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INTERNATIONAL COMPETITION LAW – A NEW DIMENSION FOR THE WTO? by *Martin Taylor* [Cambridge: Cambridge University Press, 2006. xvi + 500 inc. index. ISBN 0-521-86389-9. Hardcover Price £ 65.00]

This book focuses on a topic of great relevance, the international regulation of competition law, and advocates the incorporation of a competition agreement within the WTO. Not only does Taylor put forward this case, and support it with a thorough legal and economic analysis, but, in a clear effort to bridge theory and practice, he offers a tangible starting point for discussion: a draft negotiating text with accompanying commentary (which is worth reading and pondering even on its own!).

In the WTO there is no comprehensive competition agreement but several, relatively unutilized, competition provisions in various agreements. A Working Group to study “the interaction between trade and competition” was established after the 1996 Singapore Ministerial. Despite acknowledging the importance of competition policy, its link with the WTO’s remit, and the need for cooperation, no convergence could be found on contents and on how to put cooperation into practice. Faced with controversy and opposition by developing countries, the ‘competition issue’ was eventually removed from the negotiating agenda in 2004.

If at the official level the debate may have been put aside, the academic discussion is lively. And, by necessity, so are the forms of international cooperation. In presence of different competition laws, the potential for uncertainty and conflict is very high. The recent transatlantic row in the GE-Honeywell merger is just one notable example of

the problems caused by a lack of agreement. But – and we come to the crux of the matter – against diverse conceptions of competition policy and law among various countries, and the confidence and identity crisis faced by the WTO, it is difficult to find the necessary consensus on more general and co-ordinated initiatives.

Recently, Gerber has addressed these two obstacles (*JIEL*, 2007, page 707 et seq). Leaving aside for now the issue of the objectives of competition law, there is a general problem which may have also an impact on any international competition initiative. There is a lack of confidence that WTO's norms, practices and procedures are based on a robust conception of "community". The fostering of this dimension, based on the generalized respect of rights, the reasonable alignment of rights/incentives, the awareness of shared rights/interests at the political/institutional and economic level, all are a necessary precondition for any successful initiative in the field of international competition law in the WTO, and should shape the normative content and institutional/procedural operation of any competition agreement.

Before embarking on a detailed analysis of the contents of his book, Taylor's effort should be praised. The reviewed book represents a contribution of value to the debate. It is well-structured, clear and precise. The thread of the reasoning is consequential and the argumentation largely cogent. The research underpinning the analysis is broad. Further, Taylor manages to successfully combine the user-friendly practitioner's style with the critical analysis typical of scholarly work. To the advantage of clarity, the exposition is continuously accompanied by tables, diagrams and summaries.

The book is divided into three main parts which address three questions. (i) Is an international competition agreement desirable? (Part I) (ii) Would the WTO provide a suitable institutional vehicle? (Part II) (iii) What is the optimal form for a WTO competition agreement? (Part III) The book's intriguing *coda* is a draft negotiating text for a plurilateral WTO competition agreement.

Part I asks whether an international competition agreement is desirable. Chapter 2 focuses on the benefits of competition law, with the usual reference to market efficiency. The second and third sections are particularly interesting since they immediately recognise that the competition law discourse is not only about efficiency but also equity and distributional objectives. This is a controversial area where competition law systems *may* (significantly) differ. As the author acknowledges, “[d]ifferent nations emphasise different aspects of fairness in accordance with their different social values, norms, customs and collective preferences. These differences may lead to tensions between different nations as to the appropriate objectives of competition law” (pages 26-27).

It should be underlined that the dimension of the “objectives” of competition law (mere efficiency; social goals; industrial policy; development; market integration) is indeed one of the main obstacles in devising an internationally accepted system of competition law regulation. There may be disagreement on the *primacy* of efficiency over non-efficiency objectives, which ultimately depends on a *political-normative* choices of each jurisdiction. Gerber (*op. cit.*, page 722) wittily stated that “[t]his will require serious and creative thought in defining the relationships among the goals themselves and relating them to the objectives of the WTO as an institution”.

Despite recognising this diversity in competition policies, Taylor seems to partly confine its importance suggesting that “competition laws in almost all jurisdictions are recognised as primarily intended to increase economic efficiency by promoting and maintaining competition” (page 28). In a nutshell, he opines that an international competition agreement should give more importance to efficiency rationales (cf, eg, pages 100, 315-318, and Article 4 of the draft agreement). Interestingly enough, since this element of diversity (together with other ones) cannot be eliminated, eventually he cannot but conclude that the most viable option for an international competition agreement is *plurilateral*, and one which recognises the “different interests of different nations, particularly the interests of [developing countries]” (page 422).

In Chapters 3, 4 and 5 Taylor shows the case for an international system of competition policy. In an increasingly globalized economy, and cross-borders distortions of competition, national control, pursuing only domestic welfare, results in under-regulation or over-regulation. With a rich economic analysis and various case-studies, Chapter 3 shows how the extraterritorial application of domestic competition law is not satisfactory, and that either situation (of under- or over-regulation) provides a justification for international co-ordination of competition law able to achieve global welfare.

Moreover, although valuable in increasing co-operation and aligning interests, past/current bilateral-plurilateral arrangements are not sufficient to tackle the problem (Chapter 5). EU competition law, based on “a very high degree of legal and economic integration”, is considered a positive experience, although, due to its specificity,

cannot be generalised as a model. In the name of flexibility and pragmatism, Taylor (page 141) suggests that “a mixed architecture of tiered multilateral, plurilateral and bilateral initiatives could co-exist to address cross-border competition laws” which would combine a general framework setting out “core principles” with increasingly specific provisions and procedural and jurisdictional mechanisms eventually resulting in “clear rights and obligations between parties”. An international competition agreement would be based on this multilevel system of governance and build upon existing initiatives (page 143).

Chapter 4 enquires whether there is a “sufficient basis” for an international competition agreement through a case-study analysing the competition laws of the Asia Pacific Economic Co-operation (APEC) countries. The finding is that, despite the “otherwise” considerable diversity of these nations, it is possible “to distil a set of commonly accepted [competition] principles” which can constitute the basis of an international competition agreement (page 71). This should be based on “broad principles” (this is the core of APEC’s cooperation), not be “overly ambitious”, and, while recognising the similarity of efficiency objectives and common structure, should take account of “diverse distributional objectives” (pages 104-105). A crucial finding concerns the conditionality between effective institutions and effective competition laws.

Part II (Chapters 6-9) concentrates on whether the WTO is a suitable institution to manage an international competition agreement. Chapter 6 shows that competition law and policy is consistent with the possible theoretical objectives of the WTO. Further, although with different “causal mechanisms”, international *trade* and

competition policies and laws are found to be complementary since they pursue the same objective: economic efficiency. Quite similarly, both systems take distributional objectives into account to achieve “fair” trade or competition. Taylor shows how this complementarity is not absolute since there is an area of potential overlap (private barriers to trade) and of conflict (eg permitted trade measures that are barriers to entry). A theoretical reconciliation between trade and competition regulation is found in the theory of contestable markets. All this leads to conclude that the WTO would be a *suitable* institution for an international competition agreement.

Chapters 7 and 8 constitute a rich and practical application of the concept of market contestability to examples of under-regulation of private anti-competitive conduct (to the detriment of international trade) and governmental trade measures (to the detriment of international competition) which could be addressed by an international competition agreement.

Chapter 9 deals with anti-dumping laws which are “the most obvious example of governmental trade measures that are permitted by WTO law, but that have significant potential adverse effects on international competition” (page 260). According to Taylor, antidumping laws are not based on economic efficiency but on redistribution. This should be considered when asking whether to replace anti-dumping laws with competition laws. Competition law would involve greater procedural constraints (see the example of predation) with the result of having a limited coverage as to “unfair” trade practices. The (highly arguable) preliminary conclusion is that, except for more integrated contexts (see the EU) where “unfair” trade issues are less likely to arise, competition law is not the answer. A pragmatic

solution is suggested, ie to gradually introduce competition law *principles* in anti-dumping laws.

The final Part III of the book addresses the optimal form of a WTO competition agreement and paves the way to the intriguing appendix and its draft negotiating text. Having found that the WTO would be a *suitable* institution for dealing with an international competition agreement, the next question is whether the WTO is the *optimal* institution for doing this (Chapter 10). A comparison with other institutional alternatives ('stand-alone' treaty, UN and OECD) is made. The WTO scores high on all four assessment criteria used (effectiveness, scope, context and achievability). After evaluating previous proposals for introducing an international competition agreement, especially the Munich Code, in a deep-89-page analysis, Taylor focuses on the optimal content of a WTO competition agreement. He first begins with the provisions of more general scope, that is the "objectives" and the core "principles" (international co-operation, non-discrimination, transparency, comprehensiveness, procedural fairness).

Chapters 11 and 12 go to the more specific content of the agreement. Within a very flexible approach, the two key characteristics should be (i) 'selective convergence' of domestic competition laws in some areas (eg price fixing, cartels, other horizontal restraints, vertical restraints, and merger control), and (ii) 'co-regulatory' strategy based on supplementing specific and binding *hard* law provisions with broader non-binding *soft* law principles. The agreement should recognise the different interests of different nations particularly developing countries. Full-harmonisation should not be sought being not appropriate, and the use of minimum standards would not be desirable.

From the institutional perspective, no substantial amendment to the current structure should be required. Apart from inter-governmental peer enforcement through National Competition Agencies, compliance would be executed by the newly established Competition Council, its operational arm, the International Competition Agency, and the WTO secretariat. Compliance could also be fostered by the Trade Policy Review Mechanism and technical assistance. Finally, dispute settlement would be performed by the Dispute Settlement Body. Co-operation is envisaged with the UNCTAD and OECD.

One note, which should not necessarily be read as a criticism to Taylor's analysis: the technical expedient to tackle diversity of views is often to draft provisions broadly. As Gerber highlighted (*op. cit.*), however, vague wording combined with lack of consensus can produce ineffective norms, liable to raise controversies and shift to the judiciary an inappropriate supplementing task.

The final question is the political viability of a WTO competition agreement. The answer is positive, although a *plurilateral* track should be followed. The reader is invited to read carefully the draft negotiating text and its commentary. Although more thought would be required, and subject to the comments above (particularly concerning the balance of the "objectives"), the reviewer's provisional assessment is substantially positive.

In conclusion, Taylor's *International Competition Law – A New Dimension for the WTO?* is a learned contribution to the international competition law debate which

provides food for thought and – big credit to its author – an operative proposal. This book would be of great use to researchers, government officials and negotiators involved in the area of international competition cooperation and in WTO law, as well as EU lawyers interested in drawing on a great wealth of information to re-think their own European or domestic competition law system.

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