Regulating International Competition Issues by Regional Trade Agreements: A Stepping Stone Towards a Plurilateral Trade Agreement?

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Introduction

There is widespread consensus that international rules for the regulation of the (anti-)competitive behaviour of private economic actors are sorely needed.[1] In fact, the competition issue is not a merely internal question, specific to each individual jurisdiction. The globalisation of the international economy has gone hand in hand with the creation of international competition problems. Nonetheless, on the broader multilateral level it is hard to find a consensus for such provisions. At the same time, this gap is filled, at least in part, by provisions inserted in bilateral agreements as well as in Regional Trade Agreements (RTAs). This development raises a series of questions that need to be addressed. First, we have to ask what International Competition Law actually means and what these rules are supposed to achieve. WTO law does not totally ignore the competition agenda but several factors worked against having this subject integrated in a consistent and coordinated manner in the broader WTO framework. At a next step, it appears worth to examine to what extent competition provisions in bilateral agreements and in RTAs may constitute a substitute for the lack of an international framework agreement in this area. As it is known, the process of regionalisation has both been qualified

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[1] See for example, Heinemann, Le nécessité d´un droit mondial de la concurrence, Revue Internationale de Droit Économique 18 (2004) 3, p. 293.

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a "building block" and a "stumbling block"[2] on the way towards a further strengthening of the multilateral order.[3] We have to ask, what would be the appropriate qualification with regard to the provisions on competition.

It is interesting to note that states that have opposed the insertion of competition provisions in WTO law appear not to have had any problem in agreeing to such rules on a regional level. The special mechanisms shall be explored that were conducive to such a development. Proceeding on in the analysis, we have to note that there is not one single approach to regulate competition on the regional level. There are rather different philosophies in this field. In a comparative analysis, these various approaches shall be juxtaposed. Finally, an outlook shall be tried as to possible future developments in this field. It appears tempting to ask whether the increasing efforts to regulate the competition issue bilaterally and regionally constitute a stepping stone towards the creation of a true international competition law or whether this might be considered a "second-best"-policy[4] that makes a multilateral framework superfluous.

Why Do We Need International Competition Rules?

As liberalisation of international trade within the GATT/WTO order has torn down state created barriers to trade on a wide scale private anticompetitive measures, taking first of all the form of cartels and the abuse of dominant positions have not only become more visible but also more pernicious.[5] In fact, such measures not only make some markets impenetrable replacing governmental protectionism by private barriers but they may empower some businesses in such a way as to allow them to disrupt competitive structures in other countries. Both the internal as the external effects of anticompetitive behaviour threaten international trade.

Nonetheless, as it has been said, while the competition problem has become international, the competition laws remained national,[6] thereby creating a "regulatory disjunction."[7]

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[2] See Sutherland et al., The Future of the WTO, 2004, p. 22, para. 83, available at: http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf.

[3] The proliferation of RTAs is a matter of fact. As of 31 July 2010, 474 RTAs have been notified to GATT/WTO and 283 of those are effectively in force. See WTO, Regional Trade Agreements, at: http://www.wto.org/english/tratop_e/region_e/region_e.htm.

[4] With regard to the theory of the "second-best," see Lipsey/Kelvin Lancaster, The General Theory of Second Best, in: The Review of Economic Studies 24(1) (1956-1957), p. 11.

[5] See also Ostry, *The Post-Cold War Trading System: Who´s on First*, 1997; Bila/Olarreaga, Regionalism, Competition Policy and Abuse of Dominant Position, Journal of World Trade 32 (1998) 3, p. 153. On present developments in international competition law, see also Terhechte (ed.), *Internationales Kartell- und Fusionskontrollverfahrensrecht*, 2008.

[6] See Taylor, *International Competition Law – A New Dimension for the WTO*, 2006, p. 1.

[7] See Taylor, *International Competition Law – A New Dimension for the WTO,* 2006, p. 1.

For various reasons national competition law cannot make up for the lack of an effective international regulation of competition. First, many legal orders still do not regulate competition in detail. Second, it will be shown that international aspects cannot be tackled in all details on a unilateral way. Third, governments are usually interested to regulate anticompetitive behaviour that affects the domestic markets while they might be less interested to counter anticompetitive activities of domestic enterprises that damages only foreign markets.

As the international dimension of anticompetitive behaviour and, even more so, the perception of this dimension, is, to a large extent, only a consequence of trade liberalisation, it is understandable that attempts to regulate this area stood for a long time in the shadow of traditional trade negotiations. Further, there is a second reason why International Competition Law (ICL) was a late-comer on the scene of international trade negotiations. These negotiations followed a clear path according to which measures with the least impact on national sovereignty were tackled first while more sensitive issues, in particular those associated with internal regulations, were postponed for later negotiating agendas.

According to this ranking, it was clear that competition issues that are usually strictly interwoven with national regulations should be among the last issues governments were willing to set on the agenda for multilateral negotiations. As all countries have chosen individual approaches to the competition issue from an international perspective the overall picture was a very incoherent one. With regard to the international repercussions of these various approaches, if a government had chosen not to regulate anticompetitive behaviour or if it strictly avoided any extraterritorial effect of its own competition law no conflict with other jurisdictions, so it was thought, could arise. However, as anticompetitive behaviour is, as shown, also an international phenomenon, in both cases an important aspect of this phenomenon remained unregulated. Some jurisdictions, especially the US American and the Canadian one, had taken up this challenge and had tried to regulate this issue comprehensively, i.e. both under its national and its international aspects, thereby, however, provoking immediate conflicts with other jurisdictions. On a whole, over the time it had become ever more clear that by acting unilaterally governments were caught between a rock and a hard place, damned as they were either to leave an important regulatory problem unsolved or to enter squarely into potential jurisdictional conflicts. The only solution to this problem could be to look for some sort of an international approach. To this avail a large array of possible techniques were at disposal, everyone with its own advantages and drawbacks so that again no universal common ground could be found on this issue.

First Attempts to Find Multilateral (Universal) Solutions

As it is known, the need for a multilateral regulation of this area was sensed rather early in time. A very bold attempt in this regard was made in the immediate aftermath of World War II during the Havanna Conference when it was planned

to create an International Trade Organization (ITO). In this context, considerable energy was spent to draft rules on "restrictive business practices" as the need was perceived to tackle the issue of trade barriers comprehensively.

The respective subject was regulated in Chapter V of the Havanna Charter. The Charter took a broad approach:

> Each Member shall take appropriate measures and shall co-operate with the Organization to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other objectives act forth in Article 1.

The range of cases indicated as specifications of restrictive business practices was equally held broad. Art. 46 para. 2 of the Charter mentions, i.a. fixing prices, terms or conditions, excluding enterprises from, or allocating or dividing, any territorial market or field or business activity, discriminating against particular enterprises, limiting production or fixing production quotas, extending the use of rights under patents, trade marks or copyrights granted by any member to matters that, according to its laws and regulations, are not within the scope of such grants.

Finally, the ITO could declare, by a majority of two-thirds of the Members present and voting, further similar practices as restrictive business practices.[8] Therefore, the ITO had enormous potential to become active in the field of competition law. However, this enormous purview of the competition law provisions was in the final end more of a drawback than an advantage, especially in view of the fact that basic notions about international competition law were still unclear.

As it is known, the ITO never entered into force. Many reasons were given for this failure, among which the fact that this whole framework was ahead of its time as well as the suspicion that the relevant rules would unduly impinge on national sovereignty rank high. Both arguments find a good basis in the rules on restrictive business practices, as, on the one hand, little practical experience was given with such provisions and, on the other, the large powers for intervention awarded to an international organisation in competition issue[9] was unprecedented and could explain very well the fears by many governments as to their sovereign powers.

In 1948, only part IV of the Havanna Charter containing mainly provisions on trade liberalisation was enacted but the need for a broader framework remained nonetheless a pressing issue. Also, attention for competition issues remained high,

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[8] Art. 46(2) (g) of the Charter.

[9] According to Art. 48 of the Charter the ITO, subsequent to complaints by Members, was endowed with an investigative power in competition issues. The whole competence had evolutive characteristics as it was planned, i.a., to undertake further studies on restrictive business practices (see Art. 49 of the Charter). Members were under an obligation to ensure, within their jurisdiction, that enterprises would not engage in restrictive business practices as listed in Art. 46(2) and (3) of the Charter and to assist the Obligation in preventing these practices (Art. 50 of the Charter).

at least in the first years. However, in 1960, a Group of Experts appointed by the GATT in 1958 concluded that:

> the complexities of the subject and the impossibility of obtaining accurate and complete information on private commercial activities in international trade [make it] impracticable to set up any procedures for investigating or passing judgment on individual cases within the framework of GATT.[10]

This statement did not find unanimous approval in political practice and literature but nonetheless it introduced a long hiatus where competition was an absolute non-starter in international trade negotiations. It was studiously avoided to tackle this issue. On the positive side of this situation stood the fact that negotiating resources, which by their nature are always scarce, could be concentrated on some core topics. Furthermore, this halt on negotiations in the field of competition meant that time was bought for further studies in this area. Thereby a better understanding of the main questions to be tackled should be achieved. However, on the other side stood the fact that several states took recourse to unilateral measures in order to come to terms with competition problems arising from the universal sphere.

Possible Ways to Tackle the International Competition Issue

As has been shown, the attempt to devise a full-blown multilateral regulation on international competition, undertaken at the outset of the creation of modern International Economic Law, was doomed to fail, primarily because there was much uncertainty both about the nature of international competition itself as on the appropriate instruments to tackle the ensuing challenges in an appropriate way. Furthermore, as will be evidenced in the following, the United States had found their own, unilateral, approach to deal with this subject. As the US in the immediate after-war time had the decisive say on the further development of international economic regulations this fact exercised enormous influence on all the ensuing attempts to deal with international competition law.

Usually, two diametrically opposed approaches are distinguished when ways are looked for to address problems of international competition policy: the unilateral and the internationalist one.

The Unilateral Approach

According to the unilateral approach, competition issues are mainly a question of national law and the national legislation is the appropriate place to deal with this subject even with regard to its international perspectives. The possibility both of

[10] See GATT Basic Instruments and Selected Documents, 9 S, p. 172.

lacunae and of jurisdictional conflicts is not denied but these negative aspects are considered to be the smaller price to be paid for a situation where some compromise is unavoidable.

Up to a certain extent, the unilateral approach is aware of the international background against which all unilateral acts take place. In fact, usually conflicts will be avoided as far as possible when international measures are implemented. This attitude takes the name of (negative) comity.[11] On the basis of this position states try to avoid conflicts with other states when exercising their sovereign powers. Therefore, the existence of an international order is not denied and neither are the obligations resulting from an international legal system where its constitutive subjects pay each other consideration and respect.

The decisive question is rather how far this respect will reach or, to put it otherwise, when will the subjective interests of the state trump the reasons of comity?

We see that there is a smooth transition from the unilateral to the internationalist approach.

The unilateral approach can best be exemplified by the attitude taken by the US, both when acting from a position of strength and willing to impose its position on the international plane as in those cases when it tried to pay respect to other states´ interests in this field.[12]

The case usually reported as standing at the outset of the Supreme Court´s ruling on its jurisdiction in international competition cases, *American Banana Co v. United Fruit Co*. of 1909,[13] seems to devise a very restrictive position bearing out clear jurisdictional restraint. The Sherman Act, the US antitrust law, should apply only on conduct taken place on US territory (and not in Panama and Costa Rica as was here the case). Therefore, according to this position, US antitrust law should apply strictly according to the territoriality principle. Anticompetitive behaviour relating to the US territory only with regard to its effect should therefore not fall into the jurisdiction of US courts.

A radical reversal of this jurisprudence took place after the 2nd World War in *United States v. Aluminium Co. of America*[14] (Alcoa). In this case the Supreme

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[11] See extensively in this regard Papadopoulos, *The International Dimension of EU Competition Law and Policy*, 2010, p. 66. With regard to the concept of "comity" see also Paul, Comity in International Law, Harvard International Law Journal 32 (1991) 1, pp. 1–7 and Kämmerer, Comity, Max Planck Encyclopedia of Public International Law (online edition) 2006; for a critical analysis as to the actual relevance of the comity principle see Terhechte, WTO und Wettbewerb, in: Hilf/Oeter (eds.), *WTO-Recht*, 2010, p. 643 (652).

[12] For these cases see Guzman, International competition law, in: Guzman/Sykes (eds.), *Research Handbook in International Economic Law*, 2007, p. 418; Matsushita, Trade and Competition Policy, in:Bethlehem et al. (eds.), *The Oxford Handbook of International Trade Law*, 2009, p. 646 and Papadopoulos, *The International Dimension of EU Competition Law and Policy*, 2010, p. 67 et seq.

[13] 213 US 347 (1909).

[14] 148 F.2d 416 (2d Cir. 1945).

Court adopted the effects theory: Conduct that has consequences within the borders of another state can be judged by the courts of that state.[15]

The same position was confirmed and further strengthened in various judgments, even though, in *Timberlane Lumber Co.,*[16] the court, inspired by the comity position, reminded that it was in the interest of the US to consider other states´ interests. In *Hartford Fire Insurance Co v. California*[17] of 1993 the Supreme Court tried to mediate between comity and the effects theory. Only in cases of "true conflicts" between US law and foreign law comity should apply and prevail.[18] There is also a problem of unequal treatment of firm. In fact, already in 1982 legislation was passed according to which the application of US antitrust laws on conduct of US enterprises should be widely limited while the Sherman Act should continue to apply to foreign enterprises.[19]

On a whole it can be seen that US Antitrust law displays considerable extraterritorial effects and that comity considerations for a long time have been taken into regard only to a very limited extent. This attitude is closely associated with the position of strength of the USA on the international plane. However, this strength is not limitless and therefore, lately, the US is trying to harness the extent of its antitrust jurisdiction by the conclusion of agreements containing provisions on competition. In the end, the fight against anticompetitive measures shall thereby be made more effective and less disruptive in the international relations.

The European Union, on the other hand, had tried for a much longer time to give comity aspects greater consideration. This position changed when it first applied, in the Wood Pulp case,[20] EC competition law to conduct of foreign enterprises abroad. In the GE/*Honeywell* case[21] the EC prohibited an acquisition between US firms

[15] See the statement by Judge Learned Hand according to whom it "[is] settled law [. . .] that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends," *United States vs. Aluminium Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945).

[16] *Timberlane Lumber Co. vs. Bank of America Nat´l Trust & Sav. Ass´n*, 549 F. 2d 597 (9th Cir. 1976).

[17] 509 US 764 (1993).

[18] See also Guzman, International competition law, in: Guzman/Sykes (eds.), *Research Handbook in International Economic Law*, 2007, p. 421.

[19] See Matsushita, Trade and Competition Policy, in: Bethlehem et al. (eds.), *The Oxford Handbook of International Trade Law*, 2009, p. 650 et seq., referring to the Foreign Trade Antitrust Improvements Act of 1982, 96 Stat. 1233 of 8 October 1982, 15 USC 6 (a). According to this Act, only foreign conduct that has a "direct, substantial, and reasonably foreseeable effect" on US trade could be challenged. The overall assessment of this Act has been negative. See i.a. Springman, Fix Prices Globally, Get Sued Locally? US Jurisdiction over International Cartels, University of Chicago Law Review 72 (2005) 1, p. 265 (271 et seq.).

[20] ECJ, Joined Cases C-89/85, 104/85, 114/85, 16/85, 117/85 and 125-129/85, *Ahlstrom and others vs. EC Commission*, ECR [1988] 5193.

[21] Commission Decision 2004/134/EC of 3 July 2001, OJ [2004] L 48/01.

because it created a dominant position while the US authorities had cleared before this act. A conflict between the US and the EC competition authorities ensued.[22]

In the meantime, some emerging countries are beginning to apply their competition policy in an extraterritorial way.[23]

The Internationalist or Globalist Approach

According to the internationalist or globalist approach, national competition law, with both its active and reactive instruments, is not sufficiently equipped to deal with the international dimension of competition. This approach is not a closed or monolithic one. It can rather be further differentiated according to the stringency of the instruments adopted and according to the reach of the respective competition policy.

The most far-reaching internationalist approach would consist in the adoption of a plurilateral agreement both with procedural and substantive provisions on competition to be inserted in the WTO framework. Many arguments would militate for such an approach. In fact, there can be no doubt that an effective competition policy is co-conducive to the achievement of the goals pursued by the traditional WTO rules. On the other hand, it is also known that the respective attempt to create such a framework have failed at an early stage of the Doha Round, even though the Doha agenda recognised "the case for a multilateral framework to enhance the contribution of competition policy to international trade and development." Even before the effective launching of the Doha Round, a WTO Working Group on the Interaction between Trade and Competition Policy was established as part of the so-called "Singapore issues" where, soon after the success of Marrakesh, much hope was set for a continuous strengthening of the international trade order (December 1996).[24] Although this Working Group managed to provide important insights in the interaction of trade and competition law, its work was finally abandoned because no consensus was given on the sensibility of such a far-reaching approach. As will be seen in the following, the main reason for the failure of this attempt can be found in the fact that different stages of development imply different needs in the area of competition policy. This implies that binding agreements with both procedural and substantive provisions on competition law will be attainable, first, between countries of a similar development stage and with a comparable economic structure. This does not exclude the feasibility of such agreements between

[22] See Matsushita, Trade and Competition Policy, in: Bethlehem et al. (eds.), *The Oxford Handbook of International Trade Law*, 2009, Trade and Competition Policy, note 13, p. 653, with further details.

[23] See Papadopoulos, *The International Dimension of EU Competition Law and Policy*, 2010, p. 70, referring to the respective practice of South Korea.

[24] See Hilpold, Die Fortentwicklung der WTO-Ordnung, Recht der Internationalen Wirtschaft 44 (1998) 2, p. 90 (93 et seq.).

industrialised and developing countries and in fact a considerable number of such agreements have been concluded. Nonetheless, in these agreements the rules on competition usually make part of a greater whole. While the interest for such rules may be differently strong, the overall framework allows compensating those parties that would prefer to do without them. It is obvious that it is easier to achieve such a compensation within a smaller group of countries than on the multilateral level.

An important obstacle for the inclusion of provisions on competition law was further the question how to define the extent of this subject. Thus, there was considerable uncertainty about the relationship between competition law and anti-dumping measures. For some, these instruments should be combined at least provisionally in order to buy time for a systematic substitution of anti-dumping measures by provisions on competition law.[25] There can be no doubt that anti-dumping measures have often been abused for protectionist purposes.[26] However, others stressed the utility of anti-dumping law even in an international economic order based on free trade and independently from competition law in a narrower sense.[27]

And finally, for developing countries there was an information problem, a cost problem and a problem of economic sovereignty with such a plurilateral agreement. With next to no experience in this field and lacking further the institutional requisites for effectively implementing the required measures they feared the legal and economic consequences that would ensue from dispute settlement proceedings in case of shortcomings in this area.[28] As to the aspect of economic sovereignty, several developing countries feared they could lose their ability to conduct an autonomous industrial policy (including the de facto possibility to discriminate in favour of national industries).[29]

To fill the gap resulting from the demise of the respective endeavours within the WTO "soft" forms of multilateral cooperation for the creation of an international competition policy have come to life. In this context, the International Competition

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[25] See, i.a., Hoekman/Mavroidis, Dumping, Antidumping and Antitrust, in: Journal of World Trade 30 (1996) 1, p. 27.

[26] See Hilpold, Die Ergebnisse der Uruguay-Runde—eine Bestandsaufnahme, Zeitschrift für vergleichende Rechtswissenschaft (1994) 4, p. 419 (452 et seq.). As it has been seen, while antitrust policy is designed to protect *competition*, anti-dumping policy protects *competitors*. See Bhattacharjea, The Case for a Multilateral Agreement on Competition Policy: A Developing Country Perspective, Journal of International Economic Law 9 (2006) 2, p. 293 (300).

[27] See, i.a., Stewart, Why Antidumping Laws Need Not be Cloned After Competition Law Nor Replaced by Such Laws, paper presented at the conference "Antidumping and Competition Policy: Complements or Substitutes?," Center for Applied Studies in International Negotiations, Geneva, 11–12 July 1996, cited according to Hoekman, Competition Policy and Preferential Trade Agreements, 2002, p. 2, mentioning several further arguments why the inclusion of competition law in the multilateral trade system has been opposed in literature.

[28] See Bhattacharjea, The Case for a Multilateral Agreement on Competition Policy: A Developing Country Perspective, in: Journal of International Economic Law 9 (2006) 2, note 27, p. 297.

[29] See Bhattacharjea, The Case for a Multilateral Agreement on Competition Policy: A Developing Country Perspective, in: Journal of International Economic Law 9 (2006) 2, p. 297.

Network (ICN) has to be mentioned. This is an informal cooperation network between national and multinational competition authorities that also includes academics, practitioners, representatives from business, consumer groups, and the legal and economic professions. In the meantime, it encompasses over 100 competition agencies that try to promote "more efficient and effective antitrust enforcement worldwide to the benefit of consumers and business."[30] While the emphasis of this network is on enforcement, there can be no doubt that it may pave the way for some sort of "soft harmonisation" of national competition legislations, even beyond the national orders directly involved.

On a whole, it can be said that the particular appeal of this network lies in its extension, its flexible working methods and its problem orientation. The lesser degree of bindingness in comparison to traditional multilateral agreements may constitute, at first sight, a drawback but, on the other hand, the working method of this network fits well to the main characteristics of the norm creation process in international law, based as it is on discussion and persuasion.[31]

Nonetheless, soft forms of cooperation like that in the ICN, attractive as they may seem, cannot replace more stringent agreements, be they of a smaller or of a more extensive geographic reach, be they only procedural in nature or comprehensive of substantive provisions.

For a long time it has been tried to overcome the deficits resulting from the lack of a true international framework on competition law by bilateral cooperation agreements, regarding information sharing, notifications requirements, the introduction of choice of law rules as well as substantive cooperation.[32] While the so-called "first generation agreements" consisted mainly in soft law instruments designed to ensure effective (negative) comity, the second generation of these agreements provided for more substantive measures, in particular for enforcement measures, and setting precise obligations to investigate alleged anticompetitive practices at the other party´s request (positive comity).

An important basis for favouring this sort of cooperation was laid by an OECD recommendation of 1967.[33]

It is interesting to note that agreements of this kind were first and foremost concluded by those countries that had the most developed antitrust law and that had displayed the most extensive preparedness to apply these laws in an extraterritorial way, the US and Canada. Over the years, a whole network of such agreements was woven around these countries. The EC, for a long time, remained more prudent in this regard, first of all because it tried to avoid any sort of conflict in competition

[30] See ICN Factsheet and Key Messages, April 2009, http://www.internationalcompetitionnetwork.org/uploads/library/doc608.pdf.

[31] See in this context, in particular, the so-called "New Haven Approach" by McDougal/Lasswell.

[32] See for more details on these agreements Guzman, International competition law, in: Guzman/Sykes (eds.), *Research Handbook in International Economic Law*, 2007, and Papadopoulos, *The International Dimension of EU Competition Law and Policy*, 2010, pp. 52 et seq.

[33] See OECD, Recommendation on Cooperation between Member Countries on Restrictive Business Practices Affecting International Trade, 1967.

matters with other jurisdictions and afterwards because high hopes were set in the creation of a plurilateral framework on competition within the WTO system. As these hopes were disappointed, the EU had to partially reorient itself. Nonetheless, it already concluded in 1991 an agreement on bilateral cooperation with the US that was extended to an enforcement agreement (positive comity) in 1998.

Of a wholly different nature are those agreements that establish a separate trade regime where competition provisions constitute a natural and essential element. These agreements may be bilateral or regional (RTAs). An important characteristic of these agreements lies in the fact that they deal with competition issues as part of an attempt to liberalise trade—in the respective area—on a broader scale.

International Competition Provisions as Part of Special Trade Regimes

While attempts to establish a fully-fledged international competition law regime have not been successful, at least in so far as a binding plurilateral agreement with substantive provisions and provisions on dispute settlement was aspired at, a process has taken place over the last decades, widely unnoticed by the community of competition law experts, on the basis of which provisions on competition law were inserted in Regional Trade Agreeements (RTA).[34] As it is known, in this context the term "regional" should not be understood according to its traditional meaning. Here, it means nothing else than the opposite of "multilateral." Therefore, RTAs are exceptions to the Most-Favoured-Nation-Principle according to Art. I GATT, an exception especially provided for in Art. XXIV GATT and this provision does not set any requirement as to the geographic closeness of the cooperation partners.

As it is known, Art. XXIV does neither tell anything about competition rules in RTAs but the doctrine has developed a so-called "stage approach" according to which the following five stages of economic integration can be distinguished:[35] Free trade area (members retain national tariffs); Customs Union (a common external tariff is introduced); Common market (barriers to free factor movement are abolished); Economic union (national economic policies are harmonised to some extent) and Total economic integration (the integration zone resembles an autonomous state as economic policies are unified and supranational institutions are created to supervise their implementation).

[34] On the following see in more detail Hilpold, *Die EU im GATT/WTO-System*, 2009, pp. 19 et seq., and Hilpold, International Competition Law and Regional Trade Agreements, Manchester Journal of International Economic Law 2 (2005) 3.

[35] See L. Hog Ta, Will Asean Economic Integration progress beyond a Free Trade Area?, International and Comparative Law Quarterly 53 (2004) 4, p. 935 (942-943), referring to Balassa 1961.

This stages approach implies that a natural development takes place according to which integration in RTAs become ever deeper. At the last stage, rules on competition are an important, perhaps even necessary element of an RTA. It is probably no coincidence that the most successful integration zones so far, the European Union and NAFTA, have both devoted much importance to rules on competition. As for the European Union, competition policy is at present one of the most efficient policies of this entity.

In the last years several studies have been published that gave a decisive contribution to shed light on this issue and to furnish, first of all, empirical information about this subject. In this context, two studies have primarily to be mentioned: the UNCTAD study on "Competition Provisions in Regional Trade Agreements: How to Assure Development Gains" of 2005[36] (UNCTAD study) and the OECD study on "Competition Provisions in Regional Trade Agreements" of 2006.[37] Three years later a further study appeared that is to be seen as a specification in respect to the former two.[38] In fact, it extended the purview of the inquiry, examining the effect of provisions that did not formally relate to competition in the traditional sense but had repercussions on competition policy in a practical sense. In the following, some of the most salient results of these studies shall be summarised and briefly commented:

– The insertion of competition rules in RTAs is part of a broader attempt to foster trade liberalisation. Therefore, *competition* policy has a complementary role with respect to trade liberalisation. If an RTA adopts rules on competition law, the relevant provisions have, first of all, an instrumental function with regard to the primary intent to promote trade liberalisation. "Trade is the overriding principle."[39] The respective agreements themselves leave no doubt as to this "hierarchy of goals and values."[40]

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[36] Brusick/Alvarez/L. Cernat (eds.), Competition Provisions in Regional Trade Agreements: How to Assure Development Gains, UNCTAD Study, 2005.

[37] Solano/Sennekamp, Competition Provisions in Regional Trade Agreements, OECD Study, COM/DAF/TD (2005) 3/FINAL, March 2006.

[38] See Teh, Competition provisions in regional trade agreements, in: Estevadeordal et al. (eds.), *Regional Rules in the Global Trading System*, 2009, p. 418.

[39] So explicitly Solano/Sennekamp, Competition Provisions in Regional Trade Agreements, OECD Study, COM/DAF/TD (2005) 3/FINAL, March 2006, para. 12.

[40] See, for example, the relevant provision in agreements where the EC is a party:

> The following [anti-competitive practices] are incompatible with the proper functioning of the Agreement, in so far as they may affect trade between the parties.

The NAFTA agreement contains a similarly worded provision:

> [. . .] adopt or maintain measures to proscribe anticompetitive business conduct and take appropriate action with respect thereto, recognizing that such measures will enhance the fulfillment of the objective of this Agreement.

Both provisions are cited according to Solano/Sennekamp, Competition Provisions in Regional Trade Agreements, OECD Study, COM/DAF/TD (2005) 3/FINAL, March 2006.

- Deeper forms of integration are not only likely to contain competition provisions but these provisions are also usually more sophisticated than those in RTAs with a lesser depth of integration.
- There is a great variety in the nature of the competition rules in the various agreements. Nonetheless, by and large, two "families" can be distinguished in the important category of North-South RTAs. RTAs of this kind concluded by Canada and the US emphasise cooperation of competition authorities, thereby extending main elements of the North American antitrust philosophy to their cooperation partners. As a consequence they oppose supranational supervisions, dispute settlement and adjudication. In the same vein, the EU also "exports" main characteristics of its competition policy to its cooperation partners in the South. Consequently, these RTAs contain substantive provisions on competition law, they are designed to engender a harmonisation process and they favour even the creation of supra-national agencies to supervise competition law on the blueprint of the EU Commission.[41] At the same time it has to be remarked that these families are "flexible" categories.[42] On a whole, it is interesting to see that both the US and Canada on the one hand and the EU on the other managed to implant their visions on competition policy on a world-wide scale. The EU philosophy on competition law seems to exercise a particular attraction. In fact, several South-South agreements are now adopting the EU perspective, probably because this approach is seen as a recipe for successful "deep" integration.[43]

  In the European area, the competition provisions in RTAs resemble the more the EU competition rules the closer the RTA as a whole is to EU law. As a consequence, RTAs conceived as a form of "accession association" are regularly endowed with very detailed and "strong" rules on competition. This comes not really as a surprise as the main goal of these agreements is the preparation of full membership that implies the adoption of penetrating rules on competition law.[44]
- Not all sectors of the economy are equally affected by the attempts to introduce competition policies. Like in the case of trade rules, agriculture also constitutes an area of competition policy, a special case that is generally not easily accessible for international regulations.
- In addition to competition rules in the proper sense, sectoral provisions (for example in the field of telecommunications and financial services, government procurement, and intellectual property) and so-called horizontal competition principles (non-discrimination, transparency, and procedural fairness) have to

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[41] See Brusick/Alvarez/Cernat (eds.), Competition Provisions in Regional Trade Agreements: How to Assure Development Gains, UNCTAD Study, 2005, p. x.

[42] See Solano/Sennekamp, Competition Provisions in Regional Trade Agreements, OECD Study, COM/DAF/TD (2005) 3/FINAL, March 2006, para. 44.

[43] This is in particular true for MERCOSUR. See, for example, Bischoff-Everding, *Wettbewerbsrecht im MERCOSUR*, 2003.

[44] This aspect is closely dealt with in Papadopoulos, *The International Dimension of EU Competition Law and Policy*, 2010, note 12, pp. 93 et seq.

be considered if a more complete picture is seeked.[45] Of course, further complexity is added to the study. This broader perspective can change somewhat the overall assessment even though no or few provisions on competition law in the traditional understanding (such as those examined in the UNCTAD and in the OECD study) are present.[46] And even if competition law provisions in a narrower sense are excluded from dispute settlement,[47] competition rules in a broader sense can again be subject to such scrutiny.[48]

– There can be no doubt that competition issues assume a particular connotation with developing countries. This particular situation where they find themselves was a main reason why many of them opposed the creation of a plurilateral regime that would tackle the competition issue mainly from the perspective of the industrialised countries. On the other hand, the lack of competition in these economies can be a remarkable hindrance to development. Furthermore, developing countries are much exposed to pressures by international cartels.[49] For this reason—and because the introduction of provisions on competition is often part of a greater package deal characterised by the do ut des-principle—developing countries have agreed to provisions on competition in this context. However, to these rules, the special and differential treatment principle applies. This principle finds expression in the flexibility of commitments, provisions on technical assistance and capacity building as well as in the granting of transition periods.[50]

Conclusion

RTAs are a phenomenon that is here to stay. An ever-growing part of international trade takes place within such areas. They fulfil an important role both as a surrogate for further liberalisation steps on the multilateral level and as a stimulus to proceed

[45] This is the approach chosen by Teh, Competition provisions in regional trade agreements, in: Estevadeordal et al. (eds.), *Regional Rules in the Global Trading System*, 2009, note 39, p. 489.

[46] Teh, Competition provisions in regional trade agreements, in: Estevadeordal et al. (eds.), *Regional Rules in the Global Trading System*, 2009, note 39, p. 489.

[47] This is the case in about one third of RTAs examined by Teh, Competition provisions in regional trade agreements, in: Estevadeordal et al. (eds.), *Regional Rules in the Global Trading System*, 2009, note 39, p. 489, in particular around the US-hub.

[48] Teh, Competition provisions in regional trade agreements, in: Estevadeordal et al. (eds.), *Regional Rules in the Global Trading System*, 2009, note 39, p. 489.

[49] Brusick/Alvarez/Cernat (eds.), Competition Provisions in Regional Trade Agreements: How to Assure Development Gains, UNCTAD Study, 2005, p. xi.

[50] Solano/Sennekamp, Competition Provisions in Regional Trade Agreements, OECD Study, COM/DAF/TD (2005) 3/FINAL, March 2006, note 38, para. 10, lit. h). For a rather critical assessment of these achievements see Evenett, What Can We Really Learn From the Competition Provisions of Regional Trade Agreements, 2005, available at: http://www.evenett.com/research/chapters/RevisedEvenettUNCTADRTAvolume.pdf.

globally on the liberalisation path.[51] As integration becomes ever deeper within these zones, the inclusion of rules on competition policy becomes a natural consequence. As of yet it is not clear whether these regional regimes may equally assume the characteristics of a role model for a multilateral regulation of competition as it is the case for the general trade regime. As it is known, the different visions on how to craft multilateral trade rules are a permanent bone of contention between North and South in the relevant negotiation fora. It seems that in the field of competition law the respective divide is even greater. It has been argued that in multilateral negotiations on competition rules developing countries might have a greater levy to obtain rules that are of a more immediate concern to them.[52]

Further, beyond an agreement on a closer core meaning, there is no real consensus on how to define competition law or, respectively, on what anticompetitive measures really are. For this reason, some RTAs make only a general reference to anti-competitive measures while others content themselves with giving some examples.[53] Of course, in these cases, considerable uncertainties remain but the more homogenous perspective on the regional level (in respect to the multilateral one) should permit to overcome the impasse.

Therefore, the strong criticism levied against the UNCTAD and the OECD studies is only partly justified. While the extension of the perspective may have been useful for gaining a better insight in this difficult subject the main contribution by this new approach has to be seen in the following: It bears further evidence to the fact that the concept of competition is not yet consensually defined in all its ramifications.[54]

If it is difficult to find a consensus on the meaning of competition law on the regional level this must the more so be the case on the multilateral level and this explains to a considerable extent why it has not been possible up to this day to devise such an agreement. In this sense, the experiences made at the regional level

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[51] See Hilpold, Regional Integration According to Article XXIV GATT—Between Law and Politics, Max Planck Yearbook of United Nations Law 7 (2003), p. 1, and Hilpold, *Die EU im GATT/WTO-System*, 2009.

[52] In particular, developing countries would be more interested in regulating the abuse of dominant positions and in countering the deleterious trans-border effects of cartels. See Evenett, What Can We Really Learn From the Competition Provisions of Regional Trade Agreements, 2005, note 51, p. 16, available at: http://www.evenett.com/research/chapters/RevisedEvenettUNCTADRTAvolume.pdf.

[53] See Solano/Sennekamp, Competition Provisions in Regional Trade Agreements, OECD Study, COM/DAF/TD (2005) 3/FINAL, March 2006, note 38, para. 18.

[54] By the way, if we adopt such a broad concept of competition law then the WTO is already active in this field. In fact, provisions on competition can be found in several parts of WTO law, such as Art. III (4) GATT, Art. VIII (2) GATS, Art. 40 TRIPS, Art. 8 TRIMS, Art. 3 Anti-Dumping Agreement, Art. 8.1 TBT Agreement and Art. 11.1(a) and Art. 11.3 Safeguards Agreement. See Matsushita, Trade and Competition Policy, in: Bethlehem et al. (eds.), *The Oxford Handbook of International Trade Law*, 2009, note 13, pp. 648 et seq. For a detailed analysis of WTO provisions relating to competition law see Terhechte, WTO und Wettbewerb, in: Hilf/Oeter (eds.), *WTO-Recht*, 2010, pp. 643 (653 et seq.).

bode ill for any aspiration to find such a consensus in the near future. In sum, we can say that the regional level offers a most valuable field for an in-depth inquiry into the intricacies of international competition law. The—often neglected—results in this area, as incomplete as they may be, deserve much greater attention if further attempts to conceive a plurilateral agreement on international competition rules are made. The particularities of the various RTAs stand against any attempt to transfer these provisions lock, stock, and barrel to the multilateral level.[55] On the regional level, it is far easier to overcome diversities in competition policy cultures than on the multilateral level. Consequently, the enforcement of substantive rules is easier to achieve regionally. Therefore, with regard to the multilateral level, it is more realistic to assume that a strengthening of substantive cooperation and enforcement of competition rules could take place in an evolutionary process starting from the existing loose forms of international cooperation in competition matters. The inclusion of rules on competition law in RTAs might therefore be seen as a provisional second best solution. On the longer run it might offer important insights for a multilateral solution based on true consensus, it might engender a learning process and finally a de-facto harmonisation of central elements of national competition policy so that a multilateral framework can bridge the remaining gaps.

[55] In a comprehensive study by Evenett, Levenstein, and Suslov it has been very well explained that for the time being the diversities in national competition policies effectively bar the conclusion of a broader multilateral framework agreement in this field. There is the danger that an agreement that is not really universal and comprehensive (and we have yet to find out what this really means) would immediately open new spaces for circumvention and the creation of new safe havens. See Evenett/Levenstein/Suslow, International Cartel Enforcement: Lessons from the 1990s, World Bank Policy Research Working Paper No. 2680, 2001.