International Competition Law

A New Dimension for the WTO?

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CAMBRIDGE

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ABBREVIATIONS

ABA	American Bar Association
ACP	African, Caribbean and Pacific Group (Lomé Convention)
ANZ	Australia and New Zealand
APEC	Asia Pacific Economic Co-operation
ASEAN	Association of Southeast Asian Nations
CEECs	Central and Eastern European Countries
CER	Australia–New Zealand Closer Economic Relations Trade Agreement
DC	Developing country
EC	European Commission
ECOSOC	Economic and Social Council of the United Nations
EPG	APEC Eminent Person Group
EU	European Union (officially 'European Communities' in the WTO)
FDI	Foreign direct investment
FTAIA	(US) Foreign Trade Antitrust Improvements Act
FTC	(US) Federal Trade Commission
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GNP	Gross National Product
GSP	Generalised System of Preferences
GUPF	Grand Utility Possibility Frontier
IAA	International Antitrust Authority (as proposed by the Munich Group)
IAEAA	International Antitrust Enforcement Assistance Agreements
IAEA Act	(US) International Antitrust Enforcement Assistance Act 1994
IBRD	International Bank for Reconstruction and Development (World Bank)

ICJ	International Court of Justice
IIE	Institute of International Economics
IMF	International Monetary Fund
ITO	International Trade Organisation (never established)
JFTC	Japanese Fair Trade Commission
KHE	Kaldor-Hicks efficiency
LDCs	Less developed and developing countries (for this book)
MFN	Principle of most favoured nation treatment
MLAT	Mutual Legal Assistance Treaty
MTN	Multilateral trade negotiations
NAFTA	North American Free Trade Agreement
NT	Principle of national treatment
OAS	Organisation of American States
OECD	Organisation for Economic Co-operation and Development
OPEC	Organisation of Petroleum Exporting Countries
PECC	Pacific Economic Co-operation Council
S&D	Special and differential treatment
SCP	Structure-conduct-performance
STE	State Trading Enterprise
TPRB	Trade Policy Review Body
TPRM	Trade Policy Review Mechanism
TRIMS	Trade-Related Investment Measures
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
USTR	United States Government Office of the Trade Representative
VER	Voluntary export restraint
VIE	Voluntary import expansions
VRA	Voluntary restraint agreement
WTO	World Trade Organisation
WTO DSB	World Trade Organisation Dispute Settlement Body

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1

Introduction

Modern business operates in a world that is highly economically integrated, but that remains politically, culturally and legally diverse. Notwithstanding globalisation, law and politics is still organised primarily on the basis of nation-states. National laws reflect significant social and political differences between nations. A fragmented international regulatory environment has evolved in which each government has developed its own unique approach to the regulation of conduct that affects its territory, often without regard to the effect of that regulation on other nations.

Competition law (or 'antitrust law' as it is known in the United States) is one form of such regulation. Competition law involves laws that promote or maintain market competition by regulating anti-competitive conduct. However, modern competition laws have traditionally evolved to promote and maintain competition in markets principally within the territorial boundaries of each nation-state. Domestic competition laws are not usually concerned with activity beyond territorial borders unless it has significant domestic effects.

This limited territorial approach has created difficulties in an increasingly globalised world in which transactions subsume multiple territorial spaces. Anti-competitive conduct may have adverse economic effects in multiple jurisdictions, unconfined by territorial boundaries. In this manner, while competition law remains essentially national, competition issues have become increasingly international, creating a regulatory disjunction. To the extent the effect of anti-competitive conduct crosses territorial boundaries, it may escape effective regulation.

On the one hand, *under-regulation* may occur. Anti-competitive conduct may not be prevented due to ineffective regulation, particularly as firms have every incentive to structure their arrangements to arbitrage cross-border regulatory differences. Conversely, *over-regulation* may occur. Legitimate competition may be impeded by excessive regulation, particularly where regulation aggregates over multiple jurisdictions.

Historically, to address perceived under-regulation of anti-competitive conduct, nations commenced applying their domestic competition laws on an extraterritorial basis to regulate foreign anti-competitive practices with adverse effects on their domestic markets. As identified in Chapter 3 of this book, such extraterritorial application of competition laws remains limited and has created significant jurisdictional conflict.

More recently, to address both under-regulation and over-regulation, nations have sought to negotiate bilateral co-operation agreements in relation to competition law matters. As identified in Chapter 5 of this book, while such bilateral agreements clearly assist, they do have clear limitations. As a result, international attention has turned to the possibility of negotiating a multilateral agreement on competition law, referred to in this book as an 'international competition agreement'.

Historically, the potential for an international competition agreement has been recognised by several initiatives. In 1945, in negotiations preceding the adoption of the General Agreement on Tariffs and Trade ('GATT'), limited international competition obligations were proposed within the *Charter for an International Trade Organisation.* While these obligations were not adopted within the GATT at its inception in 1947, a number of attempts were subsequently made to incorporate competition provisions. In 1994, with the conclusion of the Uruguay Round of GATT Multilateral Negotiations, the World Trade Organisation ('WTO') was created. The *Agreement Establishing the WTO* included a range of limited provisions addressing various cross-border competition issues on a sector-specific basis

Following further consideration of international competition issues, a formal WTO Working Group on the Interaction Between Trade and Competition Policy was established by a WTO Ministerial Conference in Singapore in 1996. The WTO Working Group has investigated various issues relating to the incorporation of competition law and policy into the WTO. Other organisations, such as the World Bank, the Organisation for Economic Co-operation and Development ('OECD'), and the International Bar Association, have also contributed to the analysis under a variety of different initiatives. More recently, WTO Ministerial Conferences in Doha (2001) and Cancún (2003), have contemplated formal WTO negotiations on competition law and policy.

Accordingly, international competition issues now have a prominent position on the international trade policy agenda.

With this background in mind, this book proposes that an international competition agreement should be incorporated into the WTO in the form identified in this book.

Proposal	
A plurilateral competition agreement should be incorporated into the WTO in the form identified in this book.	
Parts of this book	*Chapters of this book*
An international competition agreement is desirable (*Part I*).	An international competition agreement is desirable and would be welfare-enhancing relative to the status quo (*Chapters 2 and 3*). There is a sufficient basis for an international competition agreement (*Chapter 4*). Existing initiatives towards the regulation of cross-border anti-competitive conduct have clear limitations that could be overcome by an international competition agreement (*Chapter 5*).
The WTO could provide a suitable institutional vehicle for an international competition agreement (*Part II*).	The WTO could provide a suitable institutional vehicle for an international competition agreement. The relationship between international trade law and international competition law can be reconciled at a theoretical level by the concept of market contestability (*Chapter 6*). At a practical level, an international competition agreement could address under-regulation and over-regulation in the trade-competition regulatory matrix, realising substantive benefits to international trade and competition (*Chapters 7, 8 and 9*).
The optimal form for an international competition agreement at the present time would be a plurilateral WTO agreement in the form identified in this book (*Part III*).	The WTO would provide the optimal institutional vehicle for an international competition agreement (*Chapter 10*). The optimal content, approach and structure for a WTO competition agreement can be clearly ascertained (*Chapters 10, 11 and 12*). A multilateral WTO competition agreement would not be politically achievable at the present time. However, a plurilateral WTO competition agreement would be politically achievable (*Chapter 13*). Bearing the above in mind, a plurilateral agreement should be incorporated into the WTO in the form set out in the Appendix to this book (*Chapter 14, Appendix*).

Figure 1: *Structure of this book*

In order to work through these issues systematically, this book is divided into three main parts as identified in Figure 1:

- Part I of this book identifies that an international competition agreement is desirable. Such an agreement would be welfare-enhancing and would address externalities in the cross-border regulation of competition. There is a sufficient basis for such an agreement. Existing initiatives towards the regulation of cross-border anti-competitive conduct have clear limitations that could be overcome by such an agreement.
- Part II of this book identifies that the WTO could provide a suitable institutional vehicle for an international competition agreement. The relationship between international trade law and international competition law can be reconciled at a theoretical level by the concept of market contestability. At a practical level, an international competition agreement could address under-regulation and over-regulation in the trade–competition regulatory matrix, realising substantive benefits to international trade and competition.
- Part III of this book identifies that the optimal form for an international competition agreement would be a plurilateral WTO agreement. A multilateral WTO competition agreement would not be politically achievable at this time. This book concludes by identifying the appropriate content and structure for a plurilateral WTO competition agreement and proposes a draft negotiating text with accompanying commentary.

This book is intended to make a substantive contribution to knowledge in this area with the intention of assisting policy-makers, lawyers, diplomats, officials, academics, jurists and experts alike in identifying the basis for, and formulating, an international competition agreement.

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