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International Antitrust: From Extraterritorial Application to Harmonization

Jürgen Basedow*

I. THE WORLDWIDE BOOM OF COMPETITION LAW AND ITS HARMONIZATION

One of the conspicuous features of law and legal thinking in the recent past is the proliferation of legislation which purports to protect competition against private restrictions. Today, more than eighty countries are said to have some kind of competition law, and more than two-thirds of these statutes took effect during the past ten years.¹ While competition policy and antitrust law were concomitant with highly developed economies until ten years ago, they are spread all over the world today. Competition statutes have been enacted in Latin America,² in the former Soviet Block³ and in the Tiger States of Southeast Asia.⁴ Even in the Arab world, competition law and policy are making some progress.⁵ The worldwide trend towards competition law can, of course, easily be explained by the breakdown of the socialist economies ten years ago. Only one of the two traditionally competing models of economic order—competition and central administration—has survived, and the nations are now in a hurry to equip their legal systems with the standard outfit of successful market economies.

The increase in the number of competition statutes is also favored by the continuing liberalization of international trade, as evidenced by the Agreement establishing the World Trade Organization of 1994 and its annexes. As trade

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1. Cf. Robert Pitofsky, *Competition Policy in a Global Economy—Today and Tomorrow*, J. Int'l Econ. L., 403 (1999); a similar statement can be found in Stellungnahme der Bundesregierung zum Zwölften Hauptgutachten der Monopolkommission 1996/1997 (1999), also published as Bundestags-Drucksache 14/1274 note 96. In a comparative survey completed in 1992, only 47 jurisdictions that have a competition statute are listed. See Ivo Schwartz & Jürgen Basedow, *Restrictions on Competition*, in III-35 Int. Encycl. Comp. L. 1, 134-39 (1995) (list of statutory material).

2. Cf. Rivière Marti, *La política de competencia en America Latina*, 25 *Revista de Direito Econômico*, 77, 83-84 (1997). Accordingly, eight countries (Brasil, Columbia, Costa Rica, Jamaica, Mexico, Panama, Peru and Venezuela) have enacted new competition statutes since 1990. In Argentina and Chili, older statutes already existed.

3. Cf. Tibor Varady, *The Emergence of Competition Law in (Former) Socialist Countries*, 47 *Am. J. Comp. L.* 229 (1999).

4. As to the Republic of Korea, compare Fritz Rittner, *Das Koreanische Wettbewerbsgesetz als kartellpolitisches Beispiel in Festschrift für Pfeiffer* 555 (Cologne 1988); for Taiwan, see Jiin Yu Wu, *Der Einfluß des Herstellers auf die Verbraucherpreise nach deutschem und taiwanesischem Recht* (Tübingen 1999).

5. For a first and hesitant approach, see the legislation of Tunisia, in particular Loi 91-64 du 29 juillet 1991 relative à la concurrence et aux prix, J. O. de la République Tunisienne no. 55 du 6 août 1991, amended by Loi 95-42 du 24 avril 1995, J. O. de la République Tunisienne no. 35 du 2 mai 1995, p. 976.

barriers set up by states are being removed in the course of liberalization, private companies are getting more and more exposed to foreign competition. This creates new incentives for private action designed to restrict that competition from abroad. A responsible policy for the opening of national markets must therefore go hand in hand with the enactment of statutes against private restrictions of competition. Otherwise, the former trade barriers put up by state law will be continued by private agreements.

In conjunction, the convergence of national laws and the need for antitrust statutes to supplement the liberalization of international trade give new momentum to the attempts directed at the international harmonization of competition laws. This is clearly expressed in article 9 of the Agreement on Trade Related Investment Measures (TRIMs) which forms part of annex A.1. of the WTO Agreement.⁶ Under this article, the Council for Trade in Goods established by the WTO Agreement shall review the operation of the TRIMs agreement and propose to the Ministerial Conference amendments to its text if that appears appropriate. It is explicitly provided that the Council for Trade in Goods "shall consider whether the Agreement should be complemented with provisions on investment policy and competition policy."

This announcement has given rise to an abundant literature and a vivid discussion throughout the last couple of years.⁷ There are essentially three types of objections. The first advocates a consequent extraterritorial application of national laws which would reduce the need for an international harmonization considerably.⁸ It is at this point that the following article meets with various comments of Professor Symeonides, to whom these lines are dedicated.⁹ A second type of argument questions the theoretical soundness of harmonization and favors a competition of competition statutes instead.¹⁰ A third type of criticism doubts the feasibility of antitrust harmonization and fears perhaps the emergence of a bloated international bureaucracy.¹¹ The following discussion will elaborate on these

6. The WTO Agreement is published in 1994 O.J. (L 336); for the TRIMs Agreement in particular, see 1994 O.J. (L 336) 100.

7. See Jürgen Basedow, *Weltkartellrecht* (Tübingen 1998) and the references at 185.

8. See, e.g., Diane P. Wood, *The Internationalization of Antitrust-Law: Options for the Future*, 44 DePaul L. Rev. 1289 (1995); Heinz Hauser & Rainer Schoene, *Is there a Need for International Competition Rules?*, 49 *Aussenwirtschaft* 205, 217 (1994); cf. Pierre Arhel, *Droit International de la Concurrence—s'orienter-t-on vers des Négociations?*, *Revue du Marché Commun et de l'Union Européenne* 84, 88 (1999).

9. See, for example, his comments on the *Hartford* case (*infra* note 22) in Symeonides, *Choice of Law in the American Courts in 1993 (and in the Six Previous Years)*, 42 *Am. J. Comp. L.* 599, 599-615 (1994).

10. Andreas Freytag & Ralf Zimmermann, *Muß die internationale Handelsordnung um eine Wettbewerbsordnung erweitert werden?*, 62 *RebelsZ* 38, 49 (1998); to a similar effect, see Hauser & Schoene, *supra* note 8, at 216 ("[W]e should follow a decentralized approach which allows some competition among rules.")

11. Cf. Wernhard Möschel, *Internationale Wettbewerbsbeschränkungen*, in *Festschrift für Lukes* 461, 462 (Cologne 1989); Joseph P. Griffin, *The WTO Study of the Interaction between Trade and Competition Policy: Timely and Controversial*, 3 *Int. Trade L. & Reg.* 39, 41 (1997); Wood, *supra* note 8, at 1297; John H. Jackson, *Alternative Approaches for Implementing Competition Rules in International Economic Relations*, 49 *Aussenwirtschaft* 177, 196 (1994); Hauser & Schoene, *supra*

objections. After a survey of the goals of harmonization, I will outline what can be called a pragmatic approach for future international negotiations.

II. IS EXTRATERRITORIAL APPLICATION SUFFICIENT?

The practical need for a harmonization of antitrust laws very much depends upon how effectively competition in transnational markets can be protected by national laws today. Only gaps in the protection of competition can justify the costly and time-consuming negotiations on harmonization. Such gaps may result from an overly lenient content of the substantive law, from restrictions to which its scope of application is subjected, and to difficulties in the international enforcement at the procedural level.

In the field of substantive law, there are of course far-reaching differences between competition laws like those of the United States of America or the European Union which essentially build upon prohibitions that are to be applied directly by the courts, and other jurisdictions which grant a wide discretion to administrative authorities that may intervene against abuses if they think fit to do so. The majority of states does not even allow for such an administrative intervention.¹² However, the competition laws of the majority of the industrialized nations today converge versus a western model consisting of prohibitions of abusive monopolistic behavior, cartels and concerted practices, while most legislation, for the practical implementation, provides for specific competition offenses.

Except for the problem of export cartels, deficits in the protection of competition can hardly be ascribed to differences in substantive law. The exception of export cartels is equally approved by all nations, but it clearly is incompatible with the idea of an effective protection of competition in international markets: if every nation tolerates anticompetitive behavior as long as it is directed at foreign markets, the overall intensity of competition in the world will not increase.¹³ Apart from the admission of export cartels, deficits in the implementation of competition law are rather the effect of rules on the application and enforcement in the international arena.

The scope of application of the law is by no means uniformly regulated. Four types of conflict rules can be discerned:¹⁴ strict territoriality, pseudo-territoriality, the effects principle, and the balancing approach. The territorial approach was traditionally followed by Great Britain, before that country adapted its legislation to European Community standards in 1999.¹⁵ Under the former legislation, some

note 8, at 218.

12. Compare the comparative survey presented by Ulrich Immenga in *Immenga/Mestmäcker* (eds.), *EG-Wettbewerbsrecht I* (München 1997) Einleitung D no. 1 seq., 18 seq.; Basedow, *supra* note 7, at 7-10.

13. Cf. Mitsuo Matsushita, *Competition Law and Policy in the Context of the WTO System*, 44 *DePaul L. Rev.* 1097, 1117 (1995); Ulrich Immenga, *Rechtsregeln für eine internationale Wettbewerbsordnung*, in *Festschrift für Mestmäcker* 593, 603 (Baden-Baden 1996); Möschel, *supra* note 11, at 467.

14. For a thorough treatment, compare Schwartz & Basedow, *supra* note 1, at § 36.

15. On the new British Competition Act 1998, see the contributions by Julian Maitland-Walker, *The New Competition Law Regime*; Julie Nazerali & David Cowan, *Importing The E. U. Model into UK*

territorial connection between either the acting persons or their acts and the British territory was required for the application of the British statutes. While the prevailing view in Britain was that only such a territorial approach could be reconciled with public international law, the country had to accept that anticompetitive conduct of foreign companies occurring in foreign countries, although affecting competition on the British market, could not be controlled by the application of British law. In the future, Britain will probably change her attitude and advocate the more expansive conflicts rule adopted by the European Court of Justice.

That rule amounts to an extraterritorial application of competition laws although it relies on considerations of territoriality; we may therefore speak of pseudo-territoriality. Thus, the European Court of Justice has held that there is a sufficient territorial connection between an acting company established and incorporated in a non-Member State and the European Community if a subsidiary of that company, although having distinct legal personality, is established in the European Community.¹⁶ Even if that is not the case, conduct carried out outside the Community by a foreign corporation may still be subject to Community competition law if the restrictions of competition are to be implemented within the Community.¹⁷ This approach has been characterized as an "effects principle in disguise,"¹⁸ and it comes very close to the effects principle indeed, although some differences remain.¹⁹ It appears that the view of the European Court of Justice is mainly influenced by objections pertaining to public international law. In particular, the United Kingdom repeatedly expressed the view that the pure effects doctrine has no basis recognized in international law.²⁰ The far-reaching reform of the British competition law in 1999 will perhaps stimulate a reconsideration of this issue in the Community since the United Kingdom now no longer focuses on the isolated evaluation of single anticompetitive acts as it did under the former legislation; it

Competition Law: A Blueprint For Reform Or A Step Into "Euroblivion"?; Jonathan D. C. Turner, *The U.K. Competition Act 1998 and Private Rights* and Shaun Goodman, *The Competition Act, Section 60—The Governing Principles Clause*, in 20 Eur. Compet. L. Rev. 51 (Feb. 1999).

16. Case 48/69 ICI v. Commission, [1972] E.C.R. 619 at 662.

17. Joint cases 89/65 et al. Wood Pulp, [1988] E.C.R. 5193 at 5243, considerations 16-18; on the extraterritorial application of the EC merger control regulation, see Eleanor Fox, *The Merger Regulation and its Territorial Reach: Gencor Ltd v. Commission*, 20 Eur. Compet. L. Rev. 334 (with further references).

18. See, e.g., Michael Martinek, *Das uneingestandene Auswirkungsprinzip des EuGH zur extraterritorialen Anwendbarkeit der EG-Wettbewerbsregeln*, IPRax 347, 351 (1989); to a similar effect, see Martin Schrödermeier, *Die vermiedene Auswirkung*, Wirtschaft und Wettbewerb 21 (1989). But see, Lowe, *International Law and the Effects Doctrine in the European Court of Justice*, 48 C.L.J. 9, 11 (1989); Dieter G. F. Lange & John Byron Sandage, *The Wood Pulp Decision and Its Implications for the Scope of EC Competition Law*, 26 Comm. On Mkt. L. Rev. 137, 160 (1989).

19. Cf. Schwartz & Basedow, *supra* note 1, at § 58.

20. Note no. 196 of the British Embassy at Washington, D.C., presented to the United States Department of State on July 27, 1978, 49 Brit. YBInt. L. 390 (1978). To a similar effect see Viscount Dilhorne in *Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.*, 1 All E.R. 434, 460 (H.L. 1978) ("For many years now the United States has sought to exercise jurisdiction over foreigners in respect of acts done outside the jurisdiction of that country. This is not in accordance with international law. . .").

will now rather depart from the restrictive effect that certain acts have on competition in Britain.

The third type of conflict rule is the effects principle. Its rationale is rooted in the substantive competition law which is concerned, not with the acts as such, but with their effect on competition. Therefore, the appropriate connecting factor for the application of a competition statute is not the territorial link of an act or of the actor, but the effect of those acts on the competition of the home market. For the first time, the effects principle has been adopted in the famous *Alcoa* case in the United States,²¹ and it has recently been confirmed by the United States Supreme Court. In *Hartford Fire Insurance Company v. California*, the Court held it to be "well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States,"²² such effects have to be "direct, substantial, and reasonably foreseeable" in order to trigger the application of the U.S. antitrust laws.²³ After the claim of extraterritorial application had severely been criticized for many years, it can be taken as accepted by now. Beginning with the German statute against restrictions of competition of 1957²⁴ many competition laws enacted all over the world have explicitly adopted the effects principle.²⁵ Although not all of them are applied rigorously, they give evidence of a new state practice and of a new orientation of public international law.

The developments of the 1990's, in particular the Supreme Court judgment in *Hartford Fire Insurance*, have greatly diminished the significance of the so-called balancing approach that had been adopted by the American Restatement Third of Foreign Relations Law. According to that restatement and some circuit court judgments which it reflected, the claim of the American antitrust laws for extraterritorial application should only be accepted after a balancing of the various domestic and foreign interests, both public and private.²⁶ In *Hartford*, the Supreme Court neither accepted nor rejected the balancing approach, but it refused to follow that approach except for cases of true conflict between an American and a foreign statute;²⁷ this did not leave much room for the balancing approach.

The widespread acceptance of the effects doctrine appears to guarantee an effective protection of competition on the domestic market. Does that doctrine not allow for the prosecution of anticompetitive behavior wherever it occurs provided that it has some effect at home? While this is true from a theoretical point of view, an effective implementation in practice meets two types of obstacles. In the first place, the assessment of one and the same anticompetitive behavior in two countries involved may be very different although it is based on similar rules. This has been

21. *U.S. v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

22. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796, 113 S. Ct. 2891, 2909 (1993).

23. *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 931 (2d Cir. 1998); cf. Symeon Symeonides, *Choice of Law in the American Courts in 1998: Twelfth Annual Survey*, 47 Am. J. Comp. L. 327, 359 (1999).

24. Bundesgesetzblatt I (BGBl. I) p. 1081 (Gesetz gegen Wettbewerbsbeschränkungen of 27 July 1957), see § 98(2), which is now § 97(2).

25. See Schwartz & Basedow, *supra* note 1, § 60, 67.

26. Restatement (Third), of Foreign Relations Law of the United States, § 403, 415 (1987).

27. See *Hartford*, 509 U.S. at 798-99, 113 S. Ct. at 2910-11.

clearly shown by the merger between Boeing and McDonnell Douglas, which practically has transformed certain segments of the world market for civil aircraft into a duopoly. While that merger was readily approved in the United States, the European Commission imposed some severe conditions.²⁸ Moreover, the international enforcement of competition statutes very often requires an effective cooperation of foreign states in the service of proceedings, in the taking of evidence, and in the enforcement of decisions. A harmonization debate would certainly help to reduce the significance of these obstacles.

III. ENFORCEMENT DEFICITS

The effective enforcement of national antitrust statutes in the international arena invariably depends upon the assistance granted by foreign states. In many cases this assistance is already required for the initial service of proceedings, in others for investigations, the search of offices or the taking of other evidence. It is equally impossible to enforce decisions, whether injunctions or penalties, in foreign countries without the cooperation of the foreign state. While transnational economic activities by necessity imply that the parties involved, relevant witnesses and other evidence are spread over various countries, the powers of domestic antitrust authorities and courts are limited by the territorial scope of sovereignty as recognized under international law. Where states cross those limits they will often be confronted with "blocking statutes" enacted by foreign countries that want to protect their spheres of sovereignty.²⁹

The attempts to overcome those procedural limits can be divided into two groups: the first deals with judicial assistance and the recognition and enforcement of foreign judicial decisions, while the second tries to establish rules on the cooperation of competition authorities.³⁰ The first group embraces a number of instruments like the Hague Evidence Convention which are applicable not only in the area of antitrust law but in all civil and commercial matters.³¹ Since most antitrust proceedings conducted outside the United States of America are not judicial but administrative proceedings, the rules on the international cooperation of cartel offices are more important in this field. These rules have made great progress, but they are still far from perfect.

Three generations can be discerned: the first generation is that of soft law consisting mainly of recommendations and other non-binding instruments elaborated by international organizations. Thus, the Council of the Organization for Economic Co-Operation and Development (OECD) started as long ago as 1967

28. See the Decision of the Commission of 30 July 1997, 1997 O.J. (L 336) 16 at considerations no. 114-119.

29. Various blocking statutes are reproduced in A. Vaughan Lowe, *Extraterritorial Jurisdiction, An Annotated Collection of Legal Material* 79 (1983); for a survey, compare P. C. F. Pettit & C. J. D. Styles, *The International Response to the Extraterritorial Application of United States Antitrust Laws*, 37 *Bus. Law.* 697 (1982).

30. See Schwartz & Basedow, *supra* note 1, §§ 92-93.

31. *Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970*, in Hague Conference on Private International Law (ed.), *Collection of Conventions 1951-1980* (The Hague s.d.) at 152.

to draft recommendations for the reciprocal notification and the exchange of information in competition proceedings with extra-territorial effects.³² The code of conduct for restrictive business practices adopted in 1980 by the United Nations Conference on Trade and Development (UNCTAD), although mainly concerned with substantive law, also establishes certain procedural duties for states.³³ This code requires states to institute procedures for obtaining information necessary for the effective control of restrictive business practices and to create mechanisms for the exchange of information and for the conveyance to other states of information at their disposal. In addition, the code provides for a duty of consultation between states that is often regarded as one of its central elements.

The second generation of procedural rules is that of bilateral treaties. Its forerunner was the Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany relating to mutual cooperation regarding restrictive business practices of 1976,³⁴ which for the first time transformed the former soft law into binding rules. It was followed by similar agreements between the United States and Australia, between the United States and Canada and between the Federal Republic of Germany and France; the most important of these agreements was concluded in 1991 between the United States and the European Economic Community.³⁵ By and large these agreements all confine their attention to establishing duties of notification and consultation and providing more detailed rules on obtaining information. But they do not deal with investigations to be conducted by the competition authorities of one country in support of competition proceedings initiated in the other contracting state. Nor do they contain any rules on the service of proceedings abroad or on the enforcement in one contracting state of decisions taken in the other contracting state. Therefore, the instruments of the second generation still are far from being effective rules for the extraterritorial application of competition law.

The third generation is characterized by the keyword of the so-called "positive comity." While "negative comity" provisions purport to reduce the national claims to extraterritorial application in case of conflict of jurisdictions, "positive comity" provisions entitle a contracting party to ask the other contracting party to take enforcement action against anti-competitive activity carried out on the latter's territory but affecting competition in the former state. While the EC-US Agreement of 1991 displayed first signs of a "positive comity" approach,³⁶ it was only the successive agreement of 1998 between the same parties which contains a clear-cut rule on the matter. Article 3 of the new agreement makes it clear that the

32. Council Recommendation concerning cooperation between member countries on restrictive business practices affecting international trade of October 5, 1967. See 8 Int. Leg. Mat. 1309 (1969).

33. UNCTAD Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, U.N. Doc. TD/RBP/Conf./10 (1980), *Wirtschaft und Wettbewerb (WuW)* 32 (1982).

34. Signed on June 23, 1976, T.I.A.S. No. 8291, (BGBl. II S. 1712).

35. Competition Laws Co-operation Agreement, Sept. 9, 1991, EEC - US, Comm. L. Eur. 1991 I 383; for other bilateral agreements, see the references in Schwartz & Basedow, *supra* note 1, at § 91 n.530; see also the recent agreement of June 17, 1999, between the EC and Canada, 1999 O.J. (L 175) 49.

36. See art. V, § 2 of the Agreement, *supra* note 35.

contracting party that is requested to initiate competition proceedings shall conduct them in accordance with its own competition laws and must do so even if the anticompetitive behavior does not violate the laws of the requesting state.³⁷

The latter clarification shows that "positive comity" is far from an equivalent to the taking of evidence in support of foreign proceedings as is provided under the Hague Evidence Convention.³⁸ Although the evidence collected in the requested state may also be useful for the conduct of proceedings in the requesting state, the competition authority in the latter state is not in a position to direct the foreign proceedings by its own questions and instructions. Moreover, the requesting party is under a certain obligation to stay its own proceedings until the end of the proceedings in the requested state.³⁹ These observations show that "positive comity" does not purport to further proceedings in the requesting state: rather, it gives prevalence to proceedings in the requested state. This may explain why the "positive comity" provisions so far have not been invoked by either side.⁴⁰ They do not provide help in the domestic proceedings of the requesting state, but rather transfer the responsibility for the enforcement of competition law to a foreign country. Although such surrender is not final and irreversible, it is difficult to understand why a national competition authority should leave the case to the cartel office of a foreign country whose substantive competition law may differ considerably from its own. The harmonization of substantive law standards appears to be a necessary precondition for the transfer of proceedings that is envisaged by the "positive comity" provisions.

IV. THE COMPETITION OF COMPETITION LEGISLATION

While the practical need for an approximation of antitrust laws and procedures should not be in dispute after the preceding considerations, some economists question the soundness of such a harmonization for theoretical reasons. In particular, they point out the advantages of a competition of jurisdictions or of national legislation. They believe that, in open or integrated markets, enterprises will articulate their preferences for a certain jurisdiction by moving their establishment or seat toward that country. The migration of companies into the country indicates the economic superiority of its legal system, while the mass exodus of enterprises from a state reveals the inefficiencies of its institutions. In their view, it is not unrealistic to assume that the latter state will adjust its legal system to the standards set by countries which succeed in attracting foreign companies. Alternatively, the less efficient states may keep their laws if they decide

37. Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles on the enforcement of their competition laws of 4 June 1998, 1998 O. J. (L 173) 28.

38. See *supra* note 31.

39. See art. VI of the Agreement, *supra* note 37.

40. Report from the Commission to the Council and the European Parliament on the application of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws—January 1, 1998, to December 31, 1998. COM (99) 439 final, at 3.3.

that the policy objectives behind the laws are worth the costs incurred by the emigration of enterprises. Whatever the reaction of business, differences between national legislations and the freedom of transborder migrations are said to establish a competition of jurisdictions as a rational procedure for the discovery of more efficient national laws.⁴¹ From this perspective, the unification or harmonization of laws is criticized as a kind of conspiracy of legislators that prevents the procedure of discovery from producing its beneficent effects.⁴²

The concept of legislative competition has originally been developed in areas that have a direct impact on costs, such as labor law, social security and tax law, but it has been extended to other areas, including antitrust law.⁴³ Some authors argue that it is not desirable for states to agree upon international minimum standards in competition law since this would prevent the institutional competition of antitrust policies. This competition is said to test different policies and uncover the most appropriate one.⁴⁴

The comparison of the unification of laws with a conspiracy of legislators appears, however, to be ill-founded.⁴⁵ This does not mean that the concept of legislative competition cannot help to explain the behavior of companies and/or legislators. But its practical significance lies in areas which are characterized by a territorial application of laws, i.e., in areas where legal provisions are applied to acts committed in the legislating state or to persons established there. From the principle of territorial application of a certain statute flows the consequence that economic actors can avoid that statute by moving to a foreign country. While this condition essentially is fulfilled with regard to matters such as tax law and labor law, the starting point is entirely different in the case of antitrust. Whether competition laws are enforced on the basis of the effects principle, the balancing approach or some pseudo-territorial application, the migration of a company from one country to another does not change anything as long as the anticompetitive behavior produces effects on the market of the legislating state. The enforcement claim of that state's legislation remains equally immune to all attempts to avoid this legislation by committing the anticompetitive acts abroad.

Therefore, one of the basic conditions for the successful functioning of legislative competition is absent in the area of antitrust law. Although the abstention from harmonization in this field will keep alive a certain competition of ideas that are tested in different national statutes, it can by no means be compared to the competition of legislation as explained in economic theory.

Moreover, a competition of antitrust laws would appear highly questionable. If the assumptions of economic theory are correct, private business would opt for

41. See Friedrich von Hayek, *Der Wettbewerb als Entdeckungsverfahren. Vortrag, gehalten am 5. 7. 1968 am Institut für Weltwirtschaft an der Universität Kiel*, in von Hayek, *Freiburger Studien* 249 (Tübingen 1969).

42. Manfred Streit, *Systemwettbewerb im europäischen Integrationsprozeß*, in *Festschrift für Mestmäcker* 521 (Baden-Baden 1996); Juergen Donges, *Wieviel Deregulierung brauchen wir für den EG-Binnenmarkt?*, 36 Beihefte der Konjunkturpolitik. *Zeitschrift für angewandte Wirtschaftsforschung* 169 (1990).

43. See *supra* note 10.

44. Freytag & Zimmermann, *supra* note 10, at 49.

45. See Basedow, *supra* note 7, at 55.

the country in which it finds the legal framework most favorable to its own interests. In the area of antitrust laws this would be a state that permits anticompetitive agreements and practices to the greatest extent possible. The most appropriate competition policy to be "discovered" in that process would allow hard-core cartels and even monopolization. If the idea of legislative competition is taken seriously in this area, we would sacrifice competition on the markets for goods and services in favor of legislative competition.

In sum, the co-existence of different antitrust statutes all over the world has the advantage of providing the continuous stimulus to reconsider the pros and cons of a national competition statute. However, this advantage would not be sacrificed by a harmonization of minimum standards at the international level. Such a minimum harmonization, which is the only realistic option at present, would preserve the laboratory of comparative law and would leave many options for national legislators above the level of the minimum standard.

V. THE FEASIBILITY OF HARMONIZATION

Many opponents to the harmonization project refer to far-reaching differences between national competition policies which practically frustrate all international negotiations in this field.⁴⁶ At first sight, this objection appears to contradict the common observation that there is a "remarkable convergence in national competition policies."⁴⁷ Isn't it true that compulsory cartels, which were so widespread before the second world war, are disappearing all over the world? Is the avalanche of antitrust statutes enacted in so many countries not evidence of a growing and spontaneous approximation of competition policies? While these observations are true, it cannot be denied that to date less than fifty percent of the 200 independent states have enacted a statute against restrictions of competition,⁴⁸ and even among those states, competition policies are far from being in conformity with each other. They differ in the evaluation of vertical restraints, merger control, the impact of non-competitive public interest, in the sanctions to be inflicted and in the procedures to be followed. It should not be forgotten that antitrust statutes can be shaped and applied in a way that comes close to a direct regulation of industry, and that is what occurs in some countries.

Nevertheless, the existing differences do not appear to preclude the harmonization of competition laws and the coordination of national competition procedures. They rather call for a cautious and pragmatic approach. It should not fix the ideal target of a uniform world competition law, but rather describe the general setting of the harmonization process. As a consequence, the following limitations should be observed:

46. See, e.g., Möschel, *supra* note 11, at 462; Griffin, *supra* note 11, at 41; Wood, *supra* note 8, at 1297; Jackson, *supra* note 11, at 196; Hauser & Schoene, *supra* note 8, at 218.

47. F. M. Scherer, *Competition Policy Convergence: Where Next?*, 24 *Int. Bus. Law.* 485 (Nov. 1996).

48. See *supra* note 1.

- (1) Negotiations should only be conducted with those states that already have proven their interest in competition law by enacting a national statute. Other states should be admitted as observers, but should not be allowed to slow down negotiations by motions rooted in an anticompetitive national policy. If they want to participate with equal rights in the negotiations they can easily adopt one of the existing national laws, the EC law, or one of the international codes of conduct as a model for a national statute.
- (2) At a first stage, the subject of negotiations should be confined to areas in which a convergence of national solutions can already be ascertained. This regards the so-called hard core cartels, vertical price fixing and the prohibition of abuses of dominant positions.⁴⁹ Although the world-wide concentration process makes it desirable to include merger control into the negotiations, it is doubtful whether the fundamental differences in this area can be overcome. It is well-known that the reservation of public interest in merger control proceedings is often used as a loop-hole for an industrial policy aimed at the creation of huge corporations which can survive in world-wide competition. Such policies have influenced merger control in many countries, even in the United States. As long as those policies are pursued, it is difficult to see how an effective merger control can be attained at the international level. Similar considerations apply to restrictions of competition inspired or supported by states, such as the business conduct of public enterprises and state aids.
- (3) A third limitation concerns the scope of harmonization. It should be confined to cases with an international dimension, i.e., where transboundary trade is affected.⁵⁰ Harmonization and unification efforts in other areas of the law such as the sale of goods⁵¹ or transportation⁵² have proven successful because they did not endeavor to achieve a unification across the board but only insofar as transboundary transactions are involved. Thus, states retain the right to adopt different rules with regard to purely domestic transactions, which substantially lowers the opposition towards international unification. As those examples show, international conventions, even

49. These subjects are also mentioned in *European Commission, Competition Policy in the New Trade Order: Strengthening International Competition and Rules—Report of the Group of Experts* 22, Sub 3.2 (Luxemburg 1995); on the resale price maintenance see Reflection paper of *Ulrich Immenga, id.* at 35 sub III; to a similar effect, see *Matsushita, supra* note 13, at 1113; *Immenga, supra* note 13, at 602.

50. To a similar effect, see *Draft International Antitrust Code, infra* note 62, Art. 3; *Immenga, supra* note 13, at 601.

51. *United Nations Convention on Contracts for the International Sale of Goods Done at Vienna on April 10, 1981*, 19 Int. Leg. Mat. 668 (1983).

52. *Convention for the Unification of Certain Rules Relating to the International Carriage by Air Done at Warsaw on October 12, 1929*, 137 L.N.T.S. 11 (1929) as amended by *The Hague Protocol Done on September 28, 1955*, 478 U.N.T.S. 371.

if limited in the aforementioned way, will have an impact on domestic legislation in the long run anyway.

- (4) Finally, negotiations should aim at an agreement on minimum standards. The world-wide debate on an international harmonization of competition laws gives rise to a certain fear in countries such as the United States which dispose of very effective means to enforce competition law that they will be bound to cut back on that enforcement, and in particular, to give up the extraterritorial application of their antitrust laws. Apparently the idea of a minimum harmonization is neither discussed nor very well-known in the United States. In the European Union this concept has been implemented in a great number of directives, in particular in the field of consumer protection.⁵³ Community measures like the "Council directive on unfair terms in consumer contracts" often contain clauses under which "[m]ember States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to insure a maximum degree of protection for the consumer."⁵⁴ A similar approach in competition law would guarantee certain minimum standards such as the prohibition of vertical restraints under the rule of reason without depriving the contracting states of the right to subject those restraints to per se prohibitions.

After all, differences in national competition legislation may be an effective obstacle to an outright unification, but they cannot be said to prevent the international community from embarking upon negotiations on a minimum harmonization of certain rules for restrictions of competition which have an international dimension.

VI. THE GOALS OF HARMONIZATION

The international harmonization of competition laws appears desirable for various reasons. Among the foremost objectives is the need to cure deficits in the enforcement of national competition laws. This need has already been explained. It requires an extension of the scope of national competition laws to export cartels and other restrictions which are primarily designed to affect foreign markets. In other words, we need a different conflicts rule for the application of competition statutes. The effect that anticompetitive behavior can have on the domestic market cannot be the sole decisive factor for the application of national competition law. The existence of alternative links such as the place of conduct or the nationality or establishment of the actors should be sufficient. This is a delicate and crucial question since the contracting states would need to accept that protection of competition is in the universal interest of the international community and not only

53. See *Mindestharmonisierung im Binnenmarkt* (Ulrich Everling & Wulf-Henning Roth eds., Baden-Baden 1997).

54. See Art. 8, Council Directive 93/13/EEC of April 5, 1993 on unfair terms in consumer contracts, 1993 O.J. (L 95) 29.

in the public interest of the particular state. At the same time, the contracting states would need to agree that a restriction of competition on foreign markets cannot be justified by their national foreign trade interests.

In the second place, there are manifold interrelations between international trade policy and competition law. As pointed out above, the liberalization of trade in goods and services is not welcome with all competitors in the markets, and some may wish to perpetuate the former trade barriers by means of private agreements. A consistent policy must foresee such consequences and conceive appropriate remedies in competition law. A similar interaction can be observed in the field of intellectual property rights. By their very nature, the holders of such rights are entitled to monopolistic behavior and may wish to engage in monopolistic abuses. Since the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)⁵⁵ puts the contracting states under a duty to respect intellectual property rights, it also had to envisage the possibility of such abuses. While articles 8(2) and 40 of TRIPs give evidence of a corresponding consciousness, they equally show that the contracting states could not agree upon appropriate countermeasures in competition law.

A further interaction between trade and competition policies relates to dumping. As a form of predatory pricing, dumping depends upon the possibility of a company to cross-subsidize certain goods or services by extra profits made on the home market where it disposes of a dominant position. An effective and extraterritorial control of such abusive conduct under the competition laws of either the exporting or the importing country would therefore allow the importing state to repeal its anti-dumping laws. This has indeed happened in the framework of a bilateral agreement between Australia and New Zealand.⁵⁶

Negotiations on the international harmonization of competition law would need to pursue other objectives as well. States would certainly embark upon the harmonization track in order to avoid conflicts of jurisdiction that have impaired international life so often in the past. Where former efforts have always focused on jurisdictional and conflict of laws issues, a solution might also be achieved by the harmonization of substantive competition laws. Only on the basis of such a harmonization would it be possible to concentrate the administrative competence and to implement the one-stop-shop principle, which is a major concern of private business in international competition law. An international harmonization project would finally serve as a model for future competition legislation at the national level. It would be particularly valuable for countries which have refrained from developing a competition policy of their own so far. A model approved by an international conference could give them guidance which they would probably accept more willingly than the adoption of a foreign competition law.

55. Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994 O.J. (L 336) 213.

56. Cf. Protocol of August 18, 1988 to the Australia New Zealand Closer Economic Relations—Trade Agreement on Acceleration of Free Trade in Goods, 1988 Austl. T. S. No. 18, *see art. 4; cf. also* Basedow, *supra* note 7, at 43.

VII. A PRAGMATIC APPROACH

Which are the recommendations for political action which follow from the preceding considerations? At the outset I must repeat that the harmonization of competition laws amounts to a taming of economic nationalism since states must no longer be allowed to tolerate, for the sake of domestic profits, anticompetitive conduct aimed at foreign markets. This is the most crucial point, and explains the difficulty of harmonization. The target cannot be expected to be achieved in one go, but only step by step. This is very different from other unification projects which may be negotiated for a number of years, but then are brought to an end at one single diplomatic conference. In antitrust law, states are well advised to embark upon the road towards harmonization with less ambition. What can be attained in the near future is the beginning of an open-ended negotiation process. At a first stage, this process may lead to a first agreement on some basic issues, which then will have to be tested in economic practice before the negotiations can be resumed and turn to further issues some years later. A successful model for that process could be the development of international trade law in the framework of the GATT⁵⁷ and its successor, the World Trade Organisation (WTO).⁵⁸ The close link between international trade and competition law would in fact suggest that the periodical WTO negotiation rounds should be used for the promotion of competition law harmonization.

The method of harmonization should be equally cautious. This does not mean that the international community should resume the former efforts to adopt soft law in this area;⁵⁹ those efforts have not produced any perceptible effects. While international negotiations should aim at the drafting of binding provisions of law, they should respect national legislations and refrain from far-reaching interventions. As pointed out before, they should be limited to restrictions of competition with an international dimension and should aim at an agreement on minimum standards. This would imply the adoption of a non-self-executing treaty. The technique of self-executing conventions, which is used for example in the UN Sales Convention⁶⁰ and in the Warsaw Convention on air transport,⁶¹ is difficult to reconcile with the intention of states to enact provisions at the national level which provide for a better protection of competition, but are applicable to the same fact situations. The resulting blend of international conventions and national provisions would be too confusing. A non-self-executing treaty would allow a contracting state to maintain, in its internal legislation, a single body of competition rules which implement the treaty and set higher standards at the same time.

As to the substance of competition law, the negotiations should be confined to types of anticompetitive conduct that are regarded as harmful to the economy by all

57. On the step-by-step liberalization of international trade in the framework of GATT, see Ernst-Ulrich Petersmann, *International Governmental Trade Organizations—GATT and UNCTAD*, Int. Encycl. Comp. L. vol. XVII ch. 25 1981 §§ 5, 23-25.

58. See *supra* note 6.

59. See *supra* text accompanying notes 32 and 33.

60. See *supra* note 51.

61. See *supra* note 52.

or the vast majority of states. This would include the prohibition of hard core cartels, i.e., agreements on horizontal price fixing, quota and other market shares, the concertation of offers in public bidding, etc. In the area of vertical restrictions it would equally include a *per se* prohibition of vertical price fixing. With regard to other vertical restraints and to abuses of dominant positions it should be possible to reach an agreement on a prohibition under the rule of reason. As pointed out before, a similar consensus on the substantive criteria of merger control is less likely, but it would appear highly desirable and feasible to harmonize the essential rules on merger control procedures: the duty to notify certain mergers to the national competition authority, the time-limits to be respected before the merger is put into effect, the kind of information to be supplied to the competition authority, etc. An international convention should also establish the obligation of the contracting states to set up national competition authorities for the enforcement of the substantive rules, and to provide for private law remedies such as damages or the invalidity of contracts concluded in violation of the substantive competition rules.

The enforcement of the harmonized laws should remain in the hands of national agencies. In order to increase the effectiveness of national enforcement proceedings, the states should conclude a multilateral convention establishing some basic procedural duties of notification, information and consultation. An additional cooperation of national authorities with regard to the service of proceedings, the taking of evidence and even the enforcement of foreign decisions would be highly desirable, but the multilateral negotiations would be overburdened with those topics; they may be negotiated in additional conventions, probably on a bilateral basis.

While the creation of an international competition authority with its own enforcement jurisdiction would not appear to be a realistic option for the time being, the international community would profit from an international agency which serves as a platform for the exchange of information and the discussion of world competition. It would have to register violations of the international competition law and publish periodical assessments of international competition in the different sectors of the economy. It might also be entrusted with the powers to conduct investigations and even with the right to bring suit in national courts, either against private companies for their anticompetitive conduct or against the respective state for tolerating violations of the international competition convention. The latter solution has been proposed in the Draft International Antitrust Code⁶² which has been elaborated by an international expert group some years ago. It is an original and inventive idea which may help to lead the debate on an international antitrust agency out of the dead end. This proposal might indeed put some pressure on states which do not comply with the international competition convention without encroaching upon the sovereignty of those countries.

62. The Draft International Antitrust Code is published in *Antitrust & Trade Regulation Report* (BNA) 64 (1993), Special Supplement no. 1628 of August 19, 1993; see also Basedow, *supra* note 7, at 70, 142; and Wolfgang Fikentscher & Andreas Heinemann, *Der "Draft International Antitrust Code"—Initiative für ein Weltkartellrecht im Rahmen des GATT*, WuW 97 (1994).

The measures outlined above are not meant to form part of a whole which could only be approved as such. Many of them could be adopted individually, but their overall effect on competition would certainly increase if the whole package could be agreed upon.