts (Basedow 1998; Warner 1999).

The unilateral application of U.S. law to third countries led to conflict also in the Mérieux/Connaught case. The Federal Trade Commission initially imposed a number of obligations upon this French-Canadian merger without consulting any French or Canadian authorities. It took massive protests from the Canadian side and extensive negotiations to prompt the Federal Trade Commission to change its decision. The conflict was eventually resolved when the Federal Trade Commission requested the involved companies to coordinate their actions also with Canadian authorities (Fox, Pietowski 1997; Waverman 1993).

Finally, international conflict resolution is extremely unlikely when national authorities basically agree about antitrust issues, but are pursuing divergent industrial policy objectives. Such cases are presented at bottom right of Table 2. The Bayer/Firestone case, where the German Cartel Office was unable to overcome French industrial policy, and the Boeing/McDonnell Douglas case, which reduced the number of participants in the relevant market from three to two, have already been discussed above.[1] The EU Commission succeeded, however, in the de Havilland/ATR case, although this merger was strongly supported by Canadian and U.S. authorities for industrial policy reasons.

In a sense, the above described Philip Morris/Rothmans case can also be traced back to divergent industrial policy objectives, because the anticompetitive effect of this merger on the European and especially on the German tobacco market was undeniable. The permission of this merger by British and U.S. authorities was probably encouraged by the improved market position of the involved companies against their German competitors, whereas the antitrust concerns of German authorities were more or less ignored.

Now and then, industrial policy conflicts may even result in the prohibition of actions which should not have been blocked for antitrust reasons. An example is provided by the strategic alliance of British Airways and American Airlines, which had already been approved by the British government and which was subject to industrial policy concerns of the U.S. government. It tried to tie its approval to the condition that American airlines would get unrestricted access to London Heathrow airport. The U.S. government strictly rejected to apply the principle of open skies also to British airlines on U.S. airports in return (Großmann et al. 1998). The U.S. government did not succeed in obstructing the formation of the strategic alliance in the end, but this case well illustrates the potential keenness of international antitrusts conflicts.

It is quite difficult to evaluate the last case of this category – the IBM case. The EU Commission tried to move IBM to disclose its computer product standards to

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1 The Bayer/Firestone decision of the German Cartel Office was withdrawn by the Court of Appeals Berlin in 1980, which was officially motivated by allegedly defective legal proceedings, but which can actually be attributed to fears of political conflict between the French and the German government (Großmann et al. 1998).

European firms at an early stage in order to enable them to adopt their periphery appliances to those standards well in time. This provision was intended to prevent an extension of the dominance of IBM on European computer markets to the markets for periphery appliances. This decision was rejected not only by IBM, but also by the U.S. Department of Justice. It made the plea that the reproaches had already been checked by U.S. authorities and that such a provision would be unreasonable in the face of fierce competition on the U.S. market. The conflict was finally resolved by a compromise which basically confirmed the U.S. position (Rishikesh 1991). It can be assumed that the U.S. position was heavily influenced by industrial policy considerations, but the true dilemma of this case lies in the fact that the early disclosure of product standards would have promoted competition on European markets, but would have been accompanied by undesirable competition effects on the U.S. market. Even an independent international antitrust authority would have found it extremely difficult, therefore, to come to the right decision in this case.

IV. Conclusions

All in all, the case studies discussed in this paper are far from being representative, because the sample is largely determined by available information from the literature. Nevertheless, they clearly demonstrate that international antitrust conflicts are no hypothetical affairs outside the bounds of possibility, but sturdy political reality. Moreover, it can be concluded that the prospects for conflict resolution via the effects doctrine and the comity principle tend to worsen when the severity of conflict is rising. Thus, the internationalization of competition policy, which is required by the internationalization of restrictive business practices in the course of globalization, strongly calls for the establishment of core international competition rules.

It has repeatedly been argued that the WTO would constitute the appropriate institutional body for monitoring and enforcing such competition rules, because it already disposes of well-established dispute settlement procedures which could easily be extended and applied to antitrust cases (see, e.g., Meiklejohn 1999; Siebert 1999; Papakrivopoulos 1999). It can be added that the WTO will in any case be concerned with antitrust issues in the future, because trade barriers at the border are increasingly replaced by "behind the border practices" which often are indistinguishable from restrictive business practices (Hoekman, Mavroides 1994; Fox 1999). An inclusion of TRAPs (trade-related antitrust principles) has already been proposed for the Millennium Round of the WTO, and a WTO working group on competition policy has been established. In the light of the evidence presented in this paper, these efforts deserve to be continued, because the international trading order could increasingly be eroded if it was not supplemented by an international competition order.

Presumably, not every reader will find the conclusions drawn in this paper convincing. The debate on the appropriateness of international competition rules will surely continue in the future. However, this paper has tried to contribute not only to the outcome of this debate, but also to its methodology. The theoretical pros and cons of international antitrust are elaborated quite well, and disagreement between participants is mainly concerned with the relative importance of controversial arguments. Hence, the debate has begun to shift from the theoretical to an empirical level. The empirical investigation of international antitrust issues essentally requires careful examinations of case studies. In this respect, the analyses presented in this paper should be regarded as a first step with further case study analyses to follow.

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Conflicts and Conflict Resolution in International Antitrust

Abstract:

Antitrust issues increasingly reach beyond national borders. This paper addresses the question whether such issues can reasonably be solved by an extraterritorial application of national competition law or whether they call for an international competition policy of its own. The analysis is based upon 20 case studies which are examined with regard to the suitability of the effects doctrine and the principles of comity as conflict resolution mechanisms. The case studies demonstrate that conflicts in international antitrust are most likely to arise where national competition laws differ from each other or where national authorities are pursuing divergent industrial policy objectives.

Keywords: antitrust policy; international economic order; effects doctrine, comity principles

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Contents