



The Interplay Between Competition Law and WTO Law

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Outline

- Introduction:
 - Importance of competition policy to the multilateral trading system
 - Efforts towards a WTO competition agreement
- Overlaps under existing WTO Agreements
 - Anti-Dumping
 - Subsidies and countervailing duties
 - State trading
 - TRIPS
 - GATS
 - Government procurement

Introduction: importance of competition policy for the multilateral trading system

- Risk that anti-competitive practices undermine gains from multilateral trade liberalization.
- Related goals: proper functioning of markets – focus on distortions by private actors (competition) // by gov'ts (WTO).
- Competition policies help render national industry more competitive on world markets.

Efforts to include competition disciplines into the WTO Agreements

- 1948 **Havana Charter for International Trade Organization** covering trade and competition disciplines.
 - Chapter V: “Restrictive Business Practices”: Members to take all possible measures to ensure that commercial enterprises + STEs within jurisdiction do not engage in “**business practices**” which:
 - affect international trade
 - restrain competition, limit access to market, or foster monopolistic control
 - have harmful effects on the expansion of production or trade and interfere with achievements of the objectives of the Havana Charter.

Efforts to include competition disciplines into the WTO Agreements

- **"Singapore issues"**: 1996 Ministerial Conference established working groups on:
 - Transparency in government procurement;
 - Trade facilitation (customs issues);
 - Trade and investment;
 - **Trade and competition**

Efforts to include competition disciplines into the WTO Agreements

- Why need for competition policies in WTO?
 - Growing incidence of anti-competitive practices with transnational dimensions, e.g. international cartels, mergers and exclusionary practices with a transnational dimension.
 - Ability of such practices to undermine the benefits of trade liberalization if left unchecked, e.g. impede market access
 - Hence, growing need for effective international cooperation.
 - Also: Take advantage of WTO dispute settlement system.

Efforts to include competition disciplines into the WTO Agreements

- 2001 Doha Ministerial Declaration (“Doha Mandate”) paras. 23-25 recognized “the case for a multilateral framework to enhance the contribution of competition policy to international trade and development”.
- Negotiations were to start in 2003 Cancún (Mexico) Ministerial Conference if explicit consensus to do so.
- WG on Interaction between Trade and Competition Policy: analytical mandate:
 - clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels;
 - modalities for voluntary cooperation;
 - support for progressive reinforcement of competition institutions in developing countries through capacity building.

Recent efforts to insert competition law disciplines into the WTO Agreements

- Initiative pushed by, esp., EU.
- US: ?
- Many DCs opposed negotiations.
- No consensus on modalities at Cancun.
- July 2004 post-Cancún WTO General Council Decision on the Doha Work Programme: no work toward negotiations on competition policy as part of Doha Round.

Competition policy under existing WTO Agreements

- Competition policy not a new issue in WTO.
- Not explicitly excluded from scope of application of GATT and WTO covered agreements.
- Certain disciplines in fact concern types of behaviour that could fall under competition policy.
- Broad wording of provisions of the WTO agreements establishing basic disciplines. For instance:
 - **Article III.4 GATT (non-discrimination “national treatment”)**: applies to “all laws, regulations and requirements affecting [the] internal sale... distribution or use” of relevant goods
 - Provisions on transparency.
- Explicitly mentioned in certain provisions.

WTO disciplines on antidumping

- Anti-Dumping measures
- Dumping:
 - Export price < price in exporting country (“normal value”); or
 - Export price < price on third country export market; or
 - Export price < cost of production.
- Not prohibited by WTO Agreements
 - But allows imposition of measures to counter dumping if causes injury to domestic industry.
- Origins: Canada, US early 1900s - with antitrust legislations.

WTO disciplines on anti-dumping

- Contained in Article VI GATT (1947) and WTO Anti-Dumping Agreement (1995)
- Procedural obligations:
 - Must only impose measure after investigation conducted according to rules
 - For instance: 30 days to answer questionnaires
 - Due process / right to a hearing
 - Right to see information relied upon by the investigating authority
 - (vs) right to have confidential information protected
- Substantive obligations:
 - How authorities calculate dumping margin (price difference between NV and EP)
 - How authorities determine injury

WTO disciplines on anti-dumping

- **Article VI:2 GATT:**

“In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty...”

Article 18.1 Anti-Dumping Agreement:

“No specific action against dumping of exports ... can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.”

WTO disciplines on anti-dumping

- **US - 1916 Act:** US law from 1916 providing for criminal sanctions and damages + punitive damages if:
 - Price discrimination between different markets
 - With (*inter alia*) intent to harm.
- Law challenged by EU and Japan (contrary to Arts. VI:2 GATT / 18.1 ADA).
- US:
 - WTO Agreements discipline the imposition of AD duties, not imposition of measures to counteract dumping
 - Not a trade remedies law, rather: anti-trust law
 - 1916 Act requires “intent”; not relevant under WTO law
- WTO panel and Appellate Body:
 - WTO Agreements disciplines actions taken against dumping
 - Member cannot take other type of action against dumping than those under Agreements.
 - 1916 Act targets dumping (international price discrimination)
 - Additional criteria (intent): does not undermine application of GATT and AD Agreement
 - 1916 Act does not respect disciplines set forth under Agreements

Subsidies disciplines

- Disciplines contained in Article XVI GATT and Agreement on Subsidies and Countervailing Measures (“SCM Agreement”)
- Defines concept of “subsidy”
- Permits imposition of “countervailing” measures (import duties) to counteract subsidies
- Permits challenge to subsidy programs and/or subsidies granted by other Members (e.g. Boeing / Airbus, Cotton, EC Sugar)

Subsidies disciplines

- Similar to EU State Aid rules, albeit possibly less stringent
 - WTO: no requirement of “cost to government”
 - WTO: no ex ante approval; only ex post (monitoring in SCM Ctee; disputes)
 - WTO: permits unilateral action: Member may act by imposing CVDs

(Further reading: C-D. Ehlermann, M. Goyette, *The Interface between EU State Aid Control and the WTO Disciplines on Subsidies*, *European State Aid Quarterly*, Issue 4, p. 695 (2006)).

- Subsidy:
 - **Financial contribution** by a government, or “entrustment/direction” by government to private entity
 - That confers a **benefit**; and
 - Is “**specific**” to the enterprise or industry or group of enterprises or industry
 - de jure or de facto
 - Also regional specificity

Subsidies disciplines

- Three types of subsidies:
 - **1. Prohibited:** export subsidies (de jure or de facto) and import-substitution subsidies
 - **2. “Actionable”:** that cause serious serious prejudice to interests of other Member:
 - “Injury” to domestic industry of importing Member
 - Nullification or impairment (negates benefit obtained in negos.)
 - Adverse trade effects:
 - Volume effects: displacement or impedance of imports in subsidizer’s market or 3rd country market
 - Price effects (undercutting, suppression or depression, or lost sales) in any market
 - Increased world market share of a primary products

Subsidies disciplines

- 3. “Non-actionable”
 - Assistance for research activities
 - Assistance to disadvantaged regions of Member
 - Assistance to promote adaptation of existing facilities to new environmental requirements
 - Provisions lapsed 31 December 1999: have become actionable and therefore subject to CVDs and challenge before panels

- Special rules for:
 - Agricultural subsidies
 - DCs / LDCs.

Subsidies disciplines

- Monitoring:
 - Bi-annual notification of all subsidies and subsidy programmes
 - Review and discussion in Subsidies Committee
- Enforcement
 - Imposition by national “investigating authority” of countervailing duty consistent with rules set forth under SCM Agreement
 - Procedural obligations (similar to AD Agreement)
 - Substantive obligations, e.g.:
 - What constitute a subsidy, what is specificity;
 - How to calculate the “amount of a subsidy”
 - Imposition of duties \leq amount of subsidy
 - Challenge before WTO panel and (on appeal) Appellate Body.

State trading

- Rules applicable to State Trading Enterprises (STEs)
- Defined as governmental and non-governmental enterprises with exclusive or special rights or privileges.
 - In exercise of which they influence through their purchases / sales the level / direction of imports / exports
- Not necessary to be state-owned or have a monopoly
- Article XVII describes three types of STEs:
 - State enterprises
 - Enterprises granted exclusive privileges
 - Enterprises granted special privileges

State trading

- Various types of STEs:
 - Statutory / regulatory / export marketing boards
 - Foreign trade enterprises
 - Boards or corporations resulting from nationalized industries
- Examples of exclusive rights or privileges and STE activities:
 - Monopoly importer
 - Single desk seller
 - Statutory power to control imports or exports Responsibility for issuing import/export licences
 - Responsibility for administering tariff rate quotas
 - Responsibility for distribution and/or pricing of imports
 - Intervention purchase sales
 - Preferential access to foreign exchange
 - Stocking of strategic/agricultural goods

State trading

- Why special rules on STEs?
 - Danger that an STE because of its special position may have significant power in a given market
 - Preservation of principle of comparative advantage
 - Possibility for governments acting indirectly through STEs to create trade distortion
 - It would be relatively easy for Members to evade their WTO commitments through an STE

State trading

- STEs not prohibited if operated according to WTO rules
- Enterprise should abide by WTO commitments
- Enterprise should operate on the basis of commercial considerations
- Objective of WTO: place the STE in the same competitive position as the private enterprise

State trading / monopolies

- General exceptions under Article XX(d) GATT - exempts enforcement of monopolies from general WTO rules:
 - “Laws or regulations . . . relating to . . . the enforcement of monopolies operated under Articles II and XVII of GATT 94”
- Provided that such measures are not discriminatory or a disguised restriction on international trade

State trading

- Four main rules based on fundamental GATT / WTO principles:
 1. Non-discrimination
 2. No quantitative restrictions (imports or exports)
 3. Preservation of the value of tariff concessions
 4. Transparency

State trading

- Non discrimination = MFN principle tempered by commercial considerations
 - STEs shall act in a manner consistent with the principle of **non-discriminatory** treatment
 - All decisions to be based on “**commercial considerations**”:
 - Price
 - Quality
 - Availability
 - Marketability
 - Transport
 - Other conditions of purchase or sale
 - Must allow other Members to compete freely for purchases or sales

State trading

- No quantitative restrictions:
 - Interpretative note to Articles XI, XII, XIII, XIV, and XVIII GATT:

“Throughout these Articles, the terms ‘import restrictions’ and ‘export restrictions’ include restrictions made effective through state trading operations.”

State trading

- Article II GATT: schedules of concessions (market access)
- Preservation of value of negotiated tariff concessions: Article II.4: monopoly on any product must not result in protection greater than what the bound tariff provides
 - (Means that “import mark-up” charged by the monopoly cannot yield more protection to the domestic industry than the tariff rate does)
- Inform Members of import mark-up or of resale price for import monopoly products where there are no concessions
- Applies to import monopolies whether or not they are STEs

TRIPS Agreement

- Addresses the application of basic principles of the multilateral trading system (e.g., national treatment/MFN) in the field of IP.
- Specifies standards concerning the availability, scope and use of IP rights to be observed by WTO Members.
- Addresses the enforcement of IP rights.
- Contains related provisions regarding dispute settlement, transitional arrangements and institutional arrangements.

TRIPS Agreement

- Recognition in the WTO of the role of competition policy in balancing the exercise of IP rights:
 - Concerns regarding the potential for anti-competitive abuse of rights protected under TRIPS Agreement.
 - TRIPS Agreement provides scope for the enforcement of competition law vis-à-vis anti-competitive licensing practices and conditions.

Article 8.2 TRIPS Agreement

- Recognizes that “appropriate measures” may be needed to prevent the “abuse” of IPRs or “the resort to practices that “unreasonably restrain trade” or “adversely affect the international transfer of technology”.
- Authorizes such measures “provided that they are consistent with the provisions of [the] Agreement”.

Article 40 TRIPS Agreement

- Recognizes that licensing practices that restrain competition may have adverse effects on trade or may impede technology transfer/diffusion (Article 40.1)
- Permits Members to specify in their national legislation anti-competitive practices constituting abuses of IPRs and to adopt measures to prevent or control such practices (Article 40.2). May include (non-exhaustive list) :
 - exclusive grantbacks
 - clauses preventing challenges to the validity of an IP right
 - coercive package licensing

Article 40 TRIPS Agreement

- Article 40.2 reiterates that the measures adopted to address such practices must be consistent with other provisions of the Agreement.
- Article 40.3: Members may request consultations with other Members in certain cases involving anti-competitive licensing practices and conditions.

Article 31 TRIPS Agreement

- Sets out detailed conditions for the granting of compulsory licences, aimed at protecting the legitimate interests of rights holders, including
 - requirement to first seek a voluntary licence from the right holder;
 - requirement for adequate remuneration to right holder;
 - limitation of the supply of the product in question, under compulsory licence, to the domestic market.
- Provides for the non-application of several such conditions where a compulsory licence is granted to remedy “a practice determined after judicial or administrative process to be anti-competitive” (Article 31(k)).

GATS

- General Agreement on Trade in Services
 - Members have obligations in services sectors in which they enter commitments (“positive list”)
 - Recognizes Members’ rights to act against anti-competitive practices; right to work together to limit these practices
 - Article VIII: monopoly and exclusive service suppliers not to act in manner inconsistent with Member’s MFN obligations and commitments and does not abuse its monopoly position in manner inconsistent with commitment when competes in supply of a service outside the scope of its monopoly right and which is subject to the commitment.
 - Article IX: consultations regarding anti-competitive business practices that restrain competition and thereby restrict trade in services

GATS

- Telecommunications: Reference Paper on Regulatory Principles:
 - Set of regulatory principles for telecoms sector reform reflecting “best practices” with respect to telecoms regulation.
 - Legally binding for WTO Members (82) who have committed to it by appending it, in whole or in part, to their schedules of commitments.
 -
 - Includes commitments to action against anti-competitive practices by major suppliers in the telecom sector.

Government Procurement Agreement

- “Plurilateral” agreement (not signed by all Members)
- Revised in 2013.
- Focused on transparency, non-discrimination.
- Art. XIII.1(a) GPA: acknowledges threat of collusive tendering and right of Members to take remedial measures

Thank you!

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