Competition over Competition Policy for International Trade and Intellectual Property

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ABSTRACT *Increasingly, international trade law demands that national competition policy play a role making domestic markets more accessible to foreign traders. But can international competition policy also control transnational business practices? New international intellectual property power is providing a reason why such control is needed. This article gauges the competition over the nature of competition policy in a global era.*

Keywords: competition policy, globalisation, intellectual property, trade law, transnational business practices, World Trade Organisation.

In the nature of the globalisation phenomenon, we are being asked to consider the intersections between three types of regulation, trade, intellectual property and competition regulation. As we know, trade regulation is reaching wider across the world and deeper into localities. But conventionally it has a negative bent; its prescriptions are concerned with deregulating national economies to eliminate obstacles to market access by foreign suppliers. Not only has intellectual property seemed to survive this deregulatory trajectory of trade regulation, but it has become perhaps the strongest suit of internationally driven reregulation. At the same time, competition regulation has largely remained a domestic national phenomenon. Now there is serious talk of it also as a candidate for international reregulation rather than the target of the deregulatory disciplines of trade regulation. This talk is the article's focus.

When people speak of clashes or complementarites between these three regulatory modalities, they may well have different versions of each in mind. In other words, there are competing models for each category, at this moment for how they are to take shape on a global canvas. If, at this global level, trade and intellectual property regulation have already acquired a distinctive form, it is competition regulation which is the most contested. So in the schematic and somewhat speculative style of this article, my interest will be in the issues which are at stake when competition regulation is related to trade regulation and specifically to trade-related intellectual property rights. My aim is to represent the state of play on this absolutely vital issue. The account should also convey something of the flavour of the negotiated and contingent nature of the 'regulatory criss-cross' which is globalisation.

Trade and Competition Regulation

The article starts with the impact of trade regulation on competition regulation. Proponents of free trade often say that it leads to greater competition. It exposes

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domestic producers, suppliers, investors and workers to competition from their foreign counterparts. So trade regulation is concerned in its own way to eliminate the impediments and distortions which national regulation creates for foreigners when they seek to compete with locals. Thus, within the jurisprudence of the GATT, standards of non-discrimination translate into a requirement that national regulation maintain an equivalence of competitive opportunity.[1]

The object of this trade regulation is primarily government regulation at the national level. Within the catchment of the particular trade treaty, which now encompass services and investment trade as well as trade in manufactured and agricultural goods, the standards should apply to competition law as much as they do to any other national regulation. On this basis, competition law should not be cast in such a way that it accords less favourable treatment to foreigners. A concern here is that the authorities may tend to deny foreigners advantages allowed to domestic firms such as restrictive trade practices, mergers and acquisitions, or participation in consortia, or make demands on foreigners such as intellectual property licensing which are not made on locals. Of course, the very purpose of the authorities may be to bolster the position of domestic firms because they are encountering rivalry from well-endowed foreign firms in import markets. In addition, certain firms may be looked upon as national champions in export markets.

Nonetheless, the motives of competition regulation can be hard to discern. For example, the even-handed application of competition criteria may lead to a similar conclusion as a protectionist policy: import competition increases the number of market players, making mergers among locals less likely to result in a dominant position.[2] In any case, to take advantage of economies of scale or scope may be regarded by authorities as pro-competitive in many situations. As Hawk concedes,[3] the national systems vary their characterisations of competition behaviour. Economy theory fluctuates; the attitude taken to intellectual property is a case in point. National systems may decide categorically to exempt intellectual property rights from the application of competition criteria, though this approach still leaves the question whether the practice is within the legitimate scope of the monopoly. But even when intellectual property practices, such as refusals to licence or exclusive licencing, are subjected to scrutiny, the authorities may take the view that the exploitation of rights is pro-competitive.

In the application of competition law, the favouritism shown to locals may not be reflected so much in the explicit criteria of the system, such as its carve-out of block sector immunities or the nomination of the benefits which may be taken into account when deciding whether to tolerate restrictions on competition in an individual case. It may instead be buried in the administrative practices of the responsible authorities. Not only do the legislative criteria leave themselves open to varying interpretations but the authorities develop working policies for prioritising offences, granting clearances and accepting undertakings.[4] Trade regulation is catching on to such national regulatory strategies. The tendency is to extend the scrutiny of the non-discrimination standard down deeper into the national regulatory culture below the layers of legislation and judicial rulings. Thus the World Trade Organisation's (WTO) General Agreement on Trade in Services (GATS) defines the measures subject to its scrutiny as any measure by a member country, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form.[5]

Even if the rationale of this informal regulatory style is not to disguise favouritism, another trade regulation standard, transparency, militates against the maintenance of administrative flexibility by demanding that the authorities publish their policies. If it goes further, and requires them to embody the policy in legal rules, then it constrains

dramatically the ways competition policy is often pursued and by which it gains its purchase. Competition policy may call for situation-specific judgements about the merits of conduct, as well as experiments with compliance strategies in order to fit them to the characteristics of the regulatees. Transparency may also insist that an administrative scheme allow foreigners to obtain a review of its decisions.

The tendency of the trade treaty is to permit only limited explicit exceptions to its standards of non-discrimination. It confers legitimacy on certain regulatory purposes which might otherwise fall foul of the standards. But at the same time it applies disciplines to the regulations which are ascribed to these purposes. For instance, the regulation may have to be able to demonstrate its connection with the exceptional purpose. It should not bear an ulterior motive of local protection; it should not be a disguised barrier to trade. It must be necessary and proportionate to the promotion of the purpose; perhaps it has to be objectively justifiable. Furthermore, in promoting the purpose, the authorities should choose the least trade disruptive regulatory modality from among their regulatory options. The result of the application of these disciplines has been to promote the regulatory modalities considered most compatible with the neo-liberal picture of a free market.[6] Another has been to look unsympathetically on attempts by authorities to achieve their regulatory purposes by seeking to influence the behaviour of those outside their territorial jurisdictions.[7]

Nevertheless, the demands for non-discrimination and transparency are not always as predictable as one might expect. If foreign traders might be the ones most in favour of clear even-handed rules, they can also benefit from local informality and discrimination. Governments may wish to form alliances with powerful and resourceful transnational corporations. So such transnational operators may see scope for exploiting differences between countries, especially if they have the freedom to choose their jurisdiction. Differential regulatory standards, even differential conflict of laws criteria, play into the hands of such operators, which are in any case enjoying the benefits of the global mobility and 'reflexivity' which the new technologies afford them. One of the attractions of standardisation for those seeking to operate on an international scale is a reduction in the transaction costs generated by conflicting national requirements. But ultimately the advantages of convergence and divergence depend upon the content of the regulation in question and what it means for the overall performance costs of the firm. Paradoxically, it may be locals who make the demand for freedom from 'reverse discrimination'.

On the other hand, national governments often have genuine non-trade reasons for treating foreign firms differently. If regulation is to be effective, governments may need to impose different types of requirements on firms whose decision-making authority or financial power is offshore.[8] An example is to require local incorporation. Traditionally, trade regulation has proscribed discrimination between products or services (for example) only where they are considered alike and deference has been shown to the national regulation's view of what is alike. But this freedom to distinguish is now being questioned.[9] So too the disciplines applied to legitimate regulation present a problem to national governments because effective regulation may call for the assertion of what is conventionally seen as 'extra-territorial' reach. It may also need to apply prescriptive standards to the conduct of private firms, rather than to rely on more market compatible strategies of financial disincentives or disclosure requirements to influence their behaviour.

Competition and Trade Regulation

The article now reverses the relationship and considers the impact of competition

regulation on trade. The trajectory of trade regulation is generating an interest in competition regulation not so much as a barrier to trade but as a regulatory aid to the expansion of opportunities for market access and presence.

At this point, it is instructive to emphasise how the trade agenda has extended beyond trade in finished goods over national borders. A much more complex and integrated global economy produces demands for rights to establish a market presence inside national territories. Trade goes 'behind the border'. This trend is true of manufacturing operations where multinational firms want to be able to invest directly in local production facilities, but it is heightened when services such as financial, audiovisuals and telecommunications services, are brought into the trade arena. These services also often have a high intellectual property quotient.

This agenda is not content to see equal treatment for foreign sourced goods, services and investment. As a neo-liberal reform agenda, it wants to see an expansion across the board of the sectors in which these opportunities for market access and presence are available. Thus, the GATS is significant not only for bringing services within the rubric of a multilateral trade agreement but also for recognising that the services supply modes run to commercial presence and that commercial presence involves both the establishment of new businesses and the acquisition of existing ones. Furthermore, its norm of market access places pressures on members to make commitments to roll back their *non-discriminatory* regulation of markets.[10] It applies to regulation which specifically limits foreign investment in sensitive sectors. But it goes further by targetting regulation that, for foreigners and locals alike, places quantitative limits on market entry and restrictions of the form which participation may assume.

We see why free trade enthusiasts might feel that competition law complements this approach. Industry-specific regulation is phased out and competition disciplines are applied to sectors that once enjoyed immunities. For instance, public sector instrumentalities are exposed to competition from private firms; professions lose their monopolies over certain lines of business; restrictions on the number of market participants are removed. In some countries, domestic dynamics are producing unilateral changes in this direction but the export of competition law may encourage other countries to follow suit.

Now, the push for 'liberalisation' is reaching deeper. When the most obvious official regulatory barriers to trade are removed, the traders often encounter further layers of resistance to their goods and services. These layers are thought to lie deep in the private sector of the domestic economy, indeed in the structures and cultures of civil society. For instance, entrenched and intricate relationships between domestic producers, financiers and distributors may loom as a barrier to the foreign supplier who wants to sell goods in local shops or provide services through local businesses. Non-discrimination carries some potential to require governments to act on these relationships. In the WTO regime, complaints of nullification or impairment of the benefits of the trade agreement may extend to measures which do not violate the terms of the agreement directly or even to situations which governments simply allow to exist. However, a direct attack on these embedded relationships generates a demand that national authorities enforce the competition laws on their books.[11] As many countries still do not have any competition laws at all, the trajectory turns to the institution of such laws.[12] Interestingly, this approach may find sympathy with those domestic interests which have traditionally been excluded from the preferential relationships.[13]

Certainly, there is a greater sense of the laws which allow anti-competitive practices to continue. To give an example: Japan's Large Retail Shop Law places restrictions on the establishment of shops beyond a certain size in city neighbourhoods, including conditions that agreement must be reached with existing small shop owners. The United

States has been arguing that this law impedes the efforts of its exporters to compete with local products.[14] The Law was a target of the bilateral Structural Impediments Initiative and now the United States is endeavouring, through the WTO dispute resolution process, to apply the GATS to this Law.

A related tack recognises that regulatory measures confer market power on private firms and require national authorities to apply disciplines to the uses of that market power. Again, in the case of the GATS, a general clause requires members to ensure that monopoly service suppliers do not act in a manner inconsistent with the commitments which the members have made to non-discrimination and market access under the agreement. To this end, members are also to ensure, when a monopoly supplier competes outside the scope of its monopoly rights, that the supplier does not abuse its monopoly position. (However, the concept of monopoly rights is not defined.) These provisions extend to exclusive service suppliers. The GATS identifies a service supplier as an exclusive supplier where a member formally or in effect authorises or establishes a small number of suppliers and substantially prevents competition amongst them.

The obligations are more specific again when the agreement comes to telecommunications service suppliers. Members must ensure that foreign service suppliers are given access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms. Public services are defined as any service required explicitly or in effect by a member to be offered to the public generally. The obligation concedes that it may be necessary to place conditions on access, for example to safeguard the technical integrity of the services, but interestingly no recognition is given to the protection of intellectual property rights.

It is significant that, in both these general and particular instances, the concern of the GATS about dominance is not confined to state-owned or state-controlled suppliers. Indeed, it is not clear that it is confined to cases in which government legislation is the source of the supplier's dominance. In the dispute over the distribution of Kodak film in Japan, now before the WTO, it is significant that the main object of the United States' ire is the close private relationship which local producer Fuji enjoys with local outlets. This wider conceptualisation of trade barriers is borne out by the approach taken in the reference paper on regulatory issues that was produced during the GATS negotiations over commitments to market access in the basic telecommunications sector.[15]

To recap, the more established trade regulation requirement of non-discrimination permits the member to maintain restrictions on liberalisation of markets, provided those restrictions involve no less favourable treatment for foreigners. This is why the norm of market access, and more directly a demand that competition policy prescriptions be applied, represent a neo-liberal agenda for the content of regulation worldwide. The current OECD regulatory reform project is a taste of the campaign to come.[16] The campaign will be far reaching because, apart from their interest in shielding or bolstering domestic industries, national authorities have a whole host of political, social and cultural reasons for placing regulatory controls on markets. For example, while the Japanese Retail Shop Law is used for protectionist purposes, it also bears powerful cultural and environmental rationales. Competition regulation competes with the schemes of these regulatory regimes. Competition law may contain some recognition of the value of these controls, but its overall frame of reference is essentially economistic. It is best suited to take account of certain economic costs and benefits.

We should also note that trade regulation has produced its own counterbalances to out and out competition in international markets. Commonly, the agreements provide for members to apply trade remedies, for instance to counter the dumping of goods. These procedures have been well used by many of the developed nations with the largest

markets, partly to placate their domestic producer constituencies. But they have caused friction with other countries interested in exporting into these markets. It has been suggested that these trade-specific procedures should be replaced with generalist competition regulation, which of course would be open to foreigners as well as to locals to invoke. But the standards of competition law do not coincide exactly with those of anti-dumping and countervail and, on the whole, competition law is more difficult for the injured party to invoke.

Competition Regulation and Transnational Business Practices

Thus far, we have been proceeding on the premise that more open trade and freer markets lead to greater competition. Breaking down national regulatory barriers certainly extends the breadth of markets beyond the confines of national jurisdictions. It enlarges the opportunities for transnational corporations and alliances to make their globally coordinated strategies work. Decisions taken offshore can more readily produce effects within national segments of these global markets. Such decisions might lead to conduct like predatory pricing or exclusive licensing. More remotely, they might comprise collusive arrangements not to compete in market segments, say through the operation of export cartels from a home base or market partitioning on a truly international scale.[17] Mergers and acquisitions could encompass a local company but they might just as well be confined to offshore companies such as the parent companies of local subsidiaries.

Simply by rolling back national regulatory impediments to market access and presence does not ensure that true competition is practised. Indeed, a *laissez-faire* approach to liberalisation and privatisation may easily result in further concentrations of market power. Nicolaides, an expert writing from within trade policy circles, concedes that global trade may import cartelisation: 'Competition policy complements liberalisation where the market has an oligopolistic or monopolistic structure'.[18]

Now that national barriers are under assault from free trade regulation, some of its supporters are calling for a more balanced and comprehensive approach to multilateral disciplines.[19] Such comments signify that those within the inner circles of trade policy are coming to see something that third world critics of globalisation argued years ago, starting with their push through the United Nations for codes of conduct that would apply to the restrictive business practices of transnational corporations. In this vein, anticipating the greater scope which the Uruguay Round would give to trade regulation, Raghavan counselled: 'Equal attention must be paid to those aspects of the behaviour of the TNC's—restrictive trade practices, restrictions on the free flow of technology, market-sharing agreements, etc. ... Any equitable multilateral arrangements must then also include acceptance by TNC's and the government of the developed countries of their own responsibilities'.[20]

The initial push for international codes of conduct was informed by the sense that many smaller countries lacked the legal jurisdiction and political power, even in some cases the cognitive and technical capacity, to discipline the transnationals on their home grounds. Even when trade agreements left them space for industry-specific regulation and foreign investment regulation, they lacked the command needed to impose performance requirements. They would require the cooperation and reinforcement of larger countries where the corporations made their home bases or enjoyed their biggest markets. But globalisation has stepped up the competition between countries to offer inducements to attract and retain the transnationals, including the inducement of laxer regulation. Global mobility and reflexivity also allow them to circumvent the bilateral agreements struck between countries which do wish to cooperate.

In this more complex and interdependent world, some countries have crafted more sophisticated criteria by which to attach their jurisdictions to these restrictive practices.[21] They use multiple aspects of the conduct in question or the persons involved as the way to establish a nexus with their territory; in particular they do not accept the separate entity conceptualisation of the corporate form. But the idea that effects or impacts are enough to attach jurisdiction, an idea with currency in the United States for instance, continues to attract resistance. Where the more powerful countries did endeavour to give 'extra-territorial' reach to their own unilateral policies, they encountered resentment among the private firms which were asked to carry the responsibility abroad. Extra-territoriality also provoked clashes with other governments which were concerned to guard their sovereignty. In any case, for practical purposes, this kind of regulation often needs support from other countries if it is to enforce the judgements it feels entitled to make.

Negative trade regulation does not necessarily assist with this project. Indeed, it may run counter to attempts to apply competition law to foreign firms. For example, competition law proscriptions may demand that a foreign firm be denied an opportunity to take over a local firm as a way of establishing a local presence, if it would aggregate too much market power.[22] As we have noted, in determining whether regulation comes within the exceptions allowed by trade agreements, the GATT panels have been reluctant to view as legitimate the kind of national regulation which depends on compliance offshore for the fulfilment of its objectives.

So, a different argument for the international standardisation of competition regulation—an international code—is needed to overcome these limitations on the efficacy of national regulation. Having freed the transnationals from the constraints of many national industry-specific and foreign investment controls, and indeed boosted their market power considerably with requirements for national intellectual property rights, it is time to take responsibility for their practices. Before the Singapore meeting, there were signs of acceptance of this responsibility in the remarks of the Director-General of the WTO: 'If the international community seeks to negotiate rules that require countries to give rights to foreign companies, it is almost inevitable that the issue of international cooperation to deal with possible abuses of those rights will also arise'[23] But ultimately the trajectory of this movement depends very much on the kind of competition regulation which the proponents have in mind.

Trade Regulation and Intellectual Property

The article now relates these observations about trade and competition regulation to intellectual property. When we focus on intellectual property, we can say that national intellectual property law has had no more to fear from trade regulation than other national regulation, so long as it was not applied discriminately. In this respect, it should be noted that the United States did run into trouble with a GATT panel because it offered domestic holders of patents more accessible procedures for enforcement of their rights than it did foreign holders.[24] Still there was also a sense that intellectual property rights could act as a barrier to trade. Like some national competition regulation, GATT trade regulation gave special permission for measures necessary to secure compliance with laws or regulations relating to the protection of patents, trademarks and copyrights.

However, trade regulation was not content to stop there. It seems the sure way to escape the critical gaze of negative trade regulation is to have yourself made an international regulatory standard. In this way, one of the most emphatic outcomes of the Uruguay Round was the Agreement on Trade-related Aspects of Intellectual Property (TRIPS) agreement. In requiring member countries to regulate to provide a high level

of substantive protection for intellectual property, the Round was saying that intellectual property was pro-trade rather than a necessary evil which was to be tolerated because it promised its own benefits. Failure to provide adequate and effective protection for intellectual property was a barrier to free trade or rather perhaps a form of unfair trade. In other words, traders expressed their interest in obtaining security for their products and processes as much as freedom; they were not going to rely solely on economic advantages such as earlier innovation, superior quality, or cheaper prices.

Not all the countries which joined the WTO were enthusiastic about this view. Some thought that substantial aspects of the protection were not truly trade related. The agreement went beyond protection from pirated or counterfeited goods which were being traded across national borders. They reached deep into national territories in requiring respect for intellectual property from products destined for domestic markets such as pharmaceuticals, processes internal to production such as chemicals, and practices in local agriculture, medicine and education which were outside of market relations. But this argument was lost as trade extended its reach behind the border and merged with investment and service activities.

Nevertheless, the point about the closures of intellectual property law remained a valid one. The TRIPS agreement conceded to members the right, within the body of their national intellectual property laws, to retain certain exceptions to the subject-matter which was within the coverage of intellectual property categories and to attach certain qualifications to the rights which property holders could exercise over uses.[25] Those concessions were, however, often in the direction of the strong reservations which some countries held about the extension of intellectual property into realms of research, communication, care, culture and nature.

Intellectual Property Regulation and Competition

Competition regulation does not usually question the existence of intellectual property rights. It has no fundamental problems with commodification and commercialisation. Rather, it may be prepared to examine the uses of intellectual property rights in individual cases, precisely because these uses might stand in the way of commodification and commercialisation. Some economic theory can see that, in the short term at least, the assertion of intellectual property rights may make competition more difficult. These uses start with refusals to licence rights to competitors and range through an inventory of restrictions placed upon licencees in their dealings with the intellectual property. For example, exclusive licensing can shut out potential competitors from production and distribution markets, including markets that might be the subject of import competition. Thus, the parallel importation issue remains a live one. Refusals to licence can provide firms in a dominant position in one market, maybe as the holder of an essential facility, with a way to bar entry of competitors into related markets.

Compulsory licensing has been an issue given attention in trade regulation. Compulsory licensing could apply to domestically originating intellectual property, but a frequent motive has been to promote the local working of intellectual property, originating from abroad, as a way of alleviating reliance on imports for supplies. Again, compulsory licensing is concerned with objectives that extend beyond the particular concerns of competition regulation; it has been another way of advancing the concerns for rural self-sufficiency, affordable health care and accessible resources for communication and education. It may also involve a long range view of the conditions conducive to economic competition. For example, technology transfer may be vital if producers in developing nations are ever to acquire the capacity to compete effectively with firms that

have a head start in the developed world. It has even supported more short-term competitive purposes such as allowing local consumers greater choice between sources of production (generic drugs) and distribution (media products).

TRIPS addresses the question of the exercise of compulsory licensing powers. It recognises several legitimate objectives for the exercise of compulsory licensing powers. Reichman reads these objectives to extend beyond the concerns of western-style competition regulation.[26] But at the same time, in the vital case of patents, TRIPS makes it clear that the holder's rights are to include the right to import. In the case of trademarks, it makes no allowance for compulsory licensing at all. It should also be noted that TRIPS was an opportunity to impose strict disciplines on the ways compulsory licensing powers were to be invoked. Several of the leading export countries had remained unhappy with the scope of the allowances made in the Paris Convention for compulsory licensing but it has not been possible to gain agreement to revisions to this Convention.

Perhaps the situation closest to the heart of competition law is the decision of the transnational not to licence out to others or to licence a subsidiary exclusively. In the case of copyright, TRIPS takes up the language of the Berne Convention which allows countries to apply limitations and exceptions in special cases, provided they do not conflict with the normal exploitation of the subject-matter and do not undermine the legitimate interests of the holder. Again, this kind of provision has been inspired by non-economic objectives such as allowing space for fair dealing. Much of the controversy has concerned the scope it allows for copying on a large scale. Interestingly, the Magill case took the view that, as a competition law remedy in an individual case, compulsory licensing would not cut across article 9(2) of the Berne Convention.[27] Yet it must be noted that TRIPS remained agnostic on the issue of whether national regulation might allow parallel importation once a product has been released in one territory.

TRIPS also contains an explicit acknowledgement that intellectual property rights can lead to anti-competitive practices. However, its admission must be regarded as a modest one. It lies predominantly in the realm of restrictive licence conditions. The agreement contains a section headed 'control of anti-competitive practices in contractual licences'. Here, it states that:

> ...the members agree that some licensing practices or conditions pertaining to intellectual property rights, which restrain competition, may have adverse effects on trade and may impede the transfer and dissemination of technology. Nothing in the agreement is to prevent members from specifying in their national legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market.

It goes on to permit the parties to adopt appropriate measures (consistently with the other provisions of the agreement) to prevent or control such practices. However, it is telling that the members could only agree on a minimal list of examples of such practices; they 'might include exclusive grant-back conditions, conditions preventing challenges to validity, and coercive package licensing'.

In any case, it is to be appreciated that all that TRIPS does here is to concede a small space to national governments to regulate. It provides no substantial guidance to help resolve conflicts between countries; moreover, it contains none of the tangible support needed by countries which do not enjoy a good bargaining position with transnationals or indeed with the governments of other countries. The TRIPS agreement merely obliges the member countries to give full and sympathetic consideration to requests from other members for assistance to deal with the anti-competitive practices of 'their' particular nationals.

So, having added solidly to the property power around the world of corporations with high technology resources (and the resources to acquire these rights in the marketplace and assert them in the courts), the challenge for trade regulation now is to get serious about disciplining the exercise of that power. Specifically, its agenda for competition regulation should include attention to intellectual property. We should note now some of the proposals which have been creating the climate for international competition regulation to be taken seriously, before we home in on the Singapore meeting of ministers and the follow up work at the WTO.

The Agenda for Competition Regulation

In the post-Uruguay round world of WTO preeminence, much of the intellectual impetus for competition regulation has been coming from western experts, some of whom are officials or consultants to the international organisations such as the European Commission, the OECD and the WTO itself, some who are more academically detached. Thus, versions of the proposals which are currently in circulation have appeared in the documents of the organisations as well as in academic journals, though none can be said to have an official imprimateur at this stage.[28]

The proposals concern primarily, of course, the type of practices which should be targeted or prioritised in any international policy. So, even within these like-minded policy circles, the proposals involve variations. The choice of each emphasis might be attributed to judgements made about which approaches would 'work' at this level. These judgements are said to be technically minded. Thus, the experts may wish to emphasise those practices which are most amenable to clear, common rules. National systems do proscribe certain practices outright, for instance by deeming them anti-competitive *per se*, without giving the administrative or judicial authorities the opportunity to make their own characterisation or indeed to apply a rule of reason. In theory, a rule could be devised for any practice, only in some situations it is the case that a blanket proscription does not seem appropriate. Intellectual property practices rarely, if ever, are the subject of blanket proscriptions, either within the legislative framework or in the guidelines issued by the authorities, such as their various white, grey and black lists. The experts are really making a judgement here about which practices attract the most censure. A worldly version of this approach to international policy-making is to say that any international code is going to require the expenditure of political as well as cognitive resources. Therefore, it is advisable for the international forum to confine its efforts to an acceptable core of practices.

This advice begins to recognise that the choice of the contents of the code cannot avoid value preferences. If there are tendencies for competition policies to converge, there are also significant differences.[29] The priorities suggest which practices are considered the mostly seriously deleterious, here where employed in an international context. Such preferences show through in the examples given by the Director-General of the WTO when he particularised his support for competition regulation. He nominated export cartels, merger controls and cooperative research and development ventures.[30] Then it must be conceded that other perspectives will perceive a different set of practices to be of concern, if they do embrace a competition policy perspective on restrictive trade practices at all. Thus, to cite a few examples, the OECD wish list identified horizontal and vertical agreements, abuse of a dominant position and mergers and acquisitions but left out intellectual property licensing and consumer protection,[31] while Scherer joined such licensing with export and import cartels and international mergers.[32] UNCTAD, which seems to have decided to participate in this discussion as part of its more moderate

line on foreign direct investment and intellectual property rights, is likely to nominate other priorities again.

If intelligent competition policy requires much of its regulation to be tailored to the individual situation, then the framework must provide ways to leave as much space as possible to national authorities. Arguably, if the framework is sound enough to attract strong support, then fellow member countries will be prepared to accept and back the judgement of one country's authority, even though the practices have spill-over effects to their territories. The framework can involve procedures to be followed in order to ensure that the perspectives of these other members are taken into account.

Ultimately, however, these efforts to allow individualisaton may activate the very differences which generated the call for international harmonisation and standardisation in the first place. If individualisation is a necessary part of a competition policy, an international authority might be a better place to invest this discretionary space. Yet, debate over the constitution of such an authority reveals similar problematics as the construction of the legislative framework. Nicolaides envisages a body more official and binding than the networks of functional national regulators which have gathered in this field as well as other fields of international business regulation such as banking regulation.[33] But he would like to see the authority avoid politicisation: a constitution of neutral experts and government delegates would seem the best way to keep the function technocratic.

The constitution of such international regulatory authorities is part of a general contest over the form which global governance is to take. If such authorities are to make sophisticated judgements about the effects on competition of various practices, better perhaps that they are not dominated by any particular theoretical perspective. More so, if they are to weigh the benefits of the practices against their effects on competition, sometimes to the point of allowing the practices to continue, then they will need input from other perspectives, such as producer, employee and regional interests. They will have to confront a problem that many international organisations are encountering when they make decisions at a remove from local communities, a problem of 'democratic deficit'.[34] Can global governance be democratic?

As the power of the WTO is appreciated, its decision-making is coming under scrutiny. The opportunities for the smaller member countries to exert a genuine influence over the provisions of its agreements is one issue; another issue is the nature of the involvement of NGOs. But any such democratisation should not allow the nations with the greatest power to discipline the transnationals to pull back from a responsible role. Arguably, the United Nations codes remained soft law because the major western powers were not prepared to back them.[35] If NGOs are to be involved, then it must be appreciated that they will include the representatives of the corporations which are the subjects of the regulation. Already, they have been incorporated in the delegations of some members to the WTO. Again, the efficacy of such regulation may depend on their willingness to comply.

Rather, the NGO question relates to the role for alternative perspectives. It remains to be seen whether, as Reichman speculated when writing for UNCTAD, international competition policy provides an opportunity for small and medium-sized enterprises to form coalitions of interest over national lines.[36] Any such involvement might just give legitimacy to a perspective that is basically skewed against them. Even where competition regulation is working effectively, it tends to make tremendous allowances for imbalances of power and concentrations of interest in the marketplace. Preston suspected that the kind of competition law which treats the globe as the market will show little concern for competitors who wish to operate just within a local part of that market.[37] Larger markets

will indeed provide the justification for rationalisations. Specific practices will have to be targeted to safeguard opportunities for competition in these localities, especially for independent start-up and minor scale producers. But it is questionable whether competition law can be sufficiently fine-tuned to deal with such practices. Paradoxically, competition law begins to take on some of the sector-specific characteristics of industry regulation when it attempts to deal with these practices. The access codes in the telecommunications area are a good illustration.

At the international level, the codes of conduct for multinationals were tailored to the particular practices of concern to importing countries. One of the reasons why these codes might seem more apt is that they explicitly represent a number of economic, cultural and political concerns which go beyond the concentrated focus of competition law on allocative efficiency and consumer choice in the marketplace. Industry, labour and tax concerns were among the concerns expressed in the earlier codes; they could now be updated to take account of the growing concerns about the loss of local and indigenous cultures and the damage to the natural environment. Such an international agenda becomes increasingly important as trade regulation eliminates many of the protections which have been maintained at the national level and competition law itself sheds the immunities it afforded to certain sensitive sectors. It is interesting to see now that the OECD proposed incorporating its own version of these guidelines in a Multilateral Agreement on Investment (MAI).[38]

The WTO's Singapore Meeting

These competing strands surface in the deliberations of the WTO. As we have noted, developing countries had in earlier decades made the running on restrictive business practices, both at the GATT and the United Nations. At Singapore, the impetus was to come instead from a European Union proposal. The Union sought to initiate work on four tracks: commitment by all members to effective domestic competition laws, identification of core competition principles and procedures, establishment of instruments of cooperation, and submission of the procedural and material elements of competition law to the WTO dispute settlement process. Other developed countries such as Japan agreed to the work but only if the uses of trade measures such as anti-dumping procedures and safeguards were subject to scrutiny too. There was apprehension among the ASEAN countries that the agenda would aim to break down local monopolies and practices that helped domestic companies maintain market share.[39] But some developing countries supported work on anti-competitive practices (such as transfer pricing and other intrafirm practices) because they thought that the further liberalisation of investment controls would heighten the need for regulation of the restrictive business practices of the TNCs.

After a great deal of negotiation, the meeting agreed to establish a working group to 'study issues raised by members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework'. To further this study, a cross-reference was made to the Midrand declaration and the work of UNCTAD. The focus shifted to the framing of the terms of reference of the working party. The developing countries were facing a fight, for the United States representatives made it clear that its sole interest was in the promulgation of anti-monopoly laws which operated at the national level. It saw them as a way to break down cartels and other private anti-competitive behaviour which impeded market access by its exporters.

The working group met for the first time in July 1997. From the many submissions,

the Chairman drew up a checklist of issues which included: the impact of anti-competitive practices of enterprises and associations on international trade, the impact of state monopolies, exclusive rights and regulatory policies on competition and international trade, the relationship between the trade-related aspects of intellectual property rights and competition policy, and the relationship between investment and competition policy.[40]

Developing countries were very mindful of the fact that competition law was coupled in the Singapore declaration with a resolution to study investment issues. QUAD countries were promoting a multilateral investment agreement which would establish rules for the liberalisation of direct investment across the board. While the United States preferred to focus its efforts within the OECD where the campaign began, the European Union and Canada became prime movers at Singapore. It should be appreciated that an MAI would overwhelm both the relevant WTO agreements, the GATS and the Agreement on Trade-Related Investment Measures (TRIMs), with their in-built controls on liberalisation; it would attack directly the controls many countries place on foreign investment, to limit the level of establishment and equity in sensitive sectors such as agriculture, media and the professions or to attach performance requirements, including requirements of joint venturing, technology transfer and payment of taxation.[41]

The initial reaction of developing countries was to oppose the addition of this agenda item. UNCTAD was seen as the more appropriate international forum. But at the meeting several of the developing countries which were included in the informal negotiating groups decided to support a study. It was to be clear, however, that a study programme would not prejudge whether negotiations should be undertaken at a later date. It was also the understanding of these countries that the study would stay within the bounds of the existing WTO provisions and in particular the limits of the TRIMs agreement struck during the Uruguay round. But the European Union (with the seeming approbation of the Director-General) signalled that negotiations on a multilateral investment agreement would be a top priority for the WTO. However, it is to be remembered that the Singapore declaration carries a safeguard that further negotiations (if any) regarding multilateral disciplines on both investment *and* competition policy are to take place only after an explicit consensus decision is taken among WTO members. For the time being, it seems that the competition over competition policy remains open.

Notes and References

1. The two main standards are most-favoured nation treatment and national treatment. Loosely, MFN means that governments should not discriminate between foreigners from different countries and NT that they should not discriminate between foreigners and locals.
2. The trend in Australia since the definition of the 'market' was expanded; see H. Spier & T. Grimwade, 'International engagement in competition law enforcement: the future for Australia', *Trade Practices Law Journal*, 5, 1997, pp. 232–241.
3. B. Hawk, 'Antitrust policy and market access', *OECD Observer*, 201, 1997, pp. 10–12.
4. See e.g. C. Arup, *Innovation, Policy and Law*, Cambridge University Press, Cambridge, 1993.
5. Article XXVIII. The texts of the WTO agreements can be found in WTO, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts*, WTO, Geneva, 1994.
6. This message can be found in A. Kawamoto, 'Regulatory reform on the international trade agenda', *Journal of World Trade*, 17, 3, 1997, pp. 81–116. Kawamoto is from the OECD's Trade Directorate.
7. The decisions of the panels in the dispute resolution procedures of the GATT and WTO are indicative. See GATT, *Analytical Index. Guide to GATT Law and Practice*, GATT/WTO, Geneva, 1994; WTO panel reports are available from the WTO's web site.

8. P. Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality*, Oxford University Press, New York, 1993.
9. See e.g. A. Mattoo, 'National treatment in the GATS—corner-stone or Pandora's Box?', *Journal of World Trade*, 31, 1, 1997, pp. 107–136.
10. B. Hoekman, 'Services and intellectual property rights', in S. Collins & B. Bosworth (eds), *The New GATT: Implications for the United States*, The Brookings Institute, Washington, 1994.
11. A. Stoyer, 'Market access and the North American Free Trade Association,' *Transnational Law and Contemporary Problems*, 4, 1994, pp. 133–155.
12. A survey of developing countries is to be found in B. Hoekman, 'Competition policy and the global trading system', *The World Economy*, 20, 1997, pp. 383–406.
13. S. Sell, 'Intellectual Property Protection and Antitrust in a Developing World: Crisis, Coercion, and Choice', *International Organization*, 49, 1995, pp. 315–349.
14. F. Upham, 'Retail convergence: the structural impediments initiative and the regulation of the Japanese retail industry', in S. Berger & R. Dore (eds), *National Diversity and Global Capitalism*, Cornell University Press, Ithaca, NY, pp. 263–297.
15. See WTO, Agreement on Telecommunications Services, Fourth Protocol to General Agreement on Trade in Services, Reference Paper, in *International Legal Materials*, XXXVI, 1997, pp. 367–369.
16. Kawamoto, *op. cit.*, Ref. 6.
17. F. Scherer, *Competition Policies for an Integrated World Economy*, The Brookings Institute, Washington, 1994.
18. P. Nicolaides, 'For a world competition authority', *Journal of World Trade*, 30, 4, 1996, pp. 131–145, at p. 135.
19. See e.g. C. Falconer & P. Sauve, 'Globalisation, trade and competition', *OECD Observer*, 201, 1997, pp. 6–9.
20. C. Raghavan, *Recolonization: GATT, the Uruguay Round and the Third World*, Zed Books, London, 1990, p. 157.
21. For an Australian discussion, see D. Meltz, 'The Extra-Territorial Operation of the Trade Practices Act—a time for reappraisal?', *Trade Practices Law Journal*, 4, 1996, pp. 185–205.
22. Generally see OECD, *Trade and Competition Policies: Comparing Objectives and Methods*, OECD, Paris, 1994.
23. R. Ruggiero, 'Economic globalization increases impact of national competition policies on international trade', WTO Press Release, Press/30, 30 November 1995, WTO, Geneva.
24. GATT, *Analytical Index*, *op. cit.*, Ref. 7.
25. For analysis of the agreement, see M. Blakeney, *Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPs Agreement*, Sweet & Maxwell, London, 1996.
26. J. Reichman, 'Beyond the historical lines of demarcation: competition law, intellectual property rights, and international trade after the GATT's Uruguay Round', *Brooklyn Journal of International Law*, XX, 1993, pp. 75–119.
27. T. Vinje, 'The final word on Magill', *European Intellectual Property Review*, 17, 1995, pp. 297–303.
28. Much of this discussion is to be found in the many articles published in the journals *The World Economy*, *World Competition* and *Journal of World Trade*.
29. See e.g. the contrasts made in A. Mattoo & A. Subranian, 'Multilateral rules on competition policy—a possible way forward', *Journal of World Trade*, 31, 5, 1997, pp. 95–115.
30. Ruggiero, *op. cit.*, Ref. 23.
31. See P. Lloyd & G. Sampson, 'Competition and trade policy: identifying the issues after the Uruguay Round', *The World Economy*, 18, 1995, pp. 681–705.
32. Scherer, *op. cit.*, Ref. 17.
33. Nicolaides, *op. cit.*, Ref. 18.
34. M. Trebilcock, 'Competition policy and trade policy—mediating the interface', *Journal of World Trade*, 30, 4, 1996, pp. 71–106.
35. F. Nixson, 'Controlling the multinationals? Political economy and the United Nations Code of Conduct', *International Journal of the Sociology of Law*, 11, 1983, pp. 83–103.
36. J. Reichman, 'The "TRIPs" Agreement and the developing countries', *UNCTAD Bulletin*, 23, 1993, pp. 8–12.

37. P. Preston, 'Competition in the telecommunications infrastructure: implications for the peripheral regions and small countries of Europe', *Telecommunications Policy*, 10, 1995, pp. 253–271.
38. It is significant that, unlike other parts of the Agreement, observance of the guidelines is slated to be voluntary. The draft agreement records a majority view that it should not contain disciplines on *non-government* imposed discriminatory corporate practices. But it states that the parties should follow developments in the area and could take up the matter again if the need arises. See the *MAI Negotiating Text* (as of 14 February 1998), footnote 111, available at the OECD web site.
39. M. Khor, 'Competing views on 'competition policy', *Third World Network*, web site, 1997.
40. See report in *WTO Focus*, 20, June/July 1997, WTO, Geneva.
41. It also has significant implications for the treatment of intellectual property because it includes intellectual property rights within its definition of investment.