International Competition Rules: The Existing Framework

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Abstract

This paper argues that externalities stemming from inadequate use of domestic competition laws are hard to measure and if at all that practice shows that they are rather unimportant. On the other hand, the existing framework (unilateral bilateral / multilateral), if used properly, can provide at least some answers to the questions raised by proponents of international competition rules. The next logical question would be why is the current system not used then ? Even if good arguments can be advanced justifying the reticence of states to have recourse to the existing framework, the careful study of what exists will help interested parties to avoid the same mistakes in the future shaping of international competition rules. The paper adopts as working hypothesis the agenda of the proponents of international competition rules, as expressed in various documents, and then tries to "match" the proposed agenda against the existing framework. It concludes that clarifications may be needed as far as the expression of current rules is concerned but, most importantly, that proponents of international competition rules should care more about the shaping of institutions to deal with those issues, rather than take if for granted that the existing multilateral framework (World Trade Organization, WTO) can aptly accomplish the task.

« And though the holes were rather small
They had to count them all
Now they know how many holes
it takes to fill the Albert Hall »
John Lennon and Paul McCartney

Introduction

In the last few years, and especially since the first attempt launched by the « Munich group », a series of proposals dealing with the interlinkages between trade and competition have seen the light of the day. Those proposals could be classified as follwoing:

First, « shy » proposals were what is requested is:

1. an obligation imposed on states to enforce their competition rules on a non descriminatory basis; and

2. an obligation imposed on states to outlaw export (and import) cartels;

Second, a slightly more ambitious agenda, whereby the proposition that positive comity (as laid down in the EC/US Agreement on Cooperation on Antitrust Related Issues) be multilateralized.

Then, an even more ambitious agenda like the one advanced by the « Muncih group » (Petersmann, 1994), according to which an international agreement should contain a common minimum, that is antitrust values that should be shared by the totality of states. What exactly could come under this common minimum is often not disclosed. When it is the case, proponents talk of a prohibition against abuses of dominant position (without defining what dominant position or, for that purpose, what abuse at the international plane should consist of).

Finally, the most ambitious agenda has been advanced by Scherer (1994) who first advanced the idea that an International Competition Authority be established to deal with tansboundary externalities in the field of antitrust.

Feasibility concerns but also lack of substative empirical evidence supporting an affirmative conclusion on the magnitude of the problem essentially removed from the table of negotiations the most ambitious agenda. Regulatory diversity in the field of antitrust as well as drastically different points of departure (SE Asian countries essentially view the discussion on trade and competition as an opportunity to get rid of antidumping, something the EC and the US would not even to see as part of the agenda) made it plain that an essential prerequisite for any discussion on Trade and Competition must be kept to the absolutely necessary minimum, that is an obligation to enforce competition laws in a non discriminatory manner, an obligation to prohibit export (and

import) cartels and eventually an obligation to accept positive comity as part of domestic competition laws.

Hence, the discussions in the WTO Group on Trade and Competition, after having « flirted » with the « upper scale » types of agenda essentially focused on the « common minimum ».

In what follows, we first explain the « typical agenda » as presented in the WTO Group and then try to explore whether the existing regime can provide some answers to the questions asked. In Section 2, we examine the particularities of telecoms which suggested a solution different from that proposed in Section 1 and ask whether the telecoms experience can serve as example for wider application. Section 3 concludes.

Section 1: The typical agenda

Typically, what is requested from proponents of the typical agenda is to ensure that states will apply competition laws in a non discriminatory manner, that eventually they will prohibit export (and import) cartels and that they will opt for inclusion of the positive comity principle in domestic competition laws.

Non discriminatiory application of domestic competition laws: the obligation to grant national treatment as laid down in Art. III: 4 GATT and Art. XVII GATS can take care of part of the problem. Domestic antitrust laws are in principle, covered by the said articles. It is reminded that the obligation to accord national treatment extends to all laws « affecting » the sale, offer for sale etc. of products. A series of panels dealing with the interpretation of the term « affecting » concluded that the widest possible interpretation of the term is appropriate (see for example, the 1958 panel report on Italian Discrimination Against Imported Agricultural Machinery, L/833, 7S/60, at p. 64).

Competition laws do affect sale, offer for sale etc. of products. Hence, a straightforward reading of the national treatment obligation would impose the view that they have to be applied in a manner that will not violate the said obligation. And other interpretation advanced is based on the intentions of the parties rather than on the wording of the treaty. Such interpretation however have been discarded in standing by now case law by the WTO Appellate Body.

Conversely, one would have to interpret the term « affecting » in a stricter manner to make the point that competition laws are not part of the game. Again such an interpretation is unsuuported in the actual WTO case law.

The point made here is at the positive and not at the normative level. We do not support the view that this should be the case. We simply state that it seems that this is the case, independantly of desirability considerations.

There is one problem though: neither Art. III:4 GATT nor Art. XVII GATS impose on WTO Members an obligation to enact competition laws. If they have them, they must apply them in a non discriminatory manner. If not, whatever they do which affects sale,

offer for sale etc. outside the realm of a propoer competition statute must also be applied in a national treatment-compatible way.

Arguably to the extent that positive comity is part of domestic competition laws, it will have to be granted to all WTO Members (Art. III:4 has to respect MFN). Once again, such a solution seems to be dictated by the traditionally wide reading of the term « affected ».

Is this reading watertight? Well, it all depends on the interpretation of the term « affecting ». It is not unusual that in the eraly years of a regime the judiciary takes liberty and interprets terms widely and then reconsiders its original position (compare from the EC context for example, the attitude of the ECJ in *Dassonville* and post-*Dassonville*). The screws at a point in time must be tightened. Probably the argument that there was no intention to include competition laws in the GATT is factually correct. Actually, the only obligation with respect to the agenda of the Havana Charter (were a chapter was devoted on restrictive business practices, RBPs) is one of best endeavours (Art. XXIX GATT). Any maybe this is one good occasion for the WTO judiciary to tighten the screws. A reading of the term « affecting » in line with some causality requirement would reduce the relevance of the national treatment principle with respect to competition laws (the latter care about economic concentration and incidentally affect sale and offer for sale of goods). Such a reading however has so far not taken place.

Export (and import). cartels: Here the issue can be treated under both the unilateral and the multilateral option.

Unilateral option: The "effects" doctrine is the basis conferring jurisdiction to domestic authorities dealing with transboundary harm.

The ECJ has, without stating it clearly, accepted the effects doctrine in its *Wood Pulp* judgement as far as inbound trade is concerned. The EC Commission in its infamous *Boeing/McDonnell Douglas* decision accepted the same doctrine with respect to outbound trade (see Mavroidis and Neven, 1999). In the US since the deletion of footnote 159, jurisidiction is customarily asserted with respect to both inbound and outbound trade (Fox, 1997).

A straightforward application of the effects docrtine in accordance with public international law would lead to the conclusion that the territoriality principle should provide the benchmark. Consequently, only extraterritorial jurisdiction concerning outbound trade (harm to national exporters through anticompetitive practices abroad) cannot be covered by a public international law conform application of extraterritorial jurisdiction (although, in practice, especially in US practice post deletion of footnote 159, import cartels in foreign countries can be attacked before US domestic courts applying US law). For the rest, any extraterritorial application of jurisdiction with respect to inbound trade can provide the forum to attack foreign export cartels and is perfectly legitimate under public international law.

***Multilateral option*:** An export cartels has been outlawed in GATT case law (the *Semiconductors* case involving a litigation between the EC and Japan, whereby Japanese exporters restricted output to the EC, BISD 35S/153) on the grounds that it is inconsistent with Art. XI GATT. As commentators have pointed out (Fox, 1997), in the case of Art. XI GATT, contrary to what takes place in the context of the effects doctrine, anticompetitive effects in the market asserting jurisidiction do not have to be shown. Art. XI GATT can be used to attack both import and export cartels.

The inescapable conclusion is that the existing system can meet most of the advanced concerns.

Surprisingly enough, Art. XI GATT was never used after *Semiconductors* to attack a cartel. One can only speculate about the reasons justifying non use of this instrument:

Maybe principals (WTO Members) think that agents (WTO panels and Appelate Body) enjoy too wide a discetion in this field and are unwilling to subject to them a large part of their dopmestic policy. Indeed Art. XI GATT does not explicitly refer to export (or import) cartels. This means that panels, by the same token, will be in a position to attack any gouvernment measure which results in a quantitative restriction.

Or, alternatively, this is an indication that there are not too many cartels after all in the real world. It is difficult to prove this point. No comprehensive study, to our knowledge, has taken place so far in this context at a worldscale. In fact, one of the basic recommendations of the International Competition Policy Advisory Committee to the Attorney General (US forum) is precisely to undertake such a study. If anything, pratice in the field of instruments of diplomatic protection (US Section 301 and EC Trade Barriers Regulation, see Finger and Fung, 1994 and Mavroidis and Zdouc, 1998) suggests that the problem has been exaggerated.

Maybe however, the existing mechanisms are not appropriate to deal with such issues. But if this is the case, it seems that the discussion should shift to an examination of the mechanisms and their defaults before assuming that only a solution at the multilateral level is the appropriate one.

And for the rest ? Nobody has seriously claimed so far that competition laws have been applied in a discriminatory way. Moreover in a world captured more and more by the rule of reason approach (recently the US Supreme Court accepted in the *Khan* case that resale price maintenance scehemes - maximum prices - are not a *per se* prohibition), it is difficult to detect discrimination when reviweing decisions by competent antitrust authorities. Moreover, as the *Kodak/Fuji* experience shows, non violation complaints can provode a forum for competition related disputes although at the present case the experience made was rather unsupporting. The panel report however, did not rule that competition laws are totally outisde the realm of WTO law.

We can conclude from the above that WTO law as it stands can in principle take care of the concerns advanced by proponents of the agenda for multilateral rules. The problems encountered have to do with the margin of discretion of the international judiciary as

well as with the institutional setting which seems to suggest that the international community is not prepared to trust competition related disputes to the existing regime.

Section 2: the telecoms experience

Negotiators on telecoms liberalization felt that Arts. VIII and IX GATS could not adequately deal with competition related issues. Hence, whereas in the EC a mixture of competition policy and sector specific regulation was advanced as the option to liberalize telecoms, in the WTO no such option was available to negotiators precisely because the existing GATS articles could hardly play the role of a comprehensive competition agreement. As a result, negotiators ended up agreeing on a regulatory framework, decsribed in literature as the first global competition agreement. Although this is hardly the case, assuming *arguendo* that indeed the telecoms experience reinforces the argument that harmonisation should be the name of the game from now on, we present arguments to the effect that the telecoms experience is a very particular one which should not be copied without a series of prerequisites.

During the telecoms negotiations states were faced with an awkward reality: many of the addressees of the international obligations were not states but private operators. Hence, by definition obligations had to be shaped in such a way that they would be capable to fit private parties. This is hardly the case anywhere else.

The discussion on Trade and Competition however can take the form of a very interesting twist because of the telecoms experience. The obligations imposed through the six regulatory principles (the common framework) can appropriately deal with the opening of national markets. In the long run though, the existing regulation will not be an appropriate tool to deal with issues that might surface. In other words, there is a ratio between sector specific regulation and general competition law, in the sense that in the opening up phase of a market the first is maybe needed more in order to ensure market access whereas after market access has been guaranteed the latter is expected to take over. The question that will eventually be posed (once telecoms markets are competitive) will be whether WTO Members can comfortably live in a world of regulatory diversity (in the field of competition law) or whether some coordination is necessary. The level of optimal coordination (cooperation) can only speculatively be prejudged at this stage.

From the above we can conclude that at this stage negotiations on telecoms were factually a very particular issue with no counterpart anywhere else (with the possible exception of postal services and maritime transport where so far no agreement exist) and that in the future telecoms might serve as platform to discuss Trade and Competition in a more comprehensive manner.

Section 3: instead of conclusions

The paper has so far argued that at this stage negotiators should examine the existing legal regime and probably would realize that the laws as they stand can take care of a large number of their concerns., The fact though that they still have concerns over these issues suggests that something is wrong. What is wrong has to do with the institutional setting rather than with the laws such (although precisions are always welcome).

Bacchetta et al. (1998) in one of the rare studies aiming at quantifying externalities stemming from inadeqauet enforcement of competition laws cocnlude that it is alomost impossible to make claims that they are large or small. They indicate however that if at all practice shows that this is not the case.

The argument could be made though that scarce practice has to do with the fact that the law is unsatisfactory and thus enter into a vicious circle. However, it is difficult to imagine what kind of legal construction is nedded here. All competition laws are divided between *per se* and rule of reason-based prohibitions, the ratio steadily increasing in favour of the latter. It is hard to imagine what kind of laws can attack rule of reason-based outcomes. The discussion can (and does) start from the postulate that there should be a worldwide *per se* prohibition of some practices. But this is already the case (Art. XI GATT).

Art. XI GATT though is not used. We submit that even absent any refinements, Art. XI GATT can be forcefully applied to attack export cartels (the major concern of proponents of harmonised rules). It is not used because few, if any, states have faith in an *ad hoc* setting (like panels) with very limited experience in the field of antitrust and too far away from any domestic market's realities. And this is the where negotiators should be focusing: a new institutional setting that can inspire confidence.

So far, negotiations in the WTO Group show that no attention at all has been paid to this argument. States have been adding to an already lengthy list sources of concern, spend little time discussing them in depth and in every other meeting the yocntinue to add to the agenda. They have, in other words, come up with an impressive list of holes to the world trading system and maybe it is time to count them. What they have not done so far is count their size. Until such an exercise has been done, it will be difficult to sell the argument that Trade and Competition rules are a priority in the world trading system when other demonstrably large holes (agriculture, textiles, antidumping, government procurement) continue to exist.

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