A New Economic World Order, Symposium Berlin, 11/12th September 1996

With the establishment of the World Trade Organisation following the negotiations within the Uruguay-Round of GATT between 1985 and 1993, the world order of international trade has significantly changed. The new WTO constitution of international trade consists of more than 6.000 pages, yet is still far from complete. One of the areas untouched by the WTO Agreement is international anti-trust law. Other areas where international standards may be desirable include environmental protection and social security issues.

With respect to anti-trust law, the outstanding contribution for an international regulation has been the Draft International Anti-trust Code published in 1993.[1] Discussions concerning a harmonisation of anti-trust rules especially between the U.S., Japan, and Europe have also been held at a different forum.[2] Under the umbrella of the Japanese-German Centre Berlin, *Herbert Sauter* (Federal Cartel Office, Berlin) and two protagonists of the above activities, *Akira Shoda* (Sophia University, Tokyo) and *Wolfgang Fikentscher* (Max Planck Institute, Munich) set the agenda for a German-Japanese discussion on a new economic world order by legal means.

After introductory words from Count *Brockdorff* (Japanese-German Centre, Berlin) and *Herbert Sauter*, *Wolfgang Fikentscher* and *Josef Drexl* (Max Planck Institute, Munich) opened the discussion on the multi-layered problem of a new economic order with a paper on basic problems of a constituted world market economy. While such constitution was inherent in EC-market regulations, on an international level no consensus had been reached about the contents of such constitution. On the other hand, in the absence of adequate international regulations, national laws were able to stymie growth and development of an increasingly global economy. Obstacles on the road to a constituted economy were both economic and cultural, and one of the most flexible instruments to deal with the problem of culture clashes would be the inclusion of a rule of reason. In addition, a successful international world order had to respect national legal traditions and apply the principle of non-discrimination. Consensus had to be found about the right legal and economic degree of integration: Whereas the creation of supra-national law might go too far (and thus prove ineffective), solutions along the lines of the Berne and the Paris Conventions appeared more feasible. The pillars of a constituted world market economy should be economic freedom of the individual and a protection of free competition. The latter mandated the creation of an international anti-trust law and made desirable the creation of international regulations against unfair competition along the lines of Article 10^{bis} Paris Convention including measures against anti-dumping. Minimum standards of social security and environmental protection were an integral and inalienable part of such an economic order to ensure the broad acceptance of market results.

Ernst Ulrich Petersmann (Geneva/St. Gallen) was more demanding in his approach on international rules for a constituted world economy. According to him, the WTO Agreement was so significant because it immensely reduced the possibilities of "government failures" in economic terms. However, economic regulations alone were insufficient to provide for *Kant*'s "Perpetual Peace". Perpetual peace required an additional correction of constitutional failures. State intervention should not only be reduced by setting general economic rules, but also by creating constitutional rules and human rights protections. The WTO Agreement should thus be supplemented by international constitutional rules providing for the rule of law, suppression of powers, individual rights, principles of proportionality of governmental restraints, democratic guarantees, and social justice. On a supra-national level, only the European Community (very often through the European Court of Justice) had included the above constitutional elements in their treaty.

The discussion primarily focused on the problem on how to set up a constituted world order in the face of widespread national instincts for the protection of domestic industries and vested domestic interests of politicians and ruling classes in the economy (Indonesia was specifically mentioned). Attention was drawn to the fact that judging from experience, by the

introduction of intellectual property rights as subjective, individual rights, very often respect of human rights did take root as well. Thus, the WTO might have already introduced the seeds of a greater respect for human rights worldwide. Deficits were mentioned in the legal protection against acts of international organisations. This was partly explained by a difference in culture between the U.S. and continental Europe. In the U.S. legal system, protection against governmental decisions is not very developed.

A feasible solution for developing a world trade order could be the evolutionary approach starting from the WTO Agreement, thereupon developing a world economic policy and later on adopting a worldwide anti-trust code along the lines of the Paris Convention and the Berne Convention that would give room for different cultures towards economic laws.

Kyohei Sakai (Fair Trade Commission, Tokyo) in his presentation focussed on the historical developments of anti-trust law in the context of changing conditions (population explosion, environmental problems) and different approaches towards economic liberalism. Especially in the context of Japan, a remarkable change of mind towards a pro-competition policy could be detected from the first oil crisis until today. As to possible future problems and policies, attention should be given to a harmonisation of environmental standards and of the extra-territorial application of anti-trust laws.

In his presentation on the unification of anti-trust law on an international level, *Akira Shoda* (Sophia University, Tokyo) focused on four questions: The question if the national and the international market should be judged by the same standards (which was affirmed), the question of jurisdiction for an international anti-trust office (basic requirement here being a unified national standard and no application of national anti-trust laws in the country where the action is initiated, such as export cartels), interim solutions along the lines of the European model plus a reciprocal acceptance of national standards concerning a competition order, and finally specific problems related to developing countries (e.g., market domination by large multinational companies).

The discussion concerned the question in how far an anti-trust world order could be drafted. One could think of a worldwide harmonisation, of an introduction of minimal standards, and of plurilateral agreements. There was a consensus that the Paris Convention and the Berne Convention should be used as models. Jurisdiction should be vested in national cartel offices, while the relevant market should be judged according to subjective criteria (who is in competition with whom?).

Reinhard Fink (Federal Cartel Office, Berlin) focused on more practical aspects of cooperation between national cartel offices. He stressed the differences in legal systems and legal perceptions impeding such an exchange. In addition, the problem of transferring confidential information had not yet been solved. In case several cartel offices were competent for the same act, the gravity centre of action should determine the ultimate jurisdiction of one cartel office only. As for international harmonisation, *Fink* made clear that the EU viewed the WTO forum as the most promising one for future negotiations.

The discussion showed that transferring confidential data was viewed as a major problem both by representatives of industry and officials from cartel offices. An exchange should be based on the rule of law, on bilateral agreements and should not concern merger procedures.

The following day came down from the lofty heights of global harmonisation to basic problems of industry amidst a globalisation of markets. The only certainty, as *Albrecht Graf von Schlieffen* (Daimler Benz AG) stressed, was *Tucholsky's* quotation that, "as the global economy is concerned, it is linked with each other". Given the fact that globalisation could mean dealing with two-hundred different national legal systems, harmonisation and internationalisation were developments devoutly to be wished. Also the discussion made clear that increasingly unilateral standards were not set by law, but rather by consumer consciousness and sensitivity for "correct" behaviour, such as in the case of environmental standards. *Reiichi Yumikura* (Asahi Chemical Industry, Ltd., Anti-trust Law Committee, Keidanren) attached importance to an equal playing field for global players. Harmonisation was

inevitable in order to apply largely similar rules worldwide. This should make both global strategies easier and level advantages or disadvantages of companies in certain markets. A specific bugbear of international companies were national procedures for mergers. Substantive examination in several countries meant higher costs for personnel, legal uncertainties and a lot more paper work. Another significant problem was the extra-territorial application of U.S. anti-trust laws. Here, common rules under the GATT/WTO umbrella would be an important progress.

The discussion made clear that while a procedural harmonisation would undoubtedly benefit the companies involved, as yet national laws did not permit joint procedures, e.g., in case of mergers.

The final discussion with statements by *Sadanobu Kusaoke* (JETRO, Düsseldorf), *Karl-Heinz Pilny* (DJJV, Berlin) and *Dietrich Barth* (German Ministry of Economy) again focused on possible advantages or disadvantages for developing countries in an international world order. While developing countries initially were quite in favour of a worldwide anti-trust regulation, interest had cooled down recently. However, due to benefits in world trade and the prohibition of unilateral sanctions by the WTO dispute resolution system, developing countries regarded the latest WTO Agreement as overall beneficial, as recent applications of developing countries indicated.

While international standards concerning anti-dumping rules were deemed necessary, this should be done outside the scope of anti-trust rules. Rather, anti-dumping should be dealt with by extending the unfair competition rules of Article 10bis Paris Convention.

Finally, problems of international mergers were identified as one of the main problems of the future that should be dealt with by a follow-up conference in Tokyo.

Presence by such distinguished guests as the President of the Federal Cartel Office, *Dieter Wolf*, underlined the significance of the event.

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Notes

1 64 BNA Anti-trust and Trade Regulation Report, Special Supplement No. 1628, August 19, 1993 (English); Jurisuto No. 1036, 1993, 36 (Japanese); WuW 1994, 97; 128 (German).

2 HALEY/IYORI, Anti-trust, a New International Trade Remedy?, Seattle 1995.