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h HGB, CMR, WA und ADSp, Heidelberg (D), 2000, WC, paras. 11, 15 et seq. on Article 18. *Kronke*, in: Münchner Kommentar zum Handelsgesetzbuch, WC 1955, para. 22 et seq. on Article 18. On the definition of the carrier's "people" and on the degree of authority to give instructions see: *Müller-Rostin* in *Fremuth/Thume*, WC, paras. 8, 9 on Article 20, which, like the BGH, requires from monopoly companies that the airfreight carrier could help to shape the contractual relationship to the company and had the opportunity of influencing its behaviour. Specifically on criminal acts by independent contractors: *Kronke*, in: Münchner Kommentar zum Handelsgesetzbuch, WC 1955, para. 46 on Article 20. On the onus of proof under WC Article 25: *Muller-Rostin*, in: *Fremuth/Thume*, WC, para. 10 on Article 25. Critical on the subject of facilitating proof: *Kronke*, in: Münchner Kommentar zum Handelsgesetzbuch, WC 1955, para. 38 on Article 25.

(E.K.-M.)

INTERNATIONAL AND EUROPEAN BUSINESS AND COMPETITION LAW

Interactive Regulation: A Plea for a Reform of International Antitrust law

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A. Introduction

The concept of "international antitrust law" is ambivalent: In the context of private international law[1] it is a synonym for national law to settle conflict-of- laws situations in the field of antitrust law.[2] In the debate on international economic law[3] it also stands for a global system of antitrust law that is supposed to overcome the supposed inadequacies of private international law. In the interest of standardised terminology, differentiation according to the source of regulation can be dispensed with here so that the concept of "international antitrust law" is shorthand for all (national and international) rules attempting to protect the market from private international restraints of competition.

B. International antitrust law's need for reform

The need to reform international antitrust law emerges from the very logic of globalisation,[4] in particular from the rise of a global marketplace for goods and services and from the concomitant lack of antitrust law solutions.

I. Challenges of globalisation

Globalisation[5] is a double-edged sword from the vantage point of antitrust law: liberalisation of (world) trade implies on the one hand that national markets, previously sealed off for foreign goods and services, should be opened up; globalisation thus makes the dangers of protectionism relative for domestic competition ("the tariff is the mother of trusts").[6] But market openings on the other hand induce private international restraints on competition ("as competition becomes increasingly transnational, so do restraints on competition"):[7] companies which can no longer fall back on artificially sealed off markets and, in particular, on protective tariffs, could then try to denude (world) trade liberalisation of its contents by replacing governmental market access barriers with private ones in order to obstruct competition from imports; they could perhaps threaten a collective boycott of traders including foreign products in their production range;[8] they could create barriers to market access along the lines of the Japanese *Keiretsu*[9] and justify it by pointing at intense horizontal competition; they could abuse proprietary rights or patents for geographic market segmentation[10] and they could obstruct third-party market access with the aid of their essential facilities.[11]

International trade law which, according to the preamble of the WTO Agreement,[12] aims at "the substantial reduction of

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1 Concept: *Rauscher*, Internationales Privatrecht, Heidelberg (D), 1999, at 1.

2 See *Meessen*, Völkerrechtliche Grundsätze des internationalen Kartellrechts, Baden-Baden (D), 1975, at 11.

3 Concept: *Behrens*, Elemente eines Begriffs des Internationalen Wirtschaftsrechts, in: RabelsZ, 50, 1986, at 483.

4 According to *von Weizsäcker*, Logik der Globalisierung, Göttingen (D), 1999, at 47 et seq.

5 On the concept, see *Wiesenthal*, Globalisierung, in: *Brunkhorst & Kettner* (eds.), Globalisierung und Demokratie, Frankfurt (D), 2000, at 21.

6 For details, see *Wins*, Eine internationale Wettbewerbsordnung als Ergänzung zum GATT, Baden-Baden (D), 1999, at 68.

7 *Gerber*, The US-European Conflict over the Globalization of Antitrust Law: A Legal Experience Perspective, in: 34 New England L Rev, at 123, 125.

8 For an example, see UNCTAD, TD/B/COM.2/CLP/9 (official document) dated 7 June 1999, "Competition Cases Involving More than One Country" 21; *R J Reynolds* v *BAT* (Kenyan tobacco industry); *Wins*, op. cit., at 46.

9 *Basedow*, Weltkartellrecht, Tübingen (D), 1998, at 42; *Wins* (see above, fn. 6), at 47 with further references.

10 *Wins*, op. cit., at 49 et seq.

11 *Wins*, op. cit., at 51; more generally, *Schwintowski*, Der Zugang zu wesentlichen Einrichtungen, WuW, 1999, at 842.

12 Agreement of 15 April 1994 to Set Up the World Trade Organisation, BGBl. 1994 II, at 1625; OJ 1994 L 336/3.

tariffs and other barriers to trade," therefore runs the risk of being eroded by a "privatisation of protectionism".[13] Backed up by private market isolation, the State pleads without compunction for liberalisation of international trade. It opens up foreign markets for domestic companies *without* putting protection of the domestic market in jeopardy.[14] It therefore projects a cooperative image on the outside but condones behind the scenes a private sealing off of the market. The lack of effective international antitrust law is, from this point of view, an open flank in the side of liberalisation of (world) trade; only a coherent legal regime of international trade law and international antitrust law excludes continuation of protectionism with other means and thus ensures comparative cost advantages.[15]

International antitrust law must nonetheless react not only to the danger of privately re-territorialised markets but also to global market integration which can be read out of the market clout of "global players" and out of the wave of international mergers. This integration process admittedly does not entail a single "universal" market;[16] there will continue to be local, national and regional markets; but it confronts international antitrust law with new challenges:

- The corporate strategy of "global players" does not only affect individual markets, but all (geographic) markets, that is, they are ubiquitous. A classic example is the market behaviour of *Microsoft*.[17] In the *Microsoft* decision (findings of fact) it is said that *Microsoft* has abused its market dominating position of the (world) market for PC operating systems in order to monopolise the market for internet browsers. Such abuse has effects not only in the US, but *everywhere* so that with a view to international antitrust law the questions arises whether foreign cartel authorities should intervene or take over the results of the US antitrust proceedings.

- The international merger wave (e.g. *Daimler/Chrysler*)[18] is due to the fact that corporations are redefining their optimal size on global markets and can grow faster externally, that is with mergers, than internally.[19] International antitrust law must in particular answer the question of whether and how it should react to progressing market concentration.

- Additionally there are international corporate networks:[20] *General Motors, Daimler/Chrysler* and *Ford* have announced that they are setting up a joint e-commerce platform "Covisint" for automotive parts[21] looking for an annual gross of US$ 240 billion;[22] with such an electronic purchasing market, the danger of abuse of demand clout is obvious, in particular the danger of discrimination against individual suppliers. Going beyond this, the joint infrastructure as an (unintended) market information method could be the breach in defences making horizontally coordinated market action possible.

International antitrust law must finally also react to export cartels some of them out (aggressively) for the conquest of foreign markets, some of them seeking (defensively) equality with established market players.[23] In particular, aggressive export cartels endanger competition: if they succeed in building up a market dominating position on the import market, then they can skim off monopoly profits and exploit foreign demand.[24] US antitrust law has in the light of these experiences even provided special privileges for (pure) export cartels;[25] in the interests of export promotion,[26] it provides a "certificate of review" which companies can apply for and in which the Secretary of Commerce makes a positive finding that the owners engage in a "pure" export cartel and that sanctions based on the Sherman Act are categorically barred.[27] The German legislator initially adopted the privilege for export cartels from US law,[28] but later rescinded it without any replacement.[29] "Export cartels," as the explanation[30] went, "have, in view of efforts worldwide to dismantle State and private competition restraints, no more raison d'être."[31]

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13 See only *Immenga*, in: *Immenga, Möschel et al.* (eds.), *FS für Mestmäcker*, Baden-Baden (D), 1996, at 593, 594.

14 *Wins* (see above, fn. 6), at 20.

15 Liberalisation of (world) trade is primarily based on *David Ricrado's* "Theory of Comparative Cost Advantages;" see *Ricrado*, The Principles of Political Economy and Taxation, 1817; hereon, *Mankiw*, Principles of Economics, 1998, at 50 et seq., 54; likewise: *Weiss*, From World Trade Law to World Competition law, in: 23 Fordham Int'l L.J., 2000, at 250, 256: "In combination, potential welfare gains derived from comparative advantage are made safe against anti-competitive erosion."

16 *Wiesenthal*, *supra* note 5, at 31.

17 US District Court for the District of Columbia, 3 April 2000, No. 98-1232-33, *US* v *Microsoft Corp*; see hereon, *Fleischer & Doege*, Der Fall United States v Microsoft, in: WuW, 2000, at 705.

18 Survey in UNCTAD, TD/B/COM.2/CLP/9, ibid., at 4-18 (Economic Concentration); see also: Monopolkommission, 13, Hauptgutachten: "Wettbewerbspolitik in Netzstrukturen," 1998/99, under VII "Megafusionen," Summary, at 99, 102, in: http://www.monopolkommission.de.

19 See only *Wolf*, Wettbewerbspolitik im Zeichen der Globalisierung, lecture on 9 January 1999 (University of Ulm), http://-www.bundeskartellamt.de/rede_9.1.1999.html.

20 See *Lang,* Die virtuelle Fabrik, Neue Formen überbetrieblicher Unternehmenskooperation, in: BB, 1998, at 1165, 1166 with further references.

21 Der Spiegel: http//www.spiegel.de/wirtschaft/maerkte/-0,1518,66529,00.html; for details, see http://www.bundeskartellamt.de/25.7.2000_auto.html; http://www.covisint.com. The Federal Cartel Office granted release for the establishment of Covisint on 25 September 2000.

22 Der Spiegel: http://www.spiegel.de/wirtschaft/maerkte/0,1518,-70182.00.html.

23 *Wins*, op. cit., at 52 et seq.

24 *Wins*, op. cit., at 53. Defensive export cartels can in exceptional cases promote competition if they succeed in overcoming market access restrictions on the import market, see *Wins*, op. cit., at 68.

25 15 USCA, sections 61-65 (Webb-Pomerene Act): section 62, Export Trade and Antitrust Legislation: "Nothing contained in the Sherman Act (...) shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade (...) provided such association (...) is not in restraint of trade within the US."

26 15 USCA, section 4011, Export Trade Promotion.

27 15 USCA, section 4016, (a) Protection from Civil or Criminal Antitrust Actions.

28 *Scherf*, in: Frankfurter Kommentar (Cologne, 45th supplement), § 6 GWB, line 5 with further references.

29 Sixth revision of the Act against Restraint of Competition!

30 Explanation in Government draft bill, WuW special issue, 1998, at 66; a survey of the Sixth Revision of the Act against Restraint of Trade in *Bechtold*, GWB-Kommentar, Munich (D), 2nd ed., 1999, introduction, para. 14 et seq.

31 Nonetheless, the irony is in the fact that (pure) export cartels have since then been left entirely unaffected by the ban on cartels (Article 130(2) of the Act against Restraint of Competition).

II. Inadequacies of international antitrust law

Heretofore, antitrust law has primarily relied on conflict and cooperation strategies and is therefore not in a position to react appropriately to "global players," international mergers, new forms of international corporate networks and the creation of national export cartels, in other words, not in a position to cope with globalisation.

1. Inadequacies in conflict strategy

a. State practice at a glance

"Conflict strategy" relies on dealing with international restraints on competition by means of conflict-of-laws measures at national level: almost every State extends its antitrust law to foreign acts having effects on domestic markets (effect principle).[32] It conducts merger control based on domestic law in case of international mergers having domestic effects[33] and accepts the risk of potential sovereignty conflicts due to extraterritorial application. The State applies its antitrust law, however, *only* to actions having effects inside the country; pure export cartels are therefore subject to a foreign cartel prohibition, but certainly not a domestic one.[34]

US court practice laid the basis for this "effects doctrine" ("actual and intended effects on US commerce") in the Alcoa[35] decision, but later significantly softened it in the Timberlane Lumber case:[36] "The (substantial) effects test by itself is incomplete because it fails to consider other nations' interests;" "as a matter of international comity and fairness" it would require a "jurisdictional rule of reason" or "balancing test" which must take into account, among other things, the international conflict potential, nationality, headquarters and the intention of companies involved as well as the actual focus of measures controlled. The Supreme Court nonetheless later decided once again in the terms of pure doctrine ("Hartford Fire Insurance").[37] The US legislator inserted the effects test into the Sherman Act and directed its attention at "direct, substantial and reasonably foreseeable effect[s]," i.e. reasonably foreseeable domestic effects;[38] US Department of Justice and Federal Trade Commission (FTC) implement these formulas in ongoing practice but also take comity principles into consideration.[39]

The European Commission likewise follows the effects principle, as it did inter alia in the *Boeing-McDonnell Douglas* case.[40] The European Court of Justice, on the other hand, formally invokes the principle of territoriality,[41] but does not determine the geographic scope of EC antitrust law applicability via the creation but via the conduct of a cartel;[42] for example, it scrutinised a price cartel of cellulose manufacturers, all of whom were headquartered outside the Community, against the provisions of Article 85 of the EC Treaty (older version);[43] it sufficed, the Court found, that the manufacturers sold directly to customers domiciled in the Community.[44]

German cartel law is applicable under Article 130(2) of the Act against Restraint of Competition to all restrictions on competition having effects in the jurisdictional scope of the Act even if caused from outside of that jurisdictional scope. The Federal Supreme Court[45] demands an actual[46] and noticeable[47] impairment of domestic competition.[48] The Federal Cartel Office has in the meanwhile published a fact sheet on "domestic effects" in merger control[49] and clarified that foreign associations also have domestic effects "if the structural prerequisites for competition inside the country are affected."[50]

b. Critique

An international antitrust law, based on the effects doctrine, relying (solely) on unilateral conflict resolution by means of a

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32 See *Rehbinder*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht, Munich (D), 1997, vol. I E, Introduction, para. 64 that notes that there is an "established State practice" of the effect principle; *Basedow*, op. cit., at 11, 20 (reference to MERCOSUR protocol No. 18/96); see also "The (UN) Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices of 22 April 1980 (WuW, 1982, at 32) (*adverse effects* on their trade and economic development).

33 With regard to the German Act against Restraint of Competition, see *Wiedemann*, in: *Wiedemann* (ed.), Handbuch des Kartellrechts, Munich (D), 1999, § 5, para. 23; for a critical view, see *Bechtold* (see above, fn. 30), § 130, para. 12: "Foreign structural change which per se cannot be subject to German jurisdiction."

34 *Wiedemann*, op. cit.

35 United States Court of Appeals, Second Circuit, 12 March 1945; 148 F 2d at 416., *United States* v *Aluminum Co of America (Alcoa)*; but see also ECJ 27 September 1988, (Cellulose) SR, paras. 89, 104, 114, 116, 117 and 127 through 129/85, *A Ahlström Osakeyhtiö et al.* v *Commission of the European Communities*. (Final pleading of Advocate General., *Darmon*, of 25 May 1988) with extensive presentation and evaluation of US court practice.

36 NT & SA (United States Court of Appeals, Ninth Circuit, 27 December 1976; 549 F 2d at 598, *Timberlane Lumber Co* v *Bank of America*, cert. denied, 472 US 1032).

37 Supreme Court of the United States, 28 June 1993; 509 US 764, 113 S Ct 2891, 125 L Ed 2d at 612, *Hartford Fire Insurance Co v California*; see hereon *Hay*, in: RabelsZ, 60, 1996, at 303. The suit was brought, *inter alia*, against British re-insurers that had supposedly agreed upon a "conspiracy in restraint of trade" in order to change forms used for commercial liability insurance and in that way limit their liability risk.

38 Article 7 of the Sherman Act, USC Sec 6a (Foreign Trade Antitrust Improvements Act of 1982).

39 See US Department of Justice and Federal Trade Commission, "Antitrust Enforcement Guidelines for International Operations," http://usdoj.gov/atr/public/guidelines/internat.htm, 1995, 3.12, 3.2.

40 Decision of the Commission of 30 July 1997 on the compatibility of a merger with the Common Market and the EEC treaty, No. IV/M.877, *Boeing/McDonnell Douglas* (97/816/EC), OJ L 366/16 of 8 December 1997; on the political background, see *Luz*, The *Boeing/McDonnell Douglas* Merger: Competition Law, Parochialism and the Need for a Globalised Antitrust System, in: 32 Geo. Wash. J. Int'l L. & Econ., at 155, 156 et seq., 163; *Peck*, Extraterritorial Application of Antitrust laws and the US-EU Dispute over the *Boeing* and *McDonnell Douglas* Merger: From Comity to Conflict?, in: 35 San Diego L. Rev., 1998, at 1163.

41 ECJ, *supra* note 35, para. 18.

42 ECJ, *supra* note 35, para. 16.

43 ECJ, *supra* note 35.

44 ECJ, *supra* note 35, paras. 12, 17; *Basedow*, op. cit., at 15, 18 et seq. speaks of "pseudo-territoriality."

45 BGH, decision of 12 July 1973, in: WuW (1276), 1972, at 705, "Oil Field Piping," = BGHSt, 25, at 2208 et seq.

46 *Bechtold*, op. cit., § 130, para. 14.

47 BGH WuW/E, 1613, 1615, Organic pigments; *Bechtold*, op. cit., § 130, para. 15; *Wiedemann*, op. cit., para. 24.

48 BGH (see above, fn. 45).

49 Federal Cartel Office: http://www.bundeskartellamt.de/Inlandsauswirkungen.pdf, 1999.

50 Federal Cartel Office (see above, fn. 49), at 2 (see below 12).

network of national cartel laws must be rejected for several reasons:

aa. Encumbrance with transaction costs

A network of national antitrust laws entails a significant cost burden for companies that then have to trim their (international) commercial operations to a series of different antitrust laws and accept the risk of parallel not coordinated antitrust cases.[51] The problem is exacerbated by every new antitrust law system: the more States that introduce antitrust legislation and react to international interdependence of markets with the effects doctrine,[52] then all the higher are the compliance costs[53] of the market players.[54] These transaction costs are ultimately borne by the customer.

bb. Impairments of global welfare

Moreover, the effects doctrine in the case of a (formalised) merger endangers global welfare.[55] A merger is ambivalent from an antitrust point of view; on the one hand, it reduces the number of market players so that competitive pressure falls and prices rise; but on the other hand it entails nonetheless efficiency benefits (economies of scale[56] or of scope) that can compensate or over-compensate the price increases. The effects doctrine hardly takes this complexity into account. In cases where price increases impinge on the consumers of one State but where the efficiency benefits occur in another State, the consumer State will even prohibit the merger if the efficiency benefits outweigh the price increases. In other words: the merger fails to take place even though it would have had positive effects on (global) balance.

cc. Inefficiency, legal uncertainty

Added to this is the inefficiency of the effects doctrine, something that is obvious, especially with export cartels. The market State may admittedly apply its antitrust law; but it typically possesses no adequate information about the (purported) cartel[57] and cannot, due to a lack of sovereign jurisdiction in the action State, enforce any claims to information. Moreover, the effects doctrine entails considerable legal uncertainty on the part of companies with an internationally oriented business.

dd. Conflict potential

One-sided antitrust law strategies must be rejected in view of their potential for political conflict that, as an example, in the case of the *Boeing/McDonnell Douglas* case[58] expressed itself in the US threat to cancel landing licences for European airlines if the EC Commission intervened.[59]

2. Inadequacies in cooperation strategy

a. State practice at a glance

The European Community and the United States concluded in the autumn of 1991, particularly in view of the potential for political conflict, a bilateral cooperation agreement.[60] In addition to notification, information and consultation[61] obligations, this agreement provides for cooperation and coordination in enforcement activities.[62] Cooperation is based on the "positive comity" provisions of Article V.[63] According to it, in cases where a domestic action also (!) has effects on a foreign market, the State of action declares its readiness, upon the request of the (foreign) market State, to intervene against the (domestic) act. The parties then additionally on 4 June 1998 concluded a (supplemental) agreement (not relating to mergers) "on the application of positive comity principles",[64] also containing a "negative comity" clause in Article VI. According to the latter, the parties, even in cases where a (foreign) act has direct, significant and predictable domestic effects, will waive, under certain circumstances, their legal application claims and recognise the priority of the foreign antitrust action.

b. Critique

In literature, bilateral cooperation agreements are overwhelmingly given a positive appraisal;[65] however, there are, in addition to general objections to conflict-of-laws arrangements in antitrust, critical voices as well: bilateral cooperation agreements have the danger of abuse of power[66] to them.[67] *Immenga*[68] at a symposium at Humboldt University pointed out that the USA have unofficially (!) justified their pleas for a network of bilateral cooperation agreements with the fact that

51 See, *inter alia*, *Brittan*, The Need for a Multilateral Framework of Competition Rules, http://www.oecd.org/daf/clp/trade, at 1 and 2.

52 See hereon, *supra* note 39, n.16, at 32.

53 *Gerber*, *supra* note 7, at 123, 126.

54 Ibid.

55 See *Guzmann*, Is International Antitrust Possible?, in: 73 NYU L Rev 1501 (1998) with a large number of case examples and analyses.

56 On the concept, see *Mankiw*, op. cit., at 278.

57 See *Brittan*, *supra* note 51, at 2 ("vital evidence is often located abroad").

58 Ibid.

59 *Wins*, op. cit., at 82.

60 Agreement between the Government of the United States of America and the Commission of the European Communities regarding the Application of their Competition Laws, OJ 1995 L 95/45; (corr.) OJ 1995 L 131/38; http://www.europa.eu.int/comm/dg04/interna/95145b.htm.

61 Articles II, III and VII.

62 Article IV.

63 Article V, 2; used for the first time in the *Sabre* v *Amadeus* case, see Report of the commission to the Council and the European Parliament on Implementation of the Agreement between the European Communities and the Government of the USA on the Application of their Competition Rules (1 January - 31 December 1998) of 2 April 1999; COM 04-1998-01931-00-EN-TRA-00 (EN) FL.

64 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, OJ 1998 L 173, at 28, dated 18 June 1998 (http://www.sdoj.gov/atr/-public/international/docs/1781.htm).

65 For a survey, see Report of the Commission, ibid.

66 In this vein *Wood*, Is Cooperation Possible?, in: 34 New Engl. L. Rev., at 103, 106, on cooperation in the individual case and the lack of any "equality of bargaining power".

67 See B II, 1 b.

68 *Immenga*, Konfliktlösung im Internationalen Kartellrecht, Paper presented to the Fifth International Business Colloquium (Crossroads of International Business and Trade Law) on 5 May 2000 at Humboldt University.

the US as the strongest trading nation would always be strong enough to enforce their interests at the bilateral level. In the debate about a reform of international antitrust law, it is thus a question of making political power more relative. Added to this is the fact that bilateral cooperation agreements only apply inter partes, that international restrictions of competition however typically have their effects in more than just two States; a bilateral solution is thus inefficient since it does not adequately cope with the complexity of real-life conditions.

C. A survey of reform proposals

I. Basic principles

In accordance with all that, there is a need for reform of the international antitrust law regime that overcomes the dichotomy of "all politics is local" and "all economics is international"[69] and avoids the inadequacies of the conflict-of-laws solution. Reform's core problems are the differences in national antitrust law systems and traditions:[70] in industrialised countries, antitrust law is commonly aimed at protecting the free market, in transition countries at market economy reforms and in developing countries at protection of manufacturers, regional development and export promotion.[71] Added to this is a disparate and constantly changing understanding of antitrust law even in leading industrialised countries ranging from the pure efficiency model of the Chicago School[72] up to alternative integration models that also take interests of industrial and social policy into consideration.[73]

II. Previous reform proposals

The reform proposals for a future international antitrust law are legion[74] and straddle the entire spectrum of conceivable reforms featuring convergence proposals on one side and coordination proposals on the other:

1. Convergence

The convergence model relies on an open self-regulating harmonisation process that is supposed to lead gradually to legal adaptation and reduce the potential of international conflict.[75] Convergence is supposed to come about through international dialogue, through the "soft law" of international organisations and through an "invisible hand" of rationality; gradually, as the American advocates of convergence argue, all States will take over the superior US antitrust law as a point of convergence.[76]

2. Coordination

Partisans of the coordination model by contrast propose an international antitrust law agreement providing for the setting up of an international antitrust authority and setting certain (minimum) antitrust standards.[77] The well-known coordination project, the Draft International Antitrust Code (DIAC) of 27 July 1993[78] was written by *Fikentscher, Immenga* and others. DIAC is designed to be a "plurilateral" antitrust agreement[79] that is supposed to fit into the regulatory structure of the Marrakesh Agreement on the establishment of the WTO; plurilateral instead of multilateral, that is, optional, only binding on the members that have ratified it.

a. Contents of DIAC

DIAC is based on five regulatory principles:[80] (1) *substantive national law*; in the interest of State sovereignty, it provides no immediately applicable standard law but only a (limited) "harmonisation of national antitrust laws from above";[81] (2) *national treatment*; it treats domestic and foreign companies equally[82] so that, for instance, creating privileges for export cartels and discriminating foreign companies is done away with on a domestic market;[83] (3) *minimum standards*; it respects differences in national antitrust law provided that a certain minimum protection of competition is ensured;[84] (4) *international procedural initiatives*; it provides for an international antitrust authority ensuring compliance with minimum standards of support for national courts[85] and it implements an international antitrust panel whose decisions are to be legally binding in case of disputes among States; (5) *restriction to cross-border situations*; it limits itself to international cases in which more than one signatory is affected, either as action State or market State.[86]

DIAC, however, does not include any catalogue of general legal principles but concrete substantial-law rules, e.g. an unambiguous ban on cartels with a view to so-called hard-core cartels.[87]

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69 *Jackson*, Global Economics and International Economic Law, in: The Jurisprudence of GATT and the WTO, Cambridge (GB), 2000, at 4.

70 *Weiss*, *supra* note 15, at 250: "Competition culture is a national culture or at best a regional one."

71 For details, see *Wins*, op. cit., at 24-27.

72 For a survey, see *Schmidt*, Wettbewerbspolitik und Kartellrecht, 6th ed., Stuttgart (D), 1999, at 19-24.

73 See Section 84 (4) of the British Fair Trading Act (1980).

74 For a survey, see *Wins*, op. cit., at 115 et seq. (his own reform proposal at 137 et seq); see also, *Basedow*, op. cit., at 84 et seq.

75 According to *Gerber*, *supra* note 7, at 123, 131 et seq., convergency solutions are viewed very favourably, particularly in the US. More sceptically, op. cit., at 134 et seq.

76 Ibid.

77 For details, see *Gerber*, op. cit., at 137-140.

78 *Fikentscher/Immenga* (eds.), Draft International Antitrust Code, Baden-Baden (D), 1994.

79 *Fikentscher/Drexel*, in: *Fikentscher/Immenga* (eds.), op. cit., at 35, 29.

80 *Fikentscher/Heinemann*, in: *Fikentscher/Immenga* (eds.), op. cit., at 19, 25-28; *Fikentscher/Drexel*, op. cit., at 35, 40-46.

81 *Wins*, op. cit., at 119 et seq.

82 Article 2, section 2 (b) of DIAC, "(...) Each party shall apply all rules and principles applicable to national antitrust cases under domestic law immediately and unconditionally to all interstate antitrust cases (...)."

83 *Fikentscher/Drexel*, op. cit., at 35, 43.

84 Article 2, section 2 (a) of DIAC: Level of Antitrust Legislation.

85 Article 19 of DIAC: The International Antitrust Authority.

86 Article 3, section 1 of DIAC: Scope of Application.

87 Article 4 [Horizontal Restraints] (1) "Agreements, understandings and concerted practices (...) between or among competitors that fix prices, divide customers or territories, or assign quotas are illegal."

b. Assessment of DIAC

Reactions to DIAC have been divided: Criticism has been primarily directed at the ambitious regulatory approach; the minimum standards basically involve maximum standards that are said to be politically unenforceable;[88] the setting up of an international antitrust authority that can take States to court (under domestic law) would likewise be unrealistic. In addition, key DIAC concepts such as "market clout" and "relevant market" are not defined so that there is a lack of "guidelines for uniform legal application."[89]

But DIAC still remains indicative: it solves on the basis of generally recognised antitrust law standards the problem of legal uncertainty and the transaction costs that accompany disparate national antitrust laws. In addition, it has found its proper regulatory siting with its linkage to the Marrakesh Agreement. DIAC, however, can be attacked from another angle: It portrays the (purported) minimum standards as concrete rules so that it ultimately aims at legal standardisation. It thereby eliminates the system competition that comprises the ability of law to innovate via parallel experimental processes and mutual learning experiences.[90]

D. My own reform proposal

I. Basic idea

The discussion thus far has formed the contours of the "right" international antitrust law without translating it into a conclusive regulation model: international trade and antitrust law are two sides of the same coin so that any reform must be pitched at a coherent and self-consistent (world) economic order. The future international antitrust law must allow system competition[91] *and* limit international conflict potential; it must be pitched at a balance between national sovereignty and the effectiveness of international regulation; it must have the necessary flexibility to take different developmental stages of a market economy into consideration and it must, in the interest of effective structures, be built on private-law and (subsidiarily) public-law instruments and not on supranational ones.

These considerations speak in favour of *interactive regulation* on the basis of DIAC consisting of four components: (1) of an international antitrust law agreement providing for substantial-law principles to protect the free market *and* cooperation among the treaty States on the basis of positive and negative comity; (2) of a model law on the basis of the UN draft "Elimination/Control of Restrictive Business Practices" (of 20 February 1998); (3) of international jurisprudence that will gradually consolidate into antitrust common law and (4) of discourse on international standards of merger control.

The concept of "interactive"[92] has a double meaning: reform of international antitrust law should be structured as a permanent, open-ended dialogue not limited to the discussion of an international antitrust law agreement but institutionalised in the concept of a dispute settlement mechanism. This dialogue should promote not only the development of a common frame of reference but also the internationalisation of external knowledge gained in system competition. Reform is thus conceptualised as an *interactive* reform *process*. But regulation should also be interactive in a figurative sense: the components outlined should not be left to stand in isolation alongside each other but should be legally interwoven with each other: The international antitrust law agreement should, for example, make an irrefutable assumption that a State that implements the model law in its domestic law has met its substantial-law obligations under the antitrust law agreement.

II. Components

1. An international antitrust law agreement

The first component is an international antitrust law agreement following the pattern of the Havana Charter[93] that includes several substantial-law principles on protecting the free market *and* that provides for cooperation by the treaty States on the basis of *comitas gentium*.

a. Regulatory siting

International antitrust law must be integrated into the WTO regulatory system:[94] the Havana Charter setting up an international trade organisation (ITO) had already contained a (non-ratified) chapter on "restrictive trade practices". The lack of an international antitrust law is, seen from an historical point of view, an unscheduled gap in the international trade law regime. The Uruguay Round acknowledged this antitrust law deficit in the GATS[95] and TRIPS[96] agreements[97] but did not rectify it. An additional argument for siting it under WTO regulation lies in the experience of the European Community[98] and the fact that the WTO already operates a dispute set-

88 *Klodt*, Wirtschaftsdienst, vol. 75, No. 10, at 556, 560; quoted in *Wins*, op. cit., at 123.

89 *Wins*, op. cit., at 123.

90 *Kerber*, Rechteinheitlichkeit und Rechtsvielfalt aus ökonomischer Sicht, in: *Grundmann* (ed.), Systembildung und Systemlücken in Kerngebieten des Europäischen Privatrechts, Tübingen (D), 2000, at 67, 97.

91 Similarly, Monopolkommission, 27th Report, "Systemwettbewerb," 30.

92 (Primary) interaction is, according to *Fassler*, Was ist Kommunikation, Munich, 1997, at 165, 167, an interpersonal face-to-face exchange by means of (para-) linguistic information bearers.

93 Havana Charter on the Setting Up of an International Trade Organisation (ITO) of 24 March 1948, Havana Charter, in: Encyclopaedia of Public International Law 8, 1985, at 20 et seq.

94 Cf. for a different view: *Meesen*, Das Für und Wider eines Weltkartellrechts, WuW, 2000, at 5, 16, citing the danger of a world Leviathan.

95 General Agreement on Trade in Services of 15 April 1994, BGBl. 1994 II, at 1643; OJ 1994 L 336/190.

96 Trade Related Aspects of Intellectual Property Rights of 15 April 1994, BGBl. 1994 II, at 1730; OJ 1994 L, at 335/213.

97 See Article IX, GATS: Business Practices; Section 8, TRIPS: Combating Anti-Competitive Practices in Contract Licences, in particular Article 40; for more detail, see *Immenga*, in: *Fikentscher/Immenga* (eds.), op. cit., at 16.

98 Thus *Fikentscher/Heinemann*, in: *Fikentscher/Immenga* (eds.), op. cit., at 19, 24; see also *Emmerich*, in: *Dauses*, Handbuch des EG-Wirtschaftsrechts, 1993, 1, section 5: "If the EC Treaty wishes to create

tlement understanding (DSU)[99] that is also suitable for solution of antitrust conflicts.[100]

b. The constituency to be regulated and the contents of regulation

The international antitrust law agreement, like all other WTO rules,[101] should only be addressed to the members and should only encompass international trade restrictions.[102] It should contain a canon of substantive rules oriented in content around DIAC, OECD recommendations and GATT: The members should obligate themselves, for example, to the effective struggle against hard core cartels[103] to a critical review of current sector exemptions[104] and, in analogy with Article III of GATT, to equal treatment with domestic actors.

Beyond that, the agreement should implement obligatory dispute settlement subsidiary to compensation and forbearance claims based on the model law;[105] it should adapt the rules of the Dispute Settlement Understanding (DSU) to the demands of international antitrust law[106] and should regulate antitrust authority cooperation along the lines set forth in the EC-US agreement, that is according to the general principles of positive and negative comity; it should encourage the transparency of national antitrust regimes and, in the interests of national sovereignty, dispense with having an international antitrust authority; national antitrust authorities can also make allowances for globalisation (materially) by means of adequate territorial delineation and (procedurally) by means of cooperation with other antitrust authorities.

2. Model law

The United Nations Conference on Trade and Development (UNCTAD) has drafted a (revised) "Model Law on Restrictive Business Practices (RBP)"[107] constituting an appropriate basis for discussion of a future model law; the UN draft contains, among other things, definitions of the concepts of "enterprise," "market dominating position" and "relevant market" (Article 1); it prohibits cartels particularly price/volume and territorial cartels (Article 3) and forbids abuse of a market dominating position, particularly in the form of predatory pricing, and discrimination of independent enterprises (Article 4). The UN draft is supposed to be applicable to "restrictive business practices adversely affecting domestic or international trade," and thus links with domestic and foreign effects.

The future model law could be built up on this basis. It could also extend its protection to foreign companies and in the interests of more efficient structures it could rely on private law instruments, i.e. for foreign companies meeting up with a sealed-off market it could provide domestic compensation and forbearance claims.

3. International Common Law

The international common law component is based on the idea that the (more) flexible common law[108] is better able to cope with globalisation than a codification carved in stone. Added to this is the fact that an international antitrust law agreement structured around the evolution of case law combines the civil law and common law traditions and can thus facilitate consensus on reform of the international competitive order. In its construction, the international common law could evolve through the organs of the dispute settlement body[109] which can differentiate the substantive principles of the antitrust law agreement, see to common terminology and in this way increase the predictability of differing antitrust law regimes.[110]

4. International standards for merger control

Wolf, former president of the Federal Cartel Office has suggested a "multilateral system of merger control" in the face of global concentration processes; he regrets that at the international level, the talk is about banning cartels not about international merger control, although cartels are unstable and reversible while mergers are irreversible. A "multilateral system of merger control" could be implemented by private litigation without more profoundly interfering with national sovereignty, that is by having States treat a merger that is not in conformity with the international antitrust agreement as void in civil law terms. Since a coherent design for such a merger control agreement has thus far been lacking, it will first require a legal policy debate under the aegis of the WTO. WTO's Ministerial Conference could accordingly modify the

a genuine internal market by eliminating all government trade barriers (...) then it will have to (...) see to it that government trade barriers are not replaced by private ones."

99 For details, see *Petersman*, The GATT/WTO Dispute Settlement System, London (GB), 1997.

100 See also *Jackson*, The World Trade Organisation: Watershed Innovation or Cautious Small Step Forward?, in: The Jurisprudence of GATT and the WTO, Cambridge (GB), 2000, at 399, 401, who emphasises the WTO's development potential with a view to "flexibility for future inclusion of new negotiated rules".

101 See Report of the DSU Panel "Japan - Measures Affecting Consumer Photographic Film and Paper" of 15 March 1998 (WT/DS44/R), at 387: "As the WTO Agreement is an international agreement, in respect of which only national governments and separate customs territories are directly subject to obligations, it follows by implication that the term measures (...) in the WTO Agreement refers only to policies or actions of governments, not those of private parties."

102 Likewise *Wins*, op. cit., at 145.

103 OECD, Recommendation concerning Effective Action against "Hard Core" Cartels [C(98) 35/FINAL] of 27-28 April 1998, http://www.oecd.org/daf/clp/Recommendations/REC4COM.htm.

104 OECD, Recommendations of the Council on Competitive Policy and Exempted or Regulated Sectors [C(79)155(Final)] of 25 September 1979, http://www.oecd/org/daf/clp/Recommendations/REC4COM-.htm.

105 See Article 1(1) in connection with Appendix 1 of DSU.

106 See Article 1(1) in conjunction with Appendix 2 of DSU; thus, for instance, the reciprocal sanctions mechanism (cf. Article 3(7) at 5, Article 22 DSU) is not an adequate means to protect competition.

107 UNCTAD, Trade and Development Board, Continued Work on the Elaboration of a Model Law or Laws on Restrictive Business Practices, (TD/B/RBP/81/Rev.5) of 20 February 1998.

108 Here used as a contrast to "statute law"; cf. *Henrich*, Einführung in das englische Privatrecht, 2nd ed., Darmstadt (D), 1993, at 2.

109 Article 3(2) DSU, however, establishes clear boundaries for the evolution of case law.

110 See also *Weber Waller*, An International Common Law of Antitrust, in: 34 New Engl. L. Rev., 1999, at 163.

mandate of the Working Group on the Interaction between Trade and Competition Policy.

E. Summary conclusion

Interactive regulation allows for system competition because, unlike DIAC, it is aimed not at *one* obligatory law but at a market for several dispersed antitrust law systems under which the optional model law constitutes but one action option among several. The obligatory antitrust law agreement integrates system competition into a normative framework; it contains in the sense of a meta-legal system[111] the "rules of the game for system competition" and intervenes in cases where markets fail, in particular if the system players are caught in a "prisoners' dilemma" as they are with their treatment of export cartels.[112] It can also be added that interactive regulation reduces the potential of political conflict: affirmation of standard antitrust law principles and cooperation of the basis of positive and negative comity rules prevents conflicts from starting in the first place; the dispute settlement process entails rationalisation and de-politicisation of conflicts. In addition, dispute settlement allows for a constructive dialogue that will promote compatibility and indirectly the convergence of different antitrust systems as well.

[111] For the general concept, see *Kerber*, *supra* note 90, at 67, 82 et seq.

[112] See *Axelrod*, The Evolution of Cooperation, Munich/Vienna (D/A), 1995, at 6 et seq.

On the relation of competition cases before the Commission and before national courts

ECJ 14 December 2000 – C-344/98 – *Masterfoods*

In competition cases, besides Commission jurisdiction there is simultaneously a competing competency of national courts in judging whether market players' competitive behaviour is in accordance with the rules of European competition law. The Commission and the national courts of course act to some extent with different objectives and have different legal resources and instruments at their disposal for implementing the tasks allotted to them. The delineation of competence and concrete coordination of decisions to be made by them in parallel actions or possibly moving in opposite directions with a competition issue is not always that simple.

The ECJ has established basic specifications on this, inter alia in the *Delimitis*[1] decision. According to that decision, competition regulation by the Commission is basically given precedence in relation to assessment of competitive behaviour by courts of the cases brought before them for decision. The ECJ justified this with the fact that the Commission and the national courts had different tasks and objectives in European competition law. Application of Articles 85 and 86 (now Article 81(1) and 82) of the EC Treaty is admittedly incumbent on both the Commission as well as on national public authorities and courts. Nonetheless, conduct and orientation of the Community's competition policy are exclusively a matter for the Commission which is, not least of all, responsible for issuing decisions on implementation of Article 85(3) (now Article 81(3)) of the EC Treaty. To avoid decisions running in opposite directions which would be in contradiction to the general principle of legal certainty, national courts are consequently obligated to loyal compliance with the Commission's decision making precedence. If in a specific case the possibility of such a contradictory ruling appears likely, then the national court may suspend the case brought before it for decision until the Commission has made a decision or it may in turn refer the legal issue to the ECJ for a preliminary ruling.[2] A more concrete elaboration came about in 1993 in the "Commission Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty."[3] Pursuant to the efforts at reform presently being discussed, the concurrent jurisdiction of the national courts should in future also be extended to the examination of the adherence to Article 85(3) (now Article 81(3)) EC Treaty.[4] Yet, the obligation of the national courts to cooperate loyally with the Commission shall remain unchanged also in the future. As a result, this issue will continue to be of interest in the ongoing discussion.

In the *Masterfoods* decision printed here below, the ECJ has once again dealt with this issue. The Irish Supreme Court had submitted a case in which a competition question had already, in the context of litigation conducted before the national courts, resulted in the first and as yet non-confirmed decisions before they were taken up and taken over by the Commission. In particular, an interlocutory injunction had already been granted and then confirmed through a trial court judgment before the matter was submitted to the Commission which decided in the opposite direction. An appeal was brought against the Commission's decision before the Court of First Instance; enforcement of the Commission decision was suspended pending decision by the Court. The Irish Supreme Court which, in turn, had to decide on an appeal lodged against the judgment of the Irish court was therefore confronted by the question of whether it was at all allowed to make any ruling in the matter under these circumstances. Moreover, the factual situation now brought about by the interlocutory injunction was problematical. Thus the question was: Does the obligation of national courts to loyal compliance with the Commission's decision making prerogatives set down in the *Delimitis* case require rescinding the injunction

[1] ECJ 28 February 1991 – C-234/89 – *Delimitis*.

[2] ECJ, *supra* note 1, paras. 43 et seq.

[3] OJ 1993 C 39, at 6.

[4] See hereon also the conference report of *Jonlet*, below in this issue p. 205.